> A State may be made a respondent in a proceeding in a court of another State when, in the territory of such other State, it engages in an industrial, commercial, financial or other business enterprise in which private persons may there engage, or does an act there in connection with such an enterprise wherever conducted, and the proceeding is based upon the conduct of such enterprise or upon such act.[41]

As the Executive Branch of our government and our courts go about the task of giving concrete expression to this newly adopted policy of restricting sovereign immunity, this suggested definition should be borne in mind. In many instances it will separate the cases calling for immunity from those which do not; but with the complexities and diversities of national economies throughout the world, classification will not be as simple as it would seem. In dealing with the harder cases, it may be hoped that our courts, lawyers and government officials will pay close heed to the decisions and the reasoning of the courts in other countries which have been drawing this distinction for many years and which will continue to have occasion to do so. On the basis of such a comparative approach, and taking into account the internal-law distinctions which our own courts have drawn in the fields of municipal corporations' liabilities to suit and inter-governmental immunities from taxes, we may expect the new practice to work out more satisfactorily than could any present attempt to give it precision in words. Eventually it may be hoped that the United Nations International Law Commission will achieve some success in the much needed work of "codification and progressive development" of international law on this subject.

WILLIAM W. BISHOP, JR.

THE CONTRACTUAL AGREEMENTS WITH THE FEDERAL REPUBLIC OF GERMANY

The unique and unprecedented situation created by the unconditional surrender of the German armed forces in 1945, by the legally doubtful status of "occupied Germany"[1] and by the political developments since 1945, have now led to a further provisional step: the Contractual Agreements with the Federal Republic of Germany. They consist of the short

[41] Art. 11, Draft Convention on Competence of Courts in Regard to Foreign States, this JOURNAL, Supp., Vol. 26 (1932), p. 597 *et seq.* It will be observed that the quoted language would limit the notion of acts *jure gestionis* to cases in which the foreign state either conducted the "commercial" enterprise within the territory of the forum state, or else performed within that territory some act in connection with such enterprise conducted elsewhere. The denial of immunity in such cases might more easily be justified on the theory of *waiver* (by conducting the enterprise or performing the act within the territory of the forum), than if the immunity is to be refused where there is no such connection with the forum state. The Department's letter does not appear to limit the field of liability to suit to those cases in which "private" acts of the foreign state are performed within the United States.

[1] See Josef L. Kunz, "The Status of Occupied Germany: A Legal Dilemma," in The Western Political Quarterly, Vol. 3, No. 4 (Dec. 1950), pp. 538–565.

and basic "Convention on Relations," with two annexes, of three "related conventions" with many annexes, and an exchange of letters at the moment of signature.[2] Their aim is to give to Western Germany as much independence as is possible under the actual circumstances, to liquidate the war and the occupation as far as possible, to integrate Western Germany into "free Europe," and also to retain certain reserved powers and to guard against the resurgence of too great German power. It is on these aims that the minds of the two negotiating parties have, although from different motives, met. Hence, those agreements, complicated as they are, do not stand by themselves, but are only a part of a web of treaties, including NATO and a supra-national "little Europe." The determining factors of the political situation were the East-West split, the sensational recovery of West Germany,[3] proving once more even this remnant of pre-war Germany to be the strongest nation of Continental Europe, and the fear of a revived Germany, held by other Continental states, particularly France.

Why "contractual" agreements? It seems that this term has been understood in more than one sense: to indicate their nature as a substitute for a final peace treaty,[4] or to mean they have been freely negotiated, not imposed;[5] finally, there was a suspicion that this term might mean executive agreements, not actual treaties.[6] But the term "Contractual Agreements" is not used in the documents. The "Convention on Relations" is a normal international treaty and that is why the President of the United States asked the advice and consent of the Senate. The "related conventions" are normal international treaties, too, not executive agreements. They were transmitted to the United States Senate only "for information,"[7] not because they are not international treaties, but because their authority to bind the United States stems from Article 8 of the Convention on Relations.

Although in all those treaties there are four participating states, they are only bipartite treaties.[8] The one party consists of the United States, the

[2] They were transmitted by the President of the United States to the Senate, 82d Cong., 2d Sess., Senate Execs. Q & R (June 2, 1952, Washington), hereafter quoted as Execs. Q & R. See also Hearings before the Committee on Foreign Relations, U. S. Senate, 82d Cong., 2d Sess., on Execs. Q & R (Washington, 1952, pp. 267), hereafter quoted as Hearings; and the Report of that Committee, Exec. Report No. 16 (Washington, 1952, pp. 58), hereafter quoted as Report.

[3] See the strong statement to this effect in the Report, pp. 6, 7; the Report justifies the agreements also with the "great productive power of Germany, its inventive genius, the skills of its people" (p. 35).

[4] Thus the Secretary of State (Hearings, p. 5).

[5] It was also held that "there is a queer combination; it is a reservation of certain rights which we had, and the rest of it is contractual." (U. S. High Commissioner for Germany John J. McCloy, Hearings, p. 108.)

[6] Senator Hickenlooper (Hearings, p. 169).

[7] This point was often raised in the Hearings (pp. 32, 34, 35, 36, 37, 164, 165, 166 and 170).

[8] This finds juridical expression in the composition of the Arbitration Tribunal.

United Kingdom and France; the other party, of the Federal Republic of Germany. Contrary to the Joint Resolution, approved by the President on October 19, 1951,[9] terminating the war with "Germany," the conventions clearly and correctly have as partner the Federal Republic of Germany. The latter is a federal state, composed now, in consequence of the drastic remaking by the Occupation Powers under their "supreme authority," of nine "Laender." [10] The territory of the Federal Republic consists exclusively of the three Western Occupation Zones, minus West Berlin. It does not include the Soviet Occupation Zone; the latter forms the German Democratic Republic, certainly not a sovereign state, nor identical in international law with pre-war Germany: It is a state-like entity, ruled in fact by the Soviets, but having a President, a Prime Minister and so on; it is a person in international law, having concluded treaties, *e.g.*, the much quoted treaty with Poland, definitively renouncing the pre-war German territory east of the Oder-Neisse line. Neither the Federal Republic nor the Western Powers have the slightest control over the German Democratic Republic, a fully Sovietized entity, wholly different from the Federal Republic.[11]

The Federal Republic, further, does not include the capital of pre-war Germany. Berlin itself is split. The eastern part is the capital of the German Democratic Republic. The western part remains under the supreme authority of the Three Western Powers. The Federal Republic, of course, does not include the pre-war German territory east of the Oder-Neisse line, nor does it include, in the West, the German Saar. This "truncated" Germany [12] is, as the Senate Committee Report [13] on the agreements correctly states, a "very different country," contains "just forty-eight percent of the pre-war German territory."

With the coming into force of the agreements, the Federal Republic will, according to the Convention on Relations, have full authority over its internal and external affairs, except in certain points; the Occupation Statute will be revoked, the Allied High Commission abolished; the relations between the contracting parties will thenceforth be conducted through ambassadors; the foreign troops on West German territory will cease to be occupation troops and will become forces for the defense of the free world. The Federal Republic will be an equal partner and, as such, integrated into the free European community.

The equality status is enhanced by the creation of an Arbitration Tri-

[9] Public Law 181, 82d Cong., 1st Sess.; this JOURNAL, Supp., Vol. 46 (1952), p. 13.

[10] Schleswig-Holstein, Hamburg, Bremen, Lower Saxony, North Rhine-Westphalia, Hesse, Rhineland Palatinate, Bavaria, Baden-Württemberg.

[11] "The zones, originally devised for administrative purposes, became virtually international boundaries in the case of the Soviet Zone" (Report, p. 5). See also East Germany Under Soviet Control (Department of State Publication 4596, Washington, June, 1952, pp. 95).

[12] Report, p. 7.

[13] Report, p. 6.

bunal.[14] It is composed of nine members; three neutral members who will furnish the President and the two Vice Presidents, three German members, and one member from each of the Three Western Powers. It has jurisdiction over all disputes (with one vital exception, later to be mentioned) arising between the parties under the provisions of the Convention on Relations or any of the related conventions or the Charter of the Tribunal. Only governments of the parties may be parties before the Tribunal. This Tribunal is also, from many other points of view, outstanding in the history of international arbitration. It also has jurisdiction in respect of any question as to the extent of competence of other authorities created by the first related convention,[15] and the Tribunal's decisions are binding on these authorities. The Tribunal shall render its decisions (binding on the parties) not only in the form of judgments, but also in the form of directives to take such measures as may be necessary to conserve the respective rights of the parties. The Tribunal, further, has jurisdiction to give an advisory opinion at the joint request of all four states. But, most interesting of all, the Tribunal may, after having established that the provisions of a law or ordinance, applicable in the Federal territory, or some such administrative measure, are in conflict with the provisions of the agreements, order the party to deprive them of effect. Should this party fail to comply with the judgment of the Tribunal, the Tribunal may, at the request of the successful party, declare the provisions null, in whole or in part, in the Federal territory, with binding effect. Equally, if a judgment of the Tribunal establishes that a judicial decision, enforceable in the Federal territory, is in conflict with the basic principles of the agreements, it may annul such decision; and in further proceedings the Tribunal's findings of fact and law shall be binding in the Federal territory. This far-reaching jurisdiction directly in the orbit of municipal law constitutes a highly interesting innovation in international law.

The first related Convention on Settlement of Matters Arising out of the War and the Occupation, serves the purpose of liquidating the war and occupation as far as possible. The Occupation Powers get a clean bill of health for the measures taken in their occupation zones since 1945, including the measures carried out or to be carried out with regard to German external assets or other property seized for the purpose of reparation or restitution, either as a result of the state of war, or on the basis of agreements with other, including neutral, states. The Federal Republic will raise no objections and waive all claims of its nationals arising out of actions taken or authorized by any of the United Nations between September 1, 1939, and June 5, 1945. These are the usual clauses which the victors insert in a

[14] The Charter of the Arbitration Tribunal (consisting of twenty-five articles) is contained in Annex B to the Convention on Relations.

[15] Namely, the Board of Review (Ch. II); the Supreme Restitution Court (Ch. III) and the Arbitral Commission on Property, Rights and Interests in Germany (Chs. V and X).

peace treaty. In this case the problem whether the Occupation Powers have acted legally under the doctrine of the "supreme authority" of conquerors, or, to a large extent illegally, under the doctrine of belligerent occupation, has now been settled in favor of the legality of these measures by the treaty consent of the Federal Republic. The first related convention also carries to an end certain major occupation policies, such as deconcentration and decartelization, internal and external restitution and so on. In addition there are chapters on compensation for Nazi victims, on displaced persons and refugees, and certain obligations of the Federal Republic *pro futuro,* such as granting facilities for the embassies of the Western Powers. On the other hand full responsibility, subject to certain restrictions, will be assumed by the Federal Republic in the field of civil aviation in the Federal territory. Of the greatest importance is the fact that the Federal Republic confirms its liability for the pre-war external debt of the German Reich, as well as for interest and other charges on securities of the Government of Austria which had become due after March 12, 1939, and before May 8, 1945.

The agreements contain, on the other hand, far-reaching limitations on the independence of the Federal Republic. It agrees to conduct its policy in accordance with the Charter of the United Nations. As the Federal Republic hardly will be admitted into the United Nations at any foreseeable time, because of the Soviet veto, this constitutes, so to speak, a "passive membership" in the United Nations. Many foreign armed forces will continue to be stationed on federal territory; the rights and obligations of these armed forces are regulated in great detail in the second related convention. It may be said that this convention is a normal one for the stationing of friendly foreign troops. But there is more to it. For the stationing of those foreign armed forces and the protection of their security is one of the rights reserved to the Three Western Powers. Any military commander, independently of a state of emergency, can, if his forces are imminently menaced, take such immediate action, including the use of armed force, as is requisite to remove the danger. And the decision as to an imminent menace and as to the appropriate action rests with the Allied Commander. Regarding the stationing of armed forces in the federal territory, the Three Powers have to consult with the Federal Republic only "insofar as the military situation permits." They can bring in, even without the consent of the Federal Republic, contingents of the armed forces of any nation not now providing such contingents, if there is an external attack or imminent threat of attack.

The Federal Republic has the obligation to participate in the European Defense Community; the details of the Federal Republic's financial contributions are regulated in the third related convention, the Finance Convention. This duty of participation means, negatively, a prohibition of the establishment of a national German Army.

The Three Powers, finally, have the far-reaching right to declare under

certain conditions a state of emergency in the whole or any part of the Federal Republic. These conditions, apart from an attack or grave threat of attack on the Republic, are "a serious disturbance of public order" or "a subversion of the liberal democratic basic order" which in the opinion of the Three Powers endangers the security of their forces. Hence, the Republic has an obligation not to change the liberal democratic basic order, to "commit itself to a democratic form of government."[16] The Three Powers alone decide whether in their opinion said conditions exist; they have to consult with the Republic, but only "to the fullest extent possible," and their right is "absolute."[17]

The second reserved right relates to West Berlin, although the Western Powers must consult with the Republic. They retain there their full rights "heretofore exercised or held by them,"[18] their "supreme authority" under the doctrine of conqueror and conquered.[19]

The third reserved right relates to "Germany as a whole, including the unification of Germany and a peace settlement." The term "Germany" or "Germany as a whole" runs through the agreements; while they mean certainly something different from the Federal Republic, they seem to adopt the fiction that the pre-war German Reich still legally exists. Furthermore, they do not always have the same meaning. When the conventions speak of the "unification of Germany," they seem to mean no more than the Federal Republic plus the German Democratic Republic, plus the whole of Berlin. But in Article 7, par. 1, of the Convention on Relations the parties agree that "the final termination [*sic*] of the boundaries of Germany must await such a [peace] settlement." That seems to indicate the pre-war German territories east of the Oder-Neisse line and the Saar. But even if the "unification of Germany" is taken in the more restricted sense, we find in the Preamble of the Convention on Relations only an expression that

> the achievement of a fully free and unified Germany through peaceful means and of a freely negotiated peace settlement . . . remains a fundamental and common goal of the Signatory States.

Naturally all measures to this effect belong to the reserved rights of the Western Powers. But it is hard to see how such unification can be brought about by peaceful means. The latest exchange of notes with the Soviet Union on the unification of Germany is certainly discouraging. The coming into force of the agreements may even enhance the unlikeliness of said unification.[20] Such unification is certainly the wish of all Germans and it is recognized here, too, that a "unified, free Germany is one of the keystones

[16] Hearings, p. 147.
[17] The Secretary of State (Hearings, p. 14). See also Report, p. 20.
[18] Convention on Relations, Art. 2, par. 1.
[19] The Secretary of State (Hearings, p. 43).
[20] See Hearings, pp. 41, 46, 98.

of a stable, free and peaceful Europe."[21] Yet, unfortunately, the division of "Germany" will in all probability continue.

The preceding legal analysis makes it now possible to determine the legal status of the Federal Republic under these agreements. It is, first, clearly not identical in international law with the pre-war German Reich; it is, at the best, a new state, a successor state of the pre-war German Reich which no longer exists in law, although this new state is burdened by treaty with some of the obligations of the former German Reich, just as the new Republic of Austria of 1918 had to take over by treaty certain obligations of the Empire of Austria-Hungary which had come to an end by dismemberment.

The Federal Republic is, further, clearly not a sovereign state in international law. Of many norms it can be said that "they affect the sovereignty of the Federal Republic only in the same way that a freely negotiated treaty limits the freedom of action of the contracting states."[22] But that cannot be said in view of the reserved rights, all of which are also excluded from the jurisdiction of the Arbitration Tribunal, and particularly of the absolute right to declare a state of emergency in case of a serious disturbance of the public order or of a subversion of the liberal democratic basic order. These rights are the residuum of the "supreme authority": they are not changed in their nature; they are absolute; they are the rights "heretofore exercised or held by them" under the doctrine of conqueror and conquered. True, these rights now have the consent of the Federal Republic by treaty. But it is theoretically untenable to pretend that *any* limitations of sovereignty, if only based on consent by treaty, do not affect sovereignty. Otherwise a state which, in exercise of its sovereignty by treaty hands over to another state the full administration of its internal or external affairs, or which by treaty even fully gives up its sovereignty, would still be a sovereign state, contrary to the practice of states. It is characteristic that the agreements nowhere use the term "sovereignty," but only "full authority"; in the same sense the President's message[23] and the Committee Report.[24] The Federal Republic is a new, state-like entity, possessing far-reaching autonomy and authority in its external and internal affairs, but subject in certain respects to the absolute rights of foreign Powers. It is a "protected State."[25] But it is certainly a person in international law;

[21] Report, p. 19. [22] Report, p. 46.

[23] The Federal Republic will only be restored "to a status which will enable it to play a full and honorable part in the family of nations"; it will "take a further great stride *toward* independence and self-government." (Execs. Q & R, pp. 2, 4.) (Italics supplied.) See also the Secretary of State (Hearings, p. 3).

[24] The Report "notes that Germany is *not yet* restored to a status of complete independence" (p. 20) (Italics supplied).

[25] See also Convention on Relations, Art. 3, par. 4: "At the request of the Federal Government, the Three Powers will arrange to represent the interests of the Federal Republic in relations with other States and in certain international organizations or conferences, whenever the Federal Republic is not in a position to do so itself."

international personality is no longer restricted exclusively to sovereign states.

In a sense, therefore, the status of the Republic, created by the agreements, is a provisional one. This provisionality is characteristic of all the agreements. They do not constitute a final peace treaty, because, it is said,[26] such final peace treaty would require the participation of the Soviet Union and the establishment of an "all German government" as an essential participant in the negotiation of a peace treaty. Apart from theoretical objections, such "final peace treaty" may very well never be concluded. The provisionality [27] in many clauses of the agreements, particularly relating to German reparations and German external assets, is, furthermore, due to the fact that the Three Western Powers were not entitled to speak for their many other wartime Allies. The provisionality is also a consequence of the fact that the problem of the "unification of Germany" is unsolved, that there is no solution as to "Germany's" frontiers. That is why the Convention on Relations [28] already contains a norm in the event of the "unification of Germany." There is, further, a revision clause,[29] in the event of "unification of Germany" or "the creation of a European federation."

The possibility of a European federation is already acknowledged. The Council of Europe appears in Article 3, par. 1, of the Convention on Relations. Article 5, par. 6, of the same convention gives to the Federal Republic, under certain conditions, the right to submit a request concerning the continuance of a state of emergency, declared by the Western Powers, to the Council of the North Atlantic Treaty Organization, although the Republic is not a member. Particularly strong are the relations with the European Defense Community Treaty; they appear in Article 4, par. 4 of the Convention on Relations and pervade the second and third related conventions; much in these latter conventions is, therefore, provisional.

All that has been stated is a legal analysis, not a *critique,* of the contents of these agreements. This writer believes that they are beneficial to the free world and to the Federal Republic, that they are "the only practical alternative" [30] to a complete and final settlement. It is, therefore, to be hoped that they will come into force. This coming into force presupposes [31] not only ratification by the four contracting states, but also the entry into force of the European Defense Community Treaty; the latter requires a separate legal analysis. At the time of writing, the agreements have been

[26] Hearings, p. 2.

[27] See the text of Art. 1, Ch. VI, of the first related convention. Par. 2 starts with the phrase: "Pending the final settlement. . . ." See also Arts. 1, 2, 3, of Ch. IX: "Without prejudice to the terms of a peace settlement with Germany . . ."; equally Arts. 3 and 6 of Ch. X: "Pending a final settlement of claims against Germany arising out of the war. . . ."

[28] Art. 7, par. 3.

[29] Convention on Relations, Art. 10.

[30] Report, p. 10.

[31] Convention on Relations, Art. 11.

ratified by the United States and the United Kingdom. Whether and when they will be ratified by France and the Federal Republic and whether and when the European Defense Community Treaty will be ratified by the six participating states, particularly by the Federal Republic, and more particularly by France, is, at this time, still on the knees of the gods.

JOSEF L. KUNZ

ANGLO-IRANIAN OIL CO. CASE (JURISDICTION)

The judgment of the International Court of Justice in the case of *The United Kingdom* v. *Iran,* rendered on July 22, 1952,[1] holds several points of interest for students of international law and international judicial settlement, although it inevitably constituted, as do all decisions denying or forswearing jurisdiction, something of an anticlimax. The judgment may not amount to the last word of the Court on this problem moreover, just as it had been preceded by an earlier action of the Court in the form of an order of provisional measures (July 5, 1951) under Article 41 of the Statute of the Court.[2]

The case arose in general, as is well known, out of action taken by the state of Iran in the spring of 1951 designed to confiscate the properties of the Anglo-Iranian Oil Company and the efforts of Great Britain to protect the company, its national. In the provisional measures case an effort was made to preserve the *status quo* pending a decision on the merits in the substantive question. The instant case was argued in the month of June, 1952, and the judgment rendered on July 22. The Court, by a vote of nine to five, found that it had no jurisdiction in the case; it also accordingly ruled that its order of provisional measures ceased to be operative.

The Iranian argument in denial of the jurisdiction of the Court rested upon a provision adopted at the time of their acceptance of the obligatory jurisdiction of the Court (1932),[3] appearing to stipulate that such jurisdiction should only apply to disputes arising after the ratification of their acceptance "with regard to situations or facts relating directly or indirectly to treaties or conventions accepted by Persia and (*sic*) subsequent to" that acceptance.[4] No treaty had been concluded with Great Britain subsequent to the acceptance; the crucial item was the Anglo-Iranian concession of April 29, 1933. The British claimed that earlier (1857, 1903) treaties giving them most-favored-nation treatment brought into play a treaty between Iran and Denmark of 1934 protecting nationals of the parties

[1] I.C.J. Reports, 1952, p. 93; this JOURNAL, Vol. 46 (1952), p. 737. To be cited as in the title of this comment.

[2] I.C.J. Reports, 1951, p. 89; this JOURNAL, Vol. 45 (1951), p. 789; commented on *ibid.*, p. 723.

[3] At that time the Permanent Court of International Justice; see Statute of the present Court, Art. 36 (5).

[4] I.C.J. Reports, 1952, p. 98.