

State Immunity and State-Owned Enterprises

Report prepared for the Special Representative of the UN Secretary-General on business and human rights.

In what circumstances can State-owned enterprises enjoy State immunity protecting them from civil or criminal legal proceedings in foreign jurisdictions?

"The extent to which immunity should be enjoyed by agencies, connected to the State but not so closely as to constitute central organs of government, remains a perennial problem in the law of State immunity."¹

I. Introduction

The SRSG research question addressed in this Report is expressed in a beguilingly straightforward way, which hides its true complexity. A complete exposition of the circumstances in which State-owned enterprises enjoy State immunity protecting them from civil or criminal legal proceedings in foreign jurisdictions would require a very detailed account of the principles and rules governing the immunities and privileges of foreign States generally under international law, as manifested in the domestic practice of individual States. Within that account, the role played by "State-owned enterprises" (however defined) would be a relatively minor one. That task has already been undertaken by others,² including by the International Law Commission in its work leading to the adoption, in 2004, of the UN Convention on Jurisdictional Immunities of States and their Property (the "2004 UN Convention"),³ and falls outside the scope of this Report. Instead, this Report considers aspects of the doctrine of State immunity which are specific to State-owned enterprises and does so, principally, by reference to the treatment accorded to such enterprises by (a) the United States Foreign Sovereign Immunities Act 1976 ("US FSIA"); (b) the United Kingdom State Immunity Act 1978 ("UK SIA"); and (c) the 2004 UN Convention.⁴ In this connection, the legislation in force in the United States and the United Kingdom is particularly significant because of the prominent role which these two States and the legal systems which they comprise still play in international and financial affairs, and because their legislation has exerted a strong influence both on State immunity legislation of other common law jurisdictions⁵ and on the drafting of the 2004 UN Convention.

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¹ H Fox, *The Law of State Immunity* (Oxford University Press, 2004) ("Fox"), p. 237.

² See, in particular, Fox, *ibid.*, esp. ch. 6-9 (Also, 2nd Ed., Oxford University Press, 2008); A Dickinson, R Lindsay & J Loonam, *State Immunity - Selected Materials and Commentary* (Oxford University Press, 2004) ("Dickinson"); G Hafner, M Kohen and S Breau (eds.), *State Practice Regarding State Immunities* (Martinus Nijhoff Publishers, 2006) ("Hafner").

³ Adopted by the General Assembly of the United Nations on 2 December 2004, but not yet in force. See UN General Assembly resolution 59/38, available at: http://untreaty.un.org/ilc/texts/instruments/english/conventions/4_1_2004_resolution.pdf. The Convention is available at http://untreaty.un.org/English/notpubl/English_3_13.pdf. See further text to fn. 105-129, 145-148 and 159 below.

⁴ The survey in this Report focuses on the text of these instruments, and (in the case of the US FSIA and UK SIA) some of the more important decisions of the US and UK courts interpreting them. The Report should not be relied on as an exhaustive statement of the law in each of these jurisdictions, and should not be taken to constitute legal advice. The entitlement of a state or related entity to assert immunity in a particular case will depend on the application of the relevant rules to the particular facts of that case.

⁵ See, in particular, Foreign States Immunities Act 1985 (Australia); State Immunity Act (Canada); State Immunity Ordinance (Pakistan); State Immunity Act (Singapore); Foreign States Immunities Act (South Africa).

The 2004 UN Convention, although not yet in force, also seems likely to play a highly significant role over the development of international law in this area in the coming years. Indeed, in a recent case, the then senior member of the English House of Lords observed⁶:

"Despite its embryonic status, this Convention is the most authoritative statement available on the current international understanding of the limits of state immunity in civil cases ...".

The formulation of the question also raises two preliminary problems of definition. First, what constitutes a "State-owned enterprise"? Secondly, what protection from civil or criminal legal proceedings does "State immunity" confer?

State-Owned Enterprises

The concept of an "enterprise" suggests an entity engaged in a trading activity. Such entities, and the interest which foreign sovereign States hold in them, may take many forms. As one commentator noted in 1985:⁷

"States differ as to how they choose to run and organise their economies and the extent to which they rely on the private market. Some States leave economic development primarily in the hands of the private market, (e.g. the United States); others rely on the private market but control it by regulation or direct participation in key sectors (e.g. Sweden). Still other States use a market approach for production and the means of distribution. Some States use non-market approaches for production and distribution (e.g. Yugoslavia). Finally, some States use non-market approaches for production and distribution (such as central economic planning) where all means of production are State property (e.g. the USSR and China)."

In the following two decades, the break up of the former Soviet Bloc, as well as the economic revolution in developing countries (notably China and India) and the growing political and economic influence of resource-rich countries, have undoubtedly created an even more complex and varied picture. One may note, in particular, the increasing (and sometimes controversial) influence in corporate and financial affairs of so-called "sovereign wealth funds", whose structures have been criticised on the ground of their lack of transparency.⁸

As will be seen, the form and structure of an entity and the nature of its legal and economic relationship to the State, is now less important than the character of the acts which the entity performs, and which form the subject matter of proceedings.

Nature of State Immunity

State immunity is a doctrine of public international law. It operates to prevent the courts of one State (the forum State) from exercising jurisdiction against a foreign State. It is not a defence in the sense that it removes liability. The defendant State can still be held responsible for its actions if it submits to the jurisdiction of the foreign court or if an exception to immunity applies in the circumstances of a particular case. Non-State parties may also take steps to enforce the obligations of a foreign State in ways (e.g. by exercising a right of set-off) which do not require recourse to judicial proceedings. Equally, if the State's actions constitute a breach of its obligations under international law, it will remain responsible on the international plane.⁹ For example, one State could espouse the claim of an injured person

⁶ *Jones v. Ministry of Interior of Saudi Arabia* [2006] UKHL 26; [2007] 1 AC 270, at [26] (Lord Bingham). See also Lord Hoffmann at [47] ("It is the result of many years work by the International Law Commission and codifies the law of state immunity"). As Lord Bingham noted (*ibid.*), some British commentators have welcomed the Convention and urged its ratification by the United Kingdom: see, for example, E Denza, "The 2005 UN Convention on State Immunity in Perspective" (2006) 55 ICLQ 395; H Fox, "In Defence of State Immunity: Why the UN Convention on State Immunity is Important" (2006) 55 ICLQ 399; R Gardiner, "UN Convention on State Immunity: Form and Function" (2006) 55 ICLQ 407. Other commentators have criticised the Convention, and opposed ratification, precisely because (in the absence of an additional protocol, which they favour) the Convention does not deny state immunity in cases where "*jus cogens*" norms of international law are said to have been violated outside the forum state: see C K Hall, "UN Convention on State Immunity: The Need for a Human Rights Protocol" (2006) 55 ICLQ 411; L McGregor, "State Immunity and Jus Cogens" (2006) 55 ICLQ 437.

⁷ G S Vargas, "Defining a Sovereign for Immunity Purposes: Proposals to amend the ILC Draft Convention" (1985) 26 Harvard Int LJ 26.

⁸ See, e.g., E M Truman, "Sovereign Wealth Funds: The Need for Greater Transparency and Accountability" (2007) Peterson Institute Policy Brief, number PB07-6 available at <http://www.iie.com/publications/pb/pb07-6.pdf>.

⁹ Draft articles on Responsibility of States for Internationally Wrongful Acts (2001). See text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10), available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf. Under Art. 4 of the draft Articles, a State is responsible in international law for the acts of its organs. Under Art. 5, "The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the

falling under its protection and exercise diplomatic protection on that person's behalf vis-à-vis another State which is claimed to be internationally responsible for that injury. Whether it would be prepared to do so and whether the negotiations would result in any prompt or satisfactory outcome for the claimant is, however, uncertain.¹⁰

The doctrine of State immunity has three aspects. First, subject to various exceptions, the courts of one State have no jurisdiction to determine a claim brought against another State or (in specified circumstances) other related persons. This can be termed "immunity from jurisdiction". Secondly, again subject to various exceptions, no measures of pre-judgment or post-judgment constraint, such as attachment or arrest, may be taken by the courts or authorities of one State against the assets of another State or certain related persons. This can be termed "immunity from enforcement". Thirdly, foreign States and certain related persons enjoy certain procedural privileges in court proceedings, in particular in relation to service of process. This Report focuses on the first aspect (in Part B), but considers also immunity from enforcement (in Part C). The topic of "immunity from jurisdiction" in relation to criminal proceedings, which is less developed than in relation to civil proceedings, is considered in a separate section at the end (in Part D).

Two additional points may briefly be made concerning the jurisdiction of national courts in claims against foreign States and related persons. First, a State may normally¹¹ consent, by agreement or by appearing otherwise than to assert its immunity, to participate in proceedings before courts of another State.¹² It may, thereby, "waive" its immunities either expressly or by implication. Since immunity from jurisdiction and immunity from enforcement are treated as separate immunities, a waiver of immunity from adjudication is not taken automatically also to be a waiver of immunity from execution.¹³ Secondly, in many legal systems (but not the United States¹⁴), the non-availability for a particular claim of State immunity does not mean that a national court will have jurisdiction to determine that.¹⁵ This aspect of the competence of the courts of the forum State must be determined separately by rules of private international law, not rules of immunity.

Sources

State immunity, being concerned with inter-State relations, is (as noted above) a doctrine of public international law. Unlike diplomatic and consular immunities and privileges, however, it had not (until the 2004 UN Convention was adopted) been the subject of a major global treaty. Accordingly, its ambit was and, for the time being at least,¹⁶ remains a matter of customary international law. In other words, its content is to be derived primarily from the custom and practice of States. State immunity is unusual among international law doctrines, in that the State practice in question comprises mainly judicial practice in claims brought in municipal courts against foreign States, applying "local" rules of immunity. The applicable principles, and their source, vary from country to country. Many common law countries which have sought

governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."

According to the accompanying commentary (Art. 5, para. (2):

"The generic term 'entity' reflects the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority. They may include public corporations, semipublic entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned. For example, in some countries private security firms may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations. Private or State-owned airlines may have delegated to them certain powers in relation to immigration control or quarantine."

¹⁰ See P Okova, ch. 16 in M Evans (ed.), *International Law* (Oxford University Press, 2nd ed., 2006)

¹¹ Unless the subject matter of proceedings is not justiciable before a domestic court (see, e.g., *Buttes Gas and Oil Co. v Hammer* [1982] AC 888 (HL)).

¹² See UK SIA, s. 2; US FSIA, 28 USC s 1605(a)(1); 2004 UN Convention, Arts. 7-9.

¹³ See, e.g., UK SIA, s. 13(3); 2004 UN Convention, Art. 20.

¹⁴ See US FSIA, 28 USC s 1330.

¹⁵ See Sir L Collins and others (eds.), *Dicey, Morris & Collins, The Conflict of Laws* (Thomson, Sweet & Maxwell, 14th ed., 2006) ("**Dicey**"), para. 10.007.

¹⁶ For the time being, the 2004 UN Convention is not in force. It has been signed by 28 countries (including the United States and the United Kingdom) but ratified by only 6 (Austria, Iran, Lebanon, Norway, Portugal and Romania). 30 ratifications are required for the Convention to enter into force.

to codify their law through legislation,¹⁷ whereas civil law countries tend to rely on the effectiveness within their legal system of customary international law. Inconsistency in the application of the legal principles from one country to another is a notable feature of this area of law and creates uncertainty as to what outcome will flow from a given fact situation, as this will depend on the location of the proceedings and the approach of the particular court.

There have been attempts to address this lack of uniformity. The first multilateral treaty on State immunity to be concluded was the European Convention on State Immunity, which came into force on 11 June 1976. It was agreed among Council of Europe countries and has been generally thought to reflect international law, but it has only been ratified by eight States.¹⁸

A further attempt to harmonise national practice began in 1977 when the UN General Assembly asked the International Law Commission (ILC) to work towards producing a treaty on the immunities of States and their property. The widely varying approaches of States, at a time when many continued to accord absolute immunity, made this an arduous task, but the work of the ILC led finally to the adoption of the 2004 UN Convention. The need to make the document sufficiently broadly acceptable resulted in the final text incorporating compromises, ambiguities and arguable gaps. Its very existence is an achievement, but it does leave significant room for individual countries again to adopt their own practice when they interpret its provisions - if and when it comes into effect. That will not happen until it has been ratified by 30 countries. Nonetheless, given that so many countries participated in drafting the Convention over a period of many years, it arguably represents a powerful statement of international thinking in this area, as the UK's highest court has already recognised.¹⁹ It will no doubt prove influential in the way State practice (and future legislation) develops even among countries who have not signed or ratified it.

On the other hand, the Convention has not been universally welcomed, and indeed has been criticised for its failure to include an exception to State immunity for breaches of internationally recognised human rights.²⁰

II. Immunity from Jurisdiction - Civil Proceedings

1. The US FSIA

The US FSIA is the sole basis for obtaining jurisdiction over a foreign state, state agency, or state instrumentality in United States' courts.²¹ The basic premise of the US FSIA is that foreign sovereigns are immune from suit in the United States unless the action falls under one or more of the specific exceptions enumerated in legislation.²²

Accordingly, no matter how allegedly egregious a foreign state's alleged conduct, suits that do not fit into one of the US FSIA's discrete and limited exceptions must be rejected on the ground of immunity from jurisdiction.²³ In particular, the US Supreme Court has stated that:²⁴

"[I]mmunity is granted in those cases involving violations of international law that do not come within one of the FSIA's exceptions."

¹⁷ These countries include Australia, Canada, Malawi, Malaysia, Pakistan, South Africa, Singapore, the United Kingdom and the United States.

¹⁸ Austria, Belgium, Cyprus, Germany, Luxembourg, The Netherlands, Switzerland and the United Kingdom. The text is available at <http://conventions.coe.int/Treaty/en/Treaties/Html/074.htm>.

¹⁹ See text to fn. 6 above.

²⁰ See the articles by Hall and McGregor cited at fn. 6 above. Compare Fox, fn. 1 above, ch. 13.

²¹ 28 USC ss. 1604, 1330(a); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 US 428, at 434 (1989) (Supreme Court).

²² *Saudi Arabia v. Nelson*, 507 U.S. 349, at 355 (1993) (Supreme Court).

²³ *Price v. Socialist People's Libyan Arab Jamahiriya*, 289 F. 3d 82, at 87 (2004) (DC Circuit).

²⁴ *Argentine Republic v. Amerada Hess Shipping Corp.*, fn. 21 above, at 436.

The Concepts of "Foreign State" and "Agencies or Instrumentalities"

For the purposes of the US FSIA, except with respect to the provisions on service of process,²⁵ a "foreign state" is defined to include not only political sub-divisions, but also "an agency or instrumentality of a foreign state", which in turn is defined to mean any entity:

"(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States... nor created under the laws of any third country".

As to the concept of "separate legal person" in sub-para. (1), the US courts have asked themselves the question "whether the core functions of the foreign entity are predominantly governmental or commercial".²⁶ If the former, the entity will not be considered to be separate. The US legislative report on the US FSIA suggested that this concept "is intended to include a corporation, association, foundation or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name".²⁷ However it is interpreted, most state owned enterprises will likely satisfy this requirement.

As to the concept of "organ of a foreign state or political subdivision thereof" in sub-para. (2), it appears that this wording should be understood as referring to either an "organ" of a foreign state or an "organ" of a political subdivision of a foreign state.²⁸ An entity is an "organ" of a foreign state (or political subdivision) if it "engages in a public activity on behalf of the foreign government".²⁹ In this connection, the court must consider "the circumstances surrounding the entity's creation, the purpose of its activities, its independence from the government, the level of government financial support, its employment policies and its obligations and privileges under state law".³⁰

If not an "organ", an entity which constitutes a separate legal person will be an "agency or instrumentality" under the FSIA, and entitled to assert immunity on the same basis as the state itself, only if it meets the majority shareholding or ownership test.³¹ In this connection, the US Supreme Court has held that (a) the foreign state must hold the ownership interests directly (and not via other agencies or instrumentalities); and (b) the test must be applied at the time of filing of the claim and not at the time at which the relevant acts or omissions giving rise to the claim occurred.³²

Under sub-para. (3) entities created under US law or the law of a third country, or having their principal place of business in the United States³³, cannot constitute "agencies or instrumentalities" under the US FSIA.

The legislative report on the US FSIA gave the following examples of entities which may constitute "agencies or instrumentalities":³⁴

"[A] state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name."

²⁵ 28 USC s. 1608, which treats states and political subdivisions, on the one hand, and agencies and instrumentalities, on the other, as separate entities.

²⁶ *Transaero, Inc. v La Fuerza Aerea Boliviana*, 30 F. 3d 148, at 151 (1994) (DC Circuit); *Garb v. Republic of Poland*, 440 F. 3d 579, at 591 (2006) (2nd Circuit).

²⁷ H.R. Rep. No. 94-1487, 6, at 16 (1976).

²⁸ *Garb v. Republic of Poland*, fn. 26 above, at 590, fn. 11.

²⁹ *Patrickson v Dole Food Co.*, 251 F. 3d 795, at 807-808 (2001) (9th Circuit).

³⁰ *Ibid.*, at 807. See also the five-part test proposed by the 3rd Circuit District Court in *Supra Medical Corp. v. McGonigle*, 955 F.Supp. 374, 379 (1997) (DC Eastern District Pennsylvania).

³¹ See, e.g., *Carey v. National Oil Corp*, 592 F 2d 673 (1979) (2nd Circuit); *Transport v. Navimpex*, 989 F 2d 572 (1993) (2nd Circuit); *Karaho Bosas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F. 3d 70 (2002) (2nd Circuit).

³² *Dole Food Co. v. Patrickson*, 123 S.Ct. 1655 (2003). For a discussion of earlier case law, see J W Hardy Jr, "Wipe Away the Tiers: Determining Agency or Instrumentality Status Under the Foreign Sovereign Immunities Act" (1997) 31 Georgia Law Rev. 1121.

³³ See 28 USC 1332(c) defining the concept of US citizenship.

³⁴ H.R. Rep. No. 94-1987, 6, at 16 (1976).

Despite the fusion of the state and its agencies or instrumentalities in this single definition, it has been noted that "[t]he distinction between, on the one hand, agencies or instrumentalities of a foreign state, and, on the other hand, other organs or subdivisions of a foreign state pervades the FSIA".³⁵ In particular, in the context of immunity from jurisdiction, (a) the so-called "takings" exception (concerning rights in property taken in violation of international law) applies more extensively to property owned or operated by an agency or instrumentality than that owned by other elements of the foreign state;³⁶ and (b) the exclusion of claims against a foreign state for punitive damages does not apply to agencies or instrumentalities.³⁷ Subject to these qualifications, an agency or instrumentality of a foreign state is, in theory at least³⁸, entitled to assert immunity from jurisdiction on the same basis as the state itself and subject to the same exceptions.

Vicarious Immunity of an Entity other than an "Agency or Instrumentality"

It is unclear whether a private entity (for example, a security company) which, for whatever reason, is not an "agency or instrumentality within the test laid out above is also entitled to immunity, or to have immunity asserted by the foreign state on its behalf. Such "vicarious immunity", based on a theory of agency, is supported by one US Court of Appeals' decision,³⁹ but the reasoning in that case has been strongly criticised.⁴⁰

Exceptions to Immunity under the FSIA

The specific exceptions for which the US FSIA provides concern (a) express or implied waiver of immunity;⁴¹ (b) actions based on a commercial activity with a sufficient connection to the United States;⁴² (c) actions based taking of property in violation of international law and which meet certain other conditions;⁴³ (d) cases in which rights in immovable and, under certain circumstances, movable property situated in the United States are in issue;⁴⁴ (e) subject to the exclusion of claims relating to the performance of discretionary functions and certain specific torts;⁴⁵ claims for money damages for personal injury, death or property damage/loss occurring in the United States and caused by a tortious act or omission of the defendant foreign state or its official or employee acting within the scope of his office or employment;⁴⁶ (f) actions to enforce arbitration agreements or to confirm arbitration awards which meet certain other conditions;⁴⁷ (g) claims against "state sponsors of terrorism"⁴⁸ for acts of torture, extrajudicial killing, aircraft sabotage, hostage taking or the provision of material support or resources for such acts;⁴⁹ and (h) certain maritime claims.⁵⁰

The Commercial Activity Exception

Of these, the "commercial activity" exception (28 USC 1605(a)(2)) is undoubtedly the most significant. The exception removes immunity in cases where:

"... the action is based on a commercial activity carried on in the United States by the foreign state, or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere, or

³⁵ *Garb v. Republic of Poland*, fn. 26 above, at 590.

³⁶ 28 USC s. 1605(a)(3).

³⁷ 28 USC s. 1606.

³⁸ In practice, it may be harder for an entity separate from the state to resist arguments that one of the exceptions (and, in particular, the "commercial activity" exception) operates to remove immunity from jurisdiction.

³⁹ *Butters v. Vance International Incorporated*, 225 F. 3d 462 (2000) (4th Circuit).

⁴⁰ A H Wen, "Suing The Sovereign's Servant: The Implications of Privatization for the Scope of Foreign Sovereign Immunities" (2003) 103 Columbia Law Rev. 1538. The author argues, however, that the immunity from jurisdiction conferred by the US FSIA should be extended to private contractors for foreign states, both as a matter of comity and to encourage enterprise.

⁴¹ 28 USC, s. 1605(a)(1).

⁴² 28 USC, s. 1605(a)(2).

⁴³ 28 USC, s. 1605(a)(3).

⁴⁴ 28 USC, s. 1605(a)(4).

⁴⁵ i.e. malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, and interference with contract rights.

⁴⁶ 28 USC, s. 1605(a)(5).

⁴⁷ 28 USC, s. 1605(a)(6).

⁴⁸ The countries currently designated as "state sponsors of terrorism" are Cuba, Iran, Sudan and Syria (see <http://www.state.gov/s/ct/c14151.htm>).

⁴⁹ 28 USC, s. 1605(a)(7)

⁵⁰ 28 USC, s. 1605(b)-(d).

upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States".

"Commercial activity" is, in turn, defined as "regular commercial conduct or a particular commercial transaction or act".⁵¹ The same definition makes clear that "[t]he commercial character of the 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". The issue which the court must address is "whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in trade and traffic or commerce".⁵² A mere connection to a commercial activity does not, of itself, make an action commercial;⁵³ rather, the action must be "based on" that commercial activity⁵⁴ in the sense that one, but not necessary all,⁵⁵ of the elements of at least one⁵⁶ of the claims must consist of a commercial activity. For these purposes, the licensing and regulation of natural resources have been held not to constitute a "commercial activity",⁵⁷ but transactions involving natural resources (even where there is plainly a sovereign interest, as in dealings with nuclear material) have been held "commercial" in nature.⁵⁸

The Tortious Act Exception

In the present context, the "tortious act" exception (28 USC 1605(a)(5)) may also be significant in cases which do not otherwise fall within the commercial activity exception. This exception removes immunity in cases 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."

By contrast with the commercial activity exception, the tortious act exception does not distinguish between sovereign activity and private/commercial activity: immunity is withdrawn in all cases, even where a tort is committed in the exercise of governmental function or authority.⁵⁹ On the other hand, the exception also contains significant restrictions in its scope because (a) the tort must have the requisite territorial connection to the United States; and (b) claims based on discretionary functions and specific torts are excluded. As to (a), although the US FSIA appears on its face only to require either the injury, loss or damage to occur within the territory of the forum, case law has applied the legislation so as to exclude situations in which the tort itself is not committed within the United States.⁶⁰ As to (b), it is necessary to consider, first, whether the conduct in question involves an element of judgment for the acting employee and, secondly, whether the judgment required is of the kind which the exception was intended to shield, that is to say a legislative or

⁵¹ 28 USC, s. 1603(d).

⁵² *Saudi Arabia v. Nelson*, fn. 23 above, 360-361 (1993). See also *Republic of Argentina v. Weltover*, 504 US 607, at 614 (1992) (Supreme Court).

⁵³ *Ibid.*, at 361-362.

⁵⁴ *Stena Rederi AB v. Comision de Contratos del Comité Ejecutivo General del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana*, SC, 923 F 2d 380, at 386-387 (1991) (5th Circuit).

⁵⁵ *Santos v. Compagnie Nationale Air France*, 934 F 2d 890, at 893 (1991) (7th Circuit).

⁵⁶ *BP Chemicals Ltd v. Jiangsu Sopo Corp.*, 285 F 3d 677, at 682 (8th Circuit).

⁵⁷ *MOL, Inc. v. People's Republic of Bangladesh*, 736 F 2d 1326, 1327 (1984) (9th Circuit).

⁵⁸ *Globe Nuclear Services and Supply GNSS, Limited v AO Techsnabexport*, 376 F. 3d 282 (2004) (4th Circuit).

⁵⁹ *Letelier v Republic of Chile* 488 F Supp 665 (DDC 1980).

⁶⁰ *Argentine Republic v Amerada Hess Shipping Corp*, 488 US 528, 441 (1989). Different circuits have interpreted this additional requirement with differing degrees of severity (see the cases cited in Dickinson, fn. 2 above, para. 3.048 and, more recently, *Doe v. Holy See*, 434 F.Supp. 2d 925 (2006) (DC Oregon); *O'Bryan v. Holy See*, 471 F.Supp 2d 784 (2007) (DC Kentucky) (both claims against Vatican with respect to its own conduct in failing to prevent sexual abuse by priests)).

administrative decision grounded in social, economic and political policy.⁶¹ Generally, acts have been said to be "discretionary" for these purposes if they are performed at the planning stage rather than the operational stage.⁶²

Another important limitation on the breadth of the immunity exception under US law is that there must be a liability in tort according to the law of the forum.⁶³ In particular, importing the principles of *respondeat superior*, courts will only find a foreign state liable where the official or employee who perpetrated the tortious act was acting within the scope of his employment.⁶⁴

2. The UK SIA

The UK SIA takes a different approach from the US FSIA in two important respects. First, as noted above, the question of entitlement to assert State immunity is separate from the question whether the court has jurisdiction to determine a particular claim against a State or related entity. Secondly, the entitlement of entities related to the State to assert immunity from jurisdiction is, for the most part, separated from the entitlement of the State to do so.

Under the UK SIA, a "State" is immune from the jurisdiction of the courts of the United Kingdom, unless one of the specific, express exceptions to immunity applies.⁶⁵ These exceptions are exhaustive and the English courts have refused to treat the immunity as subject to further, implied exceptions (most notably, in relation to alleged breaches of a State's international obligations with respect to torture).⁶⁶

The UK SIA provides exceptions to immunity dealing with the following circumstances: (a) submission to jurisdiction;⁶⁷ (b) proceedings relating to commercial transactions and contracts to be performed in the UK;⁶⁸ (c) proceedings relating to certain contracts of employment;⁶⁹ (d) certain proceedings in respect of personal injury or damage to or loss of tangible property;⁷⁰ (e) certain proceedings relating to the ownership, possession and use of property;⁷¹ (f) certain proceedings relating to intellectual property rights;⁷² (g) proceedings relating to the membership of certain bodies corporate or unincorporate or partnerships;⁷³ (h) proceedings relating to an arbitration to which a State has submitted;⁷⁴ (i) certain proceedings relating to ships used for commercial purposes and their cargoes;⁷⁵ and (j) certain proceedings relating to taxation.⁷⁶

⁶¹ *Fagot Rodriguez v Republic of Costa Rica*, 297 F. 3d 1, at 8-9 (2002). In certain situations, the plainly illegal character of an act (such as assassination) may lead the court to conclude that it is non-discretionary (see *Liu v. Republic of China*, 892 F.2d, at 1431 (1989) (9th Circuit); *Letelier v. Republic of Chile*, 488 F.Supp. 665 (1980) (DDC).

⁶² *Kline v. Kaneko*, 685 F.Supp. 386, at 392 (1988) (DC Southern District New York); *Re Terrorist Attacks on September 11, 2001*, 349 F.Supp 2d 765, at 794 (2005) (DC Southern District New York).

⁶³ *Robinson v. Government of Malaysia*, 269 F. 3d 133, at 142 (2001) (2nd Circuit).

⁶⁴ See, e.g., *MCI Telecommunications Corp. v. Alhadhood*, 82 F. 3d 658, at 664 (1996) (5th Circuit); *Moran v. Saudi Arabia*, 27 F.3d 169 (1994) (5th Circuit).

⁶⁵ Section 1(1).

⁶⁶ *Al-Adsani v. Government of Kuwait* (1996) *The Times*, 26 March (CA); *Jones v. Ministry of Interior of Saudi Arabia*, fn. 6 above. See also the decision of the European Court of Human Rights in *Al-Adsani v. United Kingdom* (Application no. 35763/97) (2001) 123 ILR 73, upholding (by a narrow majority) the UK's refusal to accept jurisdiction with respect to a claim for damages for personal injuries resulting from alleged torture in Kuwait which did not meet the requirement of territorial connection contained in UK SIA, s. 5 (see text to fn. 100 below).

⁶⁷ Section 2.

⁶⁸ Section 3.

⁶⁹ Section 4.

⁷⁰ Section 5.

⁷¹ Section 6.

⁷² Section 7.

⁷³ Section 8.

⁷⁴ Section 9.

⁷⁵ Section 10.

⁷⁶ Section 11.

The Concepts of "State" and "Separate Entity"

The concept of "State" for the purposes of the UK SIA is, for present purposes, narrower than that in the US FSIA. Section 14(1) ("*States entitled to immunities and privileges*") distinguishes between "States", which are entitled to the full range of immunities and privileges set out in the UK SIA, and "separate entities", which are entitled only to more limited immunities and privileges as set out in the remaining provisions of s. 14:

"(1) *The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include references to—*

- (a) *the sovereign or other head of that State in his public capacity;*
- (b) *the government of that State; and*
- (c) *any department of that government,*

but not to any entity (hereafter referred to as a 'separate entity') which is distinct from the executive organs of the government of the State and capable of suing or being sued. [Emphasis added]

Although s. 14(1) does not specify the system of law to be applied in determining whether an entity is a "separate entity" (although the legislative history of the UK SIA supports the view that the law of the foreign State should not be applied exclusively⁷⁷), ordinary rules of English private international law suggest that the ability to sue and be sued should be tested primarily by reference to the law of the place of incorporation of the entity.⁷⁸ As for the requirement that the entity be "distinct from the executive organs of government", this involves a largely factual exercise which requires a thorough examination of the entity's constitution, functions, powers and activities and its relationship with the State in order to determine whether the required degree of separation exists.⁷⁹

Additional guidance is provided by Art. 27(1) of the European Convention on State Immunity, from which the final sentence of s. 14(1) is derived, and the explanatory notes thereto.⁸⁰ Art. 27(1) excludes from the expression "Contracting State" as used in the Convention "any legal entity of a Contracting State which is distinct therefrom and is capable of suing or being sued, even if that entity has been entrusted with public functions". The explanatory notes suggest that the entities to which Art. 27 is intended to refer include political subdivisions or State agencies, such as national banks or railway administrations.⁸¹ Further, Art. 27, unlike s. 14(1), refers expressly to legal entities "of" a Contracting State, a connecting factor which Lord Goff in *Kuwait Airways Corporation v. Iraqi Airways Co.* thought should be read into the final sentence of s. 14(1), although the point was left open.⁸² In a later case,⁸³ the Court of Appeal construed "of" as meaning "created by". On this basis, if an entity incorporated otherwise than in the relevant foreign State acts as agent of that State, it may not assert immunity under s. 14(2) as a separate entity, although the State may be able to intervene to assert its own immunity where the entity in question has acted as the State's agent in the exercise of sovereign

⁷⁷ An amendment removed a specific reference to the law of the foreign state which was contained in the original Bill (see Dickinson, fn. 2 above, para. 4.095).

⁷⁸ Dicey, fn. 15 above, para. 30R-009 and following.

⁷⁹ See, e.g., *Coreck Maritime GmbH v. Sevrybokolodflot* (1994) 107 ILR 659 (Court of Session, Scotland). For examples of a similar process carried out in relation to the pre-existing common law rules, see *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] 1 QB 529 (CA). See also *Krajina v. Tass Agency* [1949] 2 All ER 274 (CA); *Baccus v. Servicio Nacional de Trigo* [1957] 1 QB 438 (CA); *Mellenger v. New Brunswick Development Corporation* [1971] 1 WLR 604 (CA). For a recent English cases raising similar issues, albeit in different contexts, see *Saudi Arabian Monetary Authority v. Dresdner Bank AG* [2004] EWCA 1074; [2005] 1 Lloyd's Rep. 12 (CA); *Walker International Holdings Ltd v Republique Populaire du Congo* [2005] EWHC 2813 (Comm), esp. at [94] (Morison J).

⁸⁰ *Kuwait Airways Corporation v. Iraqi Airways Co.* [1995] 1 WLR 1147, at 1158 (Lord Goff, HL).

⁸¹ Explanatory Report accompanying the European Convention on State Immunity, para. 109.

⁸² [1995] 1 WLR 1147, at 1158 (HL), where the point was left open.

⁸³ *Propend Finance Pty. Limited v. Sing* (1997) 111 ILR 611, at 670.

authority.⁸⁴ It is also unclear whether an entity incorporated under the laws of a State can be said to have been "created by" the State if it is promoted by private persons.⁸⁵

The Immunity from Jurisdiction of Separate Entities

The "separate entity" occupies a curious position under the UK SIA, for which there is no clear precedent in customary international law. Although separated from the "State" (as defined in the UK SAI)⁸⁶, it enjoys its own (limited) immunity from jurisdiction, can waive that immunity by submitting to the jurisdiction and enjoys certain procedural privileges if it submits to the jurisdiction in proceedings in which it would otherwise have enjoyed immunity.

In this connection, s. 14(2) provides:

"A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if—

- (a) the proceedings relate to anything done by it in the exercise of sovereign authority; and*
- (b) the circumstances are such that a State (...⁸⁷) would have been so immune."*

Accordingly, for a separate entity to enjoy immunity from the jurisdiction of a court or tribunal in the United Kingdom under s. 14(2) of the 1978 Act, two conditions must be satisfied. In this connection, and contrary to the position for States, the burden of satisfying those conditions lies upon the entity.⁸⁸

The first condition is that the proceedings must relate to a thing done by the entity *in the exercise of sovereign authority*. It is now clearly established that the italicised words require the court or tribunal to consider whether the acts that are the subject matter of proceedings are sovereign acts (*acta jure imperii*) or private acts (*acta iure gestionis*) according to well-established principles of customary international law.⁸⁹ Only sovereign acts are to be equated with things done "in the exercise of sovereign authority". In summary, the following principles can be derived from the judgment of Lord Wilberforce in the leading, pre-UK SIA decision of the House of Lords in *Iº Congreso del Partido*⁹⁰ and that of Lord Goff in the leading post-UK SIA decision of that court in *Kuwait Airways Corporation v. Iraqi Airways Co.*⁹¹

- (a) The activities of States cannot always be compartmentalised into trading or governmental activities. A State may have displayed both a commercial and a sovereign or governmental interest. The court or tribunal must ask "To which is the critical action to be attributed?"⁹²
- (b) The mere existence of a governmental purpose or motive will not convert what would otherwise be a private, non-sovereign act into a sovereign act.⁹³
- (c) In characterising the acts upon which the claim is based, *the court must consider the whole context in which the claim against the State is made*, with a view to deciding whether those acts should, *in that context*, be considered as fairly within an area of activity, trading or commercial, or otherwise of a private law character, in which the State has chosen to engage, or whether the relevant acts should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity.⁹⁴ This reference to "context"

⁸⁴ For the position of employees and agents under the UK SIA, see *Propend Finance v. Sing*, *ibid*; *Jones v. Ministry of Interior of Saudi Arabia*, fn. 6 above.

⁸⁵ Fox (1996) 112 LQR 186, at 188 takes Lord Goff in the *Kuwait Airways* case (see text to fn. 82 above) to be suggesting the exclusion of all private law corporations (see also Fox, fn. 1 above, p. 140).

⁸⁶ Section 14(1).

⁸⁷ The reference in brackets is to the provision of the UK SIA concerning admiralty and related proceedings.

⁸⁸ *Kuwait Airways Corporation v. Iraqi Airways Co.* fn. 80 above, at 1161 (Lord Goff).

⁸⁹ *Kuwait Airways Corporation v. Iraqi Airways*, fn. 80 above, at 1159-1160 (Lord Goff). See also *Crescent Oil and Shipping Services Ltd v. Banco Nacional de Angola* (1999) unreported, 28 May (Cresswell J); *Re Banco Nacional de Cuba* [2001] 1 WLR 2039 (Lightman J).

⁹⁰ [1983] 1 AC 244 (HL).

⁹¹ [1995] 1 WLR 1147 (HL).

⁹² *Iº Congreso del Partido*, fn. 90 above, at 264 (Lord Wilberforce).

⁹³ *Iº Congreso del Partido*, *Ibid.*, at 267 (Lord Wilberforce); *Kuwait Airways*, fn. 80 above, at 1160 (Lord Goff).

⁹⁴ *Iº Congreso del Partido*, *Ibid.*, at 267 (Lord Wilberforce).

means that UK courts do not apply a pure "nature" text in distinguishing between "sovereign" and "private/commercial" acts, in contrast to the position under US FSIA.

- (d) The ultimate test of what constitutes an act *jure imperii* is whether the act in question is of its own character a governmental act, as opposed to an act which any private citizen can perform.⁹⁵
- (e) It is not enough that the entity should have acted on the directions of the State (i.e. literally with the authority of the sovereign), because such an act need not possess the character of a sovereign act.⁹⁶

If the proceedings do relate to sovereign acts then, even if they also relate to private acts, the first condition will be satisfied.⁹⁷

The second condition is that the circumstances must be such that a State would have been immune under the UK SIA if proceedings had been brought against it. The application of this condition has been little considered by the English Courts⁹⁸ but requires that sections 1 to 11 of the 1978 Act be applied as if the acts, omissions or interests of the separate entity were acts, omissions or interests of a State.⁹⁹ Accordingly, the second requirement may take on a greater importance in future cases where the proceedings are founded on acts of a sovereign character, but the claimant seeks to rely on one of the exceptions to the immunity of a State which is capable of applying to acts of that character. The most obvious candidate is s. 5 (entitled "Personal injuries and damage to property"), which provides:

"A State is not immune as respects proceedings in respect of—

- (a) death or personal injury; or
- (b) damage or loss of tangible property,

caused by an act or omission in the United Kingdom."

Like the corresponding provision in the US FSIA, as it has been applied by the US courts,¹⁰⁰ s. 5 requires that the relevant act or omission of the defendant State (or separate entity) should have occurred in the United Kingdom. Unlike that provision, s. 5 is not limited to claims in tort but may extend, for example, to claims in contract.

Applying the dual requirement described above, the English Courts have applied s. 14(2) in denying immunity from jurisdiction (a) to a foreign State controlled airline in respect of its use of unlawfully seized aircraft after a legislative decree which purported to vest ownership of the aircraft in the airline; although immunity was recognised in respect of prior acts of assistance in the seizure of the aircraft;¹⁰¹ and (b) to a foreign central bank in respect of a claim that it had benefited from the voluntary transfer of assets at an undervalue by another entity (the former central bank), notwithstanding that the transfer had taken place against the background of a reorganisation of the foreign State's central banking structures.¹⁰² A claim by a separate entity to immunity from jurisdiction succeeded, however, (a) in the case of a claim against a central bank that it had interfered with contractual relations between two commercial entities through its

⁹⁵ *Kuwait Airways*, fn. 80 above, at 1160 (Lord Goff).

⁹⁶ *Kuwait Airways*, *ibid.*, at 1160 (Lord Goff). Compare, however, the dissenting speeches in the same case of Lord Mustill, at 1171-1172, and Lord Slynn, at 1174-1175.

⁹⁷ The claiming party may, of course, be able to modify its claim so as to exclude reference to sovereign acts.

⁹⁸ As Lord Goff noted in *Kuwait Airways Corporation v. Iraqi Airways Co.* [1995] 1 WLR 1147, at 1159, the exclusion of *acta iure gestionis* by the first requirement leaves little scope for the operation under section 14(2)(b) of the commercial transactions exception in section 3. Indeed, in *Re Banco Nacional de Cuba* [2001] 1 WLR 2039, Lightman J (at 2051) appeared to elide the two.

⁹⁹ See, for example, the approach of the Court of Appeal (whose decision was later reversed) in *Kuwait Airways Corporation v. Iraqi Airways Co.* [1995] 1 Lloyd's Rep 25.

¹⁰⁰ 28 USC s. 1605(a)(5). See text to fn. 59-64 above.

¹⁰¹ *Kuwait Airways Corporation v. Iraqi Airways Co.*, fn. 80 above. See also *Kuwait Airways Corporation v. Iraqi Airways Co. (No. 2)* [2001] 1 WLR 429 (HL) (unsuccessful attempt to re-open their Lordships' decision on the ground for fraud); *Kuwait Airways Corporation v. Iraqi Airways Corporation* [2003] EWHC 31 (Comm); [2003] 1 Lloyd's Rep. 448 (David Steel J) (setting aside, on the ground of fraud, the decision of the House of Lords in part in respect of a period before the decree during which the airline had taken steps to incorporate the aircraft in its fleet).

¹⁰² *Re Banco Nacional de Cuba* [2001] 1 WLR 2039 (Lightman J).

control of foreign currency reserves;¹⁰³ and (b) in the case of libel proceedings against a foreign central bank relating to statements contained in a communication giving notice of a regulatory decision.¹⁰⁴

3. The 2004 UN Convention

The approach taken by 2004 UN Convention to the immunity from jurisdiction of entities related to a foreign State is different from that taken in the US FSIA and UK SIA, but has certain resemblances to each of them. In particular, (a) as under the US FSIA, the principal question will be whether a particular entity is an agency or instrumentality or other entity which is to be treated as within the concept of the "State" for the purposes of the Convention; and (b) as under the UK SIA, an entity separate from the foreign State, its organs of government and political subdivisions will enjoy immunity only with respect to acts performed "in the exercise of the sovereign authority of the State".¹⁰⁵

Under the 2004 UN Convention, a "State" (as defined in Art. 2.1(b) - see below) enjoys immunity from the jurisdiction of the courts of another State, in respect of itself and its property, unless one of the exceptions to immunity set out in the Convention applies.¹⁰⁶ For these purposes, proceedings shall be considered to have been instituted against a foreign State if that State (a) is named as a party to that proceeding; or (b) is not named as a party to the proceedings but the proceedings in effect seeks to affect the property, rights, interests or activities of that State.¹⁰⁷

The 2004 UN Convention provides for exceptions to immunity dealing with the following circumstances: (a) express consent to the exercise of jurisdiction;¹⁰⁸ (b) participation in proceedings otherwise than for the purpose of asserting immunity or asserting a right or interest in property;¹⁰⁹ (c) related counter-claims against a State;¹¹⁰ (d) proceedings arising out of a commercial transaction;¹¹¹ (e) proceedings relating to certain contracts of employment;¹¹² (f) proceedings relating to pecuniary compensation for death, personal injury or damage to or loss of tangible property;¹¹³ (g) certain proceedings relating to the ownership, possession and use of property;¹¹⁴ (h) certain proceedings relating to intellectual and industrial property;¹¹⁵ (i) certain proceedings relating to participation in companies or other collective bodies;¹¹⁶ (j) certain proceedings relating to ships and their cargoes owned or operated by a State;¹¹⁷ and (i) proceedings relating to an arbitration agreement, an arbitration or an arbitration award between a State and a foreign person.¹¹⁸

The Concepts of "State", "Agencies or Instrumentalities of the State" and "Other Entities"

The 2004 Convention defines the concept of "State" broadly as follows:¹¹⁹

"(j) the State and its various organs of government;

¹⁰³ *Crescent Oil and Shipping Services Ltd v. Banco Nacional de Angola* (1999) unreported, 28 May (Cresswell J) drawing support from United States case law, notably *De Sanchez v. Nicaragua* (1985) 770 F 2d. 1385 (5th Circuit). See also *Banco Nacional de Cuba v. Cosmos Trading Corp* [2000] 1 BCLC 813 (CA).

¹⁰⁴ *Grovit v De Nederlandsche Bank* [2005] EWHC 2944 (QB); [2006] 1 WLR 3323 (Tugendhat J), affirmed (without considering the question of immunity) at [2007] EWCA Civ 953; [2008] 1 WLR 51.

¹⁰⁵ See, however, text to fn. 122-123 below for the meaning of this concept in the 2004 UN Convention.

¹⁰⁶ Art. 5.

¹⁰⁷ Art. 6.

¹⁰⁸ Art. 7.

¹⁰⁹ Art. 8.

¹¹⁰ Art. 9.

¹¹¹ Art. 10.

¹¹² Art. 11.

¹¹³ Art. 12.

¹¹⁴ Art. 13.

¹¹⁵ Art. 14.

¹¹⁶ Art. 15.

¹¹⁷ Art. 16.

¹¹⁸ Art. 17.

¹¹⁹ Art. 2.1(b).

(ii) constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity;

(iii) agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State;

(iv) representatives of the State acting in that capacity"

Although State owned enterprises, and other entities acting on behalf of the State, may clearly fall within the concept of "agencies or instrumentalities of the State and other entities"¹²⁰, it must be noted that the official Commentary prepared by the ILC on its 1991 Draft Articles on Jurisdictional Immunities, on which the final version of UN Convention was based,¹²¹ stated that:¹²²

"[t]he concept of 'agencies or instrumentalities of the State or other entities' could theoretically include State enterprises or other entities established by the State performing commercial transactions. For the purposes of the present articles, however, such State enterprises or other entities are presumed not to be entitled to perform governmental functions, and accordingly, as a rule, are not entitled to invoke immunity..."

Accordingly, it appears likely that State owned enterprise, or other entity which performs commercial transactions, which claims to be entitled to assert immunity under the 2004 UN Convention will bear the burden of proving both that it was entitled to perform and that it was performing acts in the exercise of the sovereign authority of the State. The concept of "entitlement" suggests a reference both to the capacity of the entity under the law of its place of incorporation, as well as to the relationship between the entity and the State. The concept of "performance" suggests, perhaps, that the acts of the entity must have the outward appearance of acts of a sovereign character.

In earlier drafts, the English expression "in the exercise of sovereign authority" corresponded to the French "*dans l'exercice des prérogatives de la puissance publique*". The final French version, however, uses the phrase "*dans l'exercice de l'autorité souveraine de l'État*" which seems to tie in more closely with the English text, and with the concept of "sovereign authority" used in the UK SIA, as described above.¹²³ In considering whether the relevant acts were "sovereign" in nature, it should also be pointed out that in defining the concept of "commercial transaction" in Art. 2.1(c), for the purposes of the provision removing immunity for transactions of that kind¹²⁴, the authors of the UN Convention adopted the following compromise text which enables the concept of "commerciality" to be assessed in certain circumstances by reference not only to the nature of the act (as under US and, to a lesser extent, UK law) but also its purpose:¹²⁵

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

It is possible that this approach, allowing each forum State to continue its former practice, will spill-over into the question whether an agency or instrumentality or other entity was acting "in the exercise of sovereign authority".

As under the UK SIA, the requirement that the entity in question act (and be entitled to act) "in the exercise of sovereign authority" (as well as the arguable presumption, referred to above, that State enterprises and other entities are not entitled to act in this capacity) may be decisive in most cases against a finding that the entity enjoys immunity from

¹²⁰ The reference to "other entities" was intended to cover non-governmental entities when endowed, in exceptional cases, with sovereign authority (e.g. commercial banks performing import and export licensing functions) (see Commentary on 1991 ILC Draft Articles (Yearbook ILC (43rd Session), Volume II, Part 2), at Art. 2: para. (14). The Commentary also indicates (Art. 2, para. 15) that: "There is in practice no hard-and-fast line to be drawn between agencies or instrumentalities of a State and departments of government."

¹²¹ The wording of the Art. 2.1(b) of the 1991 Draft Articles was very similar to the corresponding provision of the final Convention (quoted above), except that the phrase "*and are actually performing*" was not included in the Draft.

¹²² Commentary on 1991 Draft ILC Articles, fn. 120 above, Art: 2, para. (15).

¹²³ See text to fn. 89-97 above.

¹²⁴ Art. 10.

¹²⁵ Art. 2.2. Compare the text following fn. 51 and 94 above.

jurisdiction, with the result that it will rarely be necessary to consider the exceptions to the immunity of States generally. If, however, an entity is held to have been acting "as a sovereign", it will be necessary to consider whether any exception to immunity applies. In the present circumstances, given that it seems unlikely an entity which undertakes a "commercial transaction" (as defined in Art. 2.1(c) of the Convention) could ever be treated as acting "in the exercise of sovereign authority", the most pertinent exception would appear to be Art. 12 (entitled "Personal injuries and damage to property"), which provides:

"Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission."

This provision is similar to the corresponding provisions of the US FSIA and the UK SIA (although the latter is not limited to actions for monetary compensation).¹²⁶ Like the US and UK legislation, the exception applies whatever the motive or fault of the author of the damage and irrespective of the nature of the activity (whether sovereign in character or not).¹²⁷ In particular, the need for a territorial connection to the forum State is emphasised by the requirement not only that the relevant act or omission occurred in whole or in part in the territory of the latter, but also that the author of the act or omission was present there at the relevant time. Further, as the Commentary on the identically worded provision of the 1991 Draft Articles made clear, a claimant must also show (a) that the State would have been liable under the law of the forum, being the place of the relevant act or omission¹²⁸, and (b) there is "physical damage", excluding (for example) damage to reputation or interference with contract rights.¹²⁹

4. Conclusion

This discussion highlights the lack of any uniform treatment of the immunities from jurisdiction of entities which are legally separate from the State (including State owned enterprises). Even if the number and scope of exceptions to immunity from jurisdiction is left out of account, the US FSIA, UK SIA and 2004 UN Convention approach the problem in different ways, although these approaches (when read together with the exceptions to immunity) will often produce the same result. Under US law, entities incorporated under local law which are directly majority-owned by a foreign state enjoy, at least in principle, almost exactly the same immunity from jurisdiction as the foreign state itself. In contrast, under the 2004 UN Convention, the entity must show that it was acting in the exercise of sovereign authority in order to gain parity with a foreign state. A similar threshold requirement applies under the UK SIA, but the entity is not under these circumstances accorded full-sovereign status - it enjoys a derivative immunity from jurisdiction in its own right.

¹²⁶ See text to fn. 59-64 and 98-99 above.

¹²⁷ Commentary on 1991 Draft ILC Articles, fn. 120 above, Art 12: para. (8).

¹²⁸ *Ibid.*, Art. 12: para. (2).

¹²⁹ *Ibid.*, Art 12: para. (5).

III. Immunity from Enforcement

1. The US FSIA

The US FSIA provides that, subject to certain exceptions, the property in the United States of a "foreign state" (including an agency or instrumentality) shall be immune from attachment, arrest and execution.¹³⁰

Certain of the exceptions to immunity apply to "foreign states" generally (including agencies or instrumentalities).¹³¹ In particular, the property in the United States of a foreign state used for a commercial activity in the United States¹³² shall not be immune from attachment in aid of execution, or from execution, upon a judgment of a US court if (among other cases) (a) the foreign state has expressly or impliedly waived its immunity from attachment, or (b) the property was or is used for the commercial activity on which the claim was based.¹³³

The US FSIA also provides additional exceptions to the immunity from attachment etc. in relation to the property in the United States of an agency or instrumentality of a foreign state engaged in a commercial activity in the United States. Such property shall also not be immune if (a) the agency or instrumentality has expressly or impliedly waived its immunity from attachment; or (b) the immunity from jurisdiction of the agency or instrumentality was removed by (among other provisions) the commercial transaction or tortious act exceptions to the FSIA.¹³⁴

In cases falling within the US FSIA exception to immunity from jurisdiction for terrorist and related acts,¹³⁵ immunity from attachment etc. of an agency or instrumentality of a State sponsor of terrorism is removed where judgment has been given against the agency or instrumentality.¹³⁶ In addition, under the Terrorism Risk Insurance Act 2002, "blocked assets" of an agency or instrumentality of a State sponsor of terrorism may be subject to execution or attachment in aid of execution in respect of a judgment against the foreign State.¹³⁷

Certain categories of "foreign state" property enjoy wider protection,¹³⁸ including (a) the property of a foreign central bank or monetary authority held for its own account (unless the bank or authority or the relevant foreign state has waived its immunity from attachment); and (b) property of a military character under the control of a military authority or defense agency which is in use, or intended to be used, in connection with a military activity.¹³⁹

2. The UK SIA

Under s. 13(2)(b) of the UK SIA, the property of a "State" (as defined in s. 14(1)) enjoys immunity from any process for the enforcement of a judgment or award. Under s. 13(2)(a), no injunction or order for specific performance or for the recovery of land or other property may be given against a State. These immunities and privileges are excluded (a) if the State has consented in writing to the giving of relief or the issue of process;¹⁴⁰ and (b) (subject to certain exceptions) if property is, for the time being, in use, or intended for use for "commercial purposes".¹⁴¹

¹³⁰ 28 USC s. 1609.

¹³¹ 28 USC s. 1610(a), (c), (e), (f). Pre-judgment attachment is available only in limited circumstances under 28 USC s. 1610(d).

¹³² See text to fn. 25 above.

¹³³ 28 USC, s.1610(a), cases (1) and (2).

¹³⁴ 28 USC, s. 1610(b).

¹³⁵ See text to fn. 49 above.

¹³⁶ 28 USC s. 1610(b)(2).

¹³⁷ 28 USC s. 1610 note, para. (a).

¹³⁸ 28 USC s. 1611.

¹³⁹ 28 USC s. 1611(b).

¹⁴⁰ Section 13(3). A provision merely submitting to jurisdiction is not to be taken as a consent for this purpose.

¹⁴¹ Section 13(4). "Commercial purposes" means for the purposes of a "commercial transaction", as defined in s. 3(3) (see s. 17(1)). Under s. 3(3), a "commercial transaction" means (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, but not a contract of employment between a State and an individual.

Under s. 14(3) of the UK SIA, these immunities and privileges normally extend to a separate entity *only* if it would have been entitled to immunity under s. 14(2)¹⁴² if it had not submitted to the court's jurisdiction. In all other cases, a separate entity (other than a foreign central bank or other monetary authority) does not enjoy immunity from enforcement under the UK SIA.

Special provision¹⁴³ is made by the UK SIA for foreign central banks and other monetary authorities which, even if they constitute "separate entities", are not only entitled to assert the immunities and privileges accorded to States under s. 13(2) (see above), but benefit from an absolute presumption that their property is *not* in use for commercial purposes. That protection has been held to prevent execution against any asset in which a foreign central bank or other monetary authority has a proprietary interest, even if it holds the asset for a State (or, on the same reasoning, a third party).¹⁴⁴

3. The 2004 UN Convention

The 2004 UN Convention contains provisions which confer immunity on "the property of a State" with respect to pre-judgment and post-judgment measures of constraint, subject to certain exceptions.¹⁴⁵ In the former case, the only exceptions are express consent and the allocation or earmarking of property to satisfy the claim. In the latter case, an additional exception applies where:¹⁴⁶

"... it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed."

In this connection, one of the Understandings which was annexed to the 2004 UN Convention¹⁴⁷, and which provides an essential part of the background against which the Convention falls to be construed, stated:

"The expression 'entity' in subparagraph (c) means the State as an independent legal personality, a constituent unit of a federal State, a subdivision of a State, an agency or instrumentality of a State or other entity, which enjoys independent legal personality.

The words 'property that has a connection with the entity' in subparagraph (c) are to be understood as broader than ownership or possession.

Article 19 does not prejudice the question of 'piercing the corporate veil', questions relating to a situation where a State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim, or other related issues."

It seems clear from this that it was intended that, in some circumstances, the property of an agency or instrumentality of a State or other entity should enjoy immunity from measures of constraint under the 2004 UN Convention, subject to the exceptions there set out. Certain difficulties arise, however, by virtue of the definition of "State" in the 2004 UN Convention, as discussed above.¹⁴⁸ In connection, it may be open to a judgment creditor to argue that the property of an agency or instrumentality or other entity is not immune from measures of execution in circumstances where the proceedings relate to acts performed by it otherwise than "in the exercise of sovereign authority", whether or not the property in question is used for a governmental purpose, because in these circumstances the agency etc. does not qualify as a "State" under the Convention. If that argument were to be accepted, the position of an agency or instrumentality or other entity under the 2004 UN Convention would be similar to that of a "separate entity" under the UK SIA, in that it would be rarely entitled to immunity from enforcement. This conclusion would, however, appear

¹⁴² See text preceding and following fn. 87 above.

¹⁴³ In addition, diplomatic and consular immunities and privileges under international and UK law, including with respect to diplomatic and consular premises and property, are unaffected by the UK SIA (s. 16(1)). See the UK Diplomatic Privileges Act 1964 and Consular Relations Act 1968.

¹⁴⁴ *AIG Capital Partners Inc. v. Republic of Kazakhstan* [2005] EWHC 2239 (Comm); [2006] 1 WLR 1420 (Aikens J).

¹⁴⁵ Arts. 18 and 19.

¹⁴⁶ Art. 19(c).

¹⁴⁷ See Art. 25.

¹⁴⁸ See text to fn. 119-125 above.

problematic as it would exclude any possibility that, for example, a central bank sued upon a commercial transaction could claim protection for its assets, which (even though presumed by Art. 20(c) of the 2004 UN Convention) to be in use for government non-commercial purposes - see below) would not be "property of a State" except to the extent that the State itself had a proprietary interest. It may, therefore, be possible for an agency etc. to counter by arguing that its status as an agency or instrumentality or other entity as a "State" for the purposes of enforcement proceedings, so as to characterise its property as "property of the State", should depend only on an assessment as to whether it holds (and is entitled to hold) the particular property in question for a sovereign purpose, which appears little different from the test of "government non-commercial purposes" in Art. 19(c). Alternatively, and more consistently with the approach taken by the UK SIA, the language of Art. 20 may support the view that the property of a central bank may be capable of being treated as "property of a State" whether or not the Bank qualified as a "State" with the subject matter of the proceedings which led to the judgment. The drafting of the relevant provisions of the 2004 UN Convention is unsatisfactory, and these and other questions will need to be addressed more closely in due course.

Article 20 of the 2004 UN Convention provides that the "following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes":

"(a) property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences;

(b) property of a military character or used or intended for use in the performance of military functions;

(c) property of the central bank or other monetary authority of the State;

(d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale;

(e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale."

In practice, given the presumption which appears to underlie the 2004 UN Convention that State enterprises and other entities are not entitled to exercise government functions, it may be difficult for entities (other than central banks or other monetary authorities, and perhaps State-owned museums and galleries) to rely on immunity from enforcement.

4. Conclusion

Once again, the foregoing discussion highlights the lack of uniformity in the immunities and privileges of entities that are legally separate from the State (including State owned enterprises). Under both the US FSIA and UK SIA, the immunities from enforcement of entities which are separate from the State are generally less extensive than those accorded to the State and its organs. Indeed, under the UK SIA, those immunities are very limited indeed. The position under the 2004 UN Convention requires further clarification.

IV. Immunity from Jurisdiction - Criminal Proceedings

It is generally accepted that, at least under the present state of customary international law, criminal proceedings cannot be brought in a municipal jurisdiction against a foreign State.¹⁴⁹

The justification for this result, insofar as it is based on immunity from jurisdiction, has been said to be that:¹⁵⁰

"The exercise of criminal jurisdiction directly over another State infringes international law's requirements of equality and non-intervention. To apply public law with penalties to another State contravenes international law in two ways. It seeks to make another State subject to penal codes based on moral guilt; and it seeks to apply its criminal law to regulate the public governmental activity of the foreign state."

The author recognises, however, that developments with respect to immunity from jurisdiction in civil proceedings "might indirectly point the way, should occasion so require, to the fashioning of an exception to immunity from criminal proceedings", suggesting that any exception might be limited to proceedings for reparation only.¹⁵¹

The same conclusion (that criminal proceedings cannot presently be brought against a foreign State) may be reached on other grounds, either procedural (that there is no mechanism for bringing a foreign State before a municipal criminal court) or substantive (that a State has no capacity to commit a crime under municipal law). In *Jones v Ministry of Interior of Saudi Arabia*, Lord Bingham, giving the leading judgment of the English House of Lords, stated:¹⁵²

"A state is not criminally responsible in international or English law, and therefore cannot be directly impleaded in criminal proceedings."

The position is, however, different for State officials and other individuals acting on behalf of the State. With the exception of serving heads of State, and other high-ranking ministers of State, they do not enjoy personal immunity. Instead, subject to situations in which an express exception to immunity is created as a necessary concomitant of a duty under treaty or customary international law to assert jurisdiction (such as under the Torture Convention¹⁵³), servants or agents of a foreign State may benefit from the State's immunity for criminal proceedings concerning official acts, if the State intervenes to assert that immunity. As Lord Bingham explained in *Jones v. Saudi Arabia*:¹⁵⁴

"The prosecution of a servant or agent for an act of torture within article 1 of the Torture Convention is founded on an express exception from the general rule of immunity. It is, however, clear that a civil action against individual torturers based on acts of official torture does indirectly implead the state since their acts are attributable to it. Were these claims against the individual defendants to proceed and be upheld, the interests of the Kingdom would be obviously affected, even though it is not a named party."

In principle, there would seem to be no reason why the same reasoning should not be applied to legal persons (including State owned enterprises) who perform acts on behalf of a foreign State which give rise to criminal proceedings against them. It would probably, however, be more difficult for an entity which has a separate legal personality to show that it was acting as an "agent" of the State rather than in its own right.

¹⁴⁹ Fox, fn. 1 above, at p. 503.

¹⁵⁰ *Ibid.*, p. 505.

¹⁵¹ *Ibid.*, pp. 508-509.

¹⁵² *Jones*, fn. 6 above, at [31].

¹⁵³ UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, opened for signature on 4 February 1985. See *R v. Bow Street Stipendiary Magistrates, ex p Pinochet Ugarte (No. 3)* [2001] 1 AC 147 (HL).

¹⁵⁴ *Jones*, fn. 6 above, at [31].

1. The US FSIA

The US FSIA only positively confers jurisdiction on US courts in cases with respect to which a foreign state (including an agency or instrumentality) is not immune by virtue of one of the exceptions in non-jury civil actions.¹⁵⁵ Nevertheless, it appears that US courts have differed on whether the FSIA provides immunity from criminal indictment. On one view, the silence of the US FSIA as to immunity from criminal indictment, it must not provide such immunity, at least for commercial activities.¹⁵⁶ A different circuit of the US Court of Appeals has stated, however, that Congress would have to amend the FSIA explicitly to exclude the immunity from criminal indictment which it appears to recognise.¹⁵⁷

2. UK Law

Section 16(4) of the UK SIA provides:

"This Part of this Act does not apply to criminal proceedings".

Exclusion of particular proceedings from the scope of the UK SIA does not mean that States do not have immunity in relation to UK criminal proceedings. On the contrary, it means that immunity from criminal proceedings is not affected by any of the exceptions to immunity contained in the UK SIA. In these circumstances, the UK courts will apply what they consider to be rules of customary international law and, here, the starting point is immunity for official acts, subject to exceptions in circumstances where treaty or by customary international law requires that the UK exercises jurisdiction notwithstanding the nature of the act.¹⁵⁸

3. The 2004 UN Convention

Although not clear from the instrument's face, the UN Convention applies to civil proceedings but is not intended to deal with criminal proceedings. The General Assembly resolution which adopts the Convention refers to the understanding reached in the Ad Hoc Committee that the Convention does not deal with criminal proceedings.¹⁵⁹ The Convention seems, therefore, unlikely to affect customary international law in this area.

4. Conclusion

The law of State immunity in the context of criminal proceedings is still developing. According to current State practice, a foreign State probably enjoys immunity from the criminal jurisdiction of another State's courts. Subject to specific exceptions derived from international treaties or customary international law, that immunity also seems capable of protecting the servants and agents (whether natural or legal persons) of a foreign State with respect to criminal proceedings relating to official acts performed on behalf of the State.

¹⁵⁵ 28 USC s. 1330(a).

¹⁵⁶ *Southway v. Central Bank of Nigeria*, 198 F. 3d 1210, at 1214-1215 (1999) (10th Circuit). See also *United States v. Hendron*, 813 F.Supp. 973, at 977 (1993) (DC Eastern District New York) (concluding that the US FSIA applied only to civil proceedings are refusing to dismiss an indictment against a Polish director of a Polish state-owned enterprise).

¹⁵⁷ *Keller v. Central Bank of Nigeria*, 277 F. 3d 811, at 818-820 (2002) (6th Circuit). Both *Keller* and *Southway* (cited in the preceding footnote) concerned the requirement in the US Racketeer Influenced and Corrupt Organisations Act (RICO) that there be an "indictable" act to support a civil claim for damages.

¹⁵⁸ See text to fn. 152-154 above.

¹⁵⁹ UN General Assembly Resolution 59/38 of 16 December 2004, para 2.

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