A Foreign State Immunities Act for Australia?

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Introduction

In the last decade, the law of sovereign immunity has attracted a vast literature, stimulated by a flow of judicial decisions from the United States, England, West Germany and elsewhere, and by the enactment of legislation in the United States (1976), the United Kingdom (1978), Pakistan (1981), South Africa (1981) and Canada (1982). How much closer we are to understanding the mysterious distinction between "governmental" and "commercial" (or "private law") transactions may be a question, but there is certainly vastly more material in the form of decisions, legislation, treaties and state practice to comprehend.

This flurry of activity raises the question whether there should be Australian legislation on sovereign immunity, and the question has been given added point by the Commonwealth Attorney-General's reference to the Australian Law Reform Commission of the subject of foreign state immunity.[1] There can be no doubt as to the Commonwealth Parliament's power to enact a Foreign State Immunities Act for Australia under s 51(xxix) of the Constitution;[2] and the overseas and international developments, and the Australian Law Reform Commission's Reference, clearly call for an examination of the need for such an Act. This will depend on such questions as, on the one hand, the state of the present law and the likelihood of difficulties being experienced by the courts, compared, on the other hand, with possible difficulties in defining the scope of sovereign immunity in legislation, in the light of overseas experience. In this paper I shall attempt to summarise, and as far as possible assess, the conflicting considerations.

The background to legislation on foreign state immunity

1. The state of the Common Law

Compared with North American and Western European jurisdictions there have been relatively few Australian decisions on sovereign immunity, none of

1. The reference, given by the then Acting Attorney-General the Hon N A Brown QC on 11 November 1982, refers to the ALRC the topic of foreign State immunity and in particular the questions "whether there is a need for Commonwealth legislation with respect to foreign State immunity and, if so, the principles on which such legislation should be based". The author is Commissioner in charge of the ALRC Reference, on which a Report is planned for March 1984. The views expressed here are personal and not necessarily those of the Commission. The article is based as material available to the author as at 1 June 1983.
2. Even on the minority's view in *Koowarta* v *Bjelke-Petersen,* the leading case on the external affairs power, questions of foreign State immunity directly affect Australia's relations with other States and therefore come within s 51(xxix): (1982) 39 ALR 417 at 432 (Gibbs CJ, with whom Aickin and Wilson JJ agreed). *A fortiori* such an Act would be valid under the majority's vaguer test of "international concern": at 453 (Stephen J), at 466-7 (Mason J), at 473 (Murphy J), at 486 (Brennan J).

them recent, and none of them very helpful in assessing the present Australian law.[3] At least one can say that the Australian courts would be likely to follow a common law position established by English courts, as indeed the earlier Australian cases did do. The problem has been that, until recently, it was not beyond argument what that position was. However, as a result of the House of Lords decision in *I Congreso del Partido*[4] the common law is now clearer, with the change in the law since 1975 having been confirmed. The present law, which one can be confident would be followed by Australian courts, can be summarised as follows:

1. As the Privy Council held in *The Philippine Admiral,* a foreign State is not immune from the jurisdiction of local courts in admiralty actions *in rem* with respect to state-owned commercial vessels or cargoes. Earlier English decisions and dicta to the contrary are no longer good law.[5]
2. In actions *in personam,* the position for a long time was that foreign States and their instrumentalities were quite generally immune from local jurisdiction, irrespective of the nature of the case.[6] In *Trendtex Trading Corporation* v *Central Bank of Nigeria*[7] the Court of Appeal, in defiance of earlier English authority, rejected this rule and applied the restrictive theory of immunity which was thought to represent modern international law. The Court of Appeal had earlier held itself incompetent to take this step,[8] and it was not accepted in later decisions without dissent.[9] However *Trendtex* was reaffirmed by the Court of Appeal,[10] and approved by common law courts elsewhere.[11] Although

3. Australian cases include *Van Heyningen* v *Netherlands-Indies Government* [1948] QWN 19, [1949] StRQ 54; *USA* v *Republic of China* [1950] QWN 5; *Grunfeld* v *USA* [1968] 3 NSWR 36. See Johnson D H N, "The Puzzle of Sovereign Immunity", (1974-5) 6 Aust YBIL 1 at 41-4; Sutherland P, "Recent Statutory Developments in the Law of Foreign Sovereign Immunity", (1976–7) 7 Aust YBIL 27 at 66–71.
4. [1981] 3 WLR 328, reversing [1980] 1 Lloyd's Rep 23, CA, affirming [1978] QB 500, Robert Goff J.
5. *The Philippine Admiral* [1977] AC 373, noted (1974-5) 47 BYIL 365-9. In *I Congreso* [1981] 3 WLR 328 at 335 Lord Wilberforce accepted *The Philippine Admiral* "unhesitantly".
6. *The Cristina* [1938] AC 485 at 490 (Lord Atkin).
7. [1977] QB 529, noted (1976-7) BYIL 353-62.
8. *Thai-Europe Tapioca Service Ltd* v *Government of Pakistan* [1975] 1 WLR 1485 at 1493 (Lawton LJ), at 1495 (Scarman LJ) (see (1974-5) 47 BYIL 362-4), following *Compania Mercantil Argentina* v *United States Shipping Board* (1924) 40 TLR 601.
9. *The Uganda Co (Holdings) Ltd* v *Government of Uganda* [1979] 1 Lloyd's Rep 481 at 486-7 (Donaldson J); see (1979) 50 BYIL 218-21.
10. *Hispano Americana Mercantil SA* v *Central Bank of Nigeria* [1979] 2 Lloyd's Rep 277, CA; see (1979) 50 BYIL 221-4. And see Higgins R, "The Death Throes of Absolute Immunity: The Government of Uganda before the English Courts", (1979) 73 AJIL 465; *Planmount* v *Republic of Zaire* [1980] 2 Lloyd's Rep 393.
11. *Inter Science Research and Development Services (Pty) Ltd* v *Republica Popular de Mocambique,* [1980] (2) S AfLR 111 at 124-5 (TPD); *Kaffraria Property Co (Pty) Ltd* v *Government of the Republic of Zambia* [1980] 2 S AfLR 709 (EC). New Zealand courts have supported the restrictive theory: see *Marine Steel Ltd* v *Government of the Marshall Islands* [1981] 2 NZLR 1 (Barker J); *Buckingham* v *The Aircraft Hughes 500D Helicopter C—GPNN* unreported 23 Feb 1982 (Hardie Boys J). A similar line has been taken in Quebec: *Zodiak International Products Inc* v *Polish People's Republic* (1977) 81 DLR (3d) 565, supported on the whole by dicta in other Canadian cases: eg *Government of the Democratic Republic of the Congo* v *Venne* (1972) 22 DLR (3d) 699; *Smith* v *Canadian Javelin Ltd* (1976) 12 OR (2d) 244.

the House of Lords in *I Congreso del Partido* was divided as to the result in one of the two cases involved, their Lordships were agreed on the basic principles to be applied. Moreover, there was no support for the suggestion (made by the Privy Council in 1976) that an arbitrary distinction should be drawn between actions *in rem* and *in personam*. Lord Wilberforce, in the leading speech, summarised the position thus:[12]

> "It is necessary to start from first principle. The basis upon which one state is considered to be immune from the territorial jurisdiction of the courts of another state is that of 'par in parem' which effectively means that the sovereign or governmental acts of one state are not matters upon which the courts of other states will adjudicate.
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> The relevant exception, or limitation, which has been engrafted upon the principle of immunity of states, under the so-called 'restrictive theory', arises from the willingness of states to enter into commercial, or other private law, transactions with individuals. It appears to have two main foundations:
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> (a) It is necessary in the interest of justice to individuals having such transactions with states to allow them to bring such transactions before the courts.
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> (b) To require a state to answer a claim based upon such transactions does not involve a challenge to or enquiry into any act of sovereignty or governmental act of that state. It is, in accepted phrases, neither a threat to the dignity of that state, nor any interference with its sovereign functions.
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> When therefore a claim is brought against a state . . . and state immunity is claimed, it is necessary to consider what is the relevant act which forms the basis of the claim: is this, under the old terminology, an act 'jure gestionis' or is it an act 'jure imperii': is it (to adopt the translation of these catchwords used in the 'Tate Letter') a 'private act' or is it a 'sovereign or public act', a private act meaning in this context an act of a private law character such as a private citizen might have entered into."

3. The question of execution against foreign state property (other than trading ships) has not been carefully considered in any of the recent cases. Earlier decisions were emphatic in their prohibition of proceedings against state property,[13] but in *Trendtex* the restrictive theory of immunity was applied to an injunction against Central Bank assets

12. [1981] 3 WLR 328 at 336. His Lordship did not expressly approve *Trendtex* in relation to in personam actions *not* relating to merchant ships, but this seems an entirely formal reservation: "since there may be appeals in analogous cases it is perhaps right to avoid commitment to more of the admired judgment of Lord Denning MR [in *Trendtex*] than is necessary" (at 335). Later cases have treated *Congreso* as having "finally rejected the doctrine of absolute state immunity as part of the domestic law and established that the restrictive theory was correct": *Sengupta* v *Republic of India*, The Times, 18 November 1982 (EAT, Browne-Wilkinson J).

13. *USA* v *Dollfus Mieg et Cie SA* [1951] 1 All ER 572; *Juan Ysmael & Co Inc* v *Government of the Republic of Indonesia* [1955] AC 72 at 89.

without much argument. Lord Denning said only that the question depended "on precisely the same grounds" as liability to suit.[14] Lord Justice Shaw thought seizure a "reasonable corollary" of maintaining the action.[15] Lord Justice Stephenson (who dissented on the general immunity point) found the problem more difficult: he alone referred to some of the contrary authority, although he did not, in the end, dissent as to the injunction.[16] Possibly this aspect of the decision should be explained not as upholding execution of *state* funds but as based on the finding that the Central Bank was not a state department or agency.[17] But this is by no means clear, and in any event the status of the Central Bank and the title to funds in its keeping were not necessarily the same thing.

Subsequent cases have also involved *Mareva* injunctions rather than final execution. For example, in *Hispano Americana Mercantil SA* v *Central Bank of Nigeria,* it was argued that seizure of central bank assets was contrary to international law, but no general argument as to immunity from seizure or execution was maintained.[18] It seems that, having earlier treated immunity from execution as a reflex of absolute immunity from jurisdiction, the English courts have continued to make the same assumption under the new regime of restricted immunity. And, in view of the general acceptance of restrictive immunity by the House of Lords in *I Congreso,* it is likely that this assumption now reflects the common law.[19]

4. At common law a waiver of immunity from jurisdiction is only effective if proceedings have actually been commenced. A mere prospective agreement to submit to the jurisdiction, whether in a contract or a treaty, is insufficient.[20] This rule is clearly undesirable, and is neither required nor entailed by the international law of immunity. It has been expressly reversed by the State Immunity Act 1978 (UK),[21] and it is at least possible that an Australian court might be persuaded to reconsider the earlier authorities. Until this happens, however, the common law rules on waiver of immunity are uncertain and unsatisfactory.[22]

5. The extent to which consent to arbitration constitutes a waiver of

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14. [1977] QB 529 at 561.
15. At 580.
16. At 572.
17. Cp Higgins R. "Execution of State Property: United Kingdom Practice", (1979) 10 Netherlands YBIL 35 at 41.
18. [1979] 2 Lloyd's Rep 277.
19. The matter was not before the House in *I Congreso* and there was no comment on this aspect of the restrictive immunity rule. But see *Re Royal Bank of Canada and Corriveau* (1981) 30 OR (2d) 653.
20. *Kahan* v *Federation of Pakistan* [1951] 2 KB 1003, *Bacchus SRL* v *Servicio Nacional del Trigo* [1957] 1 QB 438. In Australia, *United States of America* v *Republic of China* [1950] QWN 6 at 8 (Philp J).
21. State Immunity Act 1978 (UK), s 2(2) All other state immunity legislation contains provisions to similar affect.
22. See Curran S, "Procedural Immunities and Submission to the Jurisdiction" (1983), at 61 et seq (ALRC Sovereign Immunity Research Paper 2).

jurisdiction is also unclear. Probably, consent to arbitration under the law of a particular state, or (at least in civil or commercial matters) where the arbitration takes place in a particular state, constitutes submission to the "supervisory" jurisdiction of the courts with respect to the arbitration. On the other hand, it has been held that consent to arbitration does not of itself amount to waiver of immunity from enforcement of the resulting award.[23]

6. It has never been expressly decided whether submission to the jurisdiction entails submission to execution of the resulting judgment at common law. In the related area of diplomatic immunity it is settled that a distinct waiver or submission is required, and it is likely that the law is the same in the case of sovereign immunity. If so then the common law in this respect probably does reflect the international law rule.[24]

7. There are many uncertainties and difficulties with respect to procedural matters in actions against foreign States. These include problems of service of process and the permissible extent of counter claims and set-offs (e.g., with respect to unrelated transactions or seeking affirmative recovery).[25]

As this brief survey indicates, the courts have been seeking to develop the common law in line with what they perceive as developments in international law. This process has been most marked in relation to the area of substantive immunity from jurisdiction, although even there it is by no means complete. It may be that a similar process will occur (in those jurisdictions where the common law still regulates this subject) in relation to matters such as waiver and submission, and execution. However, until this does happen considerable uncertainty will remain. Whether legislation is desirable depends in part on the relative weight to be accorded, on the one hand to the need for certainty and clarity, on the other to the need for flexibility and the proper consideration of unforeseen cases.

2. *The Work of the International Law Commission*

Even if legislation is ultimately desirable, it may be better to await the results of the International Law Commission's study of this subject. The topic of jurisdictional immunities of foreign States and their property has been on the Commision's provisional work program since 1949. The Commission has already considered related problems in a number of contexts, the most important of which is the lack of immunity from civil suit of state-owned commercial vessels, dealt with in Articles 20-21 of the Geneva Convention on the Territorial Sea of 1958.[26] However, only since 1978 has the Commission begun detailed consideration of sovereign immunity and, as is not un-

23. *Duff Development Co* v *Government of Kelantan* [1924] AC 797.
24. See this writer, "Execution of Judgments and Foreign Sovereign Immunity", (1981) 75 AJIL 820 at 848 fn 149. Generally on waiver see below, pp 96–102.
25. See ALRC SI RP 2, 1-60, 67-79.
26. 516 UNTS 205. Nine countries have made reservations to Art 21, and eleven (including Australia) have objected to those reservations. See also United Nations Convention on the Law of the Sea, 10 December 1982, Arts 28-32 (21 ILM 1261) to similar effect.

common in the early stages of the Commission's work on a topic, it has made slow and tentative progress. By 1983 the Commission's Special Rapporteur (Sucharitkul) had presented five reports,[27] but the Commission had only begun to address the central issues of the extent of and the rationale for foreign sovereign immunity and the detailed exceptions to it. Some important issues — notably the problem of immunity from execution or enforcement — have been deferred. Both the Commission and the Sixth Committee have shown themselves to be divided on important questions,[28] as is not surprising considering the official Soviet and Eastern European view of immunity and the very reticent approach many Third World countries have taken to what many perceive to be Western-oriented rules. On the record so far, one could not expect the Commission's work to result in the rapid conclusion of a generally acceptable Convention on State Immunity.[29]

The difficulties confronting the Special Rapporteur in his work are summarised in a revealing passage of his Second Report:[30]

> "The Commission asked the Special Rapporteur to clarify, in the first instance, the general principles and the content of the basic rules governing the subject and to endeavour with the utmost caution to define the limits of immunities and determine the exceptions to them ... Emphasis had also been placed on the need for detailed analysis of the practice and legislation of all States, particularly the socialist countries and the developing countries. The Commission felt that consideration of the topic should take the practice of States as its point of departure."

A number of elements are of interest here. The first is the emphasis on defining the limits or exceptions to immunity "with the utmost caution". This seems to mean not merely that the Commission should be careful or comprehensive in considering the material to be codified: the Commission should always be both! Rather the suggestion is that it should be restrained in its formulation of exceptions to immunity, cautious in the extent to which it accepts prevailing doctrine. This suggestion is continued in the injunction to consider "particularly [the practice and legislation of] the socialist countries and the developing countries". There is both a practical and a conceptual problem here. The practical problem is relatively simple: there is compar-

27. First Report, A/CN.4/323 (1979) (general survey); Second Report, A/CN.4/331 (1980) (introductory and definitional articles); Third Report, A/CN.4/340 (1981) (jurisdictional problems; political subdivisions, organs, agencies and instrumentalities of a foreign state); Fourth Report, A/CN.4/357 (1982) (relation between general principle and exceptions; trading and commercial activity); Fifth Report, A/CN.4/363 & Add.1(1983) (contracts of employment; personal injuries and damage to property; ownership, possession and use of property).
28. Cp Ushakov, Yb ILC 1979, Vol I, 213: "it could not be said that a State could act as a trader. By definition, everything done by a State was political. To say that the purchase of shoes by a State was commercial in nature, or that other of its activities were cultural, was to resort to a fiction that concealed the essentially political nature of all State activities".
29. This does not mean that a Convention will not emerge, even though it may not achieve the level of general support which used to be thought indispensable to treaties codifying international law. The recent Convention on State Succession with Respect to State Property Archives and Debts (Vienna, 1983) is an example of a codifying treaty adopted without such consensus (the vote was 54–11:11).
30. Second Report, 7.

atively little in the way of practice and legislation of many socialist and developing countries. The great majority of the municipal cases (there are no international decisions), the only specific multilateral convention, the only laws setting out a detailed, articulated position on sovereign immunity, and most of the literature, are European, Commonwealth or North American in origin.[31] One reason, of course, is that most centres of international commercial arbitration or litigation are Western countries.

The conceptual problem — as usual, closely related to the practical one — is that there is no justification for preferring as the general international rule a position adopted by any one group of States, however loosely defined; for preferring the practice of "socialist and developing countries" to that of "developed" or "capitalist" countries (or, of course, the reverse). General international law is a law between States with varying political and ideological positions, dealing with issues on which, in many cases, there are substantial underlying disagreements. To the extent that the reported comment is a reminder that there are diverse ideologies and interests behind the law of sovereign immunity, and that the "First World" cannot be allowed to carry the day merely through the bulk of its (possibly unshared or distinctive) practice, it is entirely proper. To the extent that it seeks to prefer one view of the law to another on grounds of ideological or political preference, it distorts the reality of the pressures that make international law, and will tend to lead to solutions which are neither generally accepted nor acceptable.

Finally the proposition that the Commission "should take the practice of States as its point of departure" is noteworthy. At face value, no-one could disagree: but the question is what is meant by the practice of States in this context. Article 38 of the Statute of the International Court can be read as treating judicial decisions (municipal or international) as "subsidiary" to, rather than an aspect of, state practice (which would, on this view, be restricted to treaties and custom). But however much this may be true of those international law rules operating primarily in direct diplomatic forums, it is very doubtfully true of sovereign immunity, which is *about* the operation of domestic courts in matters involving foreign States. In such cases, municipal courts (themselves organs of the State for the purposes, for example, of state responsibility[32]) are the primary forum, and their practice must be regarded as primary rather than subsidiary.

In the two latter respects, at least (it is still too early to speak of the first) the Special Rapporteur seems to be successfully avoiding these difficulties. In his four substantive reports, references to Commonwealth, Western European and United States practice and decisions are prominent,[33] and municipal decisions are treated as "state practice" rather than merely subsidiary reflec-

31. This is, of course, only a generalization. For example the Pakistan Supreme Court has applied the restrictive theory, basing itself in part on international practice and in part on "Islamic international law": *Qureshi* v *USSR* [1981] PLD (SC) 377. And see State Immunity Ordinance 1981 (Pak).
32. Cp the Commission's Draft Articles on State Responsibility, Art 6: A/35/388 (1980), 18.
33. For example, in his Third Report, the Special Rapporteur cited 1 International Court decision, 101 decisions from the "Western Europe and others" group of countries, and 7 decisions from Third World countries (several of them pre-1945).

tions of, or upon, that practice.[34] The point is made, in rather plaintive terms, in his Fourth Report:[35]

> "It should be emphasized ... that the challenge to 'trading or commercial activity' as an exception to State immunity has come from certain quarters as a matter of policy or principle without any evidence of contrary practice in terms of judicial decisions. Views of Governments are certainly relevant and could influence legal developments in their own right. They may indeed provide a lead for judicial decisions in certain areas as they have done in some countries, where consent and reciprocity play a prominent role, or where the determination of State immunity is considered as a responsibility shared by the courts and the political arms of the Government. The primary concern of this particular section of the report is the current evidence of judicial practice, a brief general survey of which on this point deserves close attention and careful examination. It should be observed on this point that the present inquiry is not confined to the practice of industrialized countries of the Western world, but is intended to cover all States generally. In any event, the Special Rapporteur is not expected to supplement want of judicial decisions with his own inventions or speculations."

As this passage suggests, it is easy to exaggerate the extent of discordant practice (as distinct from opinion) in this area. For example, although the Soviet Union's formal position favours absolute immunity, in fact much of its practice is equivocal or even contradictory. Its sovereign immunity legislation depends on reciprocity with the foreign State in question: if that State applies a restrictive immunity rule, then so may the Soviet Union in cases concerning it.[36] Given the widespread adoption of restrictive immunity by other States, this tends to become a reactive, rather than an independently articulated, position.

More significantly, the Soviet Union's treaty practice by no means favours absolute immunity. I have elsewhere analysed some 40 or so bilateral treaties of the Soviet Union dealing with general or particular questions of immunity. The great majority subject Soviet Trade Delegations and separate state instrumentalities to the jurisdiction of the forum State in respect of commercial or private law transactions. For example, Article 4 of the Protocol to the Treaty of 2 July 1961 with Ghana provides that:[37]

> "Any question which may arise in respect of commercial transactions entered into or guaranteed in the Republic of Ghana by the Trade

34. Eg Second Report, 17, referring to 5 English cases.
35. Fourth Report, 39. Cp (even more emphatically) Fifth Report, 8:
> "Neither he [sc the Special Rapporteur] nor States producing no evidence of their judicial and governmental practice can be justly accused of omission or neglect, since practice is to evolve and not to be fabricated. Nor indeed can the Special Rapporteur or the Commission or the Sixth Committee belittle the significance of existing practice as is prevalent the world over and remains unopposed by other silent States in the absence of opposing practice".
36. Boguslavsky M. "Foreign State Immunity: Soviet Doctrine and Practice", (1979) 10 Netherlands YBIL 166, 170–1 (though the court will not raise the reciprocity question on its own initiative, the matter being settled by decree).
37. 655 UNTS 171.

> Representation shall be determined by the Courts of the Republic of Ghana in accordance with the laws thereof and in such cases the Trade Representation or its representative shall submit to the jurisdiction of such Courts.
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> Property of the Union of Soviet Socialist Republics in the Republic of Ghana shall be subject to such measures as may lawfully be taken to give effect to the orders of the Courts of the Republic of Ghana in so far as these orders have been issued in connexion with transactions referred to in paragraph 1 of the present article unless it is property which according to International Law is immune from such measures, as being necessary for the exercise of the rights of State Sovereignty or for the official functions of Diplomatic or Consular Representatives of the Union of Soviet Socialist Republics."

In no case do these various agreements provide for the exclusion of local jurisdiction or remedies (e.g., pre-judgment attachment of property) without some countervailing provision (e.g., a guarantee in respect of the transaction or judgment).[38] Moreover, the references to "international practice" or "international law" in many of these treaties indicate that they cannot be dismissed as mere waivers of an immunity to which the Soviet Union would otherwise be entitled: they simply do not articulate an entitlement of that sort.[39] To this extent they constitute more convincing support for a restrictive rule of immunity than do the 14 United States trade agreements which are often referred to in this context, but which were intended to have a rather limited effect.[40]

The close connection between treaty practice and municipal case-law, and the difficulty of distinguishing the practice of western countries from that of socialist or developing countries, is shown in the terms of a number of trade and payments agreements concluded between Switzerland and Eastern European countries. For example, Article 13 of the Trade Agreement of 24 November 1953 between Switzerland and Czechoslovakia provides:[41]

> "Sequestration of the property of the Swiss Confederation by the Republic of Czechoslovakia or of the property of the Republic of Czechoslovakia by the Swiss Confederation may only be ordered in relation to claims in private law having a close connection to the country in which the property is located.
>
> Such close connection shall exist in particular, where a claim is governed by the law of the country in question, where its place of performance is there or where it is bound up with a legal relationship which came into being or is to be arranged in this country or finally when a provision exists for the local courts to exercise jurisdiction.
>
> If a creditor directs a claim against a body corporate belonging to one of the two countries, in particular against state enterprises, the central

38. See Crawford, op cit, 827–30.
39. Sucharitkul makes these points, with considerable skill, in his Fourth Report, 64–7.
40. Crawford, op cit, 826–7, and see below, p 102 fn 43.
41. [1954] *Receuil officiel des lois de la Confederation* 745, cited by Lalive, "Swiss Law and Practice in Relation to Measures of Execution against the Property of a Foreign State", (1979) 10 Netherlands YBIL 153, 164; cp Crawford, op cit, 830, fn 46.

> bank, nationalized enterprises, national enterprises or enterprises engaged in external trade, only that property owned by the body corporate in its own right can be subjected to sequestration if it is located in the other country, and not the property of the state concerned, nor that of its central bank or any third corporate body."

These detailed provisions correspond closely with the law developed by the Swiss Federal Tribunal in a series of cases since 1928,[42] but the treaties themselves cannot be dismised as "merely" Swiss or Western European practice. The fact is that, although the practice of socialist and developing countries is relatively meagre, what there is of it is mostly consistent with the general trend of "western" practice.[43] The dichotomy referred to in the Second Report, as the Special Rapporteur clearly perceives, does not reflect the reality.[44]

3. Problems of Drafting and Definition

If Australia is to proceed with its own legislation (not based upon the International Law Commission's work or on a resulting convention), problems of drafting and definition arise. These have of course been addressed in the United States, British and other legislation, but in rather different ways.[45] The Foreign Sovereign Immunities Act 1976 (hereafter FSIA) in particular has been the subject of considerable criticism, both formal and substantive, and many uncertainties remain.[46] There has been a mass of litigation under the FSIA, but much less under the State Immunity Act 1978 (UK) (hereafter SIA). In drafting any Australian legislation considerable care will need to be taken to avoid some of the problems caused by the drafting of the overseas (especially United States) legislation.

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42. Most recently in *Libya* v *Libyan American Oil Co.*, decision of 19 June 1980: (1981) 20 ILM 152. For the earlier case law see Lalive, op cit.
43. Eg. Poland-Czechloslavakia, Treaty of Commerce, 4 July 1947: 85 UNTS 212; Romania-Iraq, Exchange of Notes, 24 December 1958: 405 UNTS 263. Cp the views of the Afro-Asian Legal Consultative Committee (1960), in Whiteman, *Digest of International Law* vol 6, 572–4.
44. Cp Fifth Report, 10:
    > "Doubts have been raised as to the correctness of identifying as international law the customary law as developed through the practice of only 25 countries and to apply it to the rest of the community of nations, as if the Commission deliberately omitted the examination of the practice of any State. The truth is the opposite. Each and every State has been consulted. The study and examination of State practice have been thorough and exhaustive. None was left out. There are no other decisions, no outside experts to be consulted, no extra-terrestrial beings to inform us of what the law is in such and such a country at such and such a time. The fact remains that of the existing and available practice of States the Commission has taken occasion to consider all without fear or favour.
    >
    > The conclusion that is emerging is clear enough. State immunity was never considered to be an absolute principle in any sense of the term."

    For further expressions of divided views in the Sixth Committee see A/CN 4/L 352 and Corr 1 (17 Feb 1983), 47–8.
45. The legislation in Singapore, South Africa and Pakistan in substance follows the British Act. The Canadian legislation is something of a hybrid, borrowing from both the British and American Acts with variations. For texts see United Nations, *Materials on Jurisdictional Immunities of States and their Property* (ST/LEG/SER.B/20,1982).
46. See esp Smit, "The Foreign Sovereign Immunities Act of 1976: A Plea for Drastic Surgery", (1980) 74 Proc ASIL 49.

The US and UK experience: some areas of difficulty

Both an international and an Australian draftsman of a set of rules on sovereign immunity will have to consider a variety of problems which are by no means all obvious from the existing statutory or conventional texts. The following discussion of some of the more important of these is based on what is now an indisputable assumption: that modern international law does not require the courts of a State to refrain from deciding a case merely on the ground that a foreign State or State instrumentality is an unwilling defendant. But it is a considerable step from that proposition to a developed distinction between transactions properly subject to local jurisdiction and those for which a foreign State party is entitled to immunity. In taking that step, a considerable range of questions has to be addressed; some of the more interesting of these will be briefly discussed here. Other matters which are not dealt with, but which require consideration, include the method of service on foreign States,[47] the extent to which the legislation should be retrospective,[48] the appropriate procedural privileges of foreign States (in matters such as discovery),[49] the position of foreign heads of State personally, the measure of damages (including punitive damages) and other remedies, and so on.

1. The Definition and Scope of "Commercial Transactions"

In common law countries there is no tradition of a distinction between public law and private law, and therefore no developed classification of state acts as public law or private law acts. One result is that the restrictive immunity rule in common law countries has tended to be cast in terms of a distinction between "governmental" and "commercial" transactions. For example, s 1602 of the FSIA ("Findings and declaration of purpose") states that:

> "Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities."

This contrasts with formulations of restrictive immunity by countries with a civil law background; for example, the reference in the Swiss-Czechoslovakia treaty to claims in "private law" ("creances de droit prive"/"privatrechtliche Forderungen").[50] The term "commercial" used as the key element in a rule of restrictive immunity has a number of defects. It is too narrow in its coverage, since there are many relatively routine acts (e.g., driving a car) which are neither distinctive to States (e.g., "governmental") nor, in the absence of some special feature, commercial. And particular acts may be at the same time "commercial" and "governmental" (e.g., the letting of a contract for

47. See ALRC SI RP 2, 2–61.
48. The British Act in its application to contracts or transactions applies only where the relevant contract or transaction was concluded after the Act came into force. It is not enough that the contract or transaction was breached after that date. See s 23(3); *Sengupta* v *Republic of India*, The Times, 18 November 1982 (EAT). Long-term contracts concluded before 1978 thus continue to be governed by the common law.
49. ALRC SI RP 2.
50. See above fn 41.

major public works), or they may have "commercial" and "governmental" elements inextricably mixed (e.g., an embassy car may be driving a diplomat's spouse to a shopping centre). The problem of inextricably mixed activities is particularly acute in the area of execution of judgments against mixed funds.[51] And finally, even when an act is itself apparently "governmental" (by whatever criteria) the *aspect* of the act which causes damage may have nothing in particular to do with its governmental character. For example, a car driving a diplomat to a meeting may simply be involved in an accident.

In fact, except in hortatory form (as in FSIA s 1603) or in particular contexts (such as commercial contracts or trading ships), the concept of "commercial" activities is only one amongst a number of concepts operative in the legislation on sovereign immunity. In the European Convention on State Immunity of 1972,[52] the term occurs three times only, and never unaided (Article 7 "industrial commercial or financial activity", Article 12, "civil or commercial matter", Article 26 "industrial or commercial activity, in which the State is engaged in the same manner as a private person"). In the British and United States Acts the notion of a "commercial transaction" is more important, although still only as *one* exception to State immunity. In the SIA, the principal extension beyond Articles 1–14 of the European Convention is section 3(1)(a), conferring local jurisdiction over "a commercial transaction entered into by the State".[53] "Commercial transaction" is defined to mean (section 3(3)):

> "(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".

As it stands, the description in section 3(3)(c) ("otherwise than in the exercise of sovereign authority") applies only to "other" transactions or activities, and not to the transactions covered by section 3(3)(a) or (b). Even if those transactions are engaged in "in the exercise of sovereign authority", they are not immune, despite the apparent guarantee in Article 24(1) of the European Convention. For example a dispute over a loan between the IBRD and a State would appear to be a "commercial transaction" as defined, and within local competence unless the loan agreement specified otherwise.[54] It could perhaps

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51. Below, p 104.
52. UKTS 1979, No 74.
53. ECSI Art 24 allows a State party to declare that its courts may "entertain proceedings against another contracting State to the extent that its courts are entitled to entertain proceedings against States" generally, but "without prejudice to the immunity from jurisdiction which foreign States enjoy in respect of acts performed in the exercise of sovereign authority (*acta iure imperii*)". This is one of only two references in the convention to the distinction between *acta iure imperii* and *acta iure gestionis* (the other is in Art 27(2)).
54. The IBRD is not a "State" for these purposes (s 3(2)), nor could it be certified as such under s 21(a), since such a certificate is only conclusive in respect of something that is in truth a

even be argued that the Ugandan Government's ambiguous statutory undertaking to compensate for expropriated debts, in *Uganda Holdings,* would be a "guarantee or indemnity in respect of any ... financial obligation" within section 3(3)(b) and thus not immune under the Act, even though Donaldson J regarded it as "a classic example of an act which is jus imperii"[55]. Other examples could no doubt be given.

The definition of "commercial transaction" which occupies a similar place in the FSIA is much less elaborate and therefore leaves more room for judicial exegesis. Section 1605 confers jurisdiction over action "based upon" or "performed in connection with" commercial activities in certain circumstances. Section 1603(d) defines "commercial activity" as "a regular course of commercial conduct or a particular commercial transaction or act", and adds that:[56]

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

A good example of the problems of classification raised by the term "commercial transaction" is *Yessenin-Volpin* v *Novosti Press Agency,*[57] a libel action against Novosti and others in respect of articles published in the Soviet Union defaming the plaintiff. The court held that the publication was an expression, in official Soviet journals, of material representing an "official commentary of the Soviet government", and that Novosti was engaged in "intra-governmental co-operation" rather than the ordinarily commercial activity of publishing.[58] It followed that the Agency was immune, because the alternative provision, section 1605(5), clearly did not apply.

Similarly, the terms "based upon" or "performed in connection with" require interpretation but do not always receive it. For example, in *American International Group* v *Islamic Republic of Iran and Central Insurance of Iran,*[59]

"country". Cp Note, "Collection of a Foreign Nation Debt by Attachment of an International Bank Loan", (1969) 69 Col LR 886.

55. [1979] 1 Lloyd's Rep 481 at 487. See (1979) 50 BYIL 218, 221n, for the argument. This is not to say that the undertaking might well be enforceable in an English court, only that the defence of state immunity would not apply.

56. In this respect the Canadian Act follows the FSIA rather than the English Act. Section 5 simply states that "a foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state". According to s 2, a "commercial activity" means "any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character ..." The ILC's Special Rapporteur's proposals incorporate the "distinction" between the nature and the purpose of commercial activity, requiring reference to the former (Art 3(2): see Fourth Report, 10), but the proposed exception for "trading or commercial activity" is narrower: his Art 12 would read (ibid, 79):

> "1. In the absence of agreement to the contrary, a State is not immune from the jurisdiction of another State in respect of proceedings relating to any trading or commercial activity conducted by it, partly or wholly in the territory of the other State, being an activity in which private persons or entities may there engage;
> 2. Paragraph 1 does not apply to transactions concluded between States, not to contracts concluded on a government-to-government basis."

57. 443 F Supp 849 (1980, SDNY).

58. At 856.

59. 493 F Supp 522 (1980, SDNY), remanded on other grounds 657 F 2d 430 (1981) (without discussing the FSIA issues).

certain American insurance companies sought damages for the expropriation of their Iranian insurance interests without compensation. As a result the second defendant acquired a monopoly over insurance in Iran. The court held that the first defendant's failure to compensate the plaintiff's was "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere [sc. of Central Insurance of Iran]" which caused a direct effect within the United States.[60] The plaintiffs accordingly succeeded.

These cases demonstrated clearly the problems that an undifferentiated notion of "commercial transaction" can cause. And the hallowed formula, repeated in FSIA section 1603(d), to the effect that one must consider the "nature" of the transaction rather than its "purpose", is of little help. How one is supposed to classify the nature of a particular human activity without reference to purpose is unclear. The nature of an activity is not some abstract idea (certainly not for legal purposes), but rather the focussed, or relevant, or "central" purpose (according to some criterion). The classifications "governmental" and "commercial" are themselves purposive.[61]

One step which can assist in isolating the relevant "purpose" is to isolate the relevant acts of the foreign State on which the claim is based. It will often be extremely difficult to characterize as governmental or commercial a complex series of transactions with both elements present (as they very often are). But if the particular, specific transaction or action relied on to base the claim can be isolated or "individuated", some at least of these difficulties can be avoided.[62]

A good example is *I Congreso del Partido*.[63] This was an admiralty action in respect of two ships operated by a Cuban state instrumentality (Mambisa) and carrying sugar to Chile under a contract with another Cuban instrumentality (Cubazucar). The Chilean importer (IANSA) owned and had paid for the sugar. In response to the overthrow of the Allende government in Chile, the Cuban Government broke off diplomatic relations and ordered the two ships not to proceed with their contractual voyage. One ship, the *Playa Larga,* was already in a Chilean port unloading its cargo; the other, the *Marble Islands,* was still on its way to Chile. IANSA sued the Cuban government and Mambisa[64] for breach of contract, conversion and detinue.

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60. At 526. The act of state defence was also rejected, in part on this ground: at 525.
61. But Sucharitkul proposed a similar criterion on the basis that "the purpose could best be overlooked in determining whether an activity is commercial or not": Fourth Report, 10. If the term "nature" is necessary it is better to follow the Canadian example and not to contrast it with "purpose".
62. As Choy DJ said in *International Association of Machinists & Aerospace Workers* v *OPEC*, "a critical step in characterizing the nature of a given activity is defining exactly what that activity is. The immunity question may be determined by how broadly or narrowly that activity is defined": 649 F2d 1354 at 1357 (CA9, 1981) cert den 102 SCt 1036. Similarly in *In re Sedco Inc* 543 F Supp 561 at 565 (1982), O'Conor DJ emphasised the need to "focus on the specific acts made the basis of the claims", not on D's general character or activities. Not all courts have been so careful. Cp *In re Rio Grande Transport Inc* 516 F Supp 1155 at 1162 (SDNY, 1981).
63. [1981] 3 WLR 328, noted (1981) 52 BYIL 314–9. The decisions below are noted at (1978) 49 BYIL 262–7 (Robert Goff J); (1979) 50 BYIL 224–7 (CA).
64. The action against Mambisa failed for technical reasons: see (1978) 49 BYIL at 266–7.

In each of the lower courts, the problem was treated broadly, as one of classifying the Cuban Government's acts, performed apparently for political reasons but performed in relation to commercial transactions. But it is clear that this approach, which raised the *iure gestionis/iure imperii* distinction in its most baffling form, was too general, that it ignored important factual and legal distinctions between the two cases. In the case of *Playa Larga,* the Republic of Cuba was the owner, and it was at least arguable that the Republic of Cuba was contractually liable for the carriage under the bills of lading.[65] In the case of the *Marble Islands,* the Republic of Cuba only became owner after the coup, and after the Cuban decree freezing Chilean assets "located on Cuban territory" (which may or may not have included the sugar here). Moreover, it could not be argued that the Republic of Cuba was contractually liable for the carriage of the sugar in the *Marble Islands.*[66] It followed that the transaction to be characterized in respect of the *Playa Larga* was either the breach of the bills of lading by the Cuban directive (if Cuba was contractually liable under the bills of lading), or the wrongful detention of the sugar in a state-owned ship by virtue of powers which *could* have been powers of ownership rather than by governmental decree. In respect of this transaction the House of Lords held unanimoulsy that the Cuban government was not entitled to immunity.[67]

The position of the *Marble Islands* was quite different. No question of contract arose, nor of IANSA "doing business with" a Cuban-owned ship. The only claim could be tortious, for detinue and conversion of the sugar, and it could only be made against *Cuba* in respect of acts *iure gestionis* performed by it after it became owner of the ship. What was crucial then was a close analysis of the acts performed by the Cuban Government after this time, in their legal context. On this underlying distinction there was no disagreement in the House of Lords, although there was strong disagreement on the result of that analysis, with the majority holding (Lords Wilberforce and Edmund-Davies dissenting) that here too the Republic of Cuba was not entitled to immunity.[68] The point is that, difficult as it may have been, an analysis of the

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Separate proceedings under the contract were commenced by IANSA against Cubazucar: these took the form of an arbitration before the Council of the Sugar Association of London. The award, broadly in favour of IANSA, was made in the form of a Special Case for decision by the Commercial Court: *In re IANSA and Cubazucar,* Award of 18 April 1978. On the special case Mustill J upheld the arbitrators' decision in all respects except one (damages for the *Marble Islands* cargo): Decision of 29 February 1980 (unreported).

65. On the evidence available it is very doubtful whether this is so. On this point I agree with Lord Wilberforce rather than Lord Diplock: see [1981] 3 WLR 328 at 340, 346 respectively.
66. At 342 (Lord Wilberforce), 346 (Lord Diplock).
67. See below, fns 71–2 for details.
68. The principal point of difference between Lord Wilberforce and Lord Diplock was over the capacity in which Mambisa continued to operate the *Marble Islands* after its acquisition by the Government of Cuba. According to Lord Wilberforce (with whom Lord Edmund-Davies agreed) there was no evidence that the demise charter then terminated, and "all the operations of carriage, deposit and sale of the cargo were made by Mambisa" (at 343–4). It followed that there was "no basis on which it [could] be said that the cargo owners entered into any business relationship with the Republic of Cuba" (at 343). On the other hand, Lord Diplock (with whom Lords Keith and Bridge agreed) thought it clear that the demise charter had terminated, and that Mambisa thereafter operated the ship as agent for the

legal effect of the specific acts performed by the Cuban Government after it became owner of the ship was a task considerably better suited for judicial decision than some more general classification of the Government's overall motive or purpose in the complex series of transactions following the coup.

However even when the process of individuation has been carried out, and the precise transaction the basis of the claim has been isolated, substantial problems may remain. For the transaction, or the aspect of the transaction relevant to the claim, may still be a "mixed" or indistinguishable transaction, plausibly either "governmental" or "commercial", as was the case in *Yessenin-Volpin* v *Novosti Press Agency*.[69] Something will depend on the particular facts — for example, whether the defendant was acting directly as agent for the State where the State itself was indisputably exercising a governmental function,[70] or whether the particular action *could* have been performed by the defendant in the exercise of its private law powers. In *I Congreso,* the latter consideration was important at least to Lord Wilberforce. As owner of the *Playa Larga* the Cuban Government *could* have ordered the departure of the ship from Chile:[71]

> "It may well be that those instructions would not have been issued ... if the owner of the *Playa Larga* had been anyone but a state: it is almost certainly the case that there was no commercial reason for the decision. But these consequences follow inevitably from the entry of states into the trading field ... It may be too stark to say of a state 'once a trader always a trader' but, 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 *iure imperii.*"

In the result his Lordship, "with much hesitation", concluded that this could not be shown.[72]

Republic. On this basis the Republic acquired "possession and control of a trading vessel that was carrying a cargo of sugar which was still the subject of an existing contract between Mambisa and Iansa" (at 346). This brought the Republic into a commercial relationship with IANSA, and the acts of disposition of the sugar in Haiphong, performed ostensibly in the exercise of private law powers and not as independent acts of *imperium,* were (in the terminology of this article) performed vis-a-vis that commercial relationship, not independently of it. On this basis the Republic was not entitled to immunity. See at 346–8, and the particularly lucid summary by Lord Bridge at 351–2. The lessons of this part of the case for defendant States seem to be two: not to purchase trading ships in their own name, and, if it is necessary to interfere with the commercial transactions of state instrumentalities (or, indeed, third parties), to do so as arbitrarily as possible (eg by decree). But one cannot agree with Lord Edmund-Davies (at 350) that the majority's view deprives the state immunity rule of all content. On the contrary, the majority decision rests on very special facts: the combination of the Government's ownership of the ship and its possession and control by its agent (which was necessary in order to found jurisdiction over events unrelated to the United Kingdom) and the Government's directive to Mambisa to perform "private law" acts to dispose of the cargo. This is a very distinctive, if not unique, situation, with correspondingly slight implications for the general law.

69. 443 F Supp 849 (1980, SDNY).

70. Eg *Arango* v *Guzman Travel Advisors Corp* 621 F 2d 1371 at 1379–81 (1980), where the correct distinction is drawn between inquiring into the validity of direct consequences of foreign acts of state and determining their consequential effect on commercial transactions between other parties (or, arguably, with the State itself).

71. [1981] 3 WLR 328 at 342–3.

72. Ibid. Lord Diplock, who thought that the Cuban Government was also contractually liable

Once a particular transaction has, through the State's involvement in affairs, taken on a "commercial"colour, it seems reasonable to apply an onus of proof in this way. But it is still a rather insecure way of deciding sensitive questions. And it assumes that a foreign State may remain entitled to immunity if, by action taken independently of any contractual or proprietary powers, it terminates, frustrates or repudiates a commercial transaction for reasons of policy. If so then it may be that we need to develop a distinction (similar to that which may exist in the case of Crown contracts) between state action performed vis-a-vis particular private law obligations and state action performed independently of such obligations but having consequential effects on them.[73] This may not be quite as difficult as has been suggested; in the *Rolimpex* case[74] for example, the defendant, a Polish state instrumentality engaged in the export of sugar, was able to show that a Polish Government decree banning sugar exports was enacted because of serious domestic shortages rather than to evade liability in relation to the contract. As a result, the *force majeure* clause in the contract operated to cancel the defendant's liability. A similar inquiry would have been necessary where the decree was relied on to produce frustration of the contract.[75]

If this distinction holds, then one can plausibly argue that in *I Congreso* the Cuban Government's act was performed vis-a-vis the particular transaction (in the case of the *Playa Larga*, a transaction of its own since it was, at least, owner of the ship) rather than generally, and this for two reasons. First, the act was not performed pursuant to governmental or executive powers,[76] and secondly, it was not *entailed* by the rupture of diplomatic relations (which was, of course, an independent act *iure imperii*). There is no practice whereby rupture of diplomatic relations includes or involves the cessation of trade. Even non-recognition has no such consequences. Unsupported by any such practice, the Cuban order took effect simply as an act vis-a-vis one of its own transactions. On this (with respect, more secure) basis the Government was rightly held not to be entitled to immunity.

The problem of an indistinguishable or fused or mixed transaction may still remain, even after these various possibilities have been exhausted. The question may then have to be resolved either by something rather like a discretionary judgment, emphasising one aspect of the transaction over the other, as in the *Novosti* case,[77] or by a residual presumption. But it seems that careful

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for the carriage, had less difficulty: at 348. The other members of the House simply agreed.

73. Cp *Commissioner of Crown Lands* v *Page* [1960] 2 QB 274. I would, I think, argue for the distinction in the context of foreign state acts independently of its validity in the context of domestic state acts.

74. *C Czarnikow Ltd* v *Centrala Handlu Zagranicznego Rolimpex* [1979] AC 351. Cf (1978) 49 BYIL 262, 264n, for a summary of conflicting views on the *Page* point. And see Singer M, "The Act of State Doctrine of the United Kingdom: An Analysis, with Comparisons to United States Practice" (1981) 75 AJIL 283 at 315–8.

75. Since a party cannot rely upon self-induced frustration: *Maritime National Fish Ltd* v *Ocean Trawlers Ltd* [1935] AC 524. In its application to governments this must mean that a government cannot rely on frustration induced by an act performed vis-a-vis the contract in the *Page* sense.

76. Cp [1981] 3 WLR 328 at 341—2 (Lord Wilberforce).

77. Above, p 83.

analysis of the particular transaction and of the basis of the claim is a key to resolving many of the problems of classification. The need for such analysis will remain whether under the common law or a State Immunity Act.

2. Torts within the jurisdiction

Under both the FSIA and the SIA tortious recovery can occur in two principal ways. If the tort is "based on" a commercial transaction then the general commercial transactions provisions apply: the Acts are rightly concerned with the underlying factual situation, not with the form of action. But there is additional provision in each Act for tortious recovery in respect of injury caused within the jurisdiction. For example, FSIA section 1605(a)(5) provides that a foreign State is not immune in any case:[78]

> "not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—
> (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
> (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights".

What is more significant is that neither section 1605(a)(5) nor its UK or European convention equivalent requires that the State act which causes death or injury be an act *iure gestionis,* however defined. This was made clear in the striking case of *Letelier* v *Chile.*[79]

Orlando Letelier was a former Chilean ambassador and foreign minister granted asylum in the United States. He and a companion were assassinated by a car-bomb in Washington. Representatives of the victims sought damages against Chile and various agents on the grounds that this was a deliberate political assassination carried out on the instructions of the Chilean secret service. The question was: was there to be assassination without compensation. In the event, substantial damages were awarded.

At the jurisdictional hearing Chile, while denying responsibility for the deaths, claimed that if it was responsible this was a classical example of an act *iure imperii.* Confronted with the explicit terms of section 1605(a)(5) the argument failed. The court said:[80]

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78. S 1606 excludes punitive damages for the State itself. Cp also ECSI Art 11, SIA s 5 (neither containing express exception such as those in s 1605(a)(5)).
79. 488 F Supp 665 (1980, DC DC) (sovereign immunity, act of state), (1980) 19 ILM 1418 (merits and damages). The case has attracted an extensive literature: see eg Collums, (1981) 21 Va JIL 251. For Sucharitkul's comment see Fifth Report 8, 11.
80. 488 F Supp 665 at 671 (1980). The court held that the "discretionary function" exception in s 1605(a)(5)(A) did not apply, since "a foreign country ... has no 'discretion' to perpetrate conduct designed to result in the assassination of an individual ... action that is clearly contrary to the precepts of humanity as recognized in both national and international law" (at 673).

> "Prominently absent from defendant's analysis, however, is the initial step in any endeavour at statutory interpretation: a consideration of the words of the statute.
> Subject to the exclusion of these discretionary acts defined in subsection (A) and the specific causes of action enumerated in subsection (B), neither of which have been invoked by the Republic of Chile, by the plain language of section 1605(a)(5) a foreign state is not entitled to immunity from an action seeking money damages 'for personal injury or death caused by the tortious act or omission of that foreign state' or its officials or employees. Nowhere is there an indication that the tortious acts to which the Act makes reference are to only be those formerly classified as 'private', thereby engrafting onto the statute, as the Republic of Chile would have the court do, the requirement that the character of a given tortious act be judicially analysed to determine whether it was of the type heretofore denoted as jure gestionis, or should be classified as jure imperii. Indeed, the other provisions of the Act mandate that the Court not do so, for it is made clear that the Act and the principles it sets forth in its specific provisions are henceforth to govern all claims of sovereign immunity by foreign states."

The point is not so much the application of this interpretation of section 1605(a)(5) to the facts here, because there is a good case for describing political assassination as an act *iure gestionis,* at least when performed in another jurisdiction. Any distinction between "governmental" and "non-governmental" transactions of foreign States must be based on some conception of the activities proper to, or distinctive of, a State. But there is a strong consensus, underlined by the international law rule prohibiting acts such as those alleged against Chile, that foreign assassination is not "proper" in this sense.[81] And it is certainly not distinctive to States: assassinations for political motives are frequently performed by private groups of terrorists.

The point is, however, that section 1605(a)(5) applies to *all* torts within the jurisdiction, irrespective of their origins in an act properly described as *iure imperii.*[82] This goes beyond the overt justification for the United States Act itself (as set out in section 1602) and traditional formulations of the restrictive immunity rule.[83] Whether such an extension of local jurisdiction is justified may be debatable, and much will depend on the reaction of foreign States to assertions of jurisdiction over their non-commercial torts. But it is hard to deny local jurisdiction over acts performed within the jurisdiction which are unlawful both under national and international law. If the legality of the acts (under whatever is the appropriate law) is relevant, then this would appear to be a matter not of jurisdiction but of substance, to be resolved by a choice of law rule or by application of the act of state doctrine. On this basis, the assertion of jurisdiction over torts genuinely within the jurisdiction would

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81. In the words of the European Convention. States do not claim "sovereign authority" to carry out assassination on foreign territory. But cp Falk. (1975) 69 AJIL 354.
82. Cp *United Euram Corp* v *USSR* 461 F Supp 609 at 612 (1978).
83. It also. probably. goes beyond the common law rule in tort cases: cp *Carrato* v *United States of America* (1982) 141 DLR (3d) 456 (Ont HC).

appear to be proper. But it is not the product of any simple unvarying distinction between immune and non-immune transactions.

3. The need for precise jurisdictional links

A further question is whether international law requires that jurisdiction only be exercised over a foreign State in respect of transactions having some reasonably close connection to the forum. If so, then the nature of this requirement, and the precise links to be specified, will be important considerations in the framing of any Australian legislation.

There are in fact two distinct aspects to the problem. For it is not entirely settled whether international law contains any general requirement of a connection between the forum and a foreign private litigant in civil cases. That such a requirement exists in criminal and antitrust cases is established (though its nature and extent are not). Brownlie has suggested that no distinction in principle exists between criminal and civil jurisdiction, but others disagree.[84] A number of considerations tend to support Brownlie's view. For one thing, the distinction between "civil" and "criminal" proceedings is often arbitrary and unclear: it is also entirely a matter for the forum. It would be odd if a State could avoid (or conversely, attract) the international law rule merely by labelling its norm as "civil" or "criminal". For another, the analogy with the effective link rule in nationality (itself an aspect of, or cognate to, the law of jurisdiction) supports some such requirement.

If there is no such general requirement in the law of jurisdiction, it does not follow that a special requirement of connection might not exist in the case of litigation involving the foreign State itself. And if there is such a general requirement, it need not be the case that only that requirement exists for litigation involving a foreign State. So in either event the question must be whether there is any special rule. There is certainly a good deal of support for it in the practice. The European Convention goes to some pains to spell out necessary, and relatively close, jurisdictional connections (though in the context of a regime for recognition and enforcement of decisions).[85] A similar closer connection is required in the Swiss case-law and treaty practice.[86] The FSIA embodies the "minimum contacts" requirement of due process, which, though a domestic constitutional requirement, is underpinned by many of the same considerations as the general international law rule. Indeed, the jurisdictional links required under section 1605(2) are "much narrower" than with many long-arm statutes: "there must be a close connection between the cause of action asserted, and the jurisdictional facts on which it is based".[87] The

84. In favour of such a distinction cp Akehurst, "Jurisdiction in International Law" (1972–3) 46 BYIL 170–7; Henkin, Pugh, Schachter, Smit, *International Law* 2nd ed (1980), 420–5. Opponents include Brownlie, *Principles of Public International Law* 3rd ed (1979), 298–9; Mann, "The Doctrine of Jurisdiction in International Law", in *Studies in International Law* (1973), 127 et seq.

85. Eg ECSI Arts 4–12. Note especially that Art 20(3)(a) requires mutality of the relevant States' jurisdictional reach for recognition of foreign judgments, but subject to the exclusion in all cases of the prohibited jurisdictional grounds set out in the Annex. Those grounds are also excluded by Arts 24(2), 25(3).

86. Crawford, op cit, 826–7; Lalive, op cit, 162–4.

87. *Verlinden BV* v *Central Bank of Nigeria* 488 F Supp 1284 at 1295–6 (SDNY, 1980) aff'd on other grounds 647 F 2d 320 (1981), cert granted 102 S Ct 997. The court went on to hold that

SIA, following the European Convention, includes requirements of jurisdictional connection with the forum. But there are several important exceptions: the ordinary jurisdictional requirements of the forum apply to a "commercial transaction entered into by the State" (section 3(1)(a)) and to an action relating to a State-owned commercial ship (section 10). In the latter respect the Act is consistent with the European Convention; in the former it is not.[88] Whether some closer connection was required at common law had also been a matter of dispute in the English cases,[89] and the point was expressly reserved by Lord Wilberforce in *I Congreso*.[90]

The matter is discussed at some length in Sucharitkul's Third Report, but without any very clear conclusion emerging, and his proposed Article 7 ("Rules of competence and jurisdictional immunity") glosses over the issue. Article 7(1) provides only that:[91]

> "A State shall give effect to State immunity under Article 6 by refraining from submitting another State to its jurisdiction, notwithstanding its authority under its rules of competence to conduct the proceedings in a given case."

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the "direct effect" limb of s 1605(2) required a substantial direct effect not present on the facts: at 1297-1300. A large number of cases have dealt with these jurisdictional requirements, with rather divergent results. Thus failure to compensate the US owner of property expropriated in Iran was held a direct effect (*American International Group* v *Islamic Republic of Iran* 493 F Supp 522 (1980) as was the injury to plaintiff's reputation produced by a libel printed in the USSR and published in the USA without the defendant's knowledge or control: *Yessenin-Volpin* v *Novosti Press Agency* 443 F Supp 849 (1978) (sub silentio) (remanded on other grounds 657 F 2d 430 (1981)). But cp *Upton* v *Empire of Iran* 459 F Supp 264 (1978) aff'd 607 F 2d 484; *Harris* v *FAO Intourist, Moscow* 481 F Supp 1056 (1979) (consequences of injuries suffered to US citizens abroad not "direct"). And see also: *Carey* v *NOC* 453 F Supp 1097 (1978), aff'd 592 F 2d 693; *East Europe Domestic International Sales Corp* v *Terra* 467 F Supp 383 (1979); *Wankesha Engine Division, Dresser American Inc* v *Banco Nacional de Fomento Cooperativo* 485 F Supp 490 (1980); *Paterson Zochonis (UK) Ltd* v *Compania United Arrow SA* 493 F Supp 621 (1980); *Gemini Shipping Inc* v *Foreign Trade Organization for Chemicals and Foodstuffs* 496 F Supp 256 (1980); *T P Gonzales Corp* v *Consejo Nacional de Produccion de Costa Rica* 614 F 2d 1247 (1980); *Decor by Nikkei International Inc* v *Federal Republic of Nigeria* 497 F Supp 893 (1980); *Sugarman* v *Aeromexico* 629 F 2d 270 (1980). For comment see eg Wheeler, "Direct Effect Jurisdiction under the Foreign Sovereign Immunities Act of 1976" (1981) 13 NYUJILP 571; Pell, "The Foreign Sovereign Immunities Act of 1976: Direct Effects and Minimum Contacts" (1981) 4 Cornell ILJ 97.

88. See also s 9 (arbitrations): below, p xx. And cp Higgins, 10 Netherlands YBIL, 41–6 on the legislative history of s 3(1)(a). Art 30 ECSI excludes proceedings relating to the operation of State-owned "seagoing vessels" or State cargoes "carried on board merchant vessels", on the basis that these matters are covered by the Brussels Convention of 1926 and its Protocol of 1934: see Council of Europe, *Explanatory Reports on The European Convention on State Immunity and the Additional Protocol* (1972) at 39.

89. A connection requirement was formulated by Lord Denning in *Rahimtoola* v *Nizam of Hyderabad* [1958] AC 379 at 422, and applied by him in *Thai-Europe Tapioca Service Ltd* v *Government of Pakistan* [1975] 1 WLR 1485 (decided by Lawton and Scarman LJJ on grounds of general immunity). But in *I Congreso del Partido* [1978] QB 500, Robert Goff J thought that there was "no international consensus on the requirement of territorial connexion", at least with respect to the "arrest of an ordinary trading ship" (at 534–5). On this point the Court of Appeal agreed: [1980] 1 Lloyd's Rep 23 at 30 (Lord Denning MR). Cp also [1981] 3 WLR 328 at 345 (Lord Wilberforce).

90. Ibid.

91. See Third Report, 10–19, 38.

Since Article 6 (the basic statement of immunity) makes no reference to jurisdictional questions, the impression given is that only the forum's rules of competence are relevant. On the other hand, in formulating specific exceptions from immunity the Special Rapporteur has been careful to stipulate close links between the cause of action and the forum State. Thus trading or commercial activity must be conducted "partly or wholly in the territory" of the forum State,[92] employment contracts must be for the employment "of a national or resident of [the forum] State for work to be performed there",[93] and actions for death, personal injury or property damage must have been caused within the forum by a person or agency "present therein at the time".[94]

It is suggested that the rationale behind the law of sovereign immunity requires that some reasonably close connection should exist between the forum State and the cause of action. By exercising jurisdiction over a foreign State the forum State determines the rule that applies to the foreign State in the matter (and may proceed to enforce that rule). It is generally accepted that the fact that the plaintiff is a national of the forum State is no adequate ground for exercising jurisdiction in this way, and it ought to follow that some more substantial connection should exist. But again, exactly what that connection should be — or rather, how close and direct it should be, since it is most unlikely that international law goes so far as to prescribe the specific links, any more than it does in the law of nationality — would have to be specified in the legislation or case-law in each context. Given the uncertainty of the common law in this respect it may well be that legislation would be a better way of specifying such requirements.

If there is a jurisdictional requirement of the kind suggested, then two exceptions to it are established. The first, waiver or submission to the jurisdiction, needs no comment: the immunity rule only requires that a foreign State not be subjected to local jurisdiction without its consent.[95] The second is claims with respect to state-owned commercial vessels and their cargo, an exception established both in municipal case-law and in a variety of multiliteral and bilateral treaty provisions.[96]

4. A residual prohibition for acta iure imperii?

It is clear that neither the FSIA nor the SIA adhere strictly to a distinction between *acta iure imperii* and *acta iure gestionis,* however these may be defined. Instead in a number of respects they allow domestic courts to exercise jurisdiction over the "governmental" acts of foreign States. This is true of the SIA, for example, in the case of some of the "commercial transactions" defined by section 3(3)(a) and (b), in the case of some non-commercial torts committed within the jurisdiction, in the case of some

92. Fourth Report, 79.
93. Fifth Report, 23 (a particularly restrictive formulation, to which further restrictions are attached in draft article 13(2)).
94. At 17.
95. Whether a particular State chooses to exercise jurisdiction over unrelated disputes on the basis of waiver alone is a matter for its own domestic law. The position in the United States in this respect remains unsettled: cp *Verlinden BV1 v Central Bank of Nigeria* 647 F 2d 320 (CA2, 1981), cert granted 102 SCt 997.
96. See Crawford, op cit, 862; and above fn 85.

arbitrations, and possibly in the case of some actions with respect to ships (e.g. where at the relevant time the ship was not in use, though intended for use, for commercial purposes).[97] On the other hand, under the European Convention, except for the cases covered explicitly by Articles 1–14, "the immunity ... which foreign States enjoy in respect of acts performed in the exercise of sovereign authority" is expressly reserved.[98] It is not clear whether the SIA, which contains no such express reservation, would be interpreted restrictively to preserve basic or residual immunities existing under the European Convention or general international law (to the extent that these exist). Section 15 allows the Act to be varied where the United Kingdom's treaty obligations so require,[99] and the inference is that the consistency of the Act with, for example, the European Convention, is a matter for the executive rather than the courts. A further inference from the absence of any power to vary the SIA to make it consistent with *non*-treaty obligations, might be that it was intended to operate notwithstanding any such obligations, although this is less certain.

The question remains whether international law *does* require domestic courts to refrain from exercising jurisdiction over foreign States in respect of acts *iure imperii*. Decades of repetition of formulae do not establish general international law if conflicting assertions, such as those mentioned, are maintained without protest. If the position continues obscure as a matter of practice, then one is thrown back on general principle. As I have suggested, general principle may well lead us to draw a distinction between foreign state acts performed within the jurisdiction (where the presumption may be against immunity in the absence of specific, established exceptions or qualifications to local competence), and state acts performed outside the jurisdiction (where the presumption may be the other way).[1] At this stage of the law's development, any such distinction may only be tentative, but it is certainly more consistent with modern practice than alternative, sweeping formulations.

It does not follow from the fact that a State is not entitled to immunity that the forum can apply its own rules willy-nilly. The substantive law to be applied to transactions involving foreign States remains an issue, especially where international law specifically validates, or permits, the foreign State's actions. In such a case it cannot be assumed that the forum State is free to apply its own conflicting domestic law. This is, however, a matter distinct from foreign State immunity as a jurisdictional bar:[2] rather it concerns the

97. SIA, s 10(2). This may have been intended to cover situations such as that in *The Canadian Conqueror* [1962] SCR 598, but is not limited to that type of case.

98. Arts 24(1), 27(2). The point is that if not even extensions to local jurisdiction can infringe the assumed immunity, the basic rules in Arts 1–14 may have to be restrictively rather than extensively interpreted.

99. Eg, SI 1978 No 1524, implementing the UK-USSR Protocol on Merchant Navigation of 1 March 1974: UKTS 1977 No 104.

1. The maxim *par in parem non habet jurisdictionem* is not unequivocal in respect of situations within as distinct from outside the forum. To assert that States are equals with respect to acts within the forum is to beg the question.

2. Cp the problem of non-commercial torts committed within the jurisdiction: above, p 89. On the other hand, it may be possible to distinguish, in a given case, the legality of the act from

general relationship between international and local law on questions of substance. The way it is often dealt with is by applying some version of the act of state doctrine familiar in United States law. As some courts have perceived, this doctrine is not itself a rule of international law, although it will often be consistent with a rule of international law (or, perhaps, comity) requiring respect for foreign state acts performed within the foreign State's sphere of competence.[3] The tendency in recent United States caselaw is to treat the act of state doctrine as a corollary of the sovereign immunity rule,[4] and within limits this is acceptable. But the act of state doctrine so far seems to follow the common law in distinguishing "sovereign" from other transactions, rather than following any particular statutory regime established for sovereign immunity. So there is nothing incoherent in a finding that a particular transaction is not immune from jurisdiction but that inquiry into the *legality* of the foreign State's act is precluded by the act of state doctrine. One would expect then that the act of state doctrine will continue to develop alongside the law of sovereign immunity but having regard to its own underlying policies.[5] The real issue is whether the act of state doctrine will grow closer to its international law underpinnings, or remain a relatively amorphous, even discretionary, doctrine — a question which the House of Lords for the time being at least seems to have resolved in favour of the latter view.[6]

5. The position of separate state instrumentalities and corporations

The status for the purposes of sovereign immunity of separate state instrumentalities and corporations is a problem not unique to the modern restrictive rule. Even under a regime of absolute immunity it was necessary to distinguish entities entitled to immunity from those which were not, and many of these cases were of great difficulty. English courts for example tended to be generous in extending immunity in this way: to a state news

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its consequences in respect of commercial transactions: see above, fn 70. But this is a difficult area and not all cases allow this to be done: see eg the unconvincing attempt by Lord Denning MR in *Buttes Gas and Oil Co* v *Hammer (No 2)* [1975] 1 QB 57 at 59. On appeal the House of Lords took a different, but scarcely more discriminating, view: [1982] AC 888.

3. Eg *Buttes Gas and Oil Co.* v *Hammer (No 2)* [1979] 1 All ER 51 at 62–3 (Roskill LJ).
4. See esp *Alfred Dunhill of London Inc* v *Republic of Cuba* 425 US 682 at 705–6 (1976) per Burger CJ, White, Powell and Rehnquist JJ, approved by Lord Wilberforce in *I Congreso del Partido* [1981] 3 WLR 328 at 339–40 (a case involving very similar issues to *Dunhill*).
5. In fact US courts have usually applied sovereign immunity exceptions by analogy to act of state pleas, in some cases without careful appreciation of the distinctions which may be required. See eg *Outboard Marine Corp* v *Pezetel* 461 F Supp 384 at 397–8 (1978); *Behring International Ltd* v *Imperial Iranian Air Force* 475 F Supp 396 at 400–1 (1979); *Libyan American Oil Co* v *Socialist People's Libyan Arab Jamahirya* 482 F Supp 1175 at 1178–9 (1981) (act of state doctrine applied although defendant held to have waived immunity); *Letelier* v *Chile* 488 F Supp 665 at 673–4 (1980) (a particularly clear example of analogy between the two doctrines); *In re Amoco Cadiz* 491 F Supp 161 at 169 (1979) (plaintiff state held in effect to have waived the act of state doctrine with respect to counterclaims); *American International Group Inc* v *Islamic Republic of Iran* 493 F Supp 522 at 525 (1980) (mentioned above at pp83–4). The case was remanded on other grounds: 657F2d430(1981).
6. *Buttes Gas and Oil Co* v *Hammer* [1982] AC 888. For critical comment see Collier, (1982) 40 CLJ 18; Crawford, (1982) 53 BYIL 259. Cp Henkin L, "Is there a 'Political Question' Doctrine" (1976) 85 Yale LJ 597.

service,[7] some local governing bodies,[8] a provincial development corporation,[9] even a state trading corporation.[10] These difficulties are considerably reduced under a regime of restrictive immunity; there is no point in claiming to be a state in cases in which the state itself would not be immune. Nonetheless the definitional question does remain, since it has never been doubted that a separate entity may be identified with the state for the purposes of state immunity. In this context, two, or perhaps three, propositions seem to be basic: first, that a State does not lose its immunity merely by organizing one of its departments or organs as a separate entity under its own municipal law, if the department or organ still carries on recognizably governmental functions; secondly, however, that except in this case the separate legal personality of a state instrumentality creates a presumption against its continued identification with the State (unless in a particular case it is acting directly as an agent of the State), and thirdly, that where a third party contracts or deals with such a separate instrumentality on the basis that it is separate and distinct from the State, one should not be astute to "pierce the corporate veil" or to identify the instrumentality with the State, whether for the purpose of the law of immunity or, indeed, of contract.[11] These considerations are, on the whole, confirmed in international practice. The Soviet Union treaties, for example, distinguish explicitly between state-guaranteed transactions and the transactions of separate instrumentalities. The latter are fully subject to local jurisdiction, but jurisdiction and execution are limited to the particular instrumentality and its property.[12] The European Convention which generally, as we have seen, takes a rather reserved attitude to immunity, provides that a separate legal entity, even though entrusted with public functions, is not immune except "in respect of acts performed by the entity in the exercise of sovereign authority" for which the State itself would be immune (Article 27; cp Articles 6,7), and a very similar approach is taken by the SIA for separate entities "distinct from the executive organs of the government of the State and capable of suing or being sued" (section 14(1)).

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7. *Krajina* v *Tass Agency* [1949] 2 All ER 274, CA.
8. *Swiss Israel Trade Bank* v *Government of Salta and Banco Provincial de Salta* [1972] 1 Lloyd's Rep 497.
9. *Mellenger* v *New Brunswick Development Corporation* [1971] 1 WLR 604, CA.
10. *Bacchus SRL* v *Servicio Nacional del Trigo* [1975] 1 QB 438, CA. But banks, even central banks, fared less well: *Trendtex Trading Corp* v *Central Bank of Nigeria* [1977] QB 529.
11. It has not always been perceived that this separateness cuts both ways. If a contract with a state enterprise includes a *force majeure* clause referring to acts of government, then one should not identify the enterprise with the State for the purposes of the *force majeure* clause (or analogous questions of frustration) unless the enterprise was acting directly as state agent in that matter. See above, fn 74 for the *Rolimpex* case, which raised this issue. Singer is critical of *Rolimpex*, but ignores the contractual context; op cit. 318. He also seems to advocate a discriminatory "piercing of the veil" in the case of foreign government corporations, a view which is unlikely to be accepted. The foreign State is at least entitled to the benefit of the general law of the forum in its dealings with its subsidiary corporate entities there. But cp the apparent disagreement on this point in *Congreso:* above fn 68.
12. Above, p 79. The Romania-Iraq Exchange of Notes (above, fn 43) provide that separate Romanian commercial organizations are directly and exclusively responsible for their own transactions, "in accordance with the norms of the International Commercial Private Law" (para 4) [sic].

The FSIA takes a very different line. A "foreign state" is defined to include political subdivisions, agencies and instrumentalities, and even corporations formed under its law where "a majority of [their] shares or other ownership interest is owned by a foreign state or political subdivision thereof."[13] By this criterion British Leyland is a foreign State. It is true that the FSIA goes on to distinguish foreign states and political subdivisions from agencies and instrumentalities for the purposes of service, attachment and execution but its substantive jurisdictional rules apply equally to both categories.

This apparently more generous approach to separate entities at first sight seems to conflict with the generally restrictive view of immunity underlying the FSIA. On closer examination though there is rather more to be said for it. The difficulty with both the European Convention and the English Act is that they place the notion of "sovereign authority" — a notion not otherwise defined in the text — at the heart of the definition of "separate entity". Yet part of the point of a statutory or conventional statement of immunity is to avoid having to apply general, question-begging formulae such as "sovereign authority (*iure imperii*)" as central aspects of any definition or test. Although it does not seem necessary to go as far as according immunity to private corporations under the majority control of a foreign state, the more straightforward approach of the FSIA seems preferable for this reason. Similarly the stress in the Canadian Act is on the role of the separate agencies as organs of the foreign state: this gives sufficient flexibility without using phrases of wholly indeterminate reference.[14]

6. Problems of waiver

Under a regime of absolute immunity, waiver played an important mitigating role, and indeed the notion of waiver was sometimes manipulated so as to avoid the inconveniences of a strict rule of immunity.[15] Under the restrictive theory this should not be necessary. But, curiously, questions of waiver seem to have become more, not less controversial, at least in the United States. The most difficult questions relate to waiver in the context of arbitration awards and their enforcement. This is a topic which merits separate treatment, but some general comments may be made.

It is clear that questions of sovereign immunity are more or less closely

13. FSIA s 1603. Entities created under the law of the US or a third country are excluded: s 1603 (b)(3).

14. State Immunity Act 1982 (Can), s 2. For discussion of these questions see Sucharitkul's Third Report 28–34. The Commission's Drafting Committee has provisionally adopted the following definition (Art 7(3)):

> "a proceeding before a court of a State shall be considered to have been instituted against another State when the proceeding is instituted against one of the organs of the State, or against one of its agencies or instrumentalities in respect of an act performed in the exercise of governmental authority, or against one of the representatives of that State in respect of an act performed in his capacity as a representative, or when the proceeding is designed to deprive that other State of its property or of the use of property in its possession or control."

This seems to confer a greater degree of status on "representatives" than on "agencies or instrumentalities", unless "representatives" is construed narrowly.

15. Eg Enderlein F. "The Immunity of State Property from Foreign Jurisdiction and Execution: Doctrine and Practice of the German Democratic Republic" (1979) 10 Netherlands YBIL 125.

connected to questions both of jurisdiction and of choice of law (including substantive defences such as act of state). It is quite possible for a State to waive one such requirement or obstacle without waiving the others. For example, consent to the application of local law does not entail a waiver of immunity;[16] waiver of immunity does not necessarily entail waiver of jurisdictional objections,[17] or the substantive defence of act of state.[18] The extent to which a particular waiver or consent is effective in these different ways is a matter of construction, but care is evidently required in assuming that a waiver is general rather than specific. And since, *ex hypothesi,* the State whose acts are said to amount to a waiver is not otherwise obliged to submit to the jurisdiction (if it were, questions of waiver would be irrelevant), there ought to be no particular presumption that a State *has* waived its immunity, or that its waiver is more extensive than, on a fair construction, it was intended to be. For present purposes, only waiver of the defence of sovereign immunity will be discussed.

In the context of simple waiver, by agreement or conduct, of immunity from the jurisdiction of the court of a particular country, the principles seem to be clear, and indeed here the European Convention, the SIA and (with one relatively minor exception[19]) the FSIA are in agreement. A State may waive its immunity in advance, by agreement or treaty,[20] or at the time, by express or implied submission to the jurisdiction. Submission is to be implied if a State, having had the opportunity to do so, fails to raise the defence of immunity but pleads to the merits (i.e. *forum prorogatum*).[21] A State is not immune with respect to a counterclaim which must, with one partial exception, arise out of the same circumstances as its principal claim.[22] Submission to the jurisdiction entails submission to any appeal from the judgment; but it does not entail submission to any enforcement measures. For that, a distinct waiver is required.[23]

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16. Cp SIA s 2(2) (confirming the common law position).
17. Cp *Chicago Bridge & Iron Co* v *Islamic Republic of Iran* 506 F Supp 981, 985 (DC, NE Ill, 1980) ("the fiction of implied consent cannot obviate the need for establishing minimum contacts with a forum"); *Canadian Overseas Ores Ltd* v *Compania de Acero del Pacifico SA* 528 F Supp 137, 1346 (SDNY, 1982).
18. *Quaere* whether a plaintiff State can sustain an affirmative claim based on an act of its own which it maintains is an act of state. A court prevented from investigating the validity of the claim might refuse to enforce it. This was, in an indirect way, the problem with the slander action in the *Buttes* case [1982] AC 888.
19. See below, fn 22. See also ILC Draft Arts 8–10: Sucharitkul, Fifth Report, 6, 25–6.
20. ECSI, Art 2; SIA, ss 2(1) & (2), 17(2); FSIA, s 1604 (existing international agreements), s 1605 (a)(1) (other cases).
21. ECSI, Arts 3; SIA, ss 2(3)–(5). US courts would no doubt take the same view under s 1605 (a)(1), but cp Smit, op cit, 53–4.
22. The exception is FSIA s 1607 (c), providing for jurisdiction over counterclaims "to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state". This reflects earlier case-law: see *National City Bank of New York* v *Republic of China* 348 US 356 (1954). And for a further extension cf *In re Amoco Cadiz* 491 F Supp 161 (1979). In contrast unrelated counterclaims are specifically excluded by ECSI, Art 1(2)(a), by SIA, s 2(6), by the ILC's Draft Art 10 and by s 4(4) of the Canadian Act.
23. ECSI, Art 23; SIA, s 13(3); FSIA, s 1610 (a)(1), cp s 1610 (d) (pre-judgment attachment). And cp Crawford, op cit, 860—1.

From what has been said already about the relativity and particularity of waiver, it should be clear that a State is not to be taken to have submitted to the jurisdiction of the courts of one State merely because it has submitted the same matter to the jurisdiction of the courts of another State. Indeed this is explicit in both the European Convention and the SIA.[24] However the language of FSIA section 1605(a)(1) is less explicit: it provides only that a foreign State is not immune from United States jurisdiction in any case "in which the foreign state has waived its immunity". There is no express requirement that the waiver relate to the jurisdiction of *United States* courts. The FSIA itself spells out the necessary jurisdictional nexus for cases involving foreign States, and it would be remarkable if these could be evaded merely by a waiver before the courts of a third State. Nonetheless in *Ipitrade International SA* v *Federal Republic of Nigeria* the court held that a waiver of immunity from Swiss jurisdiction constituted a waiver of immunity from the jurisdiction of United States courts to enforce the Swiss award.[25] This view was convincingly rejected by a different District Court in *Verlinden BV* v *Central Bank of Nigeria*:[26]

> "It may be reasonable to suggest that a sovereign state which agrees to be governed by the laws of the United States — which is both 'another country' and 'a particular country' — has implicitly waived its ability to assert the defense of sovereign immunity when sued in an American court. But it is quite another matter to suggest, as did the Court in *Ipitrade,* that a sovereign state which agrees to be governed by the laws of the third-party country is thereby precluded from asserting its immunity in an American court.
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> Although both of these interpretations may be consistent with the literal language of the single paragraph of legislative history that addresses implicit waivers, there are strong reasons to reject the latter view. By its peculiar mixture of substantive and procedural provisions, the Immunities Act confers personal jurisdiction over all foreign states not entitled to immunity ... Proof of an implicit waiver absolutely defeats the assertion of sovereign immunity. If the language of the Act is applied literally, the result is that a foreign sovereign which has waived its immunity can be subjected to the personal jurisdiction of United States courts regardless of the nature or quality of its contacts with this country.
>
> Plantiff's view, if adopted, would presage a vast increase in the jurisdiction of federal courts in matters involving sensitive foreign relations: whenever a foreign sovereign had contracted with a private party anywhere in the world, and chose to be governed by the laws or answer in the forum of any country other than its own, it would expose itself to personal liability in the courts of the United States ... Because the Act's waiver provision is written as broadly as it is, it is incumbent upon the

24. ECSI, Arts 1(1)(3) ("to the jurisdiction of the courts of that State"), 2 ("to the jurisdiction of that court"); SIA, s. 2(1) ("to the jurisdiction of the courts of the United Kingdom").
25. 465 F Supp 824 at 826 (DC DC, 1978), approved by the same court in *Libyan American Oil Co* v *Socialist People's Libyan Arab Jamahirya* 482 F Supp 1175 at 1178 (1980).
26. 488 F Supp 1284 at 1301—2 (SDNY, 1980), aff'd on other grounds 647 F2d 320 (1980), cert granted 102 SCt 997.

> Court to narrow that provision's scope. We need not now decide whether the Court would have personal jurisdiction over a foreign state whose only contact with this country occurs by virtue of a private agreement in which it adopts American law or an American forum. We only hold that when a foreign state agrees to submit its disputes with another, non-American private party to the laws of a third country, or to answer in the tribunals of such country, it does not implicitly waive its immunity to the jurisdiction of the courts of the United States".

Later cases have, rightly, preferred *Verlinden* to *Ipitrade* on this point,[27] but there is no doubt that the more careful formulation of the waiver rule in SIA section 2 is to be preferred.

A similar problem arises, in even more aggravated a form, in the context of proceedings to enforce arbitral awards to which a State is a party. Article 12 of the European Convention is a limited provision, permitting proceedings relating to the validity or interpretation of an arbitration agreement or award, or to the arbitral procedure, to be brought in the courts of the State or States "on the territory or according to the law of which the arbitration has taken ... place", provided that the dispute submitted to arbitration arises out of "a civil or commercial matter". On the other hand SIA section 9 extends to all proceedings in the courts of the United Kingdom "which relate to" any arbitration to which a State has agreed to be a party.[28] There is no express requirement that the arbitration relate to a civil or commercial matter, or that it have taken place in the United Kingdom or under United Kingdom law. On a literal interpretation of section 9, proceedings could be taken to register an arbitral award in a non-commercial matter which had no connection with the United Kingdom.[29] Under section 13(4) the award could then be enforced against State-owned commercial property within the forum. By submitting a dispute to arbitration anywhere in the world, a State would therefore (unless the arbitration agreement provided to the contrary) lose its immunity from the jurisdiction of United Kingdom courts. Its commercial property within the United Kingdom would thus, subject to the exercise of the court's discretion under section 26 of the Arbitration Act 1950 in giving leave to enforce the award, constitute a fund out of which arbitration awards made anywhere in the world could be enforced, irrespective of whether the award arose from a dispute the substance of which would be immune from local jurisdiction under the Act.

It may be that section 9 was intended to have the same limited effect as Article 2 of the European Convention. Proceedings to enforce an arbitral award may be said to "relate to" the arbitration but the obligation to comply

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27. *Chicago Bridge & Iron Co* v *Islamic Republic of Iran* 506 F Supp 981, 981 (ND Ill, 1980); *Ohntrup* v *Firearms Centre Inc* 516 F Supp 1281, 1285 (ED Penn, 1981). The point did not need to be decided in *Maritime International Nominees* v *Republic of Guinea* (1982) 21 ILM 1355, 1364 (DC CA).
28. S 9(1) applies subject to any contrary provision in the agreement and does not apply to arbitration agreements between States: s 9(2).
29. Cf Arbitration Act, 1975 (UK), ss 3—5; Arbitration Act, 1950 (UK), ss 26, 36—8. A foreign award not within ss 36—8 of the 1950 Act (or, for that matter, the 1975 Act) can nonetheless be enforced under s 26: *Dalmia Cement Co* v *National Bank of Pakistan* [1975] QB 9.

with it derives from the agreement to arbitrate, not from the award. If that agreement is not enforceable as a commercial transaction or otherwise under section 3 it is difficult to see that it should become so merely because its content derives from the subsequent decision of an arbitrator.[30]

There is no direct equivalent to SIA section 9 in the FSIA, although arbitral awards could still be enforced against a State in a number of ways. The most straightforward of these would be under section 1605(a)(2), where the underlying dispute was a commercial activity within the terms of that subsection. But in practice enforcement of arbitral awards has most often been sought under section 1605(a)(1), the general waiver provision.

Where a State agrees to arbitrate a dispute — at least, a dispute relating to a civil or commercial transaction — in the United States, or where the arbitration in fact takes place in the United States in accordance with an agreement, the courts will usually infer a waiver of immunity in proceedings relating to the arbitration, and reasonably so.[31] (The same inference might, perhaps, be drawn where United States law was the proper law of the arbitration.[32]) Enforcement of the award would then depend on section 1610, unless the submission to arbitration could also, exceptionally, be construed as a waiver of immunity from execution.[33]

But in *Ipitrade International SA* v *Federal Republic of Nigeria,* a District Court held that agreement to arbitrate in France under Swiss law constituted a waiver of immunity from United States jurisdiction.[34] This view, which has been criticised already, was combined with an interpretation of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958,[35] whereby the United States was obliged to enforce the French award against Nigeria (also a party to the Convention). It is not clear whether the New York Convention was taken as an additional form of waiver (as Judge Weinfeld seems to have assumed in *Verlinden*[36]) or merely as consent to the exercise of subject matter jurisdiction, with the waiver of sovereign immunity established by the consent to arbitrate. Probably the

30. But cp Mann, FA, "The State Immunity Act 1978" (1979) 50 BYIL 43, 57—8. His broader view would gain support (in a jurisdiction in which reference to Parliamentary Debates was allowed in the interpretation of legislation) from the fact that a provision excluding enforcement of awards from what became section 9 was deleted in the House of Lords. See Parl Deb HL 16 March 1978, 1516–17.
31. But the inference was *not* drawn in relation to an ICSID arbitration in fact conducted in the US: *Maritime International Nominees* v *Republic of Guinea* (1982) 21 ILM 1355, 1363–4 (DC CA), reversing 505 F Supp 141 (1981).
32. The point was left open in *Verlinden BV* v *Central Bank of Nigeria* 488 F Supp 1284 at 1302 (1980).
33. It was so construed in *Birch Shipping Corp* v *Embassy of Tanzania* 507 F Supp 311 at 312 (DC DC, 1980), noted (1981) 75 AJIL 373–4.
34. 465 F Supp 824 (1978). This aspect of *Ipitrade* was supported, without any more convincing argument, in the United States *amicus curiae* brief before the Court of Appeals for the District of Columbia in *Libyan American Oil Co* v *Socialist People's Libyan Arab Jamahirya* (1981) 20 ILM 161. In the event the decision below was vacated without judgment after the matter was settled: cp Van den Berg AF, *The New York Arbitration Convention of 1958* (1981), 373.
35. 330 UNTS 3.
36. 488 F Supp 1284 at 1300 (1980). No arbitral award was involved there.

latter view is the correct one, in which case the correctness of the decision on the level of immunity depends on the ground already criticized.

But whether the New York Convention is relied on as waiving sovereign immunity or objections to subject-matter jurisdiction, the Convention is by no means clear or unproblematic in its application to States parties to arbitral awards. The Convention applies only to "arbitral awards ... arising out of differences between persons, whether physical or legal" (Article 1(1)). On its face it is not clear that States or state instrumentalities (as distinct from separate state trading corporations) are covered by the term "persons, whether physical or legal". A common lawyer might well deny this, but in fact the *travaux* of the Convention give a degree of support to its application to States and State instrumentalities. At least some delegates at the Conference thought that the term included "corporate bodies under public law, and particularly States, in their capacity as entities having rights and duties under private law",[37] and the Drafting Committee only rejected a specific amendment to this effect because it "was of the opinion that such a provision would be superfluous and that a reference in the present report would suffice". This was an unfortunate omission for several reasons. For if the term "persons" in Article 1(1) includes States, then it would seem to include them in whatever capacity (at least in those jurisdictions where the State is accorded a unitary legal personality extending beyond private law matters). It also follows that the Convention applies to arbitral awards between States (where international law is not the proper law), despite the fact that this was not intended by the draftsmen of the Convention.[39] Indeed, the rather haphazard way in which the matter was dealt with is made clear by the rejection of a Yugoslav amendment, which would have restricted the Convention to awards made between persons subject to the jurisdiction of a contracting State.[40] This would have had the side-effect of excluding States themselves from the ambit of the Convention. The amendment was rejected (16 votes in favour, 14 against, with 5 abstentions) because it did not achieve a two-thirds majority. It would be surprising if an uncontemplated inference from Article 1 of the Convention were to have such marked effects in the area of sovereign immunity. Significantly, questions of sovereign immunity from enforcement of awards were deliberately not dealt with by the more specific Convention on

37. See Gaja G, *International Commercial Arbitration: New York Convention* (1980) I, at III.1.2.8 (Austria), III.C.46 (Czechoslovakia). The same view was taken by the Court of Appeal of the Hague in *Societe Europeene d'Etudes et d'Entreprises* v *Socialist Federal Republic of Yugoslavia* (1973) 4 Netherlands YBIL 390 affirmed on appeal, (1974) 5 Netherlands YBIL 290 (Supreme Court). That Yugoslavia was not a party to the New York Convention was regarded as irrelevant.
38. UN Doc E/2704 & Corr 1, para 24; Gaja, op cit at III.A.1.3.
39. At III.A.1.2 If States are regarded as "persons" within Art 1(1) there is no textual basis in the Convention for denying its application to private law arbitrations between States. Nor (except for States which have made a reservation under Art I (3)) is there any textual basis for limiting the subject of such awards to "commercial activities in their widest sense". None of these difficulties are dealt with by Van den Berg, who asserts that the Convention applies to awards between States and private parties in commercial matters (but not to awards between States): op cit, 52–3, 98–100, 277–82. He does however concede that the Convention may not override immunity from execution: ibid, 281.
40. Gaja, op cit, at III.C.134.

the Settlement of Investment Disputes between States and Nationals of other States of 1965.[41]

A further difficulty with reliance on the Convention is that on this interpretation it requires enforcement of foreign awards involving third States, irrespective of whether the third State is itself a party to the Convention. It follows that the Convention cannot be interpreted as waiving sovereign immunity with respect to enforcement, since it would then violate the *pacta tertiis* rule.[42] And it may follow, similarly, that it should not impair a third State's rights based on any special jurisdictional rule (if one exists in this field). At best the Convention provides only indirect support for an extension of (subject-matter) jurisdictional competence in the enforcement of arbitral awards. It has no direct effect on the defence of sovereign immunity from enforcement of awards.

This discussion illustrates the need for carefully drafted waiver provisions, so as to avoid the difficulties that have tended to occur under the FSIA[43] and which may occur, in the context of arbitral awards, under the SIA. But this is not to say that legislation is not necessary in this area: on the contrary the common law rules on waiver of immunity are in an unsatisfactory state.[44]

7 Problems of enforcement of judgments

The question of execution of judgments against foreign States or state instrumentalities is a troublesome one. At least until this centrury, it was universally held that foreign state property was immune from forcible execution without an express waiver, and that this rule was quite independent of the rule of immunity from jurisdiction. The distinction continued to be maintained by the United States Government even after the Tate letter and right up to the enactment of the 1976 Act, and was adopted, largely unquestioned, by United States courts.[45] One aspect of the common law rule canonically stated by Lord Atkin in *The Cristina* was a general prohibition on proceedings involving foreign state property, even between third parties,[46] and this rule was applied on several occasions by the House of Lords and the Privy

41. 575 UNTS 159, Art 55. See Crawford, op cit, 823–4. It would be odd if the more specific Convention had less effect than the more general one.
42. Either the Convention is to be interpreted as not applying to arbitral awards to which a state is a party, or sovereign immunity is one of the "rules of procedure" under Art 3, conditioning local enforcement. The latter view may be the better one: sovereign immunity would certainly be available in the state where the arbitration occurred (unless a relevant exception applied). Cp *Libya* v *Libyan American Oil Co* (1981) 20 ILM 151 at 159–60 (Swiss Federal Tribunal). For evasion of the Convention in the analogous context of domestic State immunity, cp *Wijsmuller* v *USA* (1978) 3 Ybk Comm Arb 290 (SDNY, 1976).
43. See also the disagreements in United States courts over the extent to which the United States-Iranian Treaty of Amity of 15 Sept 1955, Art 11(4) ([1977] 8 UST 899) waives Iranian immunity from prejudgment attachment under FSIA s. 1610 (d). See, eg, *Chicago Bridge & Iron Co* v *Islamic Republic of Iran* 506 F Supp 981 at 985–7 (1980); *Mashayekhi* v *Iran* 515 F Supp 42 at 51 (1981).
44. Above, p 74.
45. For the position before the Tate letter see *Dexter and Carpenter Inc* v *Kunglig Jarnvagsstyrelsen* 43 F2d 705 (1930); for the position after it, *New York & Cuba Mail SS Co* v *Republic of Korea* 132 F Supp 684 (1955); *Weilamann* v *Chase Manhattan Bank* 192 NYS (2d) 469 (1959).
46. [1938] AC 485 at 490.

Council.[47] French courts continued to apply a rule of absolute immunity from execution at least to state (as distinct from state instrumentality) property, although the present French law is unclear.[48] The European Convention, Article 23 expressly prohibits "measures of execution or preventive measures against the property of a Contracting State" outside its territory, in the absence of express waiver.

In view of this practice is it not suprising that, until recently at least, some writers continued to adhere to a rule of general immunity from execution.[49] However support for the contrary view is now much stronger, so that it is virtually impossible to argue that modern international law entirely prohibits the execution of judgments against foreign state property. But again it is one thing to deny the existence of an absolute immunity, and quite another to specify the cases in which execution against state property is permissible. I have examined this problem in detail elsewhere: only a brief account of it will be given here.[50]

On this problem more than any other there are marked differences between the European Convention, the FSIA and the SIA. The European Convention prohibits enforcement proceedings altogether (except in the case of state merchant ships, which are established as a special category[51]). However it does allow enforcement, under reciprocal declarations, against property "used exclusively in connection with an industrial or commercial activity, in which the State is engaged in the same manner as a private person" (Article 26). There is no requirement that the property have been used in connection with the *particular* claim. The SIA allows relief by way of injunction or order with respect to property "in use *or intended for use* for commercial purposes" (section 13(4)), thus deleting the requirement that the property be used exclusively for such purposes.

The position under the FSIA is both more complex and more restrictive, especially for foreign States themselves as distinct from their separate agencies or instrumentalities. The principal exception to immunity from execution encompasses property "used for a commercial activity in the United States" where "the property is or was used for the commercial activity upon which the claim is based".[52] The commercial property of a foreign State does not therefore constitute a fund against which judgments arising from

47. Above, p 73 fn 13.
48. The principal cases are *Procureur-General* v *Vestwig* (1946) 73–6 JDI I: *Englander* v *Statni Banka Ceskoslovenka* (1966) 47 ILR 157, (1969) 96 JDI 923; *Clerget* v *Répresentation Commerciale de la République Democratique du Vietnam* (1972) 99 JDI 269. And see Crawford, op cit, 834–43.
49. Eg Johnson, op cit. See also Bouchez, "The Nature and Scope of State Immunity from Jurisdiction and Execution" (1979) 10 Netherlands YBIL 3; Venneman, "L'Immunité d'exécution de l'Etat Etranger" in *L'immunité de juridiction et d'exécution des Etats. A propos du projet de convention du Conseil de l'Europe. Actes du colloque* (1971) 119.
50. See Crawford, op cit, and works there cited.
51. ECSI, Art 23 (general prohibition of execution); cp Art 30 (state merchant ships and cargoes). Similarly SIA, s 10; FSIA, 1605 (b). See also above p 25 fn 26, and Crawford, op cit 862.
52. FSIA, s 1610 (a)(2). See generally del Bianco, "Execution and Attachment under the Foreign Sovereign Immunities Act of 1976", (1978) 5 Yale Studies in World Public Order 109.

non-immune transactions can be enforced. In consequence, a great deal of emphasis has been thrown onto assertions of waiver by States of their immunity from execution. The results have been rather unsatisfactory:[53] this is true especially of pre-judgment attachment, which is excluded altogether by the FSIA except where it has been *explicitly* waived.[54]

It can be seen that there is no consensus on whether state property must be exclusively or substantially in use for non-immune purposes (or whether even minimal non-immune use will do); whether there has to be a nexus between the claim and the property against which enforcement is sought, or what are the circumstances in which pre-judgment attachment or arrest of property is warranted. Even the notion of "non-immune use" needs careful definition in this context, since property may be lying idle, or be used at the same time or indistinguishably for purposes only some of which would be immune. In an important judgment the West German Federal Constitutional Court held that property was immune from seizure unless it was used exclusively for non-immune purposes, or unless the part used for immune purposes could (without impermissible intervention in the defendant State's affairs) be ascertained and severed.[55] Neither condition applied to the embassy bank account, used for various purposes, which was before the Court in that case. The decision, which is very carefully reasoned, has been generally approved,[56] but is not clear that the same result would be reached under the SIA, and a different result has already been reached, on grounds of waiver, by one United States District Court.[57]

Apart from formulating the general rule, there is a question what precise exceptions to execution against commercial property should be allowed. Both the SIA and the FSIA specifically exclude from the scope of "commercial property" the property of a State's central bank or monetary authority,[58] and the FSIA also exempts certain military property.[59] The need for such exceptions may reflect, in other contexts, the broad scope of the exceptions with respect to immunity from execution.

Conclusion

It remains to summarise and assess the various arguments for and against Australian legislation in this field.

The most obvious arguments for such legislation relate to the unsatisfactory or uncertain aspects of the present common law. As we have seen, in a number of respects the common law is unclear or uncertain: this is so, for example, in relation to the necessity for closer jurisdictional links with State

53. Cp FSIA, s 1610 (a)(1); above, p 102. For the position of state instrumentalities and agencies see s 1610 (b)(2) ("regardless of whether the property is or was used for the activity on which the claim is based").
54. FSIA, s 1610 (d). Cp *Geveke & Co Int Inc* v *Kompania di Awa I Elektrisidat di Korsou NV* 482 F Supp 660 (1979).
55. Decision of 13 Dec 1977: (1978) 38 *ZaöRV* 242.
56. Crawford, op cit, 863, fn 229 & references.
57. *Birch Shipping Corp* v *Embassy of Tanzania* 507 F Supp 311 (1980).
58. SIA, s 14(4); FSIA, s 1611 (b)(1).
59. FSIA, s 1611 (b)(2).

transactions, and to execution and enforcement of judgments.[60] It is also the case with respect to service of process, although this has not been dealt with here.[61] These are areas of great importance: a jurisdiction in which the rules with respect to such issues are obscure or uncertain can only with difficulty be said to have a developed jurisprudence of foreign state immunity. If anything the matter is made worse by the fact that there are no recent Australian cases in this field, and therefore no direct authority for the restrictive immunity rule itself — although the uncertainty here is relatively minor.

Problems of foreign state immunity do not arise frequently in a jurisdiciton, such as Australia, which is not a centre of transnational litigation and arbitration. When they do, however, difficult or important cases may occur with little warning or opportunity for preparation (e.g. in relation to the arrest of ships or aircraft). In such circumstances, and with a legal profession understandably unfamiliar with the intricacies of the law in this area, the need for readily available guidance is obvious. The point was made by Mr Justice Hardie Boys of the New Zealand High Court, commenting on the *Buckingham* case[62] which he was required to decide at short notice:[63]

> "This kind of case is rare in New Zealand so that there is no body of local expertise on the subject. Decisions most usually have to be given very quickly and in these circumstances there would certainly be value in having some codification of the law".

Of course the common law can itself provide guidance on an area of law, if the relevant decisions are sufficiently clear, sufficiently accessible and sufficiently well-known. But that is, in many respects, not the case now with the common law of foreign state immunity.

In some respects the present law is clear but is either unsatisfactory or arguably too narrow. The former is the case with the rules on waiver of immunity, as we have seen.[64] The latter is still the case in a number of respects: for example, non-commercial torts within the jurisdiction. I have argued that no distinction needs to be drawn, at the level of immunity, between different torts within the jurisdiction on the basis of their commercial or non-commercial character.[65] The overseas Acts, the European Convention and the International Law Commissions's Draft Articles all draw a different distinction, based on tangible injuries to the person or to property. Whatever its justification (and this seems essentially a pragmatic one) it is probably not the distinction drawn at common law.[66]

It could be argued that these difficulties might be overcome through judicial decisions developing and adapting the law to new circumstances (including the changing views of international law).[67] This is, of course, what

60. Above, pp 90–2, 102–4. Another area of uncertainty is proceedings relating to arbitration agreements and awards: above, pp 99–102.
61. ALRC SI RP2, 1–60, 67–9.
62. Above p 72, fn 11.
63. Letter to the ALRC, 29 April 1983.
64. Above p 74 fn 20.
65. Above p 89.
66. Above pp 73, 89.
67. See eg Sornarajah M, "Problems in Applying the Restrictive Theory of Sovereign Immunity" (1982) 31 ICLQ 661.

the English courts were doing in cases such as *The Philippine Admiral, Trendtex* and *Congreso,* before the enactment of the SIA. The difficulty with the argument — whatever its merits before 1978 — is that many of the common law jurisdictions which could have been expected to contribute to this new body of law have in fact legislated to exclude the common law. Except over a relatively long period of time, jurisdictions such as Australia and New Zealand could not be expected to generate a sufficient case-law for this purpose.[68]

Perhaps more fundamentally, the various statutory, treaty or other texts, on this subject do not simply codify or encapsulate any single or simple distinction between acts *iure imperii* and *iure gestionis.* This is not surprising, since far from being simple that distinction has long been recognised as elusive and extremely difficult to apply.[69] But this is only part of the point. As I have tried to show, the considerations favouring local jurisdiction (or conversely, immunity from it) are based on a variety of rules, principles and policies: on the one hand, the forum's nexus with the dispute, its interest in applying its own rule, the likelihood that the dispute will be susceptible to local judicial determination, the principle of consent and forum conveniens; on the other hand, notions of comity and reciprocity, respect for other sovereignties and for established principles of international law (such as the immunity of foreign public ships), assessment of the risk to the foreign relations of the forum of excessive claims to jurisdiction,[70] and so on. To a considerable extent the lines actually drawn in the domestic and international texts are arbitrary, as any careful reading of them will demonstrate. But this was inevitable once the absolute immunity rule was abandoned, and given the fact that no simple or single criterion dictated a regime of restrictive immunity. This is not to say that the lines drawn by the various texts are unreasonable, although, as has been seen, in a number of respects they may be defective or capable of improvement. But it does suggest that drawing them may be as much or more a legislative as a judicial task, given the present state of the law. At the same time a properly drafted Act should leave sufficient room for judicial flexibility, while giving better guidance than is presently available on the underlying policies and principles.

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68. It could perhaps be argued that Australian judges would gain assistance not only from common law decisions but from statutes in comparable jurisdictions, either as helpful analogies or as indications of what international law on the subject is. But the technique of analogy from legislative developments is undeveloped and speculative in Australia (and in other common law jurisdictions); moreover, as has been seen the various instruments disagree in many respects, so that they might be held to provide limited guidance on the state of international law. Thirdly, despite Lord Denning MR in *Trendtex* ([1977] QB 529) the relationship between international law and the common law, especially in Australia, remains uncertain.

69. Cp Lauterpacht H, "The Problem of Jurisdictional Immunities of Foreign States" (1951) 28 BYIL 220, 222–6.

70. Although protests at exercises of jurisdiction in this field are not frequent, they have occurred and can raise serious difficulties. See eg the US protest over attachment of Marshall Aid funds in the *Socobelge* case (1957) 18 ILR 3: see Bachrach, "Sovereign Immunity in Belgium" (1976) 10 Int L 459 at 465; and the Chinese protest over the US District Court's enforcement of the Huguang Railways bonds: Beijing Review No 11. 14 March 1983, 24.

Perhaps the strongest argument in favour of not legislating for the time being is the possibility that the International Law Commission will develop a generally acceptable treaty text which could form the basis of Australian legislation. It is arguable that, given the relative infrequency with which cases involving foreign state immunity arise in Australia, little is to be lost by waiting for the product of the International Law Commission's work.

Like a number of other arguments canvassed in this section, this argument would be considerably stronger were it not for the fact that a considerable number of jurisdictions — including many of Australia's trading partners — have already legislated. Their clearly articulated positions on this subject have undoubtedly influenced international practice and opinion. There is no very obvious reason why a considered Australian position in this field should not contribute in the same way. At the same time the divisions within the International Law Commission on this topic make it doubtful whether a generally acceptable text will emerge.[71] Australia presumably has some interest in supporting the view — to which, it seems clear, the Special Rapporteur himself adheres[72] — that judicial settlement by domestic courts of certain classes of disputes between states and private parties is a proper way of resolving such disputes, and thereby of protecting the legitimate interests of the forum in transactions appropriately linked to it. It is suggested therefore that Australian legislation on foreign state immunity is desirable. Carefully considered legislation may indeed assist in resolving the difficult conflicts inherent in this area, as well as providing clearer rules for Australian courts.

71. Cp above pp 76–7.
72. Cp above pp 77–8.