Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries

1991

Text adopted by the International Law Commission at its forty-third session, in 1991, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/46/10, at para. 28). The report, which also contains commentaries on the draft articles, appears in the *Yearbook of the International Law Commission, 1991*, vol. II, Part Two.

to the General Assembly, together with a recommendation (see para. 25 below).

24. Some members raised the question of State-owned or State-operated aircraft engaged in commercial service as well as the question of space objects. The Commission, while recognizing the importance of the question, felt that it called for more time and study.

B. Recommendation of the Commission

25. At its 2235th meeting, on 4 July 1991, the Commission decided, in conformity with article 23 of its Statute, to recommend to the General Assembly that it should convene an international conference of plenipotentiaries to examine the draft articles on the jurisdictional immunities of States and their property and to conclude a convention on the subject.

26. The Commission was of the view that the question of the settlement of disputes on which draft articles were proposed by the former Special Rapporteur[23] could be dealt with by the above-mentioned international conference, if it considered that a legal mechanism on the settlement of disputes should be provided in connection with the draft articles.

C. Tribute to the Special Rapporteur, Mr. Motoo Ogiso

27. At its 2221st meeting, on 7 June 1991, the Commission, after adopting the text of the articles on jurisdictional immunities of States and their property, adopted the following resolution by acclamation:

The International Law Commission,

Having adopted the draft articles on jurisdictional immunities of States and their property,

Expresses to the Special Rapporteur, Mr. Motoo Ogiso, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft by his tireless efforts and devoted work and for the results achieved in the elaboration of draft articles on jurisdictional immunities of States and their property.

D. Draft articles on jurisdictional immunities of States and their property and commentaries thereto

28. The text of, and the commentaries to, draft articles 1 to 22, as adopted by the Commission at its forty-third session are reproduced below.

[23] Articles 29 to 33 and the annex dealing with the settlement of disputes, which were proposed by the former Special Rapporteur but not discussed, are reproduced in the report of the Commission on the work of its forty-first session (*Yearbook . . . 1989*, vol. II (Part Two), para. 611).

DRAFT ARTICLES ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

PART I

INTRODUCTION

Article 1. Scope of the present articles

The present articles apply to the immunity of a State and its property from the jurisdiction of the courts of another State.

Commentary

(1) The purpose of the present articles is to formulate rules of international law on the topic of jurisdictional immunities of States and their property.

(2) Article 1 indicates the subject matter to which the articles should apply. In any given situation in which the question of State immunity may arise, a few basic notions or concepts appear to be inevitable. In the first place, the main character of the present draft articles is "jurisdictional immunities". The expression "jurisdictional immunities" in this context is used not only in relation to the right of sovereign States to exemption from the exercise of the power to adjudicate, normally assumed by the judiciary or magistrate within a legal system of the territorial State, but also in relation to the non-exercise of all other administrative and executive powers, by whatever measures or procedures and by whatever authorities of the territorial State, in relation to a judicial proceeding. The concept therefore covers the entire judicial process, from the initiation or institution of proceedings, service of writs, investigation, examination, trial, orders which can constitute provisional or interim measures, to decisions rendering various instances of judgements and execution of the judgements thus rendered or their suspension and further exemption. It should be stated further that the scope of the articles covers not only the question of immunities of a State from adjudication before the court of another State but also that of immunity of a State in respect of property from measures of constraint, such as attachment and execution in connection with a proceeding before a court of another State, as provided in part IV. Secondly, the existence of two independent sovereign States is a prerequisite to the question of jurisdictional immunities, namely, a foreign State and a State of the forum. The draft articles generally refer to "a State" and "another State" but it has been found useful to use "foreign State" and "State of the forum" in certain articles for the sake of clarity. A definition of the term "State" for the purpose of the present articles is found in article 2.

(3) The phrase "of the courts" in the present text is designed to confirm the understanding that the scope of the current topic is confined primarily to immunity from the jurisdiction "of the courts" of States. A definition of the term "court" is found in article 2.

Article 2. Use of terms

1. For the purposes of the present articles:

(*a*) "court" means any organ of a State, however named, entitled to exercise judicial functions;

(*b*) "State" means:

(i) the State and its various organs of government;

(ii) constituent units of a federal State;

(iii) political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State;

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

(v) representatives of the State acting in that capacity;

(*c*) "commercial transaction" means:

(i) any commercial contract or transaction for the sale of goods or supply of services;

(ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction;

(iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

2. In determining whether a contract or transaction is a "commercial transaction" under paragraph 1 (*c*), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if, in the practice of the State which is a party to it, that purpose is relevant to determining the non-commercial character of the contract or transaction.

3. The provisions of paragraphs 1 and 2 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or in the internal law of any State.

Commentary

Paragraph 1

(1) The present article combines original articles 2 and 3 provisionally adopted on first reading, taking into account the suggestion which was proposed and supported by members of the Commission as well as delegations in the Sixth Committee.

Paragraph 1 (a)

(2) A definition of the term "court" was deemed necessary in connection with article 1. In the context of the present articles, any organ of a State empowered to exercise judicial functions is a court, regardless of the level and whatever nomenclature is used. Although the draft articles do not define the term "proceeding", it should be understood that they do not cover criminal proceedings.

(3) With regard to the term "judicial functions", it should be noted that such functions vary under different constitutional and legal systems. For this reason, the Commission decided not to include a definition of the term "judicial functions" in the present article. The scope of judicial functions, however, should be understood to cover such functions whether exercised by courts or by administrative organs. Judicial functions may be exercised in connection with a legal proceeding at different stages, prior to the institution or during the development of a legal proceeding, or at the final stage of enforcement of judgements. Such judicial functions may include adjudication of litigation or dispute settlement, determination of questions of law and of fact, order of interim and enforcement measures at all stages of legal proceedings and such other administrative and executive functions as are normally exercised by, or under, the judicial authorities of a State in connection with, in the course of, or pursuant to, a legal proceeding. Although judicial functions are determined by the internal organizational structure of each State, the term does not, for the purposes of the present articles, cover the administration of justice in all its aspects which, at least under certain legal systems, might include other functions related to the appointment of judges.

(4) It should be noted also that this definition may, under different constitutional and legal systems, cover the exercise of the power to order or adopt enforcement measures (sometimes called "quasi-judicial functions") by specific administrative organs of the State.

Paragraph 1 (b)

(5) In view of different jurisprudential approaches to the meaning of "State" in the context of jurisdictional immunities, it was considered useful to spell out the special meaning of the term for the purposes of the present articles. The general terms used in describing "State" should not imply that the provision is an open-ended formula. The term "State" should be understood in the light of its object and purpose, namely to identify those entities or persons entitled to invoke the immunity of the State where a State can claim immunity and also to identify certain subdivisions or instrumentalities of a State that are entitled to invoke immunity when performing acts in the exercise of sovereign authority. Accordingly, in the context of the present articles, the expression "State" should be understood as comprehending all types or categories of entities and individuals so identified which may benefit from the protection of State immunity.

Paragraph 1 (b) *(i)*

(6) The first category includes the State itself, acting in its own name and through its various organs of government, however designated, such as the sovereign or head of State, the head of government, the central government, various ministries and departments of government, ministerial or sub-ministerial departments, offices or bureaux, as well as subordinate organs and missions representing the State, including diplomatic missions and consular posts, permanent missions and delegations.

The use of the expression "various organs of government" is intended to include all branches of government and is not limited to the executive branch only.

(7) The expression "State" includes fully sovereign and independent foreign States, and also, by extension, entities that are sometimes not really foreign and at other times not fully independent or only partially sovereign.[24] Certainly the cloak of State immunity covers all foreign States regardless of their form of government, whether a kingdom, empire or republic, a federal union, a confederation of States or otherwise.[25]

(8) A sovereign or a head of State, in his public capacity as a principal organ of a State, is also entitled to immunity to the same extent as the State itself, on the ground that the crown, the reigning monarch, the sovereign head of State or indeed a head of State may be equated with the central Government.

(9) A State is generally represented by the Government in most, if not all, of its international relations and transactions. Therefore a proceeding against the Government *eo nomine* is not distinguishable from a direct action against the State.[26] State practice has long recognized the practical effect of a suit against a foreign Government as identical with a proceeding against the State.[27]

(10) Just as the State is represented by its Government, which is identified with it for most practical purposes, the Government is often composed of State organs and departments or ministries that act on its behalf. Such organs of State and departments of government can be, and are often, constituted as separate legal entities within the internal legal system of the State. Lacking as they do international legal personality as a sovereign entity, they could nevertheless represent the State or act on behalf of the central Government of the State, which they in fact constitute integral parts thereof. Such State organs or departments of government comprise the various ministries of a Government,[28] including the armed forces,[29] the subordinate divisions or departments within each ministry, such as embassies,[30] special missions[31]

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[24] The practice of some States appears to support the view that semi-sovereign States and even colonial dependencies are treated, although they may fall within the same constitutional grouping as the State itself, as foreign sovereign States. British courts, for instance, consistently declined jurisdiction in actions against States members of the British Commonwealth and semi-sovereign States dependent on the United Kingdom. Thus, the Maharajah of Baroda was regarded as "a sovereign prince over whom British courts have no jurisdiction" *Gaekwar of Baroda State Railways* v. *Hafiz Habid-ul-Haq* (1938) (*Annual Digest . . ., 1938-1940* (London), vol. 9 (1942), case No. 78, p. 233). United States courts have adopted the same view with regard to their own dependencies: *Kawananakoa* v. *Polybank* (1907) (*United States Reports*, vol. 205 (1921), pp. 349 and 353), wherein the territory of Hawaii was granted sovereign immunity; and also, by virtue of the federal Constitution, with respect to member States of the Union: *Principality of Monaco* v. *Mississippi* (1934) (*Annual Digest . . ., 1933-1934* (London), vol. 7 (1940), case No. 61, p. 166; cf. G. H. Hackworth, *Digest of International Law* (Washington, D.C., United States Government Printing Office, 1941), vol. II, p. 402). More recently, in *Morgan Guaranty Trust Co.* v. *Republic of Palau* (639 F. Supp. 706, United States District Court for the Southern District of New York, 10 July 1986, AJIL (Washington, D.C.), vol. 81 (1987), p. 220) the court held that Palau was a "foreign State" for purposes of the United States Foreign Sovereign Immunities Act (see footnote 40 below) based on the de facto degree of sovereignty exercised by Palau, even though the Compact of Free Association had not been ratified and the termination of the United Nations Trusteeship Agreement designating Palau as a "strategic trust" had not been approved by the Security Council. French courts have similarly upheld immunity in cases concerning semi-sovereign States and member States within the French Union: *Bey of Tunis et consorts* v. *Ahmed-ben-Aïad* (1893) (*Recueil périodique et critique de jurisprudence, 1894* (Dalloz) (Paris), part 2, p. 421); see also cases concerning the Gouvernement chérifien, for instance, *Laurans* v. *Gouvernement impérial chérifien et Société marseillaise de crédit* (1934) (*Revue critique de droit international* (Darras) (Paris), vol. XXX, No. 4 (October-December 1935), p. 795, and a note by S. Basdevant-Bastid, pp. 796 *et seq.*). See also *Duff Development Company Ltd.* v. *Government of Kelantan and another* (1924) (United Kingdom, *The Law Reports, House of Lords, Judicial Committee of the Privy Council, 1924*, p. 797). See, however, *Marine Steel Ltd.* v. *Government of the Marshall Islands* (1981) (2 NZLR, High Court of New Zealand, 29 July 1981, AJIL (Washington, D.C.), vol. 77 (1983), p. 158), where the High Court of New Zealand held that United Nations Trust Territories, such as the Marshall Islands, have not yet achieved the status of a sovereign State and, therefore, are not entitled to sovereign immunity.

[25] See, for instance, *Dralle* v. *Republic of Czechoslovakia* (1950) (ILR, 1950 (London), vol. 17 (1956), case No. 41, p. 155); *Etat espagnol* v. *Canal* (1951) (*Journal du droit international* (Clunet) (Paris), vol. 79, No. 1 (January-March 1952), p. 220); *Patterson-MacDonald Shipbuilding Co., McLean* v. *Commonwealth of Australia* (1923) (United States of America, *The Federal Reporter*, vol. 293 (1924), p. 192); *De Froe* v. *The Russian State, now styled "The Union of Soviet Socialist Republics"* (1932) (*Annual Digest . . ., 1931-1932* (London), vol. 6 (1938), case No. 87, p. 170); *Irish Free State* v. *Guaranty Safe Deposit Company* (1927) (*Annual Digest . . ., 1925-1926* (London), vol. 3 (1929), case No. 77, p. 100); *Kingdom of Norway* v. *Federal Sugar Refining Co.* (1923) (United States of America, *The Federal Reporter*, vol. 286 (1923), p. 188); *Ipitrade International S.A.* v. *Federal Republic of Nigeria* (1978) (United States of America, *Federal Supplement*, vol. 465 (1979), p. 824); *40 D 6262 Realty Corporation and 40 E 6262 Realty Corporation* v. *United Arab Emirates Government* (1978) (ibid., vol. 447 (1978), p. 710); *Kahan* v. *Pakistan Federation* (1951) (United Kingdom, *The Law Reports, King's Bench Division, 1951*, vol. II, p. 1003); *Venne* v. *Democratic Republic of the Congo* (1968) (Canada, *The Dominion Law Reports, Third series*, vol. 5, p. 128).

[26] See, for example, *Lakhowsky* v. *Swiss Federal Government and Colonel de Reynier* (1921) (*Annual Digest . . ., 1919-1922* (London), vol. 1, case No. 83, p. 122); *U Kyaw Din* v. *His Britannic Majesty's Government of the United Kingdom and the Union of Burma* (1948) (*Annual Digest . . ., 1948* (London), vol. 15 (1953), case No. 42, p. 137); *Etienne* v. *Government of the Netherlands* (1947) (*Annual Digest . . ., 1947* (London), vol. 14, case No. 30, p. 83).

[27] Sovereign immunity has sometimes been accorded to colonial dependencies of foreign States on the ground that the actions in effect impleaded the foreign Governments, States being identifiable with their Governments. See, for instance, *The "Martin Behrman", Isbrandtsen Co.* v. *Netherlands East Indies Government* (1947) (*Annual Digest . . ., 1947* (London), vol. 14 (1951), case No. 26, p. 75); *Van Heyningen* v. *Netherlands Indies Government* (1948) (*Annual Digest . . ., 1948* (London), vol. 15 (1953), case No. 43, p. 138).

[28] See, for instance, *Bainbridge* v. *The Postmaster General* (1905) (United Kingdom, *The Law Reports, King's Bench Division, 1906*, vol. I, p. 178); *Henon* v. *Egyptian Government and British Admiralty* (1947) (*Annual Digest . . ., 1947* (London), vol. 14 (1951), case No. 28, p. 78); *Triandafilou* v. *Ministère public* (1942) (AJIL (Washington, D.C.), vol. 39, No. 2 (April 1945), p. 345); *Piascik* v. *British Ministry of War Transport* (1943) (*Annual Digest . . ., 1943-1945* (London), vol. 12 (1949), case No. 22, p. 87); and *Turkish Purchases Commission* case (1920) (*Annual Digest . . ., 1919-1922* (London), vol. 1 (1932), case No. 77, p. 114).

[29] See, for example, the opinion of Chief Justice Marshall in *The Schooner "Exchange"* v. *McFaddon and others* (1812) (W. Cranch, *Reports of Cases . . .*, (New York, 1911), vol. VII, 3rd ed., pp. 135-137). See also various status of forces agreements and foreign visiting forces acts.

[30] Embassies are subsidiary organs of the State, being part of the Ministry of Foreign Affairs or the Foreign Office of the sending State. Their status is governed by the Vienna Convention on Diplomatic Relations.

[31] Special missions are also covered by State immunity as contained in the Convention on Special Missions. See also the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

and consular posts[32] and offices, commissions, or councils[33] which need not form part of any ministry but are themselves autonomous State organs answerable to the central Government or to one of its departments, or administered by the central Government. Other principal organs of the State such as the legislature and the judiciary of a foreign State would be equally identifiable with the State itself if an action were or could be instituted against them in respect of their public or official acts.

Paragraph 1 (b) *(ii)*

(11) The second category covers the constituent units of a federal State. Constituent units of a federal State are regarded as a State for purposes of the present draft articles. No special provision for federal States appeared in the text of original article 3, paragraph 1, containing the definition of "State" as provisionally adopted on first reading. The Commission, taking into account the views expressed by some members of the Commission as well as Governments, agreed to introduce this provision on second reading. In some federal systems, constituent units are distinguishable from the political subdivisions referred to in paragraph 1 (*b*) (iii) in the sense that these units are, for historical or other reasons, to be accorded the same immunities as those of the State, without the additional requirement that they perform acts in the exercise of the sovereign authority of the State. Paragraph 1 (*b*) (ii) was introduced with this particular situation in mind. However, State practice has not been uniform on this question.[34] In some other federal systems they are not distinguishable from political subdivisions, as they are accorded the jurisdictional immunities of the federal State only to the extent that they perform acts in the exercise of "sovereign authority". This uncertain status of constituent units of a State is preserved by the European Convention on State Immunity and Additional Protocol, 1972.[35] Therefore, it depends upon the constitutional practice or historical background of a particular federal State whether its constituent units are treated as a State under this paragraph or under paragraph 1 (*b*) (iii) below.

Paragraph 1 (b) *(iii)*

(12) The third category covers subdivisions of a State which are entitled, under internal law, to perform acts in the exercise of the sovereign authority of the State. The corresponding term for "sovereign authority" used in the French text is *prérogatives de la puissance publique*. The Commission discussed at length whether in the English text "sovereign authority" or "governmental authority" should be used and has come to the conclusion that "sovereign authority" seems to be, in this case, the nearest equivalent to *prérogatives de la puissance publique*.[36] Some members, on the other hand, expressed

[32] See the Vienna Convention on Consular Relations.

[33] See, for example, *Mackenzie-Kennedy* v. *Air Council* (1927) (United Kingdom, *The Law Reports, King's Bench Division, 1927*, vol. II, p. 517); *Graham and others* v. *His Majesty's Commissioners of Public Works and Buildings* (1901) (United Kingdom, *The Law Reports, King's Bench Division, 1901*, vol. II, p. 781); *Société Viajes* v. *Office national du tourisme espagnol* (1936) (*Annual Digest . . ., 1935-1937* (London), vol. 8 (1941), case No. 87, p. 227); *Telkes* v. *Hungarian National Museum*, (1942) (*Annual Digest . . ., 1941-1942* (London), vol. 10 (1945), case No. 169, p. 576).

[34] See, for example, *Sullivan* v. *State of Sao Paulo* (1941) (*Annual Digest . . ., 1941-1942* (London), vol. 10 (1945), case No. 50, p. 178), where the United States State Department had recognized the claim of immunity. In that case, Judge Clark suggested that immunity could be grounded on the analogy with member States within the United States; Judge Hand expressed his doubts whether every political subdivision of a foreign State was immune which exercised substantial governmental power. See also *Yale Law Journal* (New Haven, Conn.), vol. 50, No. 6 (April 1941), pp. 1088 *et seq.*; *Cornell Law Quarterly Review* (Ithaca, N.Y.), vol. 26 (1940-1941), pp. 720 *et seq.*; *Harvard Law Review* (Cambridge, Mass.), vol. LV, No. 1 (November 1941), p. 149; *Michigan Law Review* (Ann Arbor, Mich.), vol. 40, No. 6 (April 1942), pp. 911 *et seq.*; *Southern California Law Review* (Los Angeles, Calif.), vol. 15 (1941-1942), p. 258. This was the most commented case of that time. See also *Hans* v. *Louisiana* (1890) (*United States Reports*, vol. 134 (1910), p.1); *South Dakota* v. *North Carolina* (1904) (ibid., vol. 192 (1911), p. 286); *United States* v. *North Carolina* (1890) (ibid, vol. 136 (1910), p. 211); *Rhode Island* v. *Massachusetts* (1846) (B. C. Howard, *Reports of Cases . . .* (New York, 1909), vol. IV, 2nd ed., p. 591); and cases cited above in footnotes 24 and 26.

See, however, the practice of France, for example, in *Etat de Ceará* v. *Dorr et autres* (1932) (Dalloz, *Recueil périodique et critique de jurisprudence*, 1933 (Paris), part 1, p. 196 *et seq.*). The Court said:

"Whereas this rule [of incompetence] is to be applied only when invoked by an entity which shows itself to have a personality of its own in its relations with other countries, considered from the point of view of public international law; whereas such is not the case of the State of Ceará, which, according to the provisions of the Brazilian Constitution legitimately relied upon by the lower courts, and whatever its internal status in the sovereign confederation of the United States of Brazil of which it is a part, being deprived of diplomatic representation abroad, does not enjoy from the point of view of international political relations a personality of its own . . .".

See also *Dumont* v. *State of Amazonas* (1948) (*Annual Digest . . ., 1948* (London), vol. 15, case No. 44, p. 140). For Italy, see *Somigli* v. *Etat de Sao Paulo du Brésil* (1910) (*Revue de droit international privé et de droit pénal international* (Darras) (Paris), vol. VI (1910), p. 527), where Sao Paulo was held amenable to Italian jurisdiction in respect of a contract to promote immigration to Brazil. For Belgium, see *Feldman* v. *Etat de Bahia* (1907) (*Pasicrisie belge, 1908* (Brussels), vol. II, p. 55 or *Supplement* to AJIL (Washington, D.C.), vol. 26, No. 3 (July 1932), p. 484), where Bahia was denied immunity although under the Brazilian Constitution it was regarded as a sovereign State. See also the case, in the United States, *Molina* v. *Comisión Reguladora del Mercado de Henequén* (1918) (Hackworth, op. cit., vol. II, pp. 402-403), where Yucatán, a member State of the United States of Mexico, was held amenable to the jurisdiction of the United States courts; and in Australia, *Commonwealth of Australia* v. *New South Wales* (1923) (*Annual Digest . . ., 1923-1924* (London), vol. 2 (1933), case No. 67, p. 161). The Court said:

"The appellation 'sovereign State' as applied to the construction of the Commonwealth Constitution is entirely out of place, and worse than unmeaning."

[35] The Convention came into force on 11 June 1976 between Austria, Belgium and Cyprus and has since been ratified by the United Kingdom of Great Britain and Northern Ireland, Switzerland, the Netherlands, Luxembourg and Germany. Article 28, paragraph 1, confirms non-enjoyment of immunity by the constituent states of a federal State, but paragraph 2 permits the federal State to make a declaration that its constituent states may invoke the provisions of the Convention. The Protocol came into effect on 22 May 1985 between Austria, Belgium, Cyprus, the Netherlands and Switzerland, and has since been ratified by Luxembourg. The European Tribunal in matters of State immunity was established on 28 May 1985 pursuant to the Protocol.

[36] The view was expressed by some members that the expression *prérogatives de la puissance publique de l'Etat* in the French text, and the expression "sovereign authority of the State" in the English text, were not equivalent in meaning and could lead to different interpretations. The French expression appears to be intended to refer to public institutions and to distinguish them from private institutions. Thus not all types of *prérogatives de la puissance publique* are related to the sovereignty of a State, and the view of those members was that the expression "sovereign authority of the State" in the

the view that the term "sovereign authority" was normally associated with the international personality of the State, in accordance with international law, which was not the subject of the paragraph. Consequently it was held that "governmental authority" was a better English translation of the French expression *la puissance publique*. Autonomous regions of a State which are entitled, under internal law, to perform acts in the exercise of sovereign authority may also invoke sovereign immunity under this category.

(13) Whatever the status of subdivisions of a State, there is nothing to preclude the possibility of such entities being constituted or authorized under internal law to act as organs of the central Government or as State agencies performing sovereign acts of the foreign State.[37] It is not difficult to envisage circumstances in which such subdivisions may in fact be exercising sovereign authority assigned to them by the State. There are cases where, dictated by expediency, the courts have refrained from entertaining suits against such autonomous entities, holding them to be an integral part of the foreign Government.[38]

Paragraph 1 (b) *(iv)*

(14) The fourth category embraces the agencies or instrumentalities of the State and other entities, including private entities, but only to the extent that they are entitled to perform acts in the exercise of *prérogative de la puissance publique*. Beyond or outside the sphere of acts performed by them in the exercise of the sovereign authority of the State, they do not enjoy any jurisdictional immunity. Thus, in the case of an agency or instrumentality or other entity which is entitled to perform acts in the exercise of sovereign authority as well as acts of a private nature, immunity may be invoked only in respect of the acts performed in the exercise of sovereign authority.

(15) The reference to "other entities" has been added on second reading and is intended to cover non-governmental entities when in exceptional cases endowed with governmental authority. It takes into account the practice which was resorted to relatively often after the Second World War and still exists, to some extent, in recent times, in which a State entrusts a private entity with certain governmental authority to perform acts in the exercise of the sovereign authority of the State. Examples may be found in the practice of certain commercial banks which are entrusted by a Government to deal also with import and export licensing which is exclusively within governmental powers. Therefore, when private entities perform such governmental functions, to that extent, they should be considered a "State" for the purposes of the present articles. One member, however, expressed doubts as to whether the examples cited were common enough to warrant the inclusion of the reference. Another member noted that in the present context the term *prérogative de la puissance publique* clearly means "government authority".[39] The 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 purpose 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 from jurisdiction of the courts of another State (see art. 10, para. 3).

(16) There is in practice no hard-and-fast line to be drawn between agencies or instrumentalities of a State and departments of government. The expression "agencies or instrumentalities"[40] indicates the interchangeability of the two terms.[41] Proceedings against an agency of a foreign Government[42] or an instrumentality of a for-

English text was too restrictive. In this connection, it was noted that the term "government" or "government authority" was used in part 1 of the draft articles on State responsibility on which the Commission had taken the view that the term was the correct translation of *prérogative de la puissance publique* in the French text of the draft articles. It was suggested, therefore, that the term should be interpreted as "government authority", or "State authority", which is the term in fact used in the Russian text of the present draft article.

[37] This possibility was pointed out by Pillet, commenting on a French case denying immunity. *Ville de Genève* v. *Consorts de Civry* (1894) (Sirey, *Recueil général des lois et des arrêts, 1896* (Paris), part 1, pp. 225 *et seq.*). See also *Rousse et Maber* v. *Banque d'Espagne et autres* (1937) (Sirey, *Recueil général des lois et des arrêts, 1938* (Paris), part 2, pp. 17 *et seq.*), where the Court of Appeal of Poitiers envisaged the same possibility; Rousseau, in his note, thought that provincial autonomies such as the Basque Government might at the same time be "an executive organ of a decentralized administrative unit". Compare the English Court of Appeal in *Kahan* v. *Pakistan Federation* (1951) (see footnote 25 above). See also *Huttinger* v. *Upper Congo-Great African Lakes Railways Co.* et al. (1934) (*Annual Digest . . ., 1933-1934* (London), vol. 7 (1940), case No. 65, pp. 172-173), and the cases cited in footnote 27 above.

[38] In *Van Heyningen* v. *Netherlands Indies Government* (1948) (*Annual Digest . . ., 1948* (London), vol. 15 (1953), case No. 43, pp. 138 *et seq.*), the Supreme Court of Queensland (Australia) granted immunity to the Netherlands Indies Government. Judge Philp said:

"In my view, an action cannot be brought in our courts against a part of a foreign sovereign State. Where a foreign sovereign State sets up as an organ of its Government a governmental control of part of its territory which it creates into a legal entity, it seems to me that that legal entity cannot be sued here, because that would mean that the authority and territory of a foreign sovereign would be subjected in the ultimate result to the jurisdiction and execution of this court."

[39] See also footnote 35 above.

[40] See, for example, the United States of America Foreign Sovereign Immunities Act of 1976 (*United States Code, 1982 Edition*, vol. 12, title 28, chap. 97 (text reproduced in United Nations, *Materials on Jurisdictional Immunities . . .*, pp. 55 *et seq.*)), which, in sect. 1603 (*b*), defines "agency or instrumentality of a foreign State" as an entity "(1) which is a separate legal person, (2) which is an organ of a foreign State or political division 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 or a State of the United States as defined in section 1332 (*c*) and (*d*) of this title nor created under the laws of any third country."

[41] See, for example, *Krajina* v. *The Tass Agency and another* (1949) (*Annual Digest . . ., 1949* (London), vol. 16 (1955), case No. 37, p. 129); compare *Compañía Mercantil Argentina* v. *United States Shipping Board* (1924) (*Annual Digest . . ., 1923-1924* (London), vol. 2 (1933), case No. 73, p. 138), and *Baccus S.R.L.* v. *Servicio Nacional del Trigo* (1956) (United Kingdom, *The Law Reports, Queen's Bench Division, 1957*, vol. 1, p. 438 *et seq.*), in which Lord Justice Jenkins observed:

"Whether a particular ministry or department or instrument, call it what you will, is to be a corporate body or an unincorporated body seems to me to be purely a matter of governmental machinery."

[42] For a different view, see the opinions of Lord Justices Cohen and Tucker in *Krajina* v. *The Tass Agency and another* (1949) (see

(*Continued on next page.*)

eign State, whether or not incorporated as a separate entity, could be considered to be a proceeding against the foreign State, particularly when the cause of action relates to the activities conducted by the agency or instrumentality of a State in the exercise of sovereign authority of that State.[43]

Paragraph 1 (b) *(v)*

(17) The fifth and last category of beneficiaries of State immunity encompasses all the natural persons who are authorized to represent the State in all its manifestations, as comprehended in the first four categories mentioned in paragraphs 1 (*b*) (i) to (iv). Thus, sovereigns and heads of State in their public capacity would be included under this category as well as in the first category, being in the broader sense organs of the Government of the State. Other representatives include heads of Government, heads of ministerial departments, ambassadors, heads of mission, diplomatic agents and consular officers, in their representative capacity.[44] The reference at the end of paragraph 1 (*b*) (v) to "in that capacity" is intended to clarify that such immunities are accorded to their representative capacity *ratione materiae*.

(18) It is to be observed that, in actual practice, proceedings may be instituted, not only against the government departments or offices concerned, but also against their directors or permanent representatives in their official capacities.[45] Actions against such representatives or agents of a foreign Government in respect of their official acts are essentially proceedings against the State they represent. The foreign State, acting through its representatives, is immune *ratione materiae*. Such immunities characterized as *ratione materiae* are accorded for the benefit of the State and are not in any way affected by the change or termination of the official functions of the representatives concerned. Thus, no action will be successfully brought against a former representative of a foreign State in respect of an act performed by him in his official capacity. State immunity survives the termination of the mission or the office of the representative concerned. This is so because the immunity in question not only belongs to the State, but is also based on the sovereign nature or official character of the activities, being immunity *ratione materiae*.[46]

(19) Of all the immunities enjoyed by representatives of Government and State agents, two types of beneficiaries of State immunities deserve special attention, namely, the immunities of personal sovereigns and those of ambassadors and diplomatic agents.[47] Apart from immunities *ratione materiae* by reason of the activities or the official functions of representatives, personal sovereigns and ambassadors are entitled, to some extent in their own right, to immunities *ratione personae* in respect of their persons or activities that are personal to them and unconnected with official functions. The immunities *ratione personae*, unlike immunities *ratione materiae* which continue to survive after the termination of the official functions, will no longer be operative once the public offices are vacated or terminated. All activities of the sovereigns and ambassadors which do not relate to their official functions are subject to review by the local jurisdiction, once the sovereigns or ambassadors have relinquished their posts.[48] Indeed, even such immunities inure not to the personal benefit of sovereigns and ambassadors but to the benefit of the States they represent, to enable them to fulfil their rep-

(*Footnote 42 continued.*)
footnote 41 above), and in *Baccus S.R.L.* v. *Servicio Nacional del Trigo* (1956) (ibid.), where Lord Justice Parker said:

> "I see no ground for thinking that the mere constitution of a body as a legal personality with the right to make contracts and to sue and be sued is wholly inconsistent with it remaining and being a department of State."

See also *Emergency Fleet Corporation, United States Shipping Board* v. *Western Union Telegraph Company* (1928) (*United States Reports*, vol. 275 (1928), p. 415 *et seq.*):

> "Instrumentalities like the national banks or the federal reserve banks, in which there are private interests, are not departments of the Government. They are private corporations in which the Government has an interest."

Sec, however, the certificate of the United States Ambassador regarding the status of the United States Shipping Board in the case brought by Compañía Mercantil Argentina (see footnote 41 above).

[43] See *Dollfus Mieg et Cie S.A.* v. *Bank of England* (1950) and *United States of America and Republic of France* v. *Dollfus Mieg et Cie S.A. and Bank of England*—"Gold bars" case (1952) (*Annual Digest . . ., 1949* (London), vol. 16 (1955), case No. 36, p. 103); and *Monopole des tabacs de Turquie* et al. v. *Régie co-intéressée des tabacs de Turquie* (1930) (*Annual Digest . . ., 1929-1930* (London), vol. 5 (1935), case No. 79, p. 123).

[44] The fact that the immunities enjoyed by representatives of government, whatever their specialized qualifications, diplomatic or consular or otherwise, are in the ultimate analysis State immunities has never been doubted. Rather, it has been unduly overlooked. Recently, however, evidence of their connection is reflected in some of the replies and information furnished by Governments. The Jamaican legislation and the Moroccan decision on diplomatic immunities and Mauritian law on consular immunities are outstanding reminders of the closeness of identities between State immunities and other types of immunities traceable to the State.

[45] See, for example, *Thai-Europe Tapioca Service* v. *Government of Pakistan, Ministry of Food and Agriculture, Directorate of Agricultural Supplies* (1975) (*The All England Law Reports, 1975* (London), vol. 3, pp. 961 *et seq.*).

[46] Immunities *ratione materiae* may outlive the tenure of office of the representatives of a foreign State. They are nevertheless subject to the qualifications and exceptions to which State immunities are ordinarily subject in the practice of States. See, for instance, *Nobili* v. *Charles I of Austria* (1921) (*Annual Digest . . ., 1919-1922* (London), vol. 1 (1932), case No. 90, p. 136) and *La Mercantile* v. *Regno de Grecia* (1955) (ILR, 1955 (London), vol. 22 (1958), p. 240), where the contract concluded by the Greek Ambassador for the delivery of raw materials was imputable to the State, and subject to the local jurisdiction.

[47] Historically speaking, immunities of sovereigns and ambassadors developed even prior to State immunities. They are in State practice regulated by different sets of principles of international law. The view has been expressed that, in strict theory, all jurisdictional immunities are traceable to the basic norm of State sovereignty. See S. Sucharitkul, *State Immunities and Trading Activities in International Law* (London, Stevens, 1959), chaps. 1 and 2; E. Suy, "Les bénéficiaires de l'immunité de l'Etat", *L'immunité de juridiction et d'exécution des Etats*, Actes du colloque conjoint des 30 et 31 janvier 1969 des Centres de droit international (Brussels, Editions de l'Institut de sociologie, 1971), pp. 257 *et seq.*

[48] Thus in *The Empire* v. *Chang and Others* (1921) (*Annual Digest . . ., 1919-1922* (London), vol. 1 (1932), case No. 205, p. 288), the Supreme Court of Japan confirmed the conviction of former employees of the Chinese legation in respect of offences committed during their employment as attendants there, but unconnected with their official duties. See also *Léon* v. *Díaz* (1892) (*Journal du droit international privé et de la jurisprudence comparée* (Clunet) (Paris), vol. 19 (1892), p. 1137), concerning a former Minister of Uruguay in France, and *Laperdrix et Penquer* v. *Kouzouboff et Belin* (1926) (*Journal du droit international* (Clunet) (Paris), vol. 53 (January-February 1926), pp. 64-65), where an ex-secretary of the United States Embassy was ordered to pay an indemnity for injury in a car accident.

resentative functions or for the effective performance of their official duties.[49] This proposition is further reflected, in the case of diplomatic agents, in the rule that diplomatic immunities can only be waived by an authorized representative of the sending State and with proper governmental authorization.[50]

Paragraph 1 (c)

(20) The expression "commercial transaction" calls for a definition in order to list the types of contracts or transactions which are intended to fall within its scope. The term "commercial contract", which was adopted on first reading for the original draft article 2, paragraph 1, subparagraph (*b*), was replaced by the term "commercial transaction" in response to the preference for that change expressed by some members of the Commission and some delegations in the Sixth Committee.[51] As will be discussed below, the term "transaction" is generally understood to have a wider meaning than the term "contract", including non-contractual activities such as business negotiations. The term "transaction" presents, however, some difficulties of translation into other official languages, owing to the existence of different terminologies in use in different legal systems. It is to be observed that "commercial transaction", as referred to in paragraph 2 (*a*) of article 10, namely, transactions between States and those on a government-to-government basis, are excluded from the application of paragraph 1 of that article. For such transactions, State immunity subsists and continues to apply. Some members considered that the use of the term "commercial" in the definition should be avoided as being tautological and circular. The Commission considered this question in some detail on second reading and sought an alternative wording which would eliminate the term "commercial" at least in paragraph 1 (*c*) (i) and (iii), but was unable to find an appropriate formulation. In the view of one member, profit-making was the most important criterion for the determination of the commercial character of a contract or transaction, and should have been incorporated in the definition of "commercial transaction".

(21) For the purposes of the draft articles, the expression "commercial transaction" covers three categories of transactions. In the first place, it covers all kinds of commercial contracts or transactions for the sale of goods or supply of services.

(22) Secondly, the expression "commercial transaction" covers *inter alia* a contract for a loan or other transaction of a financial nature, such as commercial loans or credits or bonds floated in the money market of another State. A State is often required not only to raise a loan in its own name, but sometimes also to provide a guarantee or surety for one of its national enterprises in regard to a purchase, say, of civil or commercial aircraft, which is in turn financed by foreign banks or a consortium of financial institutions. Such an undertaking may be given by a State in the form of a contract of guarantee embodying an obligation of guarantee for the repayment or settlement of the loan taken by one of its enterprises and to make payment in the event of default by the co-contractor, or an obligation of indemnity to be paid for the loss incurred by a party to the principal contract for a loan or a transaction of a financial nature. The difference between an obligation of guarantee and one of indemnity may consist in the relative directness or readiness of available remedies in relation to non-performance or non-fulfilment of contractual obligations by one of the original parties to the principal contract. An obligation of indemnity could also be described in terms of willingness or readiness to reimburse one of the original parties for the expense or losses incurred as a result of the failure of another party to honour its contractual commitments with or without consequential right of subrogation. The Commission reworded the text of subparagraph (ii) slightly on second reading to take account of the fact that an obligation of guarantee could exist not only in the case of a loan, but also in other agreements of a financial nature. The same thing applies to indemnity as well. The Commission therefore combined the reference to the obligation of guarantee and that to the obligation of indemnity so that they apply both to the contracts for a loan and to other agreements of a financial nature.

(23) Thirdly, the expression "commercial transaction" also covers other types of contracts or transactions

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[49] See, for example, the judgement of the Court of Geneva in the case *V.... et Dicker* v. *D....* (1927) (ibid., vol. 54 (January-February 1927, p. 1179 *et seq.*), where an action by a mother and newly born child was allowed to proceed against an ex-diplomat. Commenting on the decision, Nöel-Henry said:

> "... the real basis of immunity is the necessity of the function. Consequently, the principle is that the diplomat is covered by immunity only when he is fulfilling his functions... When he has relinquished his post, he can be sued, except in connection with acts performed by him in the fulfilment of his functions; moreover, it is not so much the immunity of the diplomat that is involved as the immunity of the Government which he represents."

See also M. Brandon, "Report on diplomatic immunity by an Interdepartmental Committee on State immunities", *International and Comparative Law Quarterly* (London), vol. 1 (July 1952), p. 358; P. Fiore, *Trattato di diritto internazionale pubblico*, 3rd ed. rev. (Turin, Unione tipografico-editrice, 1887-1891), p. 331, para. 491.

[50] See, for instance, *Dessus* v. *Ricoy* (1907) (*Journal du droit international privé et de la jurisprudence comparée* (Clunet) (Paris), vol. 34 (1907), p. 1086), where the Court said:

> "... since the immunity of diplomatic agents is not personal to them, but is an attribute and a guarantee of the State they represent... the agent cannot waive his immunity, especially when he cannot produce in support of a waiver of immunity any permission to do so issued by his Government."

See also *Reichenbach et Cie* v. *Mme Ricoy* (1906) (ibid., p. 111); *Cottenet et Cie* v. *Dame Raffalowich* (1908) (ibid., vol. 36 (1909), p. 150); the *Grey* case (1953) (*Journal du droit international*, vol. 80 (April-June 1953), p. 886); and *The Attorney General to the Court of Cassation* v. *H.E. Doctor Franco-Franco* (January-March 1954) (ibid., vol. 81, No. 1 (1954), p. 787). See also the provisions of the Vienna Convention on Diplomatic Relations.

[51] The term "commercial transaction" is in fact used in several national legislations. See, for example, the United Kingdom State Immunity Act of 1978 (sect. 3 (3)) (The Public General Acts, 1978, (H.M. Stationery Office), part 1, chap. 33, p. 715; reproduced in United Nations, *Materials on Jurisdictional Immunities...*, pp. 41 *et seq.*); the Singapore State Immunity Act of 1979 (sect. 5 (3)) (*1979 Supplement to the Statutes of the Republic of Singapore*; reproduced in United Nations, *Materials on Jurisdictional Immunities...*, pp. 28 *et seq.*); the Pakistan State Immunity Ordinance of 1981 (sect. 5 (3)) (*The Gazette of Pakistan* (Islamabad), 11 March 1981; reproduced in United Nations, *Materials on Jurisdictional Immunities...*, pp. 20 *et seq.*); the South Africa Foreign States Immunities Act of 1981 (sect. 4 (3)) (*Government Gazette* (Cape Town), vol. 196, No. 7849, 28 October 1981; reproduced in United Nations, *Materials on Jurisdictional Immunities...*, pp. 34 *et seq.*); the Australia Foreign States Immunities Act No. 196 of 1985 (sect. 11 (3)) (*Acts of Parliament of the Commonwealth of Australia passed during the year 1985* (Canberra, 1986), vol. 2, p. 2696; reproduced in ILM (Washington, D.C.), vol. 25 (1986), p. 715).

of a commercial, industrial, trading or professional nature, thus taking in a wide variety of fields of State activities, especially manufacturing, and possibly investment, as well as other transactions. "Contracts of employment" are excluded from this definition since they form the subject of a separate rule, as will emerge from the examination of draft article 11.

(24) Examples of the various types of transactions categorized as commercial transactions are abundant, as illustrated in the commentary to article 10.[52]

Paragraph 2

(25) In order to provide guidance for determining whether a contract or transaction is a "commercial transaction" under paragraph 1 (*c*), two tests are suggested to be applied successively. In the first place, reference should be made primarily to the nature of the contract or transaction. If it is established that it is non-commercial or governmental in nature, there would be no necessity to enquire further as to its purpose.

(26) However, if after the application of the "nature" test, the contract or transaction appears to be commercial, then it is open to the defendant State to contest this finding by reference to the purpose of the contract or transaction if in its practice, that purpose is relevant to determining the non-commercial character of the contract or transaction. This two-pronged approach, which provides for the consideration not only of the nature, but in some instances also of the purpose of the contract or transaction, is designed to provide an adequate safeguard and protection for developing countries, especially in their endeavours to promote national economic development. Defendant States should be given an opportunity to prove that, in their practice, a given contract or transaction should be treated as non-commercial because its purpose is clearly public and supported by *raison d'État*, such as the procurement of food supplies to feed a population, relieve a famine situation or revitalize a vulnerable area, or supply medicaments to combat a spreading epidemic, provided that it is the practice of that State to conclude such contracts or transactions for such public ends. It should be noted, however, that it is the competent court, and not the defendant State, which determines in each case the commercial or non-commercial character of a contract or transaction taking into account the practice of the defendant States. Some delegations in the Sixth Committee as well as members of the Commission stated that they would have preferred to exclude the reference to the purpose test which, in their view, was liable to subjective interpretation.

(27) Controversies have loomed large in the practice of States, as can be seen from the survey of State practice contained in the commentary to article 10. Paragraph 2 of article 2 is aimed at reducing unnecessary controversies arising from the application of a single test, such as the nature of the contract or transaction, which is initially a useful test, but not by any means a conclusive one in all cases. This provision is therefore designed to provide a supplementary standard for determining, in certain cases, whether a particular contract or transaction is "commercial" or "non-commercial". The "purpose" test should not therefore be disregarded totally.[53] A balanced approach is thus ensured by the possibility of reference, as appropriate, to the criterion of the purpose, as well as that of the nature, of the contract or transaction.[54]

(28) What is said above applies equally to a contract for the sale of goods or the supply of services or to other types of commercial transactions as defined in article 2, paragraph 1 (*c*). For instance, a contract of loan to make such a purchase or a contract of guarantee for such a loan could be non-commercial in character, having regard ultimately also to the public purpose for which the contract of purchase was concluded. For example, a contract of guarantee for a loan to purchase food supplies to relieve famine would usually be non-commercial in character because of its presumably public purpose.

Paragraph 3

(29) Paragraph 3 is designed to confine the use of terms in paragraphs 1 and 2, namely "court", "State" and "commercial transaction", to the context of jurisdictional immunities of States and their property. Clearly, these terms may have different meanings in

[52] See the commentary to article 10 below, paras. (13)-(18). In a recent decision, a United States court held that the commercial or non-commercial character of a contract must be determined on the basis of the essential character of the agreement and not on the basis of auxiliary terms that are designed to facilitate the performance of the contract. See *Practical Concepts, Inc.* v. *Republic of Bolivia* (1987) (811 F.2d, p. 1543, United States Court of Appeals, D.C. Cir., 17 February 1987, AJIL (Washington, D.C.), vol. 81 (1987), p. 952).

[53] For example, in the *"Parlement belge"* case (1879) (United Kingdom, *The Law Reports, Probate Division, 1879*, vol. IV, p. 129), Sir Robert Phillimore, after reviewing English and American cases, considered the *Parlement belge* itself as being neither a ship of war nor a vessel of pleasure and thus not entitled to immunity. This decision was reversed by the Court of Appeal (1880) (ibid., *1880*, vol. V, p. 197; see Lord Justice Brett (ibid., p. 203). See also *Gouvernement espagnol* v. *Casaux* (1849) (Dalloz, *Recueil périodique et critique de jurisprudence, 1849* (Paris), part 1, p. 9), concerning the purchase of boots by the Spanish Government for the Spanish army. Cf. *Hanukiew* v. *Ministère de l'Afghanistan* (1933) (*Annual Digest . . ., 1933-1934* (London), vol. 7 (1940), case No. 66, pp. 174-175), concerning a contract for the purchase of arms; and various loan cases, such as the Moroccan Loan, *Laurans* v. *Gouvernement impérial chérifien et la Société marseillaise de crédit* (1934) (see footnote 24 above). See also *Vavasseur* v. *Krupp* (1878) (United Kingdom, *The Law Reports, Chancery Division, 1878*, vol. IX , p. 351); *Trendtex Trading Corporation Ltd.* v. *The Central Bank of Nigeria* (1977) (*The All England Law Reports, 1977* (London), vol. I, p. 881), concerning an order for cement for the construction of barracks in Nigeria. Cf. *Gugenheim* v. *State of Viet Nam* (1961) (*Revue générale de droit international public* (Paris), vol. 66 (1962), p. 654; reproduced in United Nations, *Materials on Jurisdictional Immunities . . .*, p. 257), a case concerning a contract for the purchase of cigarettes for the Vietnamese national army. Other cases relevant in the present context include: *Egyptian Delta Rice Mills Co.* v. *Comisaría General de Abastecimientos y Transportes de Madrid* (1943) (*Annual Digest . . ., 1943-1945* (London), vol. 12 (1949), case No. 27, pp. 103-104), cited by S. Sucharitkul in "Immunities of foreign States before national authorities", *Collected Courses. . ., 1976-I* (Leiden, Sijthoff, 1977), vol. 149, pp. 140-141; *Khan* v. *Fredson Travel Inc.* (1982) (133 D.L.R. (3d), p. 632, Ontario High Court, *Canadian Yearbook of International Law*, vol. XXI, p. 376 (1983)); *X* v. *Empire of . . .* (1963) (*Entscheidungen des Bundesverfassungsgericht*) (Tübingen), vol. 16 (1964), p. 27; United Nations, *Materials on Jurisdictional Immunities . . .*, pp. 282 *et seq.*).

[54] This is of crucial significance in view of the emerging trend in the judicial practice and legislation of some States. See the commentary to article 10 below, paras. (13)-(17).

other international instruments, such as multilateral conventions or bilateral agreements, or in the internal law of any State in respect of other legal relationships. It is thus a signal to States which ratify or accede or adhere to the present articles, that they may do so without having to amend their internal law regarding other matters, because the three terms used have been given specific meaning in the current context only. These definitions are without prejudice to other meanings already given or to be given to these terms in the internal law of States or in international instruments. It should be observed nevertheless that for the States parties to the present articles, the meanings ascribed to those terms by article 2, paragraphs 1 and 2, would have to be followed in all questions relating to jurisdictional immunities of States and their property under the present articles.

(30) Although paragraph 3 confines itself to the terms defined in paragraphs 1 and 2, it applies also to other expressions used in the present draft articles but which are not specifically defined. This understanding is necessary in order to maintain the autonomous character of the articles.

Article 3. Privileges and immunities not affected by the present articles

1. The present articles are without prejudice to the privileges and immunities enjoyed by a State under international law in relation to the exercise of the functions of:

(*a*) its diplomatic missions, consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences; and

(*b*) persons connected with them.

2. The present articles are likewise without prejudice to privileges and immunities accorded under international law to Heads of State *ratione personae*.

Commentary

(1) Article 3 was originally conceived as a signpost to preclude the possibility of overlapping between the present articles and certain existing conventions dealing with the status, privileges, immunities and facilities of specific categories of representatives of Governments. It was originally drafted as a one-paragraph article concerning existing regimes of diplomatic and consular immunities which should continue to apply unaffected by the present articles. Historically, diplomatic immunities under customary international law were the first to be considered ripe for codification, as indeed they have been in the Vienna Convention on Diplomatic Relations, 1961, and in the various bilateral consular agreements. Another classic example of immunities enjoyed under customary international law is furnished by the immunity of sovereigns or other heads of State. A provision indicating that the present draft articles are without prejudice to these immunities appears as paragraph 2 of article 3. Both paragraphs are intended to preserve the privileges and immunities already accorded to specific entities and persons by virtue of existing general international law and more fully by relevant international conventions in force, which remain unaffected by the present articles. In order to conform to this understanding and to align the text of paragraph 1 to that of paragraph 2, the phrase "under international law" has been added to the text of paragraph 1 as adopted provisionally on first reading.

Paragraph 1

(2) Paragraph 1, in its original version, contained specific references to the various international instruments with varying degrees of adherence and ratification. Mention was made of the following missions and persons representing States:

(i) diplomatic missions under the Vienna Convention on Diplomatic Relations of 1961;

(ii) consular missions under the Vienna Convention on Consular Relations of 1963;

(iii) special missions under the Convention on Special Missions of 1969;

(iv) representation of States under the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of 1975;

(v) permanent missions or delegations and observer delegations of States to international organizations or their organs in general;[55]

(vi) internationally protected persons under the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 1973.

(3) Article 3 has since been revised and is now appropriately entitled, "Privileges and immunities not affected by the present articles". A general reference is preferred without any specific enumeration of missions governed by existing international instruments whose status in multilateral relations is far from uniform. Paragraph 1 deals with the following two categories:

(i) diplomatic, consular or special missions as well as missions to international organizations or delegations to organs of international organizations or to international conferences;

(ii) persons connected with such missions.

The extent of privileges and immunities enjoyed by a State in relation to the exercise of the functions of the entities referred to in subparagraph 1 (*a*) is determined by the provisions of the relevant international conventions referred to in paragraph (2) above, where applicable, or by general international law. The Commission had, in this connection, added the words "under international law" after the words "enjoyed by a State". This addition established the necessary parallel between paragraphs 1 and 2. The expression "persons connected with them [missions]" is to be construed similarly.

(4) The expressions "missions" and "delegations" also include permanent observer missions and observer

[55] See, for example, the Convention on the Privileges and Immunities of the United Nations and the Convention on the Privileges and Immunities of the Specialized Agencies, as well as regional conventions.

delegations within the meaning of the Vienna Convention on Representation of States of 1975.

(5) The article is intended to leave existing special regimes unaffected, especially with regard to persons connected with the missions listed. Their immunities may also be regarded, in the ultimate analysis, as State immunity, since the immunities enjoyed by them belong to the State and can be waived at any time by the State or States concerned.

Paragraph 2

(6) Paragraph 2 is designed to include an express reference to the immunities extended under existing international law to foreign sovereigns or other heads of State in their private capacities, *ratione personae*. Jurisdictional immunities of States in respect of sovereigns or other heads of State acting as State organs or State representatives are dealt with under article 2. Article 2, paragraph 1 (*b*) (i) and (v) covers the various organs of the Government of a State and State representatives, including heads of State, irrespective of the systems of government. The reservation of article 3, paragraph 2, therefore refers exclusively to the private acts or personal immunities and privileges recognized and accorded in the practice of States, without any suggestion that their status should in any way be affected by the present articles. The existing customary law is left untouched.[56]

(7) The present draft articles do not prejudge the extent of immunities granted by States to foreign sovereigns or other heads of State, their families or household staff which may also, in practice, cover other members of their entourage. Similarly, the present articles do not prejudge the extent of immunities granted by States to heads of Government and ministers for foreign affairs. Those persons are, however, not expressly included in paragraph 2, since it would be difficult to prepare an exhaustive list, and any enumeration of such persons would moreover raise the issues of the basis and of the extent of the jurisdictional immunity exercised by such persons. A proposal was made at one stage to add after "heads of State" in paragraph 2, heads of government and ministers for foreign affairs, but was not accepted by the Commission.

Article 4. Non-retroactivity of the present articles

Without prejudice to the application of any rules set forth in the present articles to which jurisdictional immunities of States and their property are subject under international law independently of the present articles, the articles shall not apply to any question of jurisdictional immunities of States or their property arising in a proceeding instituted against a State before a court of another State prior to the entry into force of the present articles for the States concerned.

Commentary

(1) Under article 28 of the Vienna Convention on the Law of Treaties, non-retroactivity is the rule in the absence of any provision in the articles to the contrary. The question arises nevertheless as regards the nature and extent of the non-retroactive effect of the application of the present articles. It is necessary to determine a precise point in time at which the articles would apply as between the States which have accepted their provisions. The Commission has decided to select a time which is relatively precise, namely, that the principle of non-retroactivity applies to proceedings instituted prior to the entry into force of the articles as between the States concerned.

(2) Thus, as between the States concerned, the present articles are applicable in respect of proceedings instituted before a court after their entry into force. Article 4 therefore does not purport to touch upon the question of non-retroactivity in other contexts, such as diplomatic negotiations concerning the question of whether a State has violated its obligations under international law to accord jurisdictional immunity to another State in accordance with the rules of international law. This article, by providing specifically for non-retroactivity in respect of a proceeding before a court, does not in any way affect the general rule of non-retroactivity under article 28 of the Vienna Convention on the Law of Treaties. The present draft articles are without prejudice to the application of other rules to which jurisdictional immunities of States and their property are subject under international law, independently of the present articles. Nor are they intended to prejudice current or future developments of international law in this area or in any other related areas not covered by them.

PART II

GENERAL PRINCIPLES

Article 5. State immunity

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

Commentary

(1) Article 5 as provisionally adopted at the thirty-second session of the Commission (then article 6) contained a commentary with an extensive survey of State judicial, executive and legislative practice.[57] The com-

[56] For the case law in this connection, see *Yearbook... 1985*, vol. II (Part One), document A/CN.4/388, paras. 119-125.

[57] See *Yearbook... 1980*, vol. II (Part Two), pp. 142-157. Several other States have recently adopted legislation dealing directly with the subject of State immunity, namely: the Singapore State Immunity Act of 1979; the Pakistan State Immunity Ordinance of 1981; the South Africa Foreign States Immunities Act of 1981, as amended in 1985 [and 1988 (South Africa Foreign States Immunities Amendment Act, No. 5, 3 March 1988; Not in force as of April 1991)]; and the Australia Foreign States Immunities Act of 1985 (see footnote 51

mentary is still generally applicable, except for the passages dealing with the formula adopted then and the two-pronged approach to the formulation of immunity as conferring a right and also as imposing a duty. The second prong is now fully covered in article 6 (Modalities for giving effect to State immunity).

(2) The formulation of article 5, which expresses the main principle of State immunity, has been difficult, as it is a delicate matter. Legal theories abound as to the exact nature and basis of immunity. There is common agreement that for acts performed in the exercise of the *prérogatives de la puissance publique* or "sovereign authority of the State", there is undisputed immunity. Beyond or around the hard core of immunity, there appears to be a grey area in which opinions and existing case law and, indeed, legislation still vary. Some of these indicate that immunity constitutes an exception to the principle of territorial sovereignty of the State of the forum and as such should be substantiated in each case. Others refer to State immunity as a general rule or general principle of international law. This rule is not absolute in any event since even the most unqualified of all the theories of immunity admits one important exception, namely, consent, which also forms the basis for other principles of international law. Others still adhere to the theory that the rule of State immunity is a unitary rule and is inherently subject to existing limitations. Both immunity and non-immunity are part of the same rule. In other words, immunity exists together with its innate qualifications and limitations.

(3) In formulating the text of article 5, the Commission has considered all the relevant doctrines as well as treaties, case law and national legislation, and was able to adopt a compromise formula stating a basic principle of immunity qualified by the provisions of the present articles incorporating those specifying the types of proceedings in which State immunity cannot be invoked. The text adopted on first reading contained square brackets specifying that State immunity was also subject to "the relevant rules of general international law". The purpose of that phrase had been to stress that the present articles did not prevent the development of international law and that, consequently, the immunities guaranteed to States were subject both to present articles and to general international law. This passage had given rise to a number of views, some in favour of its retention and others against. Some members who spoke against retention expressed the view that the retention of the phrase might entail the danger of allowing unilateral interpretation of the draft articles to the extent that exceptions to State immunities could be unduly widened. The Commission finally decided to delete it on second reading for it was considered that any immunity or exception to immunity accorded under the present articles would have no effect on general international law and would not prejudice the future development of State practice. If the articles became a convention, they would be applicable only as between the States which became parties to it. Article 5 is also to be understood as the statement of the principle of State immunity forming the basis of the present draft articles and does not prejudge the question of the extent to which the articles, including article 5, should be regarded as codifying the rules of existing international law.

above); as well as the Canada Act to Provide for State Immunity in Canadian Courts of 1982 (*The Canada Gazette, Part III* (Ottawa), vol. 6, No. 15, 22 June 1982 and *Revised Statutes of Canada, 1985*, vol. VIII, chap. S-18. See also for the recent development of the general practice of State immunity, the second report of the Special Rapporteur (footnote 17 above).

Article 6. Modalities for giving effect to State immunity

1. A State shall give effect to State immunity under article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another State and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected.

2. A proceeding before a court of a State shall be considered to have been instituted against another State if that other State:

(*a*) is named as a party to that proceeding; or

(*b*) is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State.

Commentary

Paragraph 1

(1) In article 6, paragraph 1, an attempt is made to identify the content of the obligation to give effect to State immunity and the modalities for giving effect to that obligation. The rule of State immunity may be viewed from the standpoint of the State giving or granting jurisdictional immunity, in which case a separate and complementary article is warranted.[58] Emphasis is placed, therefore, not so much on the sovereignty of the State claiming immunity, but more precisely on the independence and sovereignty of the State which is required by international law to recognize and accord jurisdictional immunity to another State. Of course, the obligation to give effect to State immunity stated in article 6 applies only to those situations in which the State claiming immunity is entitled thereto under the present draft articles. Since immunity, under article 5, is expressly from the "jurisdiction of another State", there is a clear and unmistakable presupposition of the existence of "jurisdiction" of that other State over the matter under consideration; it would be totally unnecessary to invoke the rule of State immunity in the absence of jurisdiction. There is as such an indispensable and inseparable link between State immunity and the existence of jurisdiction of another State with regard to the matter in question.

[58] Specific provisions to this effect are not uncommon in national legislation. See, for example, the United Kingdom State Immunity Act of 1978 (sect. 1 (2)); the Singapore State Immunity Act of 1979 (sect. 3 (2)); the Pakistan State Immunity Ordinance of 1981(sect. 3 (2)); the South Africa Foreign States Immunities Act of 1981 (sect. 2 (2)) (footnote 51 above); the Canada Act to Provide for State Immunity in Canadian Courts of 1982 (sect. 3 (2)) (footnote 57 above). See also the European Convention on State Immunity, art. 15.

(2) The same initial proposition could well be formulated in reverse, taking the jurisdiction of a State as a starting-point, after having established the firm existence of jurisdiction. Paragraph 1 stipulates an obligation to refrain from exercising such jurisdiction in so far as it involves, concerns or otherwise affects another State that is entitled to immunity and is unwilling to submit to the jurisdiction of the former. This restraint on the exercise of jurisdiction is prescribed as a proposition of international law and should be observed in accordance with detailed rules to be examined and clarified in subsequent draft articles. While this obligation to refrain from exercising jurisdiction against a foreign State may be regarded as a general rule, it is not unqualified. It should be applied in accordance with the provisions of the present articles. From the point of view of the absolute sovereignty of the State exercising its jurisdiction in accordance with its own internal law, any restraint or suspension of that exercise based on a requirement of international law could be viewed as a limitation.

(3) The first prerequisite to any question involving jurisdictional immunity is therefore the existence of a valid "jurisdiction", primarily under internal law rules of a State, and, in the ultimate analysis, the assumption and exercise of such jurisdiction not conflicting with any basic norms of public international law. It is then that the applicability of State immunity may come into play. It should, however, be emphasized that the Commission is not concerned in the consideration of this topic with the compatibility with general international law of a State's internal law on the extent of jurisdiction. Without evidence of valid jurisdiction, there is no necessity to proceed to initiate, let alone substantiate, any claim of State immunity. The authority competent to examine the existence of valid jurisdiction may vary according to internal law, although, in practice, courts are generally competent to determine the existence, extent and limits of their own jurisdiction.

(4) It is easy to overlook the question concerning jurisdiction and to proceed to decide the issue of immunity without ascertaining first the existence of jurisdiction if contested on other grounds. The court should be satisfied that it is competent before proceedings to examine the plea of jurisdictional immunity. In actual practice, there is no established order of priority for the court in its examination of jurisdictional questions raised by parties. There is often no rule requiring the court to exhaust its consideration of other pleas or objections to jurisdiction before deciding the question of jurisdictional immunity.

(5) The second part of paragraph 1 reading "and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected" has been added to the text as adopted on first reading. Its purpose was to define and strengthen the obligation set forth in the first part of the provision. Respect for State immunity would be ensured all the more if the courts of the State of the forum, instead of simply acting on the basis of a declaration by the other State, took the initiative in determining whether the proceedings were really directed against that State, and whether the State was entitled to invoke immunity. Appearance before foreign courts to invoke immunity would involve significant financial implications for the contesting State and should therefore not necessarily be made the condition on which the question of State immunity is determined. On the other hand, the present provision is not intended to discourage the court appearance of the contesting State, which would provide the best assurance for obtaining a satisfactory result. The expression "shall ensure that its courts" is used to make it quite clear that the obligation was incumbent on the forum State, which is responsible for giving effect to it in accordance with its internal procedures. The reference to article 5 indicates that the provision should not be interpreted as prejudging the question whether the State was actually entitled to benefit from immunity under the present articles.

Paragraph 2

(6) Paragraph 2 deals with the notion of proceedings before the courts of one State against another State. There are various ways in which a State can be impleaded or implicated in a litigation or a legal proceeding before the court of another State.

(7) Proceedings before the courts of one State are considered as having been instituted against another State if that other State is named as a party to the proceeding, or in a case where that other State itself is not a party to the proceeding, if the proceeding in effect seeks to affect the property, rights, interests or activities of that other State. The wording has been modified on second reading, in order to draw a clear distinction between two cases.

Paragraph 2 (a)

(8) A State is indubitably implicated in litigation before the courts of another State if a legal proceeding is instituted against it in its own name. The question of immunity arises only when the defendant State is unwilling or does not consent to be proceeded against. It does not arise if the State agrees to become a party to the proceeding.

(9) Although, in the practice of States, jurisdictional immunity has been granted frequently in cases where a State as such has not been named as a party to the proceeding, in reality there is a surprising collection of instances of direct implication in proceedings in which States are actually named as defendants.[59]

(10) Paragraph 2, subparagraph (*a*), applies to all proceedings naming as a party the State itself or any of its entities or persons that are entitled to invoke jurisdictional immunity in accordance with article 2, paragraph 1, subparagraph (*b*).

Paragraph 2 (b)

(11) Without closing the list of beneficiaries of State immunities, it is necessary to note that actions involving

[59] See, for example, *F. Advokaat* v. *I. Schuddinck & den Belgischen Staat* (1923) (*Annual Digest . . ., 1923-1924* (London), vol. 2 (1933), case No. 69, p. 133); *United States of America* v. *Republic of China* (1950) (ILR, 1950 (London) vol. 17 (1956), case No. 43, p. 168); *The "Hai Hsuan"—United States of America* v. *Yong Soon Fe and another* (1950) (ibid., case No. 44, p. 170); *Stato de Grecia* v. *Di Capone* (1926) (*Rivista . . .* (Rome), series III, vol. VI (1927), p. 102); *Pauer* v. *Hungarian People's Republic* (1956) (ILR, 1957 (London), vol. 24 (1961), p. 211); *Alfred Dunhill of London, Inc.* v. *Republic of Cuba* (1976) (ILM (Washington, D.C.), vol. 15, No. 4 (July 1976), p. 735).

seizure or attachment of public properties or properties belonging to a foreign State or in its possession or control have been considered in the practice of States to be proceedings which in effect implicate the foreign sovereign or seek to compel the foreign State to submit to the local jurisdiction. Such proceedings include not only actions *in rem* or in admiralty against State-owned or State-operated vessels used for defence purposes and other peaceful uses,[60] but also measures of prejudgement attachment or seizure (*saisie conservatoire*) as well as execution or measures in satisfaction of judgement (*saisie exécutoire*). The post-judgement or execution order will not be considered in the context of the present article, since it concerns not only immunity from jurisdiction but, beyond that, also immunity from execution, a further stage in the process of jurisdictional immunities.[61]

(12) As has been seen, the law of State immunities has developed in the practice of States not so much from proceedings instituted directly against foreign States or Governments in their own name, but more indirectly through a long line of actions for the seizure or attachment of vessels for maritime liens or collision damages or salvage services.[62] State practice has been rich in instances of State immunities in respect of their men-of-war,[63] visiting forces,[64] ammunitions and weapons[65] and aircraft.[66] The criterion for the foundation of State immunity is not limited to the claim of title or ownership by the foreign Government,[67] but clearly encompasses cases of property in actual possession or control of a foreign State.[68] The Court should not so exercise its jurisdiction as to put a foreign sovereign in the position of choosing between being deprived of property or else submitting to the jurisdiction of the Court.[69]

(13) Subparagraph (*b*) applies to situations in which the State is not named as a party to the proceeding, but is indirectly involved, as for instance in the case of an action *in rem* concerning State property, such as a warship. The wording adopted on first reading has been simplified on second reading. First, the clause "so long as the proceeding in effect seeks to compel that . . . State . . . to submit to the jurisdiction of the court" was deleted as it was, in the case under consideration, meaningless. The words "to bear the consequences of a determination by the court which may affect", in the last part of the sentence was also deleted, because it appeared to create too loose a relationship between the procedure and the consequences to which it gave rise for the State in question and could thus result in unduly broad interpretations of the paragraph. To make the text more precise in that regard, those words have therefore been replaced by the words "to affect". Lastly, the Commission has deleted paragraph 3, which, given the very elaborate definition of the term "State" contained in article 2, no longer had any point.

Article 7. Express consent to exercise of jurisdiction

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case:

(*a*) by international agreement;

(*b*) in a written contract; or

(*c*) by a declaration before the court or by a written communication in a specific proceeding.

2. Agreement by a State for the application of the law of another State shall not be interpreted as consent to the exercise of jurisdiction by the courts of that other State.

Commentary

(1) In the present part of the draft articles, article 5 enunciates the rule of State immunity while article 6 sets out the modalities for giving effect to State immunity. Following these two propositions, a third logical element is the notion of "consent",[70] the various forms of which are dealt with in articles 7, 8 and 9 of this part.[71]

[60] See in this connection the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels; the Convention on the Territorial Sea and the Contiguous Zone, the Convention on the High Seas and the United Nations Convention on the Law of the Sea.

[61] See draft arts. 18-19 below.

[62] See, for example, *The Schooner "Exchange" v. McFaddon and others* (1812) (see footnote 29 above); *The "Prins Frederik"* (1820) (J. Dodson, *Reports of Cases Argued and Determined in the High Court of Admiralty* (1815-1822) (London), vol. II (1828), p. 451); *The "Charkieh"* (1873) (United Kingdom, *The Law Reports, High Court of Admiralty and Ecclesiastical Courts, 1875*, vol. IV, p. 97).

[63] See, for example, *The "Constitution"* (1879) (United Kingdom, *The Law Reports, Probate Division, 1879*, vol. IV , p. 39); *The "Ville de Victoria"* and *The "Sultan"* (1887) (see G. Gidel, *Le droit international public de la mer* (Paris, Sirey, 1932), vol. II, p. 303); *"El Presidente Pinto"* (1891) and *"Assari Tewfik"* (1901) (see C. Baldoni, "Les navires de guerre dans les eaux territoriales étrangères", *Recueil des cours . . . 1938-III* (Paris, Sirey, 1938), vol. 65, pp. 247 *et seq.*).

[64] See, for example, *The Schooner "Exchange"* case (1812) and the status of forces agreements (footnote 29 above).

[65] See, for example, *Vavasseur v. Krupp* (1878) (footnote 53 above).

[66] See, for example, *Hong Kong Aircraft-Civil Air Transport Inc. v. Central Air Transport Corp.* (1953) (United Kingdom, *The Law Reports, House of Lords, Judicial Committee of the Privy Council, 1953*, p. 70).

[67] See, for example, *Juan Ysmael & Co. v. Government of the Republic of Indonesia* (1954) (ILR, 1954 (London), vol. 21 (1957), p. 95), and also cases involving bank accounts of a foreign Government, such as *Trendtex Trading Corporation Ltd. v. The Central Bank of Nigeria* (1977) (footnote 53 above).

[68] See, for example, the *"Philippine Admiral"* (1975) (ILM (Washington, D.C.), vol. 15, No. 1 (January 1976), p. 133).

[69] *Dollfus Mieg et Cie S.A. v. Bank of England* (1950) (see footnote 43 above).

[70] The notion of "consent" is also relevant to the theory of State immunity in another connection. The territorial or receiving State is sometimes said to have consented to the presence of friendly foreign forces passing through its territory and to have waived its normal jurisdiction over such forces. See, for example, Chief Justice Marshall in *The Schooner "Exchange" v. McFaddon and others* (1812) (footnote 29 above).

[71] For the legislative practice of States, see, for example, the United States Foreign Sovereign Immunities Act of 1976 (sect. 1605

(*Continued on next page*)

Paragraph 1

(a) *The relevance of consent and its consequences*

(2) Paragraph 1 deals exclusively with express consent by a State in the manner specified therein, namely, consent given by a State in an international agreement, in a written contract or by a declaration before the courts or by a written communication in a specific proceeding.

(i) *Absence of consent as an essential element of State immunity*

(3) As has been intimated in article 5 (State immunity) and more clearly indicated in article 6 (Modalities for giving effect to State immunity) with respect to the obligation to refrain from subjecting another State to its jurisdiction, the absence or lack of consent on the part of the State against which the court of another State has been asked to exercise jurisdiction is presumed. State immunity under article 5 does not apply if the State in question has consented to the exercise of jurisdiction by the court of another State. There will be no obligation under article 6 on the part of a State to refrain from exercising jurisdiction, in compliance with its rules of competence, over or against another State which has consented to such exercise. The obligation to refrain from subjecting another State to its jurisdiction is not an absolute obligation. It is distinctly conditional upon the absence or lack of consent on the part of the State against which the exercise of jurisdiction is being sought.

(4) Consent, the absence of which has thus become an essential element of State immunity, is worthy of the closest attention. The obligation to refrain from exercising jurisdiction against another State or from impleading another sovereign Government is based on the assertion or presumption that such exercise is without consent. Lack of consent appears to be presumed rather than asserted in every case. State immunity applies on the understanding that the State against which jurisdiction is to be exercised does not consent, or is not willing to submit to the jurisdiction. This unwillingness or absence of consent is generally assumed, unless the contrary is indicated. The court exercising jurisdiction against an absent foreign State cannot and does not generally assume or presume that there is consent or willingness to submit to its jurisdiction. There must be proof or evidence of consent to satisfy the exercise of existing jurisdiction or competence against another State.

(5) Express reference to absence of consent as a condition *sine qua non* of the application of State immunity is borne out in the practice of States. Some of the answers to the questionnaire circulated to Member States clearly illustrate this link between the absence of consent and the permissible exercise of jurisdiction.[72] The expression "without consent" often used in connection with the obligation to decline the exercise of jurisdiction is sometimes rendered in judicial references as "against the will of the sovereign State" or "against the unwilling sovereign".[73]

(ii) *Consent as an element permitting exercise of jurisdiction*

(6) If the lack of consent operates as a bar to the exercise of jurisdiction, it is interesting to examine the effect of consent by the State concerned. In strict logic, it follows that the existence of consent on the part of the State against which legal proceedings are instituted should operate to remove this significant obstacle to the assumption and exercise of jurisdiction. If absence of consent is viewed as an essential element constitutive of State immunity, or conversely as entailing the disability, or lack of power, of an otherwise competent court to exercise its existing jurisdiction, the expression of consent by the State concerned eliminates this impediment to the exercise of jurisdiction. With the consent of the sovereign State, the court of another State is thus enabled or empowered to exercise its jurisdiction by virtue of its general rules of competence, as though the foreign State were an ordinary friendly alien capable of bringing an action and being proceeded against in the ordinary way, without calling into play any doctrine or rule of State or sovereign immunity.[74]

(b) *The expression of consent to the exercise of jurisdiction*

(7) The implication of consent, as a legal theory in partial explanation or rationalization of the doctrine of State immunity, refers more generally to the consent of the State not to exercise its normal jurisdiction against another State or to waive its otherwise valid jurisdiction over another State without the latter's consent. The notion of consent therefore comes into play in more ways than one, with particular reference in the first instance to the State consenting to waive its jurisdiction (hence an-

(*Footnote 71 continued.*)

(*a*) (1)) (footnote 40 above); the United Kingdom State Immunity Act of 1978 (sect. 2); the Singapore State Immunity Act of 1979 (sect. 4); the Pakistan State Immunity Ordinance of 1981 (sect. 4); the South Africa Foreign States Immunities Act of 1981 (sect. 3); the Australia Foreign States Immunities Act of 1985 (sect. 10) (footnote 51 above); Canada Act to Provide for State Immunity in Canadian Courts of 1982 (sect. 4) (footnote 57 above).

[72] See, for example, the reply of Trinidad and Tobago (June 1980) to question 1 of the questionnaire addressed to Governments:

"The common law of the Republic of Trinidad and Tobago provides specifically for jurisdictional immunities for foreign States and their property and generally for non-exercise of jurisdiction over foreign States and their property *without their consent**. A court seized of any action attempting to implead a foreign sovereign or State would apply the rules of customary international law dealing with the subject." (United Nations, *Materials on Jurisdictional Immunities . . .*, p. 610.)

[73] See, for example, Lord Atkin in *The "Cristina"* (1938) (*Annual Digest . . . 1938-40* (London), vol. 9 (1942), case No. 36, p. 250-252):

"The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted into our domestic law, which seem to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign, that is, *they will not by their process make him against his will a party to legal proceedings** whether the proceedings involve process against this person or seek to recover from him specific damages."

[74] Thus, the Fundamentals of Civil Procedure of the USSR and the Union Republics, Approved in the Law of the Union of Soviet Socialist Republics dated 8 December 1961, provides in article 61:

"The filing of a suit against a foreign State, the collection of a claim against it and the attachment of the property located in the USSR may be permitted *only** with the *consent** of the competent organs of the State concerned." (United Nations, *Materials on Jurisdictional Immunities . . .*, p. 40.)

other State is immune from such jurisdiction) and to the instances under consideration, in which the existence of consent to the exercise of jurisdiction by another State precludes the application of the rule of State immunity. Consent of a State to the exercise of jurisdiction by another State could be given with regard to a particular case. Furthermore, the consent of a State with regard to a matter could be confined to a particular case only and consequently would not affect the immunity of the State with regard to a similar matter in another case. The Commission therefore slightly amended on second reading the end of the opening clause of the paragraph, to read: "with regard to the matter or case".

(8) In the circumstances under consideration, that is, in the context of the State against which legal proceedings have been brought, there appear to be several recognizable methods of expressing or signifying consent. In this particular connection, the consent should not be taken for granted, nor readily implied. Any theory of "implied consent" as a possible exception to the general principles of State immunities outlined in this part should be viewed not as an exception in itself, but rather as an added explanation or justification for an otherwise valid and generally recognized exception. There is therefore no room for implying the consent of an unwilling State which has not expressed its consent in a clear and recognizable manner, including by the means provided in article 8. It remains to be seen how consent would be given or expressed so as to remove the obligation of the court of another State to refrain from the exercise of its jurisdiction against an equally sovereign State.

(i) *Consent given in a written contract, or by a declaration or a written communication in a specific proceeding*

(9) An easy and indisputable proof of consent is furnished by the State's expressing its consent in a written contract, as provided in subparagraph (*b*),[75] or in writing on an ad hoc basis for a specific proceeding before the authority when a dispute has already arisen, as provided in subparagraph (*c*). In the latter case, a State is always free to communicate the expression of its consent to the exercise of jurisdiction by the court of another State in a legal proceeding against itself or in which it has an interest, by giving evidence of such consent in the form of an oral declaration before the court properly executed by one of its authorized representatives, such as an agent or counsel, or by a written communication through diplomatic channels or any other generally accepted channels of communication. By the same method, a State could also make known its unwillingness or lack of consent, or give evidence in writing which tends to disprove any allegation or assertion of consent.[76] As originally worded, subparagraph (*c*) provided that the consent of the State could be expressed by a declaration before the court in a specific case. It was, however, pointed out that that wording would require a State wishing to make such a declaration to send a representative especially to appear before a national court; it should be possible to make such a declaration in a written communication to the plaintiff or to the court. The Commission therefore added on second reading the last part of subparagraph (*c*) to provide that the State would have the possibility of consenting to the exercise of jurisdiction by means of such a written communication. The Commission also replaced on second reading the words "in a specific case" by the words "in a specific proceeding", to ensure better coordination between subparagraph (*c*) and the introductory clause of the paragraph.

(ii) *Consent given in advance by international agreement*

(10) The consent of a State could be given for one or more categories or cases. Such expression of consent is binding on the part of the State giving it in accordance with the manner and circumstances in which consent is given and subject to the limitations prescribed by its expression. The nature and extent of its binding character depend on the party invoking such consent. For instance, as provided under subparagraph (*a*) of paragraph 1, if consent is expressed in a provision of a treaty concluded by States, it is certainly binding on the consenting State, and States parties entitled to invoke the provisions of the treaty could avail themselves of the expression of such consent.[77] The law of treaties upholds the validity of the expression of consent to jurisdiction as well as the applicability of other provisions of the treaty. Consequently, lack of privity to the treaty precludes non-parties from the benefit or advantage to be derived from the provisions thereof. If, likewise, consent is expressed in a provision of an international agreement concluded by States and international organizations, the permissive effect of such consent is available to all parties, including international organizations. On the other hand, the extent to which individuals and corporations may successfully invoke one of the provisions of the treaty or international agreement is generally dependent on the specific rules of the domestic legal order concerned on implementation of treaties.

(11) The practice of States does not go so far as to support the proposition that the court of a State is bound to exercise its existing jurisdiction over or against another sovereign State which has previously expressed its consent to such jurisdiction in the provision of a treaty or

[75] See, for example, *Bayerischer Rundfunk* v. *Schiavetti Magnani* (Corte di Cassazione, 12 January 1987) (*Rivista di diritto internazionale privato e processuale* vol. XXIV (1988), p. 512) concerning the employment in Italy of an Italian journalist by a German public broadcasting enterprise. The court found that the parties having agreed in the employment contract to confer exclusive jurisdiction on the courts of Italy, Bayerischer Rundfunk could not invoke immunity from jurisdiction and should be treated as a private enterprise.

[76] See, for example, statements submitted in writing to the Court by accredited diplomats, in *Krajina* v. *The Tass Agency and another* (1949) (footnote 41 above) and in *First Fidelity Bank* v. *the Government of Antigua and Barbuda* (1989) (877 F.2d, p. 189, United States Court of Appeals, 2nd Cir., 7 June 1989); cf. *Compañía Mercantil Argentina* v. *United States Shipping Board* (1924) and *Baccus S.R.L.* v. *Servicio Nacional del Trigo* (1956) (footnote 41 above).

[77] In a recent case, *Frolova* v. *Union of Soviet Socialist Republics* (761 F.2d, p. 370, United States Court of Appeals, 7th Cir., 1 May 1985. AJIL (Washington, D.C.), vol. 79 (1985), p. 1057), the United States Court of Appeals held that the Soviet Union had not implicitly waived its immunity for purposes of the Foreign Sovereign Immunities Act by signing the Charter of the United Nations and the Helsinki accords. The court noted that the Congressional committee reports on the Act refer to waiver by treaty in the context of explicit waivers, but do not include waiver by treaty in the list of examples of implicit waivers.

an international agreement,[78] or indeed in the express terms of a contract[79] with the individual or corporation concerned. While the State having given express consent in any of these ways may be bound by such consent under international law or internal law, the exercise of jurisdiction or the decision to exercise or not to exercise jurisdiction is exclusively within the province and function of the trial court itself. In other words, the rules regarding the expression of consent by the State involved in a litigation are not absolutely binding on the court of another State, which is free to continue to refrain from exercising jurisdiction, subject, of course, to any rules deriving from the internal law of the State concerned. The court can and must devise its own rules and satisfy its own requirements regarding the manner in which such a consent could be given with desired consequences. The court may refuse to recognize the validity of consent given in advance and not at the time of the proceeding, not before the competent authority, or not given *in facie curiae*.[80] The proposition formulated in draft article 7 is therefore discretionary and not mandatory as far as the court is concerned. The court may or may not exercise its jurisdiction. Customary international law or international usage recognizes the exercisability of jurisdiction by the court against another State which has expressed its consent in no uncertain terms, but actual exercise of such jurisdiction is exclusively within the discretion or the power of the court, which could require a more rigid rule for the expression of consent.

(12) Consent to the exercise of jurisdiction in a proceeding before a court of another State covers the exercise of jurisdiction by appellate courts in any subsequent stage of the proceeding up to and including the decision of the court of final instance, retrial and review, but not execution of judgement.

Paragraph 2

(13) Consent by a State to the application of the law of another State shall not be construed as its consent to the exercise of jurisdiction by a court of that other State. Questions of consent to the exercise of jurisdiction and of applicable law to the case must be treated separately. The Commission on second reading added paragraph 2 in order to provide that important clarification.

Article 8. Effect of participation in a proceeding before a court

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has:

(*a*) itself instituted the proceeding; or

(*b*) intervened in the proceeding or taken any other step relating to the merits. However, if the State satisfies the court that it could not have acquired knowledge of facts on which a claim to immunity can be based until after it took such a step, it can claim immunity based on those facts, provided it does so at the earliest possible moment.

2. A State shall not be considered to have consented to the exercise of jurisdiction by a court of another State if it intervenes in a proceeding or takes any other step for the sole purpose of:

(*a*) invoking immunity; or

(*b*) asserting a right or interest in property at issue in the proceeding.

3. The appearance of a representative of a State before a court of another State as a witness shall not be interpreted as consent by the former State to the exercise of jurisdiction by the court.

4. Failure on the part of a State to enter an appearance in a proceeding before a court of another State shall not be interpreted as consent by the former State to the exercise of jurisdiction by the court.

Commentary

(1) Article 8 deals with circumstances under which participation by a State in a proceeding before the courts of another State may be regarded as evidence of consent by that participating State to the exercise of jurisdiction by the courts concerned. The expression of consent or its communication must be explicit. Consent could also be evidenced by positive conduct of the State, but it cannot be presumed to exist by sheer implication, nor by mere silence, acquiescence or inaction on the part of that State. A clear instance of conduct or action amounting to the expression of assent, concurrence, agreement, approval or consent to the exercise of jurisdiction is illustrated by entry of appearance by or on behalf of the State contesting the case on the merits. Such conduct may be in the form of a State requesting to be joined as a party to the litigation, irrespective of the degree of its preparedness or willingness to be bound by the decision or the extent of its prior acceptance of subsequent enforcement measures or execution of judgement.[81] In point of fact,

[78] There are certain multilateral treaties in point such as the European Convention on State Immunity and the 1926 Brussels Convention, and those listed in United Nations, *Materials on Jurisdictional Immunities . . .*, part III, sect. B, pp. 150 *et seq.* There are also a number of relevant bilateral trade agreements between non-socialist countries, between socialist countries and developed countries and between socialist countries and developing countries (ibid., part III, sect. A.3 and A.4, pp. 140 *et seq.*).

[79] See, for example, an agreement between the Banque Française du Commerce Extérieur and the Kingdom of Thailand signed on 23 March 1978 in Paris by the authorized representative of the Minister of Finance of Thailand. Art. III, para. 3.04, provides:

> "For the purpose of jurisdiction and of execution or enforcement of any judgement or award, the Guarantor certifies that he waives and renounces hereby any right to assert before an arbitration tribunal or court of law or any other authority any defence or exception based on his sovereign immunity." (*Malaya Law Review* (Singapore), vol. 22, No. 1 (July 1980), p. 192, note 22.)

[80] See, for example, *Duff Development Co. Ltd.* v. *Government of Kelantan and another* (1924) (footnote 24 above), where by assenting to the arbitration clause in a deed, or by applying to the courts to set aside the award of the arbitrator, the Government of Kelantan did not submit to the jurisdiction of the High Court in respect of a later proceeding by the company to enforce the award. See also *Kahan* v. *Pakistan Federation* (1951) (footnote 25 above) and *Baccus S.R.L.* v. *Servicio Nacional del Trigo* (1956) (footnote 41 above).

[81] Although, for practical purposes, F. Laurent in his *Le droit civil international* (Brussels, Bruylant-Christophe, 1881), vol. III, pp. 80-81, made no distinction between "power to decide" (jurisdiction) and

the expression of consent either in writing, which is dealt with in article 7, or by conduct, which is the subject of the present commentary, entails practically the same results. They all constitute voluntary submission by a State to the jurisdiction, indicating a willingness and readiness on the part of a sovereign State of its own free will to submit to the consequences of adjudication by the court of another State, up to but not including measures of constraint which require separate consent of that foreign State.

Paragraph 1

(2) There is unequivocal evidence of consent to the assumption and exercise of jurisdiction by the court if and when the State knowingly enters an appearance in answer to a claim of right or to contest a dispute involving the State or over a matter in which it has an interest, and when such entry of appearance is unconditional and unaccompanied by a plea of State immunity, despite the fact that other objections may have been raised against the exercise of jurisdiction in that case on grounds recognized either under general conflict rules or under the rules of competence of the trial court other than by reason of jurisdictional immunity.

(3) By choosing to become a party to a litigation before the court of another State, a State clearly consents to the exercise of such jurisdiction, regardless of whether it is a plaintiff or a defendant, or indeed is in an *ex parte* proceeding, or an action *in rem* or in a proceeding seeking to attach or seize a property which belongs to it or in which it has an interest or property which is in its possession or control.

(a) *Instituting or intervening in a legal proceeding*

(4) One clearly visible form of conduct amounting to the expression of consent comprises the act of bringing an action or instituting a legal proceeding before a court of another State. By becoming a plaintiff before the judicial authority of another State, the claimant State, seeking judicial relief or other remedies, manifestly submits to the jurisdiction of the forum. There can be no doubt that when a State initiates a litigation before a court of another State, it has irrevocably submitted to the jurisdiction of the other State to the extent that it can no longer be heard to complain against the exercise of the jurisdiction it has itself initially invoked.[82]

(5) The same result follows in the event that a State intervenes in a proceeding before a court of another State, unless, as stipulated in paragraph 2, the intervention is exclusively a plea of State immunity or made purposely to object to the exercise of jurisdiction on the ground of its sovereign immunity.[83] Similarly, a State which participates in an interpleader proceeding voluntarily submits to the jurisdiction of that court. Any positive action by way of participation in the merits of a proceeding by a State on its own initiative and not under any compulsion is inconsistent with a subsequent contention that the volunteering State is being impleaded against its will. Subparagraph (*b*) provides also for a possibility for a State to claim immunity in the case where a State has taken a step relating to the merits of a proceeding before it had knowledge of facts on which a claim to immunity might be based. It had been pointed out that there might be circumstances in which a State would not be familiar with certain facts on the basis of which it could invoke immunity. It could happen that the State instituted proceedings or intervened in a case before it had acquired knowledge of such facts. In such cases, States should be able to invoke immunity on two conditions. First, the State must satisfy the court that it could only have acquired knowledge of the facts justifying a claim of immunity after it had intervened in the proceeding or had taken steps relating to the merits of the case. Secondly, the State must furnish such proof at the earliest possible moment.[84] The second sentence of paragraph 1 (*b*) which has been added on second reading, deals with that point.

(b) *Entering an appearance on a voluntary basis*

(6) A State may be said to have consented to the exercise of jurisdiction by a court of another State without being itself a plaintiff or claimant, or intervening in proceedings before that court. For instance, a State may volunteer its appearance or freely enter an appearance, not in answer to any claim or any writ of summons, but of its own free will to assert an independent claim in connection with proceedings before a court of another State. Unless the assertion is one concerning jurisdictional immunity in regard to the proceedings in progress, entering an appearance on a voluntary basis before a court of another State constitutes another example of consent to the exercise of jurisdiction, after which no plea of State immunity could be successfully raised.

"power to execute" (execution), consent by a State to the exercise of the power to decide by the court of another State cannot be presumed to extend to the exercise of the power to execute or enforce judgement against the State having consented to the exercise of jurisdiction by appearing before the court without raising a plea of jurisdictional immunity.

[82] For example, the European Convention on State Immunity, which provides, in article 1, para. 1, that:

"A Contracting State which institutes or intervenes in proceedings before a court of another Contracting State submits, for the purpose of those proceedings, to the jurisdiction of the courts of that State."

[83] Thus, according to art. 1, para. 3, of the European Convention on State Immunity:

"A Contracting State which makes a counter-claim in proceedings before a court of another Contracting State submits to the jurisdiction of the courts of that State with respect not only to the counter-claim but also to the principal claim."

See also *The Republic of Portugal* v. *Algemene Olienhandel International (AOI)*, District Court of Rotterdam, 2 April 1982, NJ (1983) No. 722, *Netherlands Yearbook of International Law*, vol. XVI (1985), p. 522, in which Portugal's plea of immunity from jurisdiction must fail since it voluntarily submitted to the jurisdiction of a Dutch court when it objected to a default judgement of the Rotterdam District Court ordering Portugal to pay a sum of money to AOI.

[84] See, for example, subsects. 4 (*a*) and 4 (*b*) of sect. 2 of the United Kingdom State Immunity Act of 1978 (footnote 51 above). Subsect. 5 does not regard as voluntary submission any step taken by a State on proceedings before a court of another State:

"... in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained and immunity is claimed as soon as reasonably practicable."

Delay in raising a plea or defence of jurisdictional immunity may create an impression in favour of submission.

Paragraph 2

(7) A State does not consent to the exercise of jurisdiction of another State by entering a conditional appearance or by appearing expressly to contest or challenge jurisdiction on the grounds of sovereign immunity or State immunity, although such appearances accompanied by further contentions on the merits to establish its immunity could result in the actual exercise of jurisdiction by the court.[85] Participation for the limited purpose of objecting to the continuation of the proceedings will not be viewed as consent to the exercise of jurisdiction either.[86] Furthermore, a State may assert a right or interest in property by presenting *prima facie* evidence on its title at issue in a proceeding to which the State is not a party, without being submitted to the jurisdiction of another State, under paragraph 2 (*b*). But, if a State presents a claim on the property right in a proceeding, that is regarded as an intervention in the merit and accordingly the State cannot invoke immunity in that proceeding.

Paragraph 3

(8) This paragraph was introduced here on second reading to identify another type of appearance of a State, or its representatives in their official capacity, in a proceeding before a court of another State that does not constitute evidence of consent by the participating State to the exercise of jurisdiction by the court.[87] This exception to the rule of non-immunity related to a State's participation in a foreign proceeding, however, is limited to cases of appearance of the State, or its representatives as a witness, for example, to affirm that a particular person is a national of the State, and does not relate to all appearances of a State or its representatives in a foreign proceeding in the performance of the duty of affording protection to nationals of that State.[88]

Paragraph 4

(9) By way of contrast, it follows that failure on the part of a State to enter an appearance in a legal proceeding is not to be construed as passive submission to the jurisdiction. The term "failure" in the present article covers cases of non-appearance, either intentional or unintentional, in the sense of a procedural matter, and does not affect the substantive rules concerning the appearance or non-appearance of a State before foreign courts.[89] Alternatively, a claim or interest by a State in property under litigation is not inconsistent with its assertion of jurisdictional immunity.[90] A State cannot be compelled to come before a court of another State to assert an interest in a property against which an action *in rem* is in progress, if that State does not choose to submit to the jurisdiction of the court entertaining the proceedings.

Article 9. Counter-claims

1. A State instituting a proceeding before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of any counter-claim arising out of the same legal relationship or facts as the principal claim.

2. A State intervening to present a claim in a proceeding before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of any counter-claim arising out of the same legal relationship or facts as the claim presented by the State.

3. A State making a counter-claim in a proceeding instituted against it before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of the principal claim.

Commentary

(1) Article 9 follows logically from articles 7 and 8. While article 7 deals with the effect of consent given expressly by one State to the exercise of jurisdiction by a court of another State, article 8 defines the extent to

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[85] There could be no real consent without full knowledge of the right to raise an objection on the ground of State immunity (*Baccus S.R.L.* v. *Servicio Nacional del Trigo* (1956) (see footnote 41 above), but see also Earl Jowitt, in *Juan Ysmael & Co.* v. *Government of the Republic of Indonesia* (1954) (footnote 67 above), where he said *obiter* that a claimant Government:

> ". . . must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective. The court must be satisfied that conflicting rights have to be decided in relation to the foreign government's claim.").

Cf. the *Hong Kong Aircraft* case (see footnote 66 above), in which Sir Leslie Gibson of the Supreme Court of Hong Kong did not consider mere claim of ownership to be sufficient (ILR, 1950 (London), vol. 17 (1956), case No. 45, p. 173). Contrast Justice Scrutton in *The "Jupiter" No. 1* (1924) (United Kingdom, *The Law Reports, Probate Division, 1924*, p. 236), and Lord Radcliffe in the "Gold bars" case (1952) (see footnote 43 above), pp. 176-177.

[86] See, for example, art. 13 of the European Convention on State Immunity:

> "Paragraph 1 of Article 1 shall not apply where a Contracting State asserts, in proceedings pending before a court of another Contracting State to which it is not a party, that it has a right or interest in property which is the subject-matter of the proceedings, and the circumstances are such that it would have been entitled to immunity if the proceedings had been brought against it."

See also *Dollfus Mieg et Cie. S.A.* v. *Bank of England* (1950) (see footnote 43 above).

[87] See footnote 84 above.

[88] This provision, however, does not affect the privileges and immunities of members of a diplomatic mission or consular post of a State in respect of appearance before judicial or administrative proceedings of another State accorded under international law. See the Vienna Convention on Diplomatic Relations (art. 31, para. 2) and the Vienna Convention on Consular Relations (art. 44, para. 1).

[89] Thus, in *Dame Lizarda dos Santos* v. *Republic of Iraq* (Supreme Court, undated) (*extraits* in French in *Journal du droit international* (Clunet) (Paris), vol. 115 (1988), p. 472), the appeal of a Brazilian national employed as a cook at the Embassy of Iraq against a court decision to refrain from exercising immunity, on its own initiative, on the ground that Iraq had implicitly renounced its immunity, was rejected by the Court which stated that it could not recognize an implied waiver based solely on the State's refusal to respond to the complaint.

[90] For example, in *The "Jupiter" No. 1* (1924) (see footnote 85 above), Justice Hill held that a writ *in rem* against a vessel in the possession of the Soviet Government must be set aside inasmuch as the process against the ship compelled all persons claiming interests therein to assert their claims before the court, and inasmuch as the USSR claimed ownership in her *and did not submit to the jurisdiction.** Contrast *The "Jupiter" No. 2* (1925), where the same ship was then in the hands of an Italian company and the Soviet Government did not claim an interest in her (United Kingdom, *The Law Reports, Probate Division, 1925*, p. 69).

which consent may be inferred from a State's conduct in participating in a proceeding before a court of another State. Article 9 is designed to complete the trilogy of provisions on the scope of consent by dealing with the effect of counter-claims against a State and counter-claims by a State.

(2) A State may institute a proceeding before a court of another State under article 8, paragraph 1 (*a*), thereby consenting or subjecting itself to the exercise of jurisdiction by that court in respect of that proceeding, including pre-trial hearing, trial and decisions, as well as appeals. Such consent to jurisdiction is not consent to execution, which is a separate matter to be dealt with in part IV in connection with immunity of the property of States from attachment and execution. The question may arise as to the extent to which the initiative taken by a State in instituting that proceeding could entail its subjection or amenability to the jurisdiction of that court in respect of counter-claims against the plaintiff State. Conversely, a State against which a proceeding has been instituted in a court of another State may decide to make a counter-claim against the party which initiated the proceeding. In both instances, a State is to some extent amenable to the competent jurisdiction of the forum, since in either case there is clear evidence of consent by conduct or manifestation of volition to submit to the jurisdiction of that court. The consequence of the expression of consent by conduct, such as by a State instituting a proceeding, or by intervening in a proceeding to present a claim or, indeed, by making a counter-claim in a proceeding instituted against it, may indeed vary according to the effectiveness of its consent to the exercise of jurisdiction by the competent judicial authority concerned. In each of the three cases, an important question arises as to the extent and scope of the effect of consent to the exercise of jurisdiction in the event of such a counter-claim against or by a State.

(a) *Counter-claims against a State*

(3) The notion of "counter-claims" presupposes the prior existence or institution of a claim. A counter-claim is a claim brought by a defendant in response to an original or principal claim. For this reason, there appear to be two possible circumstances in which counter-claims could be brought against a State. The first possibility is where a State has itself instituted a proceeding before a court of another State, as in article 8, paragraph 1 (*a*), and in article 9, paragraph 1. The second case occurs when a State has not itself instituted a proceeding but has intervened in a proceeding to present a claim. There is an important qualification as to the purpose of the intervention. In article 8, paragraph 1 (*b*), a State may intervene in a proceeding or take any other step relating to the merits thereof, and by such intervention subject itself to the jurisdiction of that court in regard to the proceeding, subject to the qualification provided in the same subparagraph. Article 9, paragraph 2, deals with cases where a State intervenes in order to present a claim; hence the possibility arises of a counter-claim being brought against the State in respect of the claim it has presented by way of intervention. There would be no such possibility of a counter-claim against an intervening State which had not also made a claim in connection with the proceeding. For instance, a State could intervene as an *amicus curiae*, or in the interest of justice, or to make a suggestion, or to give evidence on a point of law or of fact without itself consenting to the exercise of jurisdiction against it in respect of the entire proceeding. Such actions would not fall under paragraph 2 of article 9. Thus, as in article 8, paragraph 2 (*a*), a State could intervene to invoke immunity or, as in paragraph 2 (*b*) of that article, to assert a right or interest in property at issue in that proceeding. In the case of paragraph 2 (*b*) of article 8, the intervening State, in so far as it may be said to have presented a claim connected with the proceeding, could also be considered to have consented to a counter-claim brought against it in respect of the claim it has presented, quite apart from, and in addition to, its amenability to the requirement to answer a judicial inquiry or to give prima facie evidence in support of its title or claim to rights or interests in property as contemplated in article 8, paragraph 2 (*b*). Even to invoke immunity as envisaged in article 8, paragraph 2 (*a*), a State may also be required to furnish proof or the legal basis of its claim to immunity. But once the claim to immunity is sustained under article 8, paragraph 2 (*a*), or the claim or right or title is established under paragraph 2 (*b*), consent to the exercise of jurisdiction ceases. The court should, therefore, in such a case, refrain from further exercise of jurisdiction in respect of the State that is held to be immune or the property in which the State is found to have an interest, for the reason that the State and the property respectively would, in ordinary circumstances, be exempt from the jurisdiction of the court. Nevertheless, the court could continue to exercise jurisdiction if the proceeding fell within one of the exceptions provided in part III or the State had otherwise consented to the exercise of jurisdiction or waived its immunity.

Paragraph 1

(4) As has been seen in article 8, paragraph 1 (*a*), a State which has itself instituted a proceeding is deemed to have consented to the jurisdiction of the court for all stages of the proceeding, including trial and judgement at first instance, appellate and final adjudications and the award of costs where such lies within the discretion of the deciding authority, but excluding execution of the judgement. Article 9, paragraph 1, addresses the question of the extent to which a State which has instituted a proceeding before a court of another State may be said to have consented to the jurisdiction of the court in respect of counter-claims against it. Clearly, the mere fact that a State has instituted a proceeding does not imply its consent to all other civil actions against the State which happen to be justiciable or subject to the jurisdiction of the same court or another court of the State of the forum. The extent of consent in such an event is not unlimited, and the purpose of article 9, paragraph 1, is to ensure a more precise and better balanced limit of the extent of permissible counter-claims against a plaintiff State. A State instituting a proceeding before a court of another State is not open to all kinds of cross-actions before that court nor to cross-claims by parties other than the defendants. A plaintiff State has not thereby consented to separate and independent counter-claims. There is no general submission to all other proceedings or all actions against the State, nor for all times. The State instituting a proceeding is amenable to the court's jurisdiction in re-

spect of counter-claims arising out of the same legal relationship or facts as the principal claim,[91] or the same transaction or occurrence that is the subject-matter of the principal claim.[92] In some jurisdictions, the effect of a counter-claim against a plaintiff State is also limited in amount, which cannot exceed that of the principal claim; or if it does exceed the principal claim, the counter-claims against the State can only operate as a set-off.[93] This is expressed in American legal terminology as "recoupment against the sovereign claimant", which normally cannot go beyond "the point where affirmative relief is sought".[94] Only defensive counter-claims against foreign States appear to have been permitted in common-law jurisdictions.[95] On the other hand, in some civil-law jurisdictions, independent counter-claims have been allowed to operate as offensive remedies, and, in some cases, affirmative relief is known to have been granted.[96]

(5) Where the rules of the State of the forum so permit, article 9, paragraph 1, also applies in the case where a counter-claim is made against a State, and that State could not, in accordance with the provisions of the present articles, notably in part III, invoke immunity from jurisdiction in respect of that counter-claim, had separate proceedings been brought against the State in those courts.[97] Thus independent counter-claims, arising out of different transactions or occurrences not forming part of the subject-matter of the claim or arising out of a distinct legal relationship or separate facts from those of the principal claim, may not be maintained against the plaintiff State, unless they fall within the scope of one of the admissible exceptions under part III. In other words, independent counter-claims or cross-actions may be brought against a plaintiff State only when separate proceedings are available against that State under other parts of the present articles, whether or not the State has instituted a proceeding as in paragraph 1 or has intervened to present a claim as in paragraph 2 of article 9.

Paragraph 2

(6) Paragraph 2 of article 9 deals with cases where a State intervenes in a proceeding before a court of another State not as an *amicus curiae*, but as an interested party, to present a claim. It is only in this sense that it is possible to conceive of a counter-claim being brought against a State which has intervened as a claimant, and not as a mere witness or merely to make a declaration, as in article 8, paragraph 1 (*b*), without presenting a claim. Once a State has intervened in a proceeding to make or present a claim, it is amenable to any counter-claim against it which arises out of the same legal relationship or facts as the claim presented by the State. Other parts of the commentary applicable to paragraph 1 concerning the limits of permissible counter-claims against a plaintiff State apply equally to counter-claims against an intervening claimant State, as envisaged in paragraph 2. They apply in particular to the identity of the legal relationship and facts as between the claim presented by the intervening State and the counter-claim, and possibly also to the quantum of the counter-claim and the extent or absence of allowable affirmative relief, if any, or of a remedy different in kind from, or beyond the limits of, the claim presented by the intervening State.

(b) *Counter-claims by a State*

Paragraph 3

(7) Where a State itself makes a counter-claim in a proceeding instituted against it before a court of another State, it is taking a step relating to the merits of the proceeding within the meaning of article 8, paragraph 1. In such a case, the State is deemed to have consented to the exercise of jurisdiction by that court with respect not

[91] For example, the United Kingdom State Immunity Act of 1978 (see footnote 51 above) provides in sect. 2, subsect. (6), that:

> "A submission in respect of any proceedings extends to any appeal but not to any counter-claim unless it arises out of the same legal relationship or facts as the claim."

See also *Strousberg* v. *Republic of Costa Rica* (1881), *Law Times Reports* (London), vol. 44, p. 199, where the defendant was allowed to assert any claim he had by way of cross-action or counter-claim to the original action in order that justice might be done. But such counter-claims and cross-suits can only be brought in respect of the same transactions and only operate as set-offs.

[92] For example, the United States Foreign Sovereign Immunities Act of 1976 (see footnote 40 above) provides in sect. 1607 (Counter-claims), subsect. (*b*), that immunity shall not be accorded with respect to any counter-claim "arising out of the transaction or an occurrence that is the subject-matter of the claim of the foreign State". Thus, in *Kunstsammlungen Zu Weimar and Grand Duchess of Saxony-Weimar* v. *Federal Republic of Germany and Elicofon* (United States Court of Appeals, 2nd Cir., 5 May 1982, ILM (Washington, D.C.), vol. 21 (1982), p. 773) where the court was asked to determine the ownership of two priceless Albrecht Dürer portraits based on the competing claims of the German Democratic Republic, the Federal Republic of Germany, the Grand Duchess of Saxony-Weimar, and a United States citizen who had purchased the drawings in good faith without knowledge that they were Dürers, it held that the Grand Duchess' cross-claim for annuities under a 1921 agreement did not come under the immunity exception for counter-claims arising out of the same transaction or occurrence as the claim of the foreign State.

[93] Sect. 1607, subsect. (*c*), of the United States Foreign Sovereign Immunities Act of 1976 states: "to the extent that the counter-claim does not seek relief exceeding in amount or differing in kind from that sought by the foreign State" (see footnote 40 above). See also *Strousberg* v. *Republic of Costa Rica* (1881) (footnote 91 above) and *Union of Soviet Socialist Republics* v. *Belaiew* (1925) (*The All England Law Reports, 1925* (London) (reprint), p. 369).

[94] See, for example, *South African Republic* v. *La Compagnie franco-belge du chemin de fer du Nord* (1897) (United Kingdom, *The Law Reports, Chancery Division, 1898*, p. 190) and the cases cited in footnotes 91 and 93 above.

[95] For an indication of possible means of affirmative relief in justifiable circumstances, see *Republic of Haiti* v. *Plesch* et al. (1947) (*New York Supplement, 2nd Series*, vol. 73 (1947), p. 645); *United States of Mexico* v. *Rask* (1931) (*Pacific Reporter, 2nd Series*, vol. 4 (1931), p. 981); see also *The International and Comparative Law Quarterly* (London), vol. 2 (1953), p. 480; *The Law Quarterly Review* (London), vol. 71, No. 283 (July 1955), p. 305; *The Modern Law Review* (London), vol. 18 (1955), p. 417; and *Minnesota Law Review* (Minneapolis, Minn.), vol. 40 (1956), p. 124. See, however, *Alberti* v. *Empresa Nicaragüense de la Carne* (705 F.2d, p. 250, United States Court of Appeals, 7th Cir., 18 April 1983).

[96] See, for example, *Etat du Pérou* v. *Kreglinger* (1857) (*Pasicrisie belge, 1857* (Brussels), part 2, p. 348); *Letort* v. *Gouvernement ottoman* (1914) (*Revue juridique internationale de la locomotion aérienne* (Paris), vol. V (1914), p. 142).

[97] See, for example, the United States Foreign Sovereign Immunities Act of 1976 (footnote 40 above), sect. 1607, subsect. (*a*), concerning counter-claims "for which a foreign State would not be entitled to immunity under sect. 1605 of this chapter had such claim been brought in a separate action against the foreign State". Cf. art. 1, para. 2, of the European Convention on State Immunity and Additional Protocol.

only to the counter-claim brought by the State itself, but also to the principal claim against it.

(8) By itself bringing a counter-claim before a judicial authority of another State, a State consents by conduct to the exercise of jurisdiction by that forum. However, the effect, extent and scope of counter-claims by a State under article 9, paragraph 3, could be wider than those of counter-claims against the plaintiff State under paragraph 1, or against the intervening claimant State under paragraph 2 of article 9. For one thing, counter-claims by a defendant foreign State, although usually limited by local law to matters arising out of the same legal relationship or facts as the principal claim, are not limited in respect of the extent or scope of the relief sought, nor in respect of the nature of the remedy requested. Indeed, if they arise out of a different legal relationship or a different set of facts from those of the principal claim or if they are truly new and separate or independent counter-claims, they are still permissible as independent claims or, indeed, as separate proceedings altogether unconnected with the principal or original claim against the State. It is clear that the defendant State has the choice of bringing a counter-claim against the plaintiff or instituting a fresh and separate proceeding. Whatever the alternative chosen, the State making the counter-claim under article 9, paragraph 3, or instituting a separate proceeding under article 8, paragraph 1, is deemed to have consented to the exercise of jurisdiction by that court. Under article 8, as has been seen, the plaintiff State has consented to all stages of the proceeding before all the courts up to judgement, but not including its execution. Likewise, under article 9, paragraph 3, a State is deemed to have consented to the exercise of jurisdiction with regard to its counter-claims and to the principal claim instituted against it.[98]

PART III

PROCEEDINGS IN WHICH STATE IMMUNITY CANNOT BE INVOKED

(1) The title of part III, as adopted provisionally on first reading, contained two alternative titles in square brackets reading "[Limitations on] [Exceptions to] State immunity" which reflected, on the one hand, the position of those States which had favoured the term "limitations" subscribing to the notion that present international law did not recognize the jurisdictional immunity of States in the areas dealt with in part III and, on the other hand, the position of those which had favoured the term "exceptions" holding the view that the term correctly described the notion that State jurisdictional immunity was the rule of international law, and exceptions to that rule were made subject to the express consent of the State. The Commission adopted the present formulation on second reading to reconcile these two positions.

(2) It is to be kept in mind that the application of the rule of State immunity is a two-way street. Each State is a potential recipient or beneficiary of State immunity as well as having the duty to fulfil the obligation to give effect to jurisdictional immunity enjoyed by another State.

(3) In the attempt to specify areas of activity to which State immunity does not apply, several distinctions have been made between acts or activities to which State immunity is applicable and those not covered by State immunity. The distinctions, which have been discussed in greater detail in a document submitted to the Commission,[99] have been drawn up on the basis of consideration of the following factors: dual personality of the State,[100] dual capacity of the State,[101] *acta jure imperii* and *acta jure gestionis*,[102] which also relate to the public and private nature of State acts,[103] and commercial and non-commercial activities.[104] The Commission, however, decided to operate on a pragmatic basis, taking into account the situations involved and the practice of States.

Article 10. Commercial transactions

1. If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.

2. Paragraph 1 does not apply:

(*a*) in the case of a commercial transaction between States; or

(*b*) if the parties to the commercial transaction have expressly agreed otherwise.

3. The immunity from jurisdiction enjoyed by a State shall not be affected with regard to a proceeding which relates to a commercial transaction engaged in by a State enterprise or other entity established by the State which has an independent legal personality and is capable of:

(*a*) suing or being sued; and

(*b*) acquiring, owning or possessing and disposing of property, including property which the State has authorized it to operate or manage.

Commentary

(a) *General observations on the draft article*

(1) Article 10 as adopted by the Commission on second reading is now entitled "Commercial transactions", replacing the words "commercial contracts" originally adopted on first reading, consistent with the change made in article 2 (Use of terms), paragraph 1 (*c*). It constitutes the first substantive article of part III, dealing

[98] See, for example, art. 1, para. 3, of the European Convention on State Immunity.

[99] See *Yearbook ... 1982*, vol. II (Part One), p. 199, document A/CN.4/357, paras. 35-45.

[100] Ibid., para. 36.

[101] Ibid., para. 37.

[102] Ibid., paras. 38-39.

[103] Ibid., paras. 40-42.

[104] Ibid., paras. 43-45.

with proceedings in which State immunity cannot be invoked.

Paragraph 1

(2) Paragraph 1 represents a compromise formulation. It is the result of continuing efforts to accommodate the differing viewpoints of those who are prepared to admit an exception to the general rule of State immunity in the field of trading or commercial activities, based upon the theory of implied consent, or on other grounds, and those who take the position that a plea of State immunity cannot be invoked to set aside the jurisdiction of the local courts where a foreign State engages in trading or commercial activities. For reasons of consistency and clarity, the phrase "the State is considered to have consented to the exercise of" which appeared in the original text of paragraph 1 provisionally adopted on first reading has been amended to read "the State cannot invoke immunity", as a result of the Commission's second reading of the draft article. This change, which is also made in articles 11 to 14, does not, however, suggest any theoretical departure from various viewpoints as described above. The Commission held an extensive debate on this specified area of State activities[105] and adopted a formula in an attempt to take into account the interests and views of all countries with different systems and practices.

(3) The application of jurisdictional immunities of States presupposes the existence of jurisdiction or the competence of a court in accordance with the relevant internal law of the State of the forum. The relevant internal law of the forum may be the laws, rules or regulations governing the organization of the courts or the limits of judicial jurisdiction of the courts and may also include the applicable rules of private international law.

(4) It is common ground among the various approaches to the study of State immunities that there must be a pre-existing jurisdiction in the courts of the foreign State before the possibility of its exercise arises and that such jurisdiction can only exist and its exercise only be authorized in conformity with the internal law of the State of the forum, including the applicable rules of jurisdiction, particularly where there is a foreign element involved in a dispute or differences that require settlement or adjudication. The expression "applicable rules of private international law" is a neutral one, selected to refer the settlement of jurisdictional issues to the applicable rules of conflict of laws or private international law, whether or not uniform rules of jurisdiction are capable of being applied. Each State is eminently sovereign in matters of jurisdiction, including the organization and determination of the scope of the competence of its courts of law or other tribunals.

(5) The rule stated in paragraph 1 of article 10 concerns commercial transactions between a State and a foreign natural or juridical person when a court of another State is available and in a position to exercise its jurisdiction by virtue of its own applicable rules of private international law. The State engaging in a commercial transaction with a person, natural or juridical, other than its own national cannot invoke immunity from the exercise of jurisdiction by the judicial authority of another State where that judicial authority is competent to exercise its jurisdiction by virtue of its applicable rules of private international law. Jurisdiction may be exercised by a court of another State on various grounds, such as the place of conclusion of the contract, the place where the obligations under the contract are to be performed, or the nationality or place of business of one or more of the contracting parties. A significant territorial connection generally affords a firm ground for the exercise of jurisdiction, but there may be other valid grounds for the assumption and exercise of jurisdiction by virtue of the applicable rules of private international law.

Paragraph 2

(6) While the wording of paragraph 1, which refers to a commercial transaction between a State and a foreign natural or juridical person, implies that the State-to-State transactions are outside the scope of the present article, this understanding is clarified in paragraph 2, particularly because "foreign natural or juridical persons" could be interpreted broadly to include both private and public persons.[106]

(7) Subparagraphs (*a*) and (*b*) of paragraph 2 are designed to provide precisely the necessary safeguards and protection of the interests of all States. It is a well-known fact that developing countries often conclude trading contracts with other States, while socialist States also engage in direct State-trading not only among themselves, but also with other States, both in the developing world and with the highly industrialized countries. Such State contracts, concluded between States, are excluded by subparagraph (*a*) of paragraph 2 from the operation of the rule stated in paragraph 1. Thus State immunity continues to be the applicable rule in such cases. This type of contract also includes various tripartite transactions for the better and more efficient administration of food aid programmes. Where food supplies are destined to relieve famine or revitalize a suffering village or a vulnerable area, their acquisition could be financed by another State or a group of States, either directly or through an international organization or a specialized agency of the United Nations, by way of purchase from a developing

[105] See *Yearbook... 1982*, vol. I, pp. 183-199, 1728th meeting, paras. 7-45, and 1729th to 1730th meetings; the discussion is summarized in *Yearbook... 1982*, vol. II (Part Two), pp. 98-99, paras. 194-197. See also, comments and observations of Governments reproduced in *Yearbook... 1988*, vol. II (Part One), pp. 51 *et seq.*, document A/CN.4/410 and Add.1-5, and the Commission's discussion at its forty-first session, which is summarized in *Yearbook... 1989*, vol. II (Part Two), pp. 107-108, paras. 489-498.

[106] See, for example, *Republic of Syria* v. *Arab Republic of Egypt* (Supreme Court, undated) (*extraits* in French in *Journal du droit international* (Clunet) (Paris), vol. 115 (1988), p. 472) concerning the dispute of the ownership of a building purchased by Syria in Brazil, subsequently used by Egypt and retained by Egypt after the break-up of the union between the two States. By a one-vote majority, immunity from jurisdiction prevailed in the Court's split decision.

The Government Procurator held the view that a discussion of the substantive issues could be relevant only if the Arab Republic of Egypt accepted Brazilian jurisdiction. He said that its right to refuse was clear, and would have been even according to the doctrine of restrictive immunity, still confused and hardly convincing, which made a distinction between acts *jure imperii* and *jure gestionis*. This was because the case at hand had nothing to do with any private business whatsoever, but concerned diplomatic premises within the context of State succession, which was exclusively and primarily within the domain of public international law.

food-exporting country on a State-to-State basis as a consequence of tripartite or multilateral negotiations. Transactions of this kind not only help the needy population, but may also promote developing countries' exports instead of encouraging dumping or unfair competition in international trade. It should be understood that "a commercial transaction between States" means a transaction which involves all agencies and instrumentalities of the State, including various organs of government, as defined in article 2, paragraph (1) (*b*).

(8) Subparagraph (*b*) leaves a State party to a commercial transaction complete freedom to provide for a different solution or method of settlement of differences relating to the transaction. A State may expressly agree in the commercial transaction itself, or through subsequent negotiations, to arbitration or other methods of amicable settlement such as conciliation, good offices or mediation. Any such express agreement would normally be in writing.

Paragraph 3

(9) Paragraph 3 sets out a legal distinction between a State and certain of its entities in the matter of State immunity from foreign jurisdiction. In the economic system of some States, commercial transactions as defined in article 2, paragraph 1 (*c*), are normally conducted by State enterprises, or other entities established by a State, which have independent legal personality. The manner under which State enterprises or other entities are established by a State may differ according to the legal system of the State. Under some legal systems, they are established by a law or decree of the Government. Under some other systems, they may be regarded as having been established when the parent State has acquired majority shares or other ownership interests. As a rule, they engage in commercial transactions on their own behalf as separate entities from the parent State, and not on behalf of that State. Thus, in the event of a difference arising from a commercial transaction engaged in by a State entity, it may be sued before the court of another State and may be held liable for any consequences of the claim by the other party. In such a case, the immunity of the parent State itself is not affected, since it is not a party to the transaction.

(10) The application of the provision of paragraph 3 is subject to certain conditions. First, a proceeding must be concerned with a commercial transaction engaged in by a State enterprise or other entity. Secondly, a State enterprise or entity must have an independent legal personality. Such an independent legal personality must include the capacity to: (*a*) sue or be sued; and (*b*) acquire, own, possess and dispose of property, including property which the State has authorized the enterprise or entity to operate or manage. In some socialist States, the State property which the State empowers its enterprises or other entities to operate or manage is called "segregated State property". This terminology is not used in paragraph 3, since it is not universally applicable in other States. The requirements of subparagraphs (*a*) and (*b*) are cumulative: in addition to the capacity of such State enterprises and other entities to sue or be sued, they must also satisfy certain financial requirements as stipulated in subparagraph (*b*). Namely, they must be capable of acquiring, owning or possessing and of disposing of property—property that the State has authorized them to operate or manage as well as property they gain themselves as a result of their activities. The term "disposing" in paragraph (*b*) is particularly important, because that makes the property of such entities, including the property which the State authorized them to operate or manage, potentially subject to measures of constraint, such as attachment, arrest and execution, to the satisfaction of the claimant.

(11) The text of paragraph 3 is the result of lengthy discussion in the Commission. The original proposal (former article 11 *bis*), which was submitted by the Special Rapporteur in response to the suggestion of some members and Governments, was an independent article relating specifically to State enterprises with segregated property. During the Commission's deliberation of the proposal, however, it was the view of some members that the provision was of limited application as the concept of segregated property was a specific feature of socialist States and should not be included in the present draft articles. However, the view of some other members was that the question of State enterprises performing commercial transactions as separate and legally distinct entities from the State had a much wider application as it was also highly relevant to developing countries and even to many developed countries. They further maintained that a distinction between such enterprises and the parent State should be clarified in the present draft articles in order to avoid abuse of judicial process against the State. The Commission, taking into account these views, adopted the present formulation which includes not only the State enterprise with segregated property but also any other enterprise or entity established by the State engaged in commercial transactions on its own behalf, having independent legal personality and satisfying certain requirements as specified in subparagraphs (*a*) and (*b*). The Commission further agreed to the inclusion of the provision as part of article 10 rather than as an independent article, since article 10 itself deals with "commercial transactions". One member, however, had serious reservations about the substance of paragraph 3 which, in his view, had been introduced to meet the concern of a limited number of States and was likely to thwart the whole object of the draft articles, which was to ensure the enforcement of commercial transactions and the performance of contractual obligations. Other members emphasized that the provisions of subparagraphs (*a*) and (*b*) did not add anything to the notion of "independent legal personality" and were therefore superfluous.

(12) Although not specifically dealt with in the draft articles, note should be taken of the question of fiscal matters particularly in relation to the provisions of article 10. It is recalled that former article 16 as provisionally adopted on first reading dealt with that particular question.[107] One member expressed strong reservations with regard to the article, since it violated the principle of the sovereign equality of States by allowing a State to institute proceedings against another State before the courts of the former State. In this connection, a proposal was made to delete the article. The reason for the proposal

[107] See *Yearbook . . . 1986*, vol. II (Part Two), p. 11.

was that the article concerned only the relations between two States, the forum State and the foreign State; it essentially dealt with a bilateral international problem governed by existing rules of international law. In contrast, the present draft articles dealt with relations between a State and foreign natural or juridical persons, the purpose being to protect the State against certain actions brought against it by such persons or to enable those persons to protect themselves against the State. Hence, the article which dealt with inter-State relations alone was not considered to have its proper place in the draft articles. There were members, however, who opposed the deletion of the article as it was based on extensive legislative practice and had been adopted on first reading. After some discussion, it was finally decided to delete former article 16 on the understanding that the commentary to article 10 would clarify that its deletion is without prejudice to the law with respect to fiscal matters.

(b) *"Commercial transactions" in the context of State immunity*

(13) In order to appreciate the magnitude and complexity of the problem involved in the consideration and determination of the precise limits of jurisdictional immunities in this specified area of "commercial transactions",[108] it is useful to provide here, in a condensed form, a chronological survey of State practice relating to this question.

(i) *A survey of judicial practice: international and national*

(14) This brief survey, of which a more detailed version has been submitted to the Commission,[109] begins by mentioning one of the earliest cases, *The "Charkieh"* (1873), in which the exception of trading activities (for the purpose of the article, "commercial transactions") was recognized and applied in State practice. In this case, the court observed:

> No principle of international law, and no decided case, and no dictum of jurists of which I am aware, has gone so far as to authorize a sovereign prince to assume the character of a trader, when it is for his benefit; and when he incurs an obligation to a private subject to throw off, if I may so speak, his disguise, and appear as a sovereign, claiming for his own benefit, and to the injury of a private person, for the first time, all the attributes of his character.[110]

(15) The uncertainty in the scope of application of the rule of State immunity in State practice is, in some measure, accountable for the relative silence of judicial pronouncement on an international level. Nevertheless, by not pursuing the matter on the international level, a State affected by an adverse judicial decision of a foreign court may remain silent at the risk of acquiescing in the judgement or the treatment given, though, as will be seen in part IV of the present draft articles, States are not automatically exposed to a measure of seizure, attachment and execution in respect of their property once a judgement which may adversely affect them has been rendered or obtained.

(16) The practice of States such as Italy,[111] Belgium[112] and Egypt[113] which could be said to have led the field of "restrictive" immunity, denying immunity in regard to trading activities, may now have been overtaken by the recent practice of States which traditionally favoured a more unqualified doctrine of State immunity, such as

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[108] Art. 10 has to be read in conjunction with art. 2, para. 1 (*c*), on the definition of "commercial transaction", and art. 2, para. 2, on the interpretation of that definition. The commentaries to those provisions should also be taken into consideration.

[109] See the fourth report of the former Special Rapporteur (footnote 13 above), paras. 49-92; and the second report of the Special Rapporteur (footnote 17 above), paras. 2-19.

[110] This was the first case in which the commercial nature of the service or employment of a public ship was held to disentitle her from State immunity.

[111] The courts of Italy were the first, in 1882, to limit the application of State immunity to cases where the foreign State had acted as an *ente politico* as opposed to a *corpo morale* (see *Morellet ed altri* v. *Governo Danese* (1882) (*Giurisprudenza Italiana* (Turin), vol. XXXV, part 1 (1883), p. 125)), or in the capacity of a sovereign authority or political power (*potere politico*) as distinguished from a *persona civile* (see *Guttieres* v. *Elmilik* (1886) (*Il Foro Italiano* (Rome), vol. XI, part 1 (1886), pp. 920-922)). See also *Hamspohn* v. *Bey di Tunisi ed Erlanger* (1887) (ibid., vol. XII, part 1 (1887), pp. 485-486).

In Italian jurisdiction, State immunity was allowed only in respect of *atti d'impero* and not *atti di gestione*. The public nature of the State act was the criterion by which it was determined whether or not immunity should be accorded. Immunity was not recognized for private acts or acts of a private-law nature. See *Department of the Army of the United States of America* v. *Gori Savellini* (*Rivista* . . . (Milan), vol. XXXIX (1956), pp. 91-92, and ILR, 1956 (London), vol. 23 (1960), p. 201). Cf. *La Mercantile* v. *Regno di Grecia* (1955) (see footnote 46 above). More recently, in *Banco de la Nación* v. *Credito Varesino* (Corte di Cassazione, 19 October 1984) (*Rivista di diritto internazionale privato e processuale*, vol. XXI (1985), p. 635) concerning the debts arising from money transfers made by an Italian bank in favour of a Peruvian bank, the court held that even assuming that the bank is a public entity, immunity from the jurisdiction of Italian courts could not be invoked with respect to a dispute arising not from the exercise of sovereign powers but from activities of a private nature.

[112] Belgian case law was settled as early as 1857 in a trilogy of cases involving the guano monopoly of Peru. These cases are: (*a*) *Etat du Pérou* v. *Kreglinger* (1857) (see footnote 96 above); cf. E. W. Allen, *The Position of Foreign States before Belgian Courts* (New York, Macmillan, 1929), p. 8; (*b*) the "Peruvian loans" case (1877) (*Pasicrisie belge, 1877* (Brussels), part 2, p. 307); this case was brought not against Peru, but against the Dreyfus Brothers company; (*c*) *Peruvian Guano Company* v. *Dreyfus et consorts et le Gouvernement du Pérou* (1880) (ibid., *1881* (Brussels), part 2, p. 313). In these three cases, a distinction was drawn between the public activities of the State of Peru and its private activities with respect to which the Court of Appeals of Brussels denied immunity. Thus, like Italian courts, Belgian courts have, since 1888, also adopted the distinction between acts of the State in its sovereign (public) and civil (private) capacities: in *Société pour la fabrication de cartouches* v. *Colonel Mutkuroff, Ministre de la guerre de la principauté de Bulgarie* (1888) (ibid., *1889* (Brussels), part 3, p. 62), the Tribunal civil of Brussels held that, in concluding a contract for the purchase of bullets, Bulgaria had acted as a private person and subjected itself to all the consequences of the contract. Similarly, in *Société anonyme des chemins de fer liégeois-luxembourgeois* v. *Etat néerlandais* (Ministère du Waterstaat) (1903) (ibid., *1903* (Brussels), part 1, p. 294), a contract to enlarge a railway station in Holland was made subject to Belgian jurisdiction. The distinction between *acta jure imperii* and *acta jure gestionis* has been applied by Belgian courts consistently since 1907; see *Feldman* v. *Etat de Bahia* (1907) (footnote 34 above).

[113] The current case law of post-war Egypt has confirmed the jurisprudence of the country's mixed courts, which have been consistent in their adherence to the Italo-Belgian practice of limited immunity. In Egypt, jurisdictional immunities of foreign States constitute a question of *ordre public*; see Decision 1173 of 1963 of the Cairo Court of First Instance (cited in United Nations, *Materials on Jurisdictional Immunities* . . ., p. 569). Immunity is allowed only in respect of acts of sovereign authority and does not extend to "ordinary acts" (ibid.).

Germany,[114] the United States of America[115] and the United Kingdom.[116]

(17) In Europe, the "restrictive" view of State immunity pronounced by the Italian and Belgian courts, as already noted, was soon followed also by the French,[117] Netherlands[118] and Austrian[119] courts.

(18) The judicial practice of a certain number of developing countries can also be said to have adopted re-

[114] The practice of German courts began as early as 1885 with restrictive immunity based on the distinction between public and private activities, holding State immunity to "suffer at least certain exceptions"; see *Heizer* v. *Kaiser Franz-Joseph-Bahn A.G.* (1885) (*Gesetz und Verordnungsblatt für das Königreich Bayern* (Munich), vol. I (1885), pp. 15-16; cited in Harvard Law School, *Research in International Law*, part III, "Competence of Courts in regard to Foreign States" (Cambridge, Mass., 1932), published as *Supplement* to AJIL (Washington, D.C.), vol. 26 (1932), pp. 533-534). In the *Republic of Latvia* case (1953) (*Rechtsprechung zum Wiedergutmachungsrecht* (Munich), vol. 4 (1953), p. 368; ILR, 1953 (London), vol. 20 (1957), pp. 180-181), the Restitution Chamber of the Kammergericht of West Berlin denied immunity on the grounds that "this rule does not apply where the foreign State enters into commercial relations . . . viz., where it does not act in its sovereign capacity but exclusively in the field of *private law**, by engaging in purely private business, and more especially in commercial intercourse". This restrictive trend has been followed by the Federal Constitutional Court in later cases; see, for example, *X* v. *Empire of* . . . (1963) (footnote 53 above), in which a contract for repair of the heating system of the Iranian Embassy was held to be "non-sovereign" and thus not entitled to immunity. In 1990, Germany ratified the European Convention on State Immunity.

[115] It has sometimes been said that the practice of the courts of the United States of America started with an unqualified principle of State immunity. The truth might appear to be the opposite upon closer examination of the dictum of Chief Justice Marshall in *The Schooner "Exchange"* v. *McFaddon and others* (1812) (see footnote 29 above). In *Bank of the United States* v. *Planters' Bank of Georgia* (1824) (H. Wheaton, *Reports of Cases* . . . (New York, 1911), vol. IX, 4th ed., pp. 904 and 907), it was held that, "when a Government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen".

The first clear pronouncement of restrictive immunity by a United States court, based on the distinction between *acta jure imperii* and *acta jure gestionis*, came in 1921 in *The "Pesaro"* case (United States of America, *The Federal Reporter*, vol. 277 (1922), pp. 473, at 479-480; see also AJIL (Washington, D.C.), vol. 21 (1927), p. 108). This distinction was supported by the Department of State, but rejected by the Supreme Court in 1926 in *Berizzi Brothers Co.* v. *The S.S. "Pesaro"* (*United States Reports*, vol. 271 (1927), p. 562). In subsequent cases, the courts preferred to follow the suggestion of the political branch of the Government; see, for example, Chief Justice Stone in *Republic of Mexico* et al. v. *Hoffman* (1945) (ibid., vol. 324 (1946), pp. 30-42). It was not until the "Tate Letter" of 1952 (United States of America, *The Department of State Bulletin* (Washington, D.C.), vol. XXVI, No. 678 (23 June 1952), pp. 984-985) that the official policy of the Department of State was restated in general and in the clearest language in favour of a restrictive theory of immunity based upon the distinction between *acta jure imperii* and *acta jure gestionis*. See, further, *Victory Transport Inc.* v. *Comisaria General de Abastecimientos y Transportes* (United States of America, *The Federal Reporter, 2nd Series*, vol. 336 (1965), p. 354; see also ILR (London), vol. 35 (1967), p. 110).

Since the adoption of the Foreign Sovereign Immunities Act of 1976 (see footnote 40 above), United States courts have decided on the question of immunity, without any suggestion from the Department of State in the form of a "Tate Letter". It is this 1976 Act that now provides legislative guidance for the courts with regard to the exception of commercial activity. See, for example, *West* v. *Multibanco Comermex, S.A.* (807 F.2d 820, United States Court of Appeals, 9th Cir., 6 January 1987, AJIL (Washington, D.C.) vol. 81 (1987), p. 660); *Rush-Presbyterian-St. Luke's Medical Center* v. *The Hellenic Republic* (United States Court of Appeals, 7th Cir., 14 June 1989). Cf. *De Sanchez* v. *Banco Central de Nicaragua* (720 F.2d, p. 1385, United States Court of Appeals, 5th Cir., 19 September 1985, AJIL (Washington, D.C.), vol. 80 (1986), p. 658); *Gregorian* v. *Izvestia* (871 F.2d, p. 1515, United States Court of Appeals, 9th Cir., 12 April 1989); *Harris Corporation* v. *National Iranian Radio and Television and Bank Melli Iran* (United States Court of Appeals, 11th Cir., 22 November 1982, ILR (London), vol. 72 (1987), p. 172); *America West Airlines, Inc.* v. *GPA Group, Ltd.* (877 F.2d, p. 793, United States Court of Appeals, 9th Cir., 12 June 1989); *MOL Inc.* v. *The People's Republic of Bangladesh* (United States Court of Appeals, 9th Cir., 3 July 1984, ILR (London), vol. 80 (1989), p. 583).

[116] In connection with the commercial activities of a foreign State, notably in the field of shipping or maritime transport, the case law of the United Kingdom fluctuated throughout the nineteenth century. The decision which went furthest in the direction of restricting immunity was that of *The "Charkieh"* case (1873) (see footnote 62 above); see also the fourth report of the former Special Rapporteur (see footnote 13 above), para. 80. The decision which went furthest in the opposite direction was that of *The "Porto Alexandre"* case (1920) (United Kingdom, *The Law Reports, Probate Division, 1920*, p. 30). Thus the principle of unqualified immunity was followed in subsequent cases concerning commercial shipping, such as *Compañía Mercantil Argentina* v. *United States Shipping Board* (1924) (see footnote 41 above), and other trading activities, such as the ordinary sale of a quantity of rye in *Baccus S.R.L.* v. *Servicio Nacional del Trigo* (1956) (ibid.).

However, even in *The "Cristina"* case (1938) (see footnote 73 above), considerable doubt was thrown upon the soundness of the doctrine of immunity when applied to trading vessels, and some of the judges were disposed to reconsider the unqualified immunity held in *The "Porto Alexandre"* case (1920). Thus, in a series of cases which include *Dollfus Mieg et Cie S.A.* v. *Bank of England* (1950) and *United States of America and Republic of France* v. *Dollfus Mieg et Cie S.A. and Bank of England* (1952) (see footnote 43 above), *Sultan of Johore* v. *Abubakar, Tunku Aris Bendahara and others* (1952) (*The All England Law Reports, 1952* (London), vol. 1, p. 1261; see also *The Law Quarterly Review* (London), vol. 68 (1952), p. 293) and *Rahimtoola* v. *Nizam of Hyderabad* (1957) (United Kingdom, *The Law Reports, House of Lords, 1958*, p. 379), a trend towards a "restrictive" view of immunity was maintained. In the *Dollfus Mieg et Cie S.A.* case (1950), the Master of the Rolls, Sir Raymond Evershed, agreed with Lord Maugham that "the extent of the rule of immunity should be jealously watched". In the *Sultan of Johore* case (1952), Lord Simon, *per curiam*, denied that unqualified immunity was the rule in England in all circumstances.

A forerunner of the ultimate reversal of the unqualified immunity held in *The "Porto Alexandre"* case (1920) came in 1975 in the *"Philippine Admiral"* case (see footnote 68 above), in which the decision in the *"Parlement belge"* case (1880) (see footnote 53 above) was distinguished and the *Sultan of Johore* case (1952) cited as establishing that the question of unqualified immunity was an open one when it came to State-owned vessels engaged in ordinary commerce.

Then, in 1977, in *Trendtex Trading Corporation Ltd.* v. *The Central Bank of Nigeria* (ibid.), the Court of Appeal unanimously held that the doctrine of sovereign immunity no longer applied to ordinary trading transactions and that the restrictive doctrine of immunity should therefore apply to actions *in personam* as well as actions *in rem*. This emerging trend was reinforced by the State Immunity Act of 1978 (see footnote 51 above), which came before the House of Lords for a decision in 1981 in the *"I° Congreso del Partido"* case (1981) (*The All England Law Reports, 1981* (London), vol. 2, p. 1064). With the 1978 Act and this recent series of cases, the judicial practice of British courts must now be said to be well settled in relation to the exception of trading activities of foreign Governments. See also, *Planmount Limited* v. *The Republic of Zaire* (High Court, Queen's Bench Division (Commercial Court), 29 April 1980 (ILR (London), vol. 64 (1983), p. 268).

[117] A survey of the practice of French courts discloses traces of certain limitations on State immunity, based on the distinction between the State as *puissance publique* and as *personne privée*, and between *acte d'autorité* and *acte de gestion* or *acte de commerce*, in the judgements of lower courts as early as 1890; see *Faucon et Cie* v. *Gouvernement grec* (1890), (*Journal du droit international privé et de la jurisprudence comparée* (Clunet) (Paris), vol. 17 (1890), p. 288). It was not until 1918, however, that the restrictive theory of State immunity was formulated and adopted by the French courts. See *Société maritime auxiliaire de transports* v. *Capitaine du vapeur*

(*Continued on next page.*)

strictive immunity. Egypt, as already noted,[120] was the pioneer in this field. In recent years, the judicial practice of Pakistan[121] and Argentina[122] has provided examples of acceptance of restrictive immunity, while in the case of the Philippines,[123] there have been some relevant cases, but no decisions on the question of the exception of commercial transactions from State immunity.

(ii) *A survey of national legislation*

(19) A number of Governments have recently enacted legislation dealing comprehensively with the question of

(*Footnote 117 continued.*)

anglais "Hungerford" (Tribunal de commerce of Nantes, 1918) (*Revue de droit international privé* (Darras) (Paris), vol. XV (1919), p. 510); *Capitaine Seabrook* v. *Société maritime auxiliaire de transports* (Court of Appeal of Rennes, 1919) (ibid., vol. XVIII (1922-1923), p. 743); *Etat roumain* v. *Pascalet et Cie* (*Journal du droit international* (Clunet) (Paris), vol. 52 (1925), p. 113).

The current jurisprudence of France may be said to be settled in its adherence to the "restrictive" view of State immunity, based on "trading activities". The more recent decisions, however, have interpreted the theory of *actes de commerce* with some divergent results. For example, on the one hand, the purchase of cigarettes for a foreign army and a contract for a survey of water distribution in Pakistan were both held to be *actes de puissance publique* for public service; see, respectively, *Gugenheim* v. *State of Viet Nam* (1961) (footnote 53 above) and *Société Transshipping* v. *Federation of Pakistan* (1966) (ILR (London), vol. 47 (1974), p. 150). On the other hand, a contract for the commercial lease of an office for the tourist organization of a foreign Government and methods of raising loans both posed difficulties for the courts in applying the standards of *actes de commerce*; see, respectively, *Etat espagnol* v. *Société anonyme de l'Hôtel George V* (1970) (ibid. (Cambridge), vol. 52 (1979), p. 317); and *Montefiore* v. *Congo belge* (1955) (ibid., *1955*, vol. 22 (1958), p. 226). In *Banque camerounaise de développement* v. *Société des Etablissements Robler* (Cour de cassation 18 November 1986) (*Journal du droit international* (Clunet) (Paris), vol. 114 (1987), p. 632) involving the aval guaranteed by the Banque camerounaise de développement, a public bank, on bills of exchange drawn by the State of Cameroon for the financing of the construction of a public hospital in Yaoundé, the court upheld the restrictive view of State immunity based on the distinction between the State as *puissance publique* and as *personne privée*, and held that, regardless of the cause of the difference, the aval guaranteed by the bank on behalf of the State of Cameroon is a commercial transaction entered into in the normal exercise of banking activities and is not related to the exercise of *puissance publique*. See also, *Banque Tejarat-Iran* v. *S.A. Tunzini Nessi Entreprises Equipements* (Cour d'appel de Paris, 29 November 1982) (*Recueil Dalloz-Sirey*, 1983, *Inf. rap.*, p. 302).

[118] A survey of the Netherlands courts indicates that, after the passage of a bill in 1917 allowing the courts to apply State immunity with reference to *acta jure imperii*, the question of *acta jure gestionis* remained open until 1923, when a distinction between the two categories of acts was made. However, the Netherlands courts remained reluctant to consider any activities performed by Governments to be other than an exercise of governmental functions. Thus a public service of tug boats, State loans raised by public subscription and the operation of a State ship were all considered to be *acta jure imperii*; see, respectively, *F. Advokaat* v. *Schuddinck & den Belgischen Staat* (1923) (footnote 59 above), *De Froe* v. *The Russian State, now styled "The Union of Soviet Socialist Republics"* (1932) (footnote 25 above) and *The "Garbi"* (1938) (*Weekblad van het Recht en Nederlandse Jurisprudentie* (Zwolle), No. 96 (1939); *Annual Digest . . ., 1919-1942* (London), vol. 11 (1947), case No. 83, p. 155).

It was not until 1947 that the Netherlands courts were able to find and apply a more workable criterion for restricting State immunity, holding that "the principles of international law concerning the immunity of States from foreign jurisdiction did not apply to State-conducted undertakings in the commercial, industrial or financial fields"; see *Weber* v. *USSR* (1942) (*Weekblad van het Recht en Nederlandse Jurisprudentie* (Zwolle), No. 757 (1942); *Annual Digest . . ., 1919-1942* (London), vol. 11 (1947), case No. 74, p. 140) and *The Bank of the Netherlands* v. *The State Trust Arktikugol (Moscow)*; *The Trade Delegation of the USSR in Germany (Berlin)*; *The State Bank of the USSR (Moscow)* (1943) (*Weekblad van het Recht en Nederlandse Jurisprudentie* (Zwolle), No. 600 (1943); *Annual Digest . . ., 1943-1945* (London), vol. 12 (1949), case No. 26, p. 101). The exception of trading activities, however, was more clearly stated in the 1973 decision of the Netherlands Supreme Court in *Société européenne d'études et d'entreprises en liquidation volontaire* v. *Socialist Federal Republic of Yugoslavia* (*Netherlands Yearbook of International Law* (Leiden), vol. V (1974), p. 290; reproduced in United Nations, *Materials on Jurisdictional Immunities . . .*, p. 355). See also *L. F. and H. M. H. K.* v. *Federal Republic of Germany (FRG)* (District Court of Haarlem, 7 May 1986, KG (1986) No. 322, NJ (1987) No. 955, *Netherlands Yearbook of International Law* (Leiden), vol. XX (1989), pp. 285, at 287-290).

[119] The practice of Austria has fluctuated, starting with unqualified immunity in the nineteenth century, changing to restrictive immunity from 1907 to 1926, and reverting to unqualified immunity until 1950. In *Dralle* v. *Republic of Czechoslovakia*, decided in 1950, the Supreme Court of Austria reviewed existing authorities on international law before reaching a decision denying immunity for what were not found to be *acta jure gestionis*. The Court declared:

> ". . . This subjection of the *acta gestionis* to the jurisdiction of States has its basis in the development of the commercial activity of States. The classic doctrine of immunity arose at a time when all the commercial activities of States in foreign countries were connected with their political activities . . . Today the position is entirely different; States engage in commercial activities and . . . enter into competition with their own nationals and with foreigners. Accordingly, the classic doctrine of immunity has lost its meaning, and, *ratione cessante*, can no longer be recognized as a rule of international law." (See footnote 25 above.)

[120] See footnote 113 above.

[121] In its decision in 1981 in *A. M. Qureshi* v. *Union of Soviet Socialist Republics through Trade Representative in Pakistan and another* (*All Pakistan Legal Decisions* (Lahore), vol. XXXIII (1981), p. 377), the Supreme Court of Pakistan, after reviewing the laws and practice of other jurisdictions, as well as relevant international conventions and opinions of writers, and confirming with approval the distinction between *acta jure imperii* and *acta jure gestionis*, held that the courts of Pakistan had jurisdiction in respect of commercial acts of a foreign Government.

[122] An examination of the case law of Argentina reveals that the courts have recognized and applied the principle of sovereign immunity in various cases concerning sovereign acts of a foreign Government; see, for example, *BAIMA y BESSOLINO* v. *Gobierno del Paraguay* (1916) (Argentina, *Fallos de la Corte Suprema de Justicia de la Nación* (Buenos Aires), decision No. 123, p. 58), *United States Shipping Board* v. *Dodero Hermanos* (1924) (ibid., decision No. 141, p. 129) and *Zubiaurre* v. *Gobierno de Bolivia* (1899) (ibid., decision No. 79, p. 124); all cases referred to in United Nations, *Materials on Jurisdictional Immunities . . .*, pp. 73-74. The exception of trading activities was applied in *The S.S. "Aguila"* case (1892) in respect of a contract of sale to be performed and complied with within the jurisdictional limits of the Argentine Republic (see *Ministro Plenipotenciario de Chile* v. *Fratelli Lavarello*, (ibid., decision No. 47, p. 248). The court declared itself competent and ordered the case to proceed on the grounds that "the intrinsic validity of this contract and all matters relating to it should be regulated in accordance with the general laws of the Nation and that the national courts are competent in such matters" (see extract of the decision in United Nations, *Materials on Jurisdictional Immunities . . .*, p. 73). See also I. Ruiz Moreno, *El Derecho Internacional Público ante la Corte Suprema* (Editorial Universitaria de Buenos Aires, 1941).

[123] See the fourth report of the former Special Rapporteur (footnote 13 above), para. 92. For example, in *The United States of America, Capt. James E. Galloway, William I. Collins and Robert Gohier, petitioners*, v. *Hon. V. M. Ruiz* (Presiding Judge of Branch XV, Court of First Instance of Rizal and Eligio de Guzman & Co. Inc., respondents, No. L-35645, 22 May 1985, the Supreme Court of the Philippines, en banc, *Philippine Yearbook of International Law*, vol. XI (1985), p. 87), the Supreme Court of the Philippines held that contracts to repair a naval base related to the defence of a nation, a governmental function, and did not fall under the State immunity exception for commercial activities. There appear to be, however, no decisions upholding the exception of commercial transactions from State immunity. A similar situation is found in Chile. See the fourth report of the former Special Rapporteur (footnote 13 above), para. 91.

jurisdictional immunities of States and their property. While these laws share a common theme, namely the trend towards "restrictive" immunity, some of them differ in certain matters of important detail which must be watched. Without going into such details here, it is significant to compare the relevant texts relating to the "commercial contracts" exception as contained in the Foreign Sovereign Immunities Act of 1976[124] of the United States of America and in the State Immunity Act of 1978[125] of the United Kingdom. The latter Act has, on this point, been followed closely by Pakistan,[126] Singapore[127] and South Africa[128] and partly by Australia[129] and Canada.[130]

(iii) *A survey of treaty practice*

(20) The attitude or views of a Government can be gathered from its established treaty practice. Bilateral treaties may contain provisions whereby parties agree in advance to submit to the jurisdiction of the local courts in respect of certain specified areas of activities, such as trading or investment. Thus the treaty practice of the Soviet Union amply demonstrates its willingness to have commercial relations carried on by State enterprises or trading organizations with independent legal personality regulated by competent territorial authorities. While the fact that a State is consistent in its practice in this particular regard may be considered as proof of the absence of rules of international law on the subject, or of the permissibility of deviation or derogation from such rules through bilateral agreements, an accumulation of such bilateral treaty practices could combine to corroborate the evidence of the existence of a general practice of States in support of the limitations agreed upon, which could ripen into accepted exceptions in international practice.[131] However, at the time of first reading a member of the Commission maintained that the repeated inclusion of such an exception in specific agreements was based on consent and must not be taken to imply general acceptance of such an exception.

(21) The 1951 agreement between the Soviet Union and France,[132] typical of treaties concluded between the Soviet Union and developed countries, and paragraph 3 of the exchange of letters of 1953 between the Soviet Union and India,[133] which is an example of such agreements between the Soviet Union and developing countries, provide further illustrations of treaty practice relating to this exception.

(iv) *A survey of international conventions and efforts towards codification by intergovernmental bodies*

(22) One regional convention, the 1972 European Convention on State Immunity, and one global convention, the 1926 Brussels Convention, addressed the question of commercial activities as an exception to State immunity. While article 7 of the European Convention is self-evident in addressing the issue,[134] it needs to be observed that the main object of article 1 of the Brussels Convention[135] was clearly to assimilate the position of State-operated merchant ships to that of private vessels of commerce in regard to the question of immunity.

(23) While the efforts of the Council of Europe culminated in the entry into force of the 1972 European Convention on State Immunity, similar efforts have been or are being pursued also in other regions. The Central American States, the Inter-American Council and the Caribbean States have been considering similar projects.[136] Another important development concerns the work of OAS on the Inter-American Draft Convention on Jurisdictional Immunity of States. In the early 1980s, the OAS General Assembly requested the Permanent Council, a political body, to study the Inter-American Draft Convention on Jurisdictional Immunity of States approved by the Inter-American Juridical Committee in

[124] See sections 1604 and 1605 (footnote 40 above).

[125] See section 3 under "Exceptions from immunity" (footnote 51 above).

[126] The State Immunity Ordinance of 1981, section 5 (ibid.).

[127] State Immunity Act of 1979, section 5 (ibid.).

[128] The South Africa Foreign States Immunities Act of 1981, section 4 (1) (ibid.).

[129] The Australia Foreign States Immunities Act of 1985, section II (1) and (2) (ibid.).

[130] Act to Provide for State Immunity in Canadian Courts (State Immunity Act), section 5 (see footnote 57 above).

[131] This view was substantiated by a member of the Commission. See the statement by Mr. Tsuruoka during the thirty-third session of the Commission, in which he referred to the trade treaties concluded by Japan with the United States of America in 1953 and with the USSR in 1957 (*Yearbook . . . 1981*, vol. I, p. 63, 1654th meeting, para. 23).

[132] United Nations, *Treaty Series*, vol. 221, p. 95, art. 10. See similar provisions in treaties concluded by the USSR with Denmark (1946) (ibid., vol. 8, p. 201); Finland (1947) (ibid., vol. 217, p. 3); Italy (1948) (ibid., p. 181); Austria (1955) (ibid., vol. 240, p. 289); Japan (1957) (ibid., vol. 325, p. 35); Federal Republic of Germany (1958) (ibid., vol. 346, p. 71); the Netherlands (1971) (*Tractatenblad van het Koninkrijk der Nederlanden* (The Hague, 1971), No. 163). The relevant provisions of these treaties are reproduced in English in United Nations, *Materials on Jurisdictional Immunities . . .*, pp. 140-144.

[133] United Nations, *Treaty Series*, vol. 240, p. 157. See also similar provisions in treaties concluded by the USSR with other developing countries, such as Egypt (1956) (ibid., vol 687, p. 221); Iraq (1958) (ibid., vol. 328, p. 118); Togo (1961) (ibid., vol. 730, p. 187); Ghana (1961) (ibid., vol. 655, p. 171); Yemen (1963) (ibid., vol. 672, p. 315); Brazil (1963) (ibid., vol. 646, p. 277); Singapore (1966) (ibid., vol. 631, p. 125); Costa Rica (1970) (ibid., vol. 957, p. 347); Bolivia (1970) (ibid., p. 373). The relevant provisions of these treaties are reproduced in English in United Nations, *Materials on Jurisdictional Immunities . . .*, pp. 145-150.

[134] Article 7 provides:

"1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it has on the territory of the State of the forum an office, agency or other establishment through which it engages, in the same manner as a private person, in an industrial, commercial or financial activity, and the proceedings relate to that activity of the office, agency or establishment.

"2. Paragraph 1 shall not apply if all the parties to the dispute are States, or if the parties have otherwise agreed in writing."

[135] Article 1 provides:

"Seagoing vessels owned or operated by States, cargoes owned by them, and cargoes and passengers carried on government vessels and the States owning or operating such vessels, or owning such cargoes, are subject in respect of claims relating to the operation of such vessels or the carriage of such cargoes, to the same rules of liability and to the same obligations as those applicable to private vessels, cargoes and equipment."

[136] See, for example, the materials submitted by the Government of Barbados: "The Barbados Government is . . . at the moment in the process of considering such legislation [as the United Kingdom State Immunity Act of 1978] and in addition is spearheading efforts for a Caribbean Convention on State Immunity." (United Nations, *Materials on Jurisdictional Immunities . . .*, pp. 74-75.)

1983,[137] which contains a provision limiting immunity in regard to "claims relative to trade or commercial activities undertaken in the State of the forum".[138] The draft has been considered by a working group, established by the Permanent Council, which prepared a revised text as well as a comparative analysis of the two OAS drafts and the ILC draft on jurisdictional immunities. The revised OAS draft has been referred to Governments for their consideration.

(24) It may be said from the foregoing survey that while the precise limits of jurisdictional immunities in the area of "commercial transactions" may not be easily determined on the basis of existing State practice, the concept of non-immunity of States in respect of commercial activities as provided in the rule formulated in paragraph 1 of the present article finds precedent in the sources reviewed above.[139]

(25) The distinction made between a State and certain of its entities performing commercial transactions in the matter of State immunity from foreign jurisdiction appears to be generally supported by the recent treaties[140] and national legislation[141] as well as by the judicial practice of States,[142] although specific approaches or requirements may vary among them.[143]

[137] Inter-American Draft Convention on Jurisdictional Immunity of States, adopted on 21 January 1983 by the Inter-American Juridical Committee (OEA/Ser.G-CP/doc. 1352/83 of 30 March 1983). See also ILM (Washington, D.C.), vol. 22 (1983), No. 2, p. 292.

[138] According to the second paragraph of article 5 of the draft Convention, "trade or commercial activities of a State" are construed to mean the performance of a particular transaction or commercial or trading act pursuant to its ordinary trade operations.

[139] See also the contributions from non-governmental bodies surveyed in the fourth report of the former Special Rapporteur (see footnote 13 above), pp. 226-227. See further, for recent developments, *Yearbook of the Institute of International Law, 1989*, vol. 63, part II, session of Santiago de Compostela, 1989; and ILA, Queensland Conference (1990), International Committee on State Immunity, *First Report on Developments in the field of State Immunity since 1982*.

[140] See, for example, the European Convention on State Immunity, article 27 and the Union of Soviet Socialist Republics-United States Agreement on Trade Relations of 1 June 1990, article XII (1).

Provisions similar to the USSR-United States Agreement are found also in the Czechoslovakia-United States Agreement on Trade Relations of 12 April 1990, article XIV (1) and in the Mongolia-United States Agreement on Trade Relations of 23 January 1991, article XII (1).

[141] See, for example, the United Kingdom State Immunity Act of 1978, section 14 (1), (2) and (3); the Singapore State Immunity Act of 1979, section 16 (1), (2) and (3); the Pakistan State Immunity Ordinance of 1981, section 15 (1), (2) and (3); the South Africa Foreign States Immunities Act of 1981, sections 1 (2) and 15; the Australia Foreign Immunities Act of 1985, section 3 (1) (footnote 51 above) and the Canada Act to Provide for State Immunity in Canadian Courts of 1982, sections 2, 3 (1), 11 (3) and 13 (2) (footnote 57 above). See also, the United States Foreign Sovereign Immunities Act of 1976, section 1603 (*a*) and (*b*) and section 1606 (footnote 40 above) as well as section 452 of the Third Restatement.

National legislation specially relevant in the present context has been recently enacted in several socialist States. See, for example, Law of the Union of Soviet Socialist Republics on State enterprises (associations), dated 30 June 1987 (*Vedomosti Verkhovnogo soveta SSR*, 1 July 1987, No. 26 (2412) (Article 385, pp. 427-463) (section 1 (1), (2) and (6)); 1987 Decree on the Procedure for the Establishment on the Territory of the USSR and the Activities of Joint Enterprises with the Participation of Soviet Organizations and Firms of Capitalist and Developing Countries (Decree of the USSR Council of Ministers, adopted on 13 January 1987, No. 49, *Sobraniye postanovlenii Pravitelstva SSSR* (1987), No. 9, item 40; as amended by Decrees No. 352 of 17 March 1988 and No. 385 of 6 May 1989, *Svod zakonov SSSR*, IX. 50-19; *Sobraniye postanovlenii Pravitelstva SSSR* (1989), No. 23, item 75); Law of the Union of Soviet Socialist Republics on Cooperatives in the USSR, adopted by the Supreme Soviet of the USSR on 1 June 1988 (arts. 5, 7 and 8); Law of the People's Republic of China on Industrial Enterprises owned by the Whole People, adopted on 13 August 1988 at the first session of the Seventh National People's Congress (art. 2); General Principles of the Civil Law of the People's Republic of China, adopted at the fourth session of the Sixth National People's Congress, promulgated by Order No. 37 of the President of the People's Republic of China on 12 April 1986 and effective as of 1 January 1987 (arts. 36, 37 and 41); the Enterprise with Foreign Property Participation Act of the Czechoslovak Federal Republic, the Act of 19 April 1990 amending the Enterprise with Foreign Property Participation Act No. 173 of 1988, Coll. (arts. 2 and 4).

[142] For the judicial practice of the United States of America, see, for example, *Matter of SEDCO, Inc.* (543 F. Supp. p. 561, United States District Court, Southern District, Texas, 30 March 1982); *O'Connell Machinery Co.* v. *M.V. "Americana" and Italia Di Navigazione, SpA* (734, F. 2d, p. 115, United States Court of Appeals, 2d Cir., 4 May 1984, ILR (London), vol. 81 (1990), p. 539). See, however, *First National City Bank* v. *Banco Para el Comercio Exterior de Cuba* (1983) (103 S.Ct., p. 2591, 17 June 1983, AJIL (Washington, D.C.), vol. 78 (1984), p. 230). See, further, *Foremost-McKesson, Inc.* v. *Islamic Republic of Iran* (905 F. 2d, p. 438, United States Court of Appeals, D.C. Cir., 15 June 1990), and *Kalamazoo Spice Extraction Company* v. *The Provisional Military Government of Socialist Ethiopia* (ILM (Washington, D.C.), vol. 24 (1985), p. 1277). Cf. *Edlow International Co.* v. *Nuklearna Elektrarna Krsko* (441, F. Supp., p. 827 (D.D.C. 1977), ILR (London), vol. 63 (1982), p. 100).

For the judicial practice of the United Kingdom, see, for example, *I° Congreso del Partido* (1983) (*The Law Reports, 1983*, vol. I, p. 244) in which the Appeals Court said:

> "State-controlled enterprises, with legal personality, ability to trade and to enter into contracts of private law, though wholly subject to the control of their State, are a well-known feature of the modern commercial scene. The distinction between them, and their governing State, may appear artificial: but it is an accepted distinction in the law of England and other States. Quite different considerations apply to a State-controlled enterprise acting on government directions on the one hand, and a State, exercising sovereign functions, on the other." (Ibid., p. 258, citations omitted.)

Later in his opinion, Lord Wilberforce rejected the contention that commercial transactions entered into by State-owned organizations could be attributed to the Cuban Government:

> "The status of these organizations is familiar in our courts, and it has never been held that the relevant State is in law answerable for their actions." (Ibid., p. 271.)

See also *Trendtex Trading Corp.* v. *Central Bank of Nigeria* (1977) (footnote 53 above) in which the Court of Appeal ruled that the Bank was not an *alter ego* or organ of the Nigerian Government for the purpose of determining whether it could assert sovereign immunity; and *C. Czarnikow Ltd.* v. *Centrala Handlu Zagranicznego Rolimpex* (Court of Appeal (1978) Q.B. 176, House of Lords (1979) A.C. 351, ILR (London), vol. 64 (1983), p. 195) in which the House of Lords affirmed the decision of the lower court stating that, in the absence of clear evidence and definite findings that the foreign government took the action purely in order to extricate a State enterprise from State contract liability, the enterprise cannot be regarded as an organ of the State.

For the judicial practice of Canada see, for example, *Ferranti-Packard Ltd.* v. *Cushman Rentals Ltd.* et al. (ibid., p. 63), and *Bouchard* v. *J. L. Le Saux Ltée* (1984) (45 O.R. (2d), p. 792, Ontario Supreme Court (Master's Chambers) (*Canadian Yearbook of International Law*, vol. XXIII (1985), pp. 416-417). In the former case, the Ontario High Court of Justice (Divisional Court) held that the New York State Thruway Authority was not an organ or *alter ego* of the State of New York but an independent body constituted so as to conduct its own commercial activities and, therefore, was not entitled to sovereign immunity. In the latter case, although the Senior Master reached the decision to set aside the service on the James Bay Energy Corporation on the ground that the corporation was entitled to sovereign immunity as an organ of the government of Quebec, he did consider the question of whether there was any evidence to show that the corporation was engaged in purely private or commercial activities.

For the judicial practice of France, see, for example, *Corporación del Cobre* v. *Braden Copper Corporation and Société Groupement*

Article 11. Contracts of employment

1. 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 a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State.

2. Paragraph 1 does not apply if:

(*a*) the employee has been recruited to perform functions closely related to the exercise of governmental authority;

(*b*) the subject of the proceeding is the recruitment, renewal of employment or reinstatement of an individual;

(*c*) the employee was neither a national nor a habitual resident of the State of the forum at the time when the contract of employment was concluded;

(*d*) the employee is a national of the employer State at the time when the proceeding is instituted; or

(*e*) the employer State and the employee have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.

Commentary

(a) *Nature and scope of the exception of "contracts of employment"*

(1) Draft article 11 adopted by the Commission covers an area commonly designated as "contracts of employment", which has recently emerged as an exception to State immunity. "Contracts of employment" have been excluded from the expression "commercial transaction" as defined in article 2, paragraph 1 (*c*), of the present draft articles. They are thus different in nature from commercial transactions.

(2) Without technically defining a contract of employment, it is useful to note some of the essential elements of such a contract for the purposes of article 11. The area of exception under this article concerns a contract of employment or service between a State and a natural person or individual for work performed or to be performed in whole or in part in the territory of another State. Two sovereign States are involved, namely the employer State and the State of the forum. An individual or natural

d'Importation des Métaux (ILR, vol. 65 (1984), p. 57); *Société des Ets. Poclain and Compagnie d'Assurances La Concorde* v. *Morflot USSR and Others* (ibid., p. 67). In *Société Nationale des Transports Routiers* v. *Compagnie Algérienne de Transit et d'Affrétement Serres et Pilaire and Another* (1979) (ibid., p. 83 *et seq.*) the Court of Cassation held as follows:

> "SNTR had a legal personality distinct from that of the Algerian State, was endowed with its own assets, against which the action of the creditors was exclusively directed, and performed commercial operations by transporting goods in the same way as an ordinary commercial undertaking. Having made these findings, the Court of Appeal correctly concluded, . . . that SNTR could not claim before a French court either to exploit assets belonging to the Algerian State or, even if such had been the case, to act pursuant to an act of public power or in the interests of a public service. It therefore followed that SNTR was not entitled either to jurisdictional immunity or immunity from execution."

For the judicial practice of Germany, which may be said to have applied both the structural and the functional tests, see, for example, *Non-resident Petitioner* v. *Central Bank of Nigeria* (1975) (ibid., p. 131) relating to a contract claim, in which the District Court of Frankfurt held that "[w]e need not decide whether, based on the responsibilities assigned to it, the respondent discharges sovereign functions and whether, under Nigerian law, the respondent acts as a legal personality and carried out in whole or in part the authority of the State in fulfilment of responsibilities under public law. The petitioner correctly points out that in accordance with general case law, legal publications and writings on international law, separate legal entities of a foreign State enjoy no immunity" (ibid., p. 134). The court added cautiously that, even if the defendant were a legally dependent government department, it would still not be entitled to immunity, since immunity from jurisdiction was only available in respect of *acta jure imperii* and not for *acta jure gestionis*. Also, in the *National Iranian Oil Company Pipeline Contracts* case, 1980 (ibid., p. 212), the Superior Provincial Court of Frankfurt held that there was no general rule of public international law to the effect that domestic jurisdiction was excluded for actions against a foreign State in relation to its non-sovereign activity (*acta jure gestionis*) and further stated as follows:

> "In German case law and legal doctrine, it is predominantly argued that commercial undertakings of a foreign State which have been endowed with their own independent legal personality do not enjoy immunity. . . . what is decisive is that the defendant is organized under Iranian law as a public limited company—that is as a legal person in private law enjoying autonomy *vis-à-vis* the Iranian State."

See further, *In the Matter of Constitutional Complaints of the National Iranian Oil Company against Certain Orders of the District Court and the Court of Appeals of Frankfurt in Prejudgement Attachment Proceedings against the Complainant* (37 *WM Zeitschrift für Wirtschafts- und Bankrecht* 722 (1983) (Federal Constitutional Court, 12 April 1983, ILM (Washington, D.C.), vol. 22 (1983), p. 1279).

For the judicial practice of Switzerland, see, for example, *Banque Centrale de la République de Turquie* v. *Weston Compagnie de Finance et d'Investissement SA* (1978) (ILR (London), vol. 65 (1984), p. 417), in which the Federal Tribunal rejected the plea of immunity on the ground that the agreement for the provision of a "time deposit" between two commercial banks, to which a State was not a party and which had been concluded according to prevailing international banking practice, was to be classified according to its nature as a contract under private law (*jure gestionis*) over which the Swiss courts had jurisdiction. In this case, it seems that the *ratione materiae* approach weighed. But, also in this case, it was indicated that the State Bank was deemed to be like a private bank as far as the transaction in question was concerned. See also *Banco de la Nación Lima* v. *Banco Cattolica del Veneto* (1984) (ILR (London), vol. 82 (1990), p. 10); *Swissair* v. *X and Another* (Federal Tribunal, 1985, ibid., p. 36) and *Banque du Gothard* v. *Chambre des Recours en Matière Pénale du Tribunal d'Appel du Canton du Tessin and Another* (Federal Tribunal, 1987, ibid., p. 50). In the latter case the bank deposits of the Vatican City Institute were dealt with in the same manner as that of a foreign State bank.

Some other cases relevant to the question of State enterprises or other entities in relation to immunity of States from the jurisdiction of foreign courts include, Belgium: *S.A. "Dhlellemes et Masurel"* v. *Banque Centrale de la République de Turquie* (Court of Appeal of Brussels, 1963, ILR (London), vol. 45 (1972) p. 85); Italy: *Hungarian Papal Institute* v. *Hungarian Institute (Academy) in Rome* (Court of Cassation, 1960 (ibid.), vol. 40 (1970), p. 59).

The judicial practice of developing countries on foreign State enterprises or entities is not readily discernible due to the lack of information. With regard to the practice of Indian courts see, for example, *New Central Jute Mills Co. Ltd.* v. *VEB Deutfracht Seereederei Rostock* (Calcutta High Court, A.I.R. 1983, cal. 225, *Indian Journal of International Law*, vol. 23 (1983), p. 589) in which the Court held that VEB Deutfracht Seereederei Rostock which was a company incorporated under the laws of the German Democratic Republic was not a "State" for the purposes of national legislation requiring consent of the Indian Central Government to sue a foreign State, but did not decide whether the entity should be considered as part of a State for the purposes of jurisdictional immunity under international law.

[143] See C. Schreuer, *State Immunity: Some Recent Developments* (Cambridge, Grotius Publications, 1988), pp. 92-124.

person is also an important element as a party to the contract of employment, being recruited for work to be performed in the State of the forum. The exception to State immunity applies to matters arising out of the terms and conditions contained in the contract of employment.

(3) With the involvement of two sovereign States, two legal systems compete for application of their respective laws. The employer State has an interest in the application of its law in regard to the selection, recruitment and appointment of an employee by the State or one of its organs, agencies or instrumentalities acting in the exercise of governmental authority. It would also seem justifiable that for the exercise of disciplinary supervision over its own staff or government employees, the employer State has an overriding interest in ensuring compliance with its internal regulations and the prerogative of appointment or dismissal which results from unilateral decisions taken by the State.

(4) On the other hand, the State of the forum appears to retain exclusive jurisdiction if not, indeed, an overriding interest in matters of domestic public policy regarding the protection to be afforded to its local labour force. Questions relating to medical insurance, insurance against certain risks, minimum wages, entitlement to rest and recreation, vacation with pay, compensation to be paid on termination of the contract of employment, and so forth, are of primary concern to the State of the forum, especially if the employees were recruited for work to be performed in that State, or at the time of recruitment were its nationals or habitual or permanent residents there. Beyond that, the State of the forum may have less reason to claim an overriding or preponderant interest in exercising jurisdiction. The basis for jurisdiction is distinctly and unmistakably the closeness of territorial connection between the contracts of employment and the State of the forum, namely performance of work in the territory of the State of the forum, as well as the nationality or habitual residence of the employees. Indeed, local staff working, for example, in a foreign embassy would have no realistic way to present a claim other than in a court of the State of the forum.[144] Article 11, in this respect, provides an important guarantee to protect their legal rights. The employees covered under the present article include both regular employees and short-term independent contractors.

(b) *The rule of non-immunity*

(5) Article 11 therefore endeavours to maintain a delicate balance between the competing interests of the employer State with regard to the application of its law and the overriding interests of the State of the forum for the application of its labour law and, in certain exceptional cases, also in retaining exclusive jurisdiction over the subject-matter of a proceeding.

(6) Paragraph 1 thus represents an effort to state the rule of non-immunity. In its formulation, the basis for the exercise of jurisdiction by the competent court of the State of the forum is apparent from the place of performance of work under the contract of employment in the territory of the State of the forum. Reference to the coverage of its social security provisions incorporated in the original text adopted on first reading has been deleted on second reading, since not all States have social security systems in the strict sense of the term and some foreign States may prefer that their employees not be covered by the social security system of the State of the forum. Furthermore, there were social security systems whose benefits did not cover persons employed for very short periods. If the reference to social security provisions was retained in article 11, such persons would be deprived of the protection of the courts of the forum State. However, it was precisely those persons who were in the most vulnerable position and who most needed effective judicial remedies. The reference to recruitment in the State of the forum which appeared in the original text adopted on first reading has also been deleted.

(7) Paragraph 1 is formulated as a residual rule, since States can always agree otherwise, thereby adopting a different solution by waiving local labour jurisdiction in favour of immunity. Respect for treaty regimes and for the consent of the States concerned is of paramount importance, since they are decisive in solving the question of waiver or of exercise of jurisdiction by the State of the forum or of the maintenance of jurisdictional immunity of the employer State. Without opposing the adoption of paragraph 1, some members felt that paragraph 1 should provide for the immunity of the State as a rule and that paragraph 2 should contain the exceptions to that rule.

(c) *Circumstances justifying maintenance of the rule of State immunity*

(8) Paragraph 2 strives to establish and maintain an appropriate balance by introducing important limitations on the application of the rule of non-immunity, by enumerating circumstances where the rule of immunity still prevails.

(9) Paragraph 2 (*a*) enunciates the rule of immunity for the engagement of government employees of rank whose functions are closely related to the exercise of governmental authority. Examples of such employees are private secretaries, code clerks, interpreters, translators and other persons entrusted with functions related to State security or basic interests of the State.[145] Officials of established accreditation are, of course, covered by this

[144] See, for example, *S.* v. *Etat indien* (Federal Tribunal, 22 May 1984) (*Annuaire suisse de droit international*, vol. 41 (1985), p. 172) concerning the dismissal of a locally recruited Italian national originally employed by the Embassy of India to Switzerland as a radiotelegraphist, subsequently carrying out drafting, translation and photography, finally working as an office employee. The court held that, since the employee was an Italian national, carried out activities of a subordinate nature and had been recruited outside India, he had no link with the State of India and exercise of jurisdiction on the case could not cause any prejudice to the discharge of State functions, and, therefore, that the employment contract was not in the realm of the *puissance publique* of India and that the Swiss courts had jurisdiction over the case.

[145] See, for example, the judicial practice of Italy: *Console generale britannico in Napoli* v. *Ferraino* (Corte di Cassazione (Sezioni Unite), 17 January 1986, No. 283, *The Italian Yearbook of International Law*, vol. VII (1986-1987), pp. 298-299); *Console generale belga in Napoli* v. *Esposito* (Corte di Cassazione (Sezioni Unite), 3 February 1986, No. 666, ibid.); *Panattoni* v. *Repubblica federale di Germania* (Corte di Cassazione, 15 July 1987) (*Rivista . . .*, vol. LXXI (1988), p. 902).

subparagraph. Proceedings relating to their contracts of employment will not be allowed to be instituted or entertained before the courts of the State of the forum. The Commission on second reading considered that the expression "services associated with the exercise of governmental authority" which had appeared in the text adopted on first reading might lend itself to unduly extensive interpretation, since a contract of employment concluded by a State stood a good chance of being "associated with the exercise of governmental authority", even very indirectly. It was suggested that the exception provided for in subparagraph (*a*) was justified only if there was a close link between the work to be performed and the exercise of governmental authority. The word "associated" has therefore been amended to read "closely related". In order to avoid any confusion with contracts for the performance of services which were dealt with in the definition of a "commercial transaction" and were therefore covered by article 11, the word "services" was replaced by the word "functions" on second reading.

(10) Paragraph 2 (*b*) is designed to confirm the existing practice of States[146] in support of the rule of immunity in the exercise of the discretionary power of appointment or non-appointment by the State of an individual to any official post or employment position. This includes actual appointment which under the law of the employer State is considered to be a unilateral act of governmental authority. So also are the acts of "dismissal" or "removal" of a government employee by the State, which normally take place after the conclusion of an inquiry or investigation as part of supervisory or disciplinary jurisdiction exercised by the employer State. This subparagraph also covers cases where the employee seeks the renewal of his employment or reinstatement after untimely termination of his engagement. The rule of immunity applies to proceedings for recruitment, renewal of employment and reinstatement of an individual only. It is without prejudice to the possible recourse which may still be available in the State of the forum for compensation or damages for "wrongful dismissal" or for breaches of obligation to recruit or to renew employment. In other words, this subparagraph does not prevent an employee from bringing action against the employer State in the State of the forum to seek redress for damage arising from recruitment, renewal of employment or reinstatement of an individual. The Commission on second reading replaced the words "the proceeding relates

For the judicial practice of some other States, see for example, Poland: *Maria B.* v. *Austrian Cultural Institute in Warsaw* (Supreme Court, 25 March 1987, ILR (London), vol. 82 (1990), p. 1); Germany: *Conrades* v. *United Kingdom of Great Britain and Northern Ireland* (Hanover Labour Court, 4 March 1981, ibid., vol. 65 (1984), p. 205); Belgium: *Portugal* v. *Gonçalves* (Civil Court of Brussels, Second Chamber, 11 March 1982, ibid., vol. 82 (1990), p. 115); Switzerland: *Tsakos* v. *Government of the United States of America* (Labour Tribunal of Geneva, 1 February 1972, ibid., vol. 75 (1987), p. 78); United Kingdom: *Sengupta* v. *Republic of India* (Employment Appeal Tribunal, 17 November 1982, ibid., vol. 64 (1983), p. 352).

[146] See, for example, in the judicial practice of Italy, the interesting decision rendered in 1947 by the Corte di Cassazione (Sezioni Unite) in *Tani* v. *Rappresentanza commerciale in Italia dell'U.R.S.S.* (*Il Foro Italiano* (Rome), vol. LXXI (1948), p. 855; *Annual Digest . . ., 1948* (London), vol. 15 (1953), case No. 45, p. 141), in which the Soviet Trade Delegation was held to be exempt from jurisdiction in matters of employment of an Italian citizen, being *acta jure imperii*, notwithstanding the fact that the appointing authority was a separate legal entity, or for that matter a foreign corporation established by a State. Also in this case, no distinction was made between diplomatic and commercial activities of the trade agency. Similarly, in 1955, in *Department of the Army of the United States of America* v. *Gori Savellini* (see footnote 111 above), the Corte di Cassazione declined jurisdiction in an action brought by an Italian citizen in respect of his employment by a United States military base established in Italy in accordance with the North Atlantic Treaty, this being an *attività pubblicistica* connected with the *funzioni pubbliche o politiche* of the United States Government. The act of appointment was performed in the exercise of governmental authority, and as such considered to be an *atto di sovranità*.

In *Rappresentanza commerciale dell'U.R.S.S.* v. *Kazmann* (1933) *Rivista . . .* (Rome), vol. XXV (1933), p. 240; *Annual Digest . . ., 1933-1934* (London), vol. 7 (1940), case No. 69, p. 178, concerning an action for wrongful dismissal brought by an ex-employee of the Milan branch of the Soviet Trade Delegation, the Italian Supreme Court upheld the principle of immunity. This decision became a leading authority followed by other Italian courts in other cases, such as *Little* v. *Riccio e Fischer* (Court of Appeal of Naples, 1933) (*Rivista . . .*, vol. XXVI (1934), p. 110) (Court of Cassation, 1934) (*Annual Digest . . ., 1933-1934,* case No. 68, p. 177); the Court of Appeal of Naples and the Court of Cassation disclaimed jurisdiction in this action for wrongful dismissal by Riccio, an employee in a cemetery the property of the British Crown and "maintained by Great Britain *jure imperii* for the benefit of her nationals as such, and not for them as individuals". Furthermore, in another case, *Luna* v. *Repubblica socialista di Romania* (1974) (*Rivista . . .* (Milan), vol. LVIII (1975), p. 597), concerning an employment contract concluded by an economic agency forming part of the Romanian Embassy, the Supreme Court dismissed Luna's claim for 7,799,212 lire as compensation for remuneration based on the employment contract. The court regarded such labour relations as being outside Italian jurisdiction.

See the practice of Dutch courts, for example, in *M. K.* v. *Republic of Turkey*, (The Hague Sub-District Court, 1 August 1985, *Institute's Collection* No. R 2569; *Netherlands Yearbook of International Law*, vol. XIX (1988), p. 435) concerning the application for a declaration of nullity in respect of the dismissal of a Dutch secretary employed at the Turkish Embassy in The Hague. The court held that the conclusion of a contract of employment with a Dutch clerical worker who had no diplomatic or civil service status was an act which the defendant performed on the same footing as a natural or legal person under private law and that there was no question whatsoever there of a purely governmental act; the defendant, who was represented by his ambassador, entered into a legal transaction on the same footing as a natural or legal person under private law. The court accordingly decided that the defendant's plea of immunity must therefore be rejected and further that since the defendant gave notice of dismissal without the consent of the Director of the Regional Employment Office [Gewestelijk Arbeidsbureau] without K's consent and without any urgent reason existing or even having been alleged, the dismissal was void.

See also the practice of Spanish courts, for example, in *E.B.M.* v. *Guinea Ecuatorial* (Tribunal Supremo, 10 February 1986, abstract in *Revista Española de Derecho Internacional*, vol. 40, II (1988), p. 10) concerning the application of a Spanish national for reinstatement as a receptionist at the Embassy of Equatorial Guinea. The court said that granting Equatorial Guinea immunity from jurisdiction would imply an extension by analogy of the rules on diplomatic immunity and the recognition of absolute immunity of States from jurisdiction as a basic principle or customary rule of international law, while this principle was presently being questioned by the doctrine, and national courts were exercising their jurisdiction over sovereign States in matters in the sphere of *acta jure gestionis*; and in *D. A.* v. *Sudáfrica* (Tribunal Supremo, 1 December 1986, ibid., p. 11) in which the court upheld the application of a non-Spanish national for reinstatement as a secretary in the Embassy of South Africa, stating that *acta jure gestionis* were an exception to the general rules on jurisdictional immunity of States.

With regard to the practice of Belgian courts see, for example, *Castanheira* v. *Office commercial du Portugal* (1980) (Tribunal du travail de Bruxelles, abstract in *Revue belge de droit international*, vol. 19 (1986), p. 368) which related to an employment contract between a Portuguese national and the Portuguese public entity *Fundo de Fomenteo de Exportação*. The Tribunal held that while, as an emanation of the State, the entity could in principle enjoy immunity from jurisdiction, the employment contract had the characteristics of an *acte de gestion privée**. Immunity was therefore denied.

to'' adopted on first reading by the words ''the subject of the proceeding is'' to clarify this particular point. The new wording is intended to make it clear that the scope of the exception is restricted to the specific acts which are referred to in the subparagraph and which are legitimately within the discretionary power of the employer State.

(11) Paragraph 2 (*c*) also favours the application of State immunity where the employee was neither a national nor a habitual resident of the State of the forum, the material time for either of these requirements being set at the conclusion of the contract of employment. If a different time were to be adopted, for instance the time when the proceeding is initiated, further complications would arise as there could be incentives to change nationality or to establish habitual or permanent residence in the State of the forum, thereby unjustly limiting the immunity of the employer State. The protection of the State of the forum is confined essentially to the local labour force, comprising nationals of the State of the forum and non-nationals who habitually reside in that State. Without the link of nationality or habitual residence, the State of the forum lacks the essential ground for claiming priority for the exercise of its applicable labour law and jurisdiction in the face of a foreign employer State, in spite of the territorial connection in respect of place of recruitment of the employee and place of performance of services under the contract.

(12) Another important safeguard to protect the interest of the employer State is provided in paragraph 2 (*d*). The fact that the employee has the nationality of the employer State at the time of the initiation of the proceeding is conclusive and determinative of the rule of immunity from the jurisdiction of the courts of the State of the forum. As between the State and its own nationals, no other State should claim priority of jurisdiction on matters arising out of contracts of employment. Remedies and access to courts exist in the employer State. Whether the law to be applied is the administrative law or the labour law of the employer State, or of any other State, would appear to be immaterial at this point.

(13) Finally, paragraph 2 (*e*) provides for the freedom of contract, including the choice of law and the possibility of a chosen forum or *forum prorogatum*. This freedom is not unlimited. It is subject to considerations of public policy or *ordre public* or, in some systems, ''good moral and popular conscience'', whereby exclusive jurisdiction is reserved for the courts of the State of the forum by reason of the subject-matter of the proceeding.

(14) The rules formulated in article 11 appear to be consistent with the emerging trend in the recent legislative and treaty practice of a growing number of States.[147]

(15) It was observed in the Commission that the provision of paragraph 2 (*c*) might deprive persons who were neither nationals nor habitual residents of the State of the forum at the relevant time of every legal protection.

Article 12. Personal injuries and damage to property

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.

Commentary

(1) This article covers an exception to the general rule of State immunity in the field of tort or civil liability resulting from an act or omission which has caused personal injury to a natural person or damage to or loss of tangible property.[148]

(2) This exception to the rule of immunity is applicable only to cases or circumstances in which the State concerned would have been liable under the *lex loci delicti commissi*. Although the State is as a rule immune from the jurisdiction of the courts of another State, for this exceptional provision immunity is withheld.

(3) The exception contained in this article is therefore designed to provide relief or possibility of recourse to justice for individuals who suffer personal injury, death or physical damage to or loss of property caused by an act or omission which might be intentional, accidental or caused by negligence attributable to a foreign State. Since the damaging act or omission has occurred in the territory of the State of the forum, the applicable law is clearly the *lex loci delicti commissi* and the most convenient court is that of the State where the delict was committed. A court foreign to the scene of the delict might be considered as a *forum non conveniens*. The injured individual would have been without recourse to justice had the State been entitled to invoke its jurisdictional immunity.

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[147] With regard to the provision of paragraph 2 (*c*) of article 11, see for example, the United Kingdom State Immunity Act of 1978 which provides in subsection (2) (*b*) of section 4 that the non-immunity provided for in subsection (1) of that section does not apply if:

''(*b*) at the time when the contract was made the individual was neither a national of the United Kingdom nor habitually resident there; . . .''

Subsection (2) (*b*) of section 6 of the Pakistan State Immunity Ordinance of 1981, subsection (2) (*b*) of section 6 of the Singapore State Immunity Act of 1979, subsection (1) (*b*) of section 5 of the South Africa Foreign States Immunities Act of 1981 (ibid.), section 12 (3) of the Australia Foreign States Immunities Act of 1985 (see footnote 51 above), and paragraph 2 (*b*) of article 5 of the European Convention on State Immunity are worded in similar terms.

The United Kingdom State Immunity Act of 1978 (sect. 4, subsect. (2) (*a*)), the Pakistan State Immunity Ordinance of 1981 (sect. 6, subsect. (2) (*a*)), the Singapore State Immunity Act of 1979 (sect. 6, subsect. 2 (*a*)), the South Africa Foreign States Immunities Act of 1981 (sect. 5, subsect. (1) (*c*)) and the European Convention (art. 5, para. 2 (*a*)) grant immunity to the employer State if the employee is a national of that State at the time when the proceeding is instituted.

[148] See the State practice cited in the fifth report of the former Special Rapporteur (footnote 13 above), paras. 76-99. See also Australia Foreign States Immunities Act of 1985, section 13 (footnote 51 above).

(4) Furthermore, the physical injury to the person or the damage to tangible property, resulting in death or total loss or other lesser injury, appears to be confined principally to insurable risks. The areas of damage envisaged in article 12 are mainly concerned with accidental death or physical injuries to persons or damage to tangible property involved in traffic accidents, such as moving vehicles, motor cycles, locomotives or speedboats. In other words, the article covers most areas of accidents involved in the transport of goods and passengers by rail, road, air or waterways. Essentially, the rule of non-immunity will preclude the possibility of the insurance company hiding behind the cloak of State immunity and evading its liability to the injured individuals. In addition, the scope of article 12 is wide enough to cover also intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including political assassination.[149]

(5) Article 12 does not cover cases where there is no physical damage. Damage to reputation or defamation is not personal injury in the physical sense, nor is interference with contract rights or any rights, including economic or social rights, damage to tangible property.

(6) The existence of two cumulative conditions is needed for the application of this exception. The act or omission causing the death, injury or damage must occur in whole or in part in the territory of the State of the forum so as to locate the *locus delicti commissi* within the territory of the State of the forum. In addition, the author of such act or omission must also be present in that State at the time of the act or omission so as to render even closer the territorial connection between the State of the forum and the author or individual whose act or omission was the cause of the damage in the State of the forum.

(7) The second condition, namely the presence of the author of the act or omission causing the injury or damage within the territory of the State of the forum at the time of the act or omission, has been inserted to ensure the exclusion from the application of this article of cases of transboundary injuries or trans-frontier torts or damage, such as export of explosives, fireworks or dangerous substances which could explode or cause damage through negligence, inadvertence or accident. It is also clear that cases of shooting or firing across a boundary or of spill-over across the border of shelling as a result of an armed conflict are excluded from the areas covered by article 12. The article is primarily concerned with accidents occurring routinely within the territory of the State of the forum, which in many countries may still require specific waiver of State immunity to allow suits for recovering damages to proceed, even though compensation is sought from, and would ultimately be paid by, an insurance company.[150]

(8) The basis for the assumption and exercise of jurisdiction in cases covered by this exception is territoriality. The *locus delicti commissi* offers a substantial territorial connection regardless of the motivation of the act or omission, whether intentional or even malicious, or whether accidental, negligent, inadvertent, reckless or careless, and indeed irrespective of the nature of the activities involved, whether *jure imperii* or *jure gestionis*. This distinction has been maintained in the case law of some States[151] involving motor accidents in the course of official or military duties. While immunity has been maintained for acts *jure imperii*, it has been rejected for acts *jure gestionis*. The exception proposed in article 12 makes no such distinction, subject to a qualification in the opening paragraph indicating the reservation which in fact allows different rules to apply to questions specifically regulated by treaties, bilateral agreements or regional arrangements specifying or limiting the extent of liabilities or compensation, or providing for a different procedure for settlement of disputes.[152]

(9) In short, article 12 is designed to allow normal proceedings to stand and to provide relief for the individual who has suffered an otherwise actionable physical damage to his own person or his deceased ancestor, or to his

[149] See, for example, the possibilities unfolded in *Letelier* v. *Republic of Chile* (1980) (United States of America, *Federal Supplement*, vol. 488 (1980), p. 665); see also H. D. Collums, "The *Letelier* case: Foreign sovereign liability for acts of political assassination", *Virginia Journal of International Law* (Charlottesville, Va.), vol. 21 (1981), p. 251. *Chile-United States Agreement to Settle Dispute Concerning Compensation for the Deaths of Letelier and Moffit.* Done at Santiago, 11 June 1990, ILM (Washington, D.C), vol. 30 (1991), p. 421.

See also *Olsen* v. *Mexico* (729 F.2d, p. 641, United States Court of Appeals, 9th Cir., 30 March 1984, as amended 16 July 1984); *Frolova* v. *Union of Soviet Socialist Republics* (1985) (See footnote 77 above); *Gerritsen* v. *De La Madrid* (819 F.2d, p. 1511, United States Court of Appeals, 9th Cir., 18 June 1987); *Helen Liu* v. *The Republic of China* (Court of Appeals, 9th Cir., 29 December 1989, ILM (Washington, D.C.), vol. 29 (1990), p. 192. However, acts committed outside the territory of the State of the forum are excluded from the application of this article. See, for example, United States: *McKeel* v. *Islamic Republic of Iran* (United States Court of Appeals, 9th Cir., 30 December 1983, ILR (London), vol. 81 (1990), p. 543); *Perez* et al v. *The Bahamas*, Court of Appeals, District of Columbia Circuit, 28 April 1981, ibid., vol. 63 (1982), p. 601; *Berkovitz* v. *Islamic Republic of Iran and Others*. United States Court of Appeals, 9th Cir., 1 May 1984, ibid., vol. 81 (1990), p. 552; *Argentine Republic* v. *Amerada Hess Shipping Corp.* (488 U.S.428, United States Supreme Court, 23 January 1989, AJIL (Washington, D.C.), vol. 83 (1989), p. 565).

[150] In some countries, where proceedings cannot be instituted directly against the insurance company, this exception is all the more necessary. In other countries, there are legislative enactments making insurance compulsory for representatives of foreign States, such as the United States Foreign Missions Amendments Act of 1983 (Public Law 98-164 of 22 November 1983, title VI, sect. 603 (*United States Statutes at Large, 1983*, vol. 97, p. 1042)), amending the *United States Code*, title 22, section 204.

[151] See, for example, the judgements delivered in Belgium, in *S.A. "Eau, gaz, électricité et applications"* v. *Office d'aide mutuelle* (1956) (*Pasicrisie belge* (Brussels), vol. 144 (1957), part 2, p. 88; ILR, 1956 (London), vol. 23 (1960), p. 205); in the Federal Republic of Germany, in *Immunity of United Kingdom from Jurisdiction (Germany)* (1957) (ibid., 1957, vol. 24 (1961), p. 207); in Egypt, in *Dame Safia Guebali* v. *Colonel Mei* (1943) (*Bulletin de législation et de jurisprudence égyptiennes* (Alexandria), vol. 55 (1942-1943), p. 120; *Annual Digest . . ., 1943-1945* (London), vol. 12 (1949), case No. 44, p. 164); in Austria, in *Holubek* v. *Government of the United States* (1961) (*Juristische Blätter* (Vienna), vol. 84 (1962), p. 43; ILR (London), vol. 40 (1970), p. 73); in Canada in *Carrato* v. *United States of America* (1982) (141 D.L.R. (3d), p. 456, Ontario High Court; *Canadian Yearbook of International Law*, vol. XXII (1984), p. 403); and in the United States in *Tel-Oren* v. *Libyan Arab Republic, United States Brief Submitted to Supreme Court in Response to Court's Invitation in Reviewing Petition for a Writ of* Certiorari (ILM (Washington, D.C.), vol. 24 (1985), p. 427).

[152] Examples include the various status of forces agreements and international conventions on civil aviation or on the carriage of goods by sea.

property. The cause of action relates to the occurrence or infliction of physical damage occurring in the State of the forum, with the author of the damaging act or omission physically present therein at the time, and for which a State is answerable under the law of the State of the forum, which is also the *lex loci delicti commissi*.

(10) The Commission has added on second reading the word "pecuniary" before "compensation" to clarify that the word "compensation" did not include any non-pecuniary forms of compensation. The words "author of the act" should be understood to refer to agents or officials of a State exercising their official functions and not necessarily the State itself as a legal person. The expression "attributable to the State" is also intended to establish a distinction between acts by such persons which are not attributable to the State and those which are attributable to the State. The reference to act or omission attributable to the State, however, does not affect the rules of State responsibility. It should be emphasized that the present article does not address itself to the question of State responsibility but strictly to non-immunity of a State from jurisdiction before a court of another State in respect of damage caused by an act or omission of the State's agents or employees which is "alleged" to be attributable to that State; the determination of attribution or responsibility of the State concerned is clearly outside the scope of the present article. Neither does it affect the question of diplomatic immunities, as provided in article 3, nor does it apply to situations involving armed conflicts.

(11) Some members expressed reservations about the very broad scope of the article and on the consequences that might have for State responsibility. In their view, the protection of individual victims would effectively be secured by negotiations through diplomatic channels or by insurance.

Article 13. Ownership, possession and use of property

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 the determination of:

(*a*) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum;

(*b*) any right or interest of the State in movable or immovable property arising by way of succession, gift or *bona vacantia*; or

(*c*) any right or interest of the State in the administration of property, such as trust property, the estate of a bankrupt or the property of a company in the event of its winding-up.

Commentary

(1) Article 13 deals with an important exception to the rule of State immunity from the jurisdiction of a court of another State quite apart from State immunity in respect of its property from attachment and execution. It is to be recalled that, under article 6, paragraph 2 (*b*),[153] State immunity may be invoked even though the proceeding is not brought directly against a foreign State but is merely aimed at depriving that State of its property or of the use of property in its possession or control. Article 13 is therefore designed to set out an exception to the rule of State immunity. The provision of article 13 is, however, without prejudice to the privileges and immunities enjoyed by a State under international law in relation to property of diplomatic missions and other representative offices of a government, as provided under article 3.

(2) This exception, which has not encountered any serious opposition in the judicial and governmental practice of States,[154] is formulated in language which has to satisfy the differing views of Governments and differing theories regarding the basis for the exercise of jurisdiction by the courts of another State in which, in most cases, the property—especially immovable property—is situated. According to most authorities, article 13 is a clear and well-established exception, while others may still hold that it is not a true exception since a State has a choice to participate in the proceeding to assert its right or interest in the property which is the subject of adjudication or litigation.

(3) Article 13 lists the various types of proceedings relating to or involving the determination of any right or interest of a State in, or its possession or use of, movable or immovable property, or any obligation arising out of its interest in, or its possession or use of, immovable property. It is not intended to confer jurisdiction on any court where none exists. Hence the expression "which is otherwise competent" is used to specify the existence of competence of a court of another State in regard to the proceeding. The word "otherwise" merely suggests the existence of jurisdiction in normal circumstances had there been no question of State immunity to be determined. It is understood that the court is competent for this purpose by virtue of the applicable rules of private international law.

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[153] See article 6 and the commentary thereto.

[154] See the fifth report of the former Special Rapporteur (footnote 13 above), where he discusses the decision and dictum of a Tokyo court in *Limbin Hteik Tin Lat* v. *Union of Burma* (1954) (ibid., para. 117) as well as the dictum of Lord Denning, Master of the Rolls, in *Thai-Europe Tapioca Service Ltd* v. *Government of Pakistan, Ministry of Food and Agriculture, Directorate of Agricultural Supplies* (1975) (ibid., para. 118; see also footnote 45 above). For the English doctrine of trust, see the cases cited in paras. 120-121 of the fifth report. The case law of other countries has also recognized this exception, especially Italian case law (ibid., para. 122). See, however, the decision of a Brazilian court in *Republic of Syria* v. *Arab Republic of Egypt* (footnote 106 above).

For relevant legislative provisions, reference may be made to section 56 of Hungary's Law Decree No. 13 of 1979, to article 29 of Madagascar's Ordinance No. 62-041 of 19 September 1962 and to the information given in other replies to the secretariat's questionnaire (paras. 125-129 of the fifth report), as well as to section 14 of the Australia Foreign States Immunities Act of 1985 (see footnote 51 above). For discussion of other legislative provisions, international conventions and international opinions see fifth report, paras. 130-139. See, further, comments and observations of Governments analysed in the present Special Rapporteur's preliminary report (see footnote 16 above), paras. 1, 2 and 7-9).

(4) Subparagraph (*a*) deals with immovable property and is qualified by the phrase "situated in the State of the forum". This subparagraph as a whole does not give rise to any controversy owing to the generally accepted predominance of the applicability of the *lex situs* and the exclusive competence of the *forum rei sitae*. However, the expression "right or interest" in this paragraph gives rise to some semantic difficulties. The law of property, especially real property or immovable property, contains many peculiarities. What constitutes a right in property in one system may be regarded as an interest in another system. Thus the combination of "right or interest" is used as a term to indicate the totality of whatever right or interest a State may have under any legal system. The French text of the 1972 European Convention on State Immunity used in article 9 the term *droit* in its widest sense, without the addition of *intérêt*. In this connection, it should also be noted that "possession" is not always considered a "right" unless it is adverse possession or *possessio longi temporis, nec vi nec clam nec precario*, which could create a "right" or "interest", depending on the legal terminology used in a particular legal system. The Spanish equivalent expression, as adopted, is *derecho o interés*.

(5) Subparagraph (*b*) concerns any right or interest of the State in movable or immovable property arising by way of succession, gift or *bona vacantia*. It is clearly understood that, if the proceeding involves not only movable but also immovable property situated within the territorial jurisdiction of the State of the forum, then a separate proceeding may also have to be initiated in order to determine such rights or interests before the court of the State where the immovable property is situated, that is to say, the *forum rei sitae*.

(6) Subparagraph (*c*) need not concern or relate to the determination of a right or interest of the State in property, but is included to cover the situation in many countries, especially in the common-law systems, where the court exercises some supervisory jurisdiction or other functions with regard to the administration of trust property or property otherwise held on a fiduciary basis; of the estate of a deceased person, a person of unsound mind or a bankrupt; or of a company in the event of its winding-up. The exercise of such supervisory jurisdiction is purely incidental, as the proceeding may in part involve the determination or ascertainment of rights or interests of all the interested parties, including, if any, those of a foreign State. Taking into account the comments and observations of Governments as well as those of members of the Commission, the present subparagraph (*c*) combines original paragraph 1, subparagraphs (*c*), (*d*) and (*e*), as adopted on first reading, in a single paragraph.

(7) Former paragraph 2,[155] which was included in the text of the article adopted provisionally on first reading notwithstanding the contention of some members, has been deleted in view of the fact that the definition of the term "State" having been elaborated in article 2, paragraph 1 (*b*), the possibility of a proceeding being instituted in which the property, rights, interests or activities of a State are affected, although the State is not named as a party, has been much reduced. Even if such a case arose, that State could avoid its property, rights, interests or activities from being affected by providing *prima facie* evidence of its title or proof that the possession was obtained in conformity with the local law.

[155] See footnote 14 above.

Article 14. Intellectual and industrial property

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:

(*a*) the determination of any right of the State in a patent, industrial design, trade name or business name, trade mark, copyright or any other form of intellectual or industrial property, which enjoys a measure of legal protection, even if provisional, in the State of the forum; or

(*b*) an alleged infringement by the State, in the territory of the State of the forum, of a right of the nature mentioned in subparagraph (*a*) which belongs to a third person and is protected in the State of the forum.

Commentary

(1) Article 14 deals with an exception to the rule of State immunity which is of growing practical importance. The article is concerned with a specialized branch of internal law in the field of intellectual or industrial property. It covers wide areas of interest from the point of view of the State of the forum in which such rights to industrial or intellectual property are protected. In certain specified areas of industrial or intellectual property, measures of protection under the internal law of the State of the forum are further strengthened and reinforced by international obligations contracted by States in the form of international conventions.[156]

(2) The exception provided in article 14 appears to fall somewhere between the exception of "commercial transactions" provided in article 10 and that of "ownership, possession and use of property" in article 13. The protection afforded by the internal system of registration in force in various States is designed to promote inventiveness and creativity and, at the same time, to regulate and secure fair competition in international trade. An infringement of a patent of invention or industrial design or of any copyright of literary or artistic work may not always have been motivated by commercial or financial gain, but invariably impairs or entails adverse effects on the commercial interests of the manufacturers or producers who are otherwise protected for the production and distribution of the goods involved. "Intellectual and industrial property" in their collective nomenclature constitute a highly specialized form of property rights which are intangible or incorporeal, but which are capable of ownership, possession or use as recognized under various legal systems.

[156] See, for example, the Universal Copyright Convention. There is also a United Nations specialized agency, WIPO, involved in this field.

(3) The terms used in the title of article 14 are broad and generic expressions intended to cover existing and future forms, types, classes or categories of intellectual or industrial property. In the main, the three principal types of property that are envisaged in this article include: patents and industrial designs which belong to the category of industrial property; trade marks and trade names which pertain more to the business world or to international trade and questions relating to restrictive trade practices and unfair trade competition (*concurrence déloyale*); and copyrights or any other form of intellectual property. The generic terms employed in this article are therefore intended to include the whole range of forms of intellectual or industrial property which may be identified under the groups of intellectual or industrial property rights, including, for example, a plant breeder's right and a right in computer-generated works. Some rights are still in the process of evolution, such as in the field of computer science or other forms of modern technology and electronics which are legally protected. Such rights are not readily identifiable as industrial or intellectual. For instance, hardware in a computer system is perhaps industrial, whereas software is more clearly intellectual, and firmware may be in between. Literary and culinary arts, which are also protected under the name of copyright, could have a separate grouping as well. Copyrights in relation to music, songs and the performing arts, as well as other forms of entertainment, are also protected under this heading.

(4) The rights in industrial or intellectual property under the present draft article are protected by States, nationally and also internationally. The protection provided by States within their territorial jurisdiction varies according to the type of industrial or intellectual property in question and the special regime or organized system for the application, registration or utilization of such rights for which protection is guaranteed by domestic law.

(5) The voluntary entrance by a State into the legal system of the State of the forum, for example by submitting an application for registration of, or registering a copyright, as well as the legal protection offered by the State of the forum, provide a strong legal basis for the assumption and exercise of jurisdiction. Protection is generally consequential upon registration, or even sometimes upon the deposit or filing of an application for registration. In some States, prior to actual acceptance of an application for registration, some measure of protection is conceivable. Protection therefore depends on the existence and scope of the national legislation, as well as on a system of registration. Thus, in addition to the existence of appropriate domestic legislation, there should also be an effective system of registration in force to afford a legal basis for jurisdiction. The practice of States appears to warrant the inclusion of this article.[157]

(6) Subparagraph (*a*) of article 14 deals specifically with the determination of any rights of the State in a legally protected intellectual or industrial property. The expression "determination" is here used to refer not only to the ascertainment or verification of the existence of the rights protected, but also to the evaluation or assessment of the substance, including content, scope and extent of such rights.

(7) Furthermore, the proceeding contemplated in article 14 is not confined to an action instituted against the State or in connection with any right owned by the State, but may also concern the rights of a third person, and only in that connection would the question of the rights of the State in a similar intellectual or industrial property arise. The determination of the rights belonging to the State may be incidental to, if not inevitable for, the establishment of the rights of a third person, which is the primary object of the proceeding.

(8) Subparagraph (*b*) of article 14 deals with an alleged infringement by a State in the territory of the State of the forum of any such right as mentioned above which belongs to a third person and is protected in the State of the forum. The infringement under this article does not necessarily have to result from commercial activities conducted by a State as stipulated under article 10 of the present draft articles; it could also take the form of activities for non-commercial purposes. The existence of two conditions is essential for the application of this paragraph. First, the alleged infringement by a State of a copyright must take place in the territory of the State of the forum. Secondly, such a copyright of a third person must be legally protected in the State of the forum. Hence there is a limit to the scope of the application of the article. Infringement of a copyright by a State in its own territory, and not in the State of the forum, does not establish a sufficient basis for jurisdiction in the State of the forum under this article.

(9) Article 14 expresses a residual rule and is without prejudice to the rights of States to formulate their own domestic laws and policies regarding the protection of any intellectual or industrial property in accordance with relevant international conventions to which they are parties and to apply them domestically according to their national interests. It is also without prejudice to the extraterritorial effect of nationalization by a State of intellectual or industrial property within its territory. The question of the precise extent of the extraterritorial effects of compulsory acquisition, expropriation or other measures of nationalization brought about by the State in regard to such rights within its own territory in accordance with its internal laws is not affected by the provision of the present articles.

(10) It should be observed that the application of the exception to State immunity in subparagraph (*b*) of this article is confined to infringements occurring in the State of the forum. Every State is free to pursue its own policy within its own territory. Infringement of such rights in

[157] Domestic legislation adopted since 1970 supports this view; see section 7 of the United Kingdom State Immunity Act of 1978; section 9 of the Singapore State Immunity Act of 1979; section 8 of the Pakistan State Immunity Ordinance of 1981; section 8 of the South Africa Foreign States Immunities Act of 1981; section 15 of the Australia Foreign States Immunities Act of 1985 (see footnote 51 above). The United States Foreign Sovereign Immunities Act of 1976 (see footnote 40 above) contains no direct provision on this. Section 1605 (*a*) (2) of the Act may in fact be said to have overshadowed, if not substantially overlapped, the use of copyrights and other similar rights. The European Convention on State Immunity, in its article 8, supports the above view. A leading case in support of this view is the decision of the Austrian Supreme Court in *Dralle* v. *Republic of Czechoslovakia* (1950) (see footnote 25 above).

the territory of another State, for instance the unauthorized reproduction or distribution of copyrighted publications, cannot escape the exercise of jurisdiction by the competent courts of that State in which measures of protection have been adopted. The State of the forum is also equally free to tolerate or permit such infringements or to deny remedies thereof in the absence of an internationally organized system of protection for the rights violated or breached in its own territory.

Article 15. Participation in companies or other collective bodies

1. A State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to its participation in a company or other collective body, whether incorporated or unincorporated, being a proceeding concerning the relationship between the State and the body or the other participants therein, provided that the body:

(*a*) has participants other than States or international organizations; and

(*b*) is incorporated or constituted under the law of the State of the forum or has its seat or principal place of business in that State.

2. A State can, however, invoke immunity from jurisdiction in such a proceeding if the States concerned have so agreed or if the parties to the dispute have so provided by an agreement in writing or if the instrument establishing or regulating the body in question contains provisions to that effect.

Commentary

(1) Article 15 contains an exception to the rule of jurisdictional immunity of a State in a proceeding before the courts of another State relating to the participation by the State in a company or other collective body which has been established or has its seat or principal place of business in the State of the forum. Such a body in which the State participates may be incorporated, that is to say, with a legal personality, or unincorporated with limited legal capacity.

(2) The expression "company or other collective body, whether incorporated or unincorporated", used in article 15, has been deliberately selected to cover a wide variety of legal entities as well as other bodies without legal personality. The formulation is designed to include different types or categories of bodies, collectivities and groupings known under different nomenclatures, such as corporations, associations, partnerships and other similar forms of collective bodies which may exist under various legal systems with varying degrees of legal capacity and status.

(3) The collective body in which the State may thus participate with private partners or members from the private sector may be motivated by profit-making, such as a trading company, business enterprise or any other similar commercial entity or corporate body. On the other hand, the State may participate in a collective body which is inspired by a non-profit-making objective, such as a learned society, a temple, a religious congregation, a charity or charitable foundation, or any other similar philanthropic organization.

(4) Article 15 is thus concerned with the legal relationship within the collective body or the corporate relations—more aptly described in French as *rapports sociétaires*—or legal relationship covering the rights and obligations of the State as participant in the collective body in relation to that body, on the one hand, and in relation to other participants in that body on the other.

Paragraph 1

(5) The rule of non-immunity as enunciated in paragraph 1 depends in its application upon the concurrence or coexistence of two important conditions. First, the body must have participants other than States or international organizations; in other words, it must be a body with participation from the private sector. Thus international organizations and other forms of collectivity which are composed exclusively of States and/or international organizations without participation from the private sector are excluded from the scope of article 15.

(6) Secondly, the body in question must be incorporated or constituted under the law of the State of the forum, or have its seat or principal place of business in that State. The seat is normally the place from which the entity is directed; and the principal place of business means the place where the major part of its business is conducted. The reference to the place of control which appeared in the English text of paragraph 1 (*b*) provisionally adopted on first reading[158] has been deleted, as it was felt that the issue of determination of how a State is in control of a corporate entity was a very controversial one. The reference is replaced by another more easily identifiable criterion, namely the "seat" of the corporate entity, which is also used in article 6 of the European Convention on State Immunity.

(7) When a State participates in a collective body, such as by acquiring or holding shares in a company or becoming a member of a body corporate which is organized and operated in another State, it voluntarily enters into the legal system of that other State and into a relationship recognized as binding under that legal system. Consequently, the State is of its own accord bound and obliged to abide by the applicable rules and internal law of the State of incorporation, of registration or of the principal place of business. The State also has rights and obligations under the relevant provisions of the charter of incorporation, articles of association or other similar instruments establishing limited or registered partnerships. The relationship between shareholders *inter se* or between shareholders and the company or the body of any form in matters relating to the formation, management, direction, operation, dissolution or distribution of assets of the entity in question is governed by the law of the State of incorporation, of registration or of the seat or principal place of business. The courts of such States are best qualified to apply this specialized branch of their own law.

[158] See footnote 14 above.

(8) It has become increasingly clear from the practice of States[159] that matters arising out of the relationship between the State as participant in a collective body and that body or other participants therein fall within the areas covered by this exception to the rule of State immunity. To sustain the rule of State immunity in matters of such a relationship would inevitably result in a jurisdictional vacuum. One of the three links based on substantial territorial connection with the State of the forum must be established to warrant the assumption and exercise of jurisdiction by its courts. These links are: the place of incorporation indicating the system of incorporation, charter or other type of constitution or the seat or the principal place of business (*siège social ou statutaire*).

Paragraph 2

(9) The exception regarding the State's participation in companies or other collective bodies as provided in paragraph 1 is subject to a different or contrary agreement between the States concerned, namely the State of the forum, which in this case is also the State of incorporation or of the seat or principal place of business, on the one hand, and the State against which a proceeding is instituted on the other. This particular reservation had originally been placed in paragraph 1, but was moved to paragraph 2 on second reading, with a view to setting out clearly the general rule of non-immunity in paragraph 1 and consolidating all the reservation clauses in paragraph 2. Paragraph 2 also recognizes the freedom of the parties to the dispute to agree contrary to the rule of non-immunity as enunciated in paragraph 1. Furthermore, parties to the corporate relationship (*rapports sociétaires*) may themselves agree that the State as a member or participant continues to enjoy immunity or that they may choose or designate any competent courts or procedures to resolve the differences that may arise between them or with the body itself. In particular, the instrument establishing or regulating that body itself may contain provisions contrary to the rule of non-immunity for the State, in its capacity as a member, shareholder or participant, from the jurisdiction of the courts so chosen or designated. Subscription by the State to the provisions of the instrument constitutes an expression of consent to abide by the rules contained in such provisions, including the choice of law or jurisdiction. The phrase "the instrument establishing or regulating the body in question" should be understood as intending to apply only to the two fundamental instruments of a corporate body and not to any other type of regulation.

[159] Recent national legislation on jurisdictional immunities of States may be cited in support of this exception. See, for example, section 8 of the United Kingdom State Immunity Act of 1978; section 10 of the Singapore State Immunity Act of 1979; section 9 of the Pakistan State Immunity Ordinance of 1981; section 9 of the South Africa Foreign States Immunities Act of 1981; and section 16 of the Australia Foreign States Immunities Act of 1985 (see footnote 51 above).

This exception appears to have been included in the broader exception of trade or commercial activities conducted or undertaken in the State of the forum provided in the United States of America Foreign Sovereign Immunities Act of 1976, section 1605 (*a*) (2) (see footnote 40 above), in the European Convention, and in the Inter-American Draft Convention on Jurisdictional Immunity of States (see footnote 137 above).

Article 16. Ships owned or operated by a State

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the operation of that ship, if at the time the cause of action arose, the ship was used for other than government non-commercial purposes.

2. Paragraph 1 does not apply to warships and naval auxiliaries nor does it apply to other ships owned or operated by a State and used exclusively on government non-commercial service.

3. For the purposes of this article, "proceeding which relates to the operation of that ship" means, *inter alia*, any proceeding involving the determination of a claim in respect of:

(*a*) collision or other accidents of navigation;

(*b*) assistance, salvage and general average;

(*c*) repairs, supplies or other contracts relating to the ship;

(*d*) consequences of pollution of the marine environment.

4. 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 the carriage of cargo on board a ship owned or operated by that State if, at the time the cause of action arose, the ship was used for other than government non-commercial purposes.

5. Paragraph 4 does not apply to any cargo carried on board the ships referred to in paragraph 2 nor does it apply to any cargo owned by a State and used or intended for use exclusively for government non-commercial purposes.

6. States may plead all measures of defence, prescription and limitation of liability which are available to private ships and cargoes and their owners.

7. If in a proceeding there arises a question relating to the government and non-commercial character of a ship owned or operated by a State or cargo owned by a State, a certificate signed by a diplomatic representative or other competent authority of that State and communicated to the court shall serve as evidence of the character of that ship or cargo.

Commentary

(1) Draft article 16 is concerned with a very important area of maritime law as it relates to the conduct of external trade. It is entitled "Ships owned or operated by a State". The expression "ship" in this context should be interpreted as covering all types of seagoing vessels, whatever their nomenclature and even if they are engaged only partially in seagoing traffic. It is formulated as a residual rule, since States can always conclude

agreements or arrangements[160] allowing, on a reciprocal basis or otherwise, for the application of jurisdictional immunities in respect of ships in commercial service owned or operated by States or their agencies.

(2) Paragraphs 1 and 3 are mainly concerned with ships engaged in commercial service, paragraph 2 mainly with warships and naval auxiliaries and paragraphs 4 and 5 with the status of cargo. Paragraph 4 enunciates the rule of non-immunity in proceedings relating to the carriage of cargo on board a ship owned or operated by a State and used for other than government non-commercial service. Paragraph 5 maintains State immunity in respect of any cargo carried on board the ships referred to in paragraph 2 as well as of any cargo belonging to a State and used or intended for use exclusively for government non-commercial purposes.

(3) The difficulties inherent in the formulation of rules for the exception provided for under article 16 are manifold. They are more than linguistic. The English language presupposes the employment of terms that may be in current usage in the terminology of common law but are unknown to and have no equivalents in other legal systems. Thus the expressions "suits in admiralty", "libel *in rem*", "maritime lien" and "proceedings *in rem* against the ship", may have little or no meaning in the context of civil law or other non-common-law systems. The terms used in article 16 are intended for a more general application.

(4) There are also conceptual difficulties surrounding the possibilities of proceedings *in rem* against ships, for example by service of writs on the main mast of the ship, or by arresting the ship in port, or attaching it and releasing it on bond. In addition, there is a special process of arrest *ad fundandam jurisdictionem*. In some countries, it is possible to proceed against another merchant ship in the same ownership as the ship in respect of which the claim arises, on the basis of what is known as sister-ship jurisdiction, for which provision is made in the International Convention relating to the Arrest of Seagoing Ships (Brussels, 1952). The present article should not be interpreted as recognizing such systems as arrest *ad fundandam jurisdictionem* or sister-ship jurisdiction as a generally applicable rule. It follows that where a claim is brought against a merchant ship owned or operated by a State, another merchant ship owned or operated by the same State could not be subject to a proceeding *in rem* against it.

(5) The problem of government-owned or State-operated vessels employed in ordinary commercial activities is not new. This is apparent from the vivid account given by one author[161] and confirmed by the fact that some maritime Powers felt it necessary to convene a conference to adopt the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (Brussels, 1926) and its Additional Protocol (1934) on the subject. The main purpose of the 1926 Brussels Convention was to reclassify seagoing vessels not according to ownership but according to the nature of their operation (*exploitation*) or their use, whether in "governmental and non-commercial" or in "commercial" service.

(6) The text of article 16 as provisionally adopted on first reading[162] maintained the dichotomy of service of vessels, classified according to a dual criterion of "commercial and non-governmental" or "governmental and non-commercial" use. The term "governmental and non-commercial" is used in the 1926 Brussels Convention, and the term "government non-commercial" in conventions of a universal character such as the Convention on the High Seas (Geneva, 1958) and the 1982 United Nations Convention on the Law of the Sea, in which ships are classified according to their use, that is to say, government and non-commercial service as opposed to commercial service.

(7) Some members of the Commission at the time of adopting the article on first reading expressed misgivings concerning that dual criterion, as it might suggest the possibility of a very different combination of the two adjectives, such as "governmental commercial" service or "commercial and governmental" service. Other members, on the other hand, denied the likelihood of that interpretation, and considered that "commercial" and "non-governmental" could be taken cumulatively. Others again added that States, particularly developing countries, and other public entities could engage in activities of a commercial and governmental nature without submitting to the jurisdiction of national courts. Furthermore, the purchase of armaments was often concluded on a government-to-government basis, including the transport of such armaments by any type of carrier, which would not normally be subject to the exercise of jurisdiction by any national court. The diversity of views led the Commission to maintain square brackets round the phrase "non-governmental" in paragraphs 1 and 4 of the draft article on first reading.

(8) The Commission, after further discussion, adopted on second reading the present formulation "other than government non-commercial purposes" in paragraphs 1 and 4, thereby eliminating the problem of dual criterion.

(9) The words "operate" (*exploiter*) and "operation" (*exploitation*) in paragraph 1 must be understood against the background of the 1926 Brussels Convention and existing State practice. Both terms refer to the exploitation or operation of ships in the transport of goods and pas-

[160] See, for example, the Protocol of 1 March 1974 to the Treaty of Merchant Navigation of 3 April 1968 between the United Kingdom and the Soviet Union (United Kingdom, *Treaty Series No. 104 (1977)*). See also the treaties on maritime navigation concluded between the Soviet Union and the following States: France, Maritime Agreement of 20 April 1967 (art. 14) (United Nations, *Treaty Series*, vol. 1007, p. 183); Netherlands, Agreement of 28 May 1969 concerning shipping (art. 16) (ibid., vol. 815, p. 159); Bulgaria, Czechoslovakia, German Democratic Republic, Hungary, Poland, Romania, Agreement of 3 December 1971 on cooperation with regard to maritime merchant shipping (art. 13) (ibid., vol. 936, p. 19); Algeria, Agreement of 18 April 1973 concerning maritime navigation (art. 16) (ibid., vol. 990, p. 211); Iraq, Agreement of 25 April 1974 on maritime merchant shipping (art. 15); Portugal, Agreement of 20 December 1974 on maritime navigation (art. 15). Cf. M.M. Boguslavsky, "Foreign State immunity: Soviet doctrine and practice", *Netherlands Yearbook of International Law* (Alphen aan den Rijn), vol. X (1979), pp. 173-174.

[161] See G. van Slooten, "La Convention de Bruxelles sur le statut juridique des navires d'Etat", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. VII (1926), p. 453, in particular p. 457.

[162] See footnote 14 above.

sengers by sea. The carriage of goods by sea constitutes an important subject in international trade law. A study has been undertaken by UNCITRAL, and a standard convention or legislation on maritime law or the law of carriage of goods by sea[163] has been proposed to serve as a model for developing countries which are contemplating national legislation on the subject. The subject covers a wide field of maritime activities, from organization of the merchant marine, construction and building of a merchant fleet, training of master and crew, establishment of forwarding and handling agents, and taking of marine insurance. More generally known are questions relating to the liabilities of carriers for the carriage of dangerous goods or of animals, the discharge of oil offshore away from the port, collision at sea, salvage and repair, general average, seamen's wages, maritime liens and mortgages. The concept of the operation of merchant ships or ships engaged in commerce is given some clarification by way of illustration in paragraph 3. The expression "a State which operates a ship" covers also the "possession", "control", "management" and "charter" of ships by a State, whether the charter is for a time or voyage, bare-boat or otherwise.

(10) A State owning a ship, but allowing a separate entity to operate it, could still be proceeded against owing to the special nature of proceedings *in rem* or in admiralty or maritime lien which might be provided for in some common-law countries, and which were directed to all persons having an interest in the ship or cargo. In practice, a State owning a ship but not operating it should not otherwise be held liable for its operation at all, as the corporation or operating entity exists to answer for all liabilities arising out of the operation of that ship. The provision of paragraph 1 should be interpreted that in a case where a ship is owned by a State but operated by a State enterprise which has independent legal personality, it is the ship-operating State enterprise and not the State owning the ship that would become subject to jurisdiction before the court of the forum State. It may be also said that it should be possible to allow actions to proceed relating to the operation of the ship without involving the State or its claim for jurisdictional immunity. There seemed to be no need in such a case to institute a proceeding *in personam* against the State owning the ship as such, particularly if the cause of action related to its operation, such as collision at sea, general average, or carriage of goods by sea. But if the proceeding related to repairs or salvage services rendered to the ship, it might be difficult in some legal systems to imagine that the owner did not benefit from the repairs or services rendered and that the operator alone was liable. If such an eventuality occurred, a State owning but not operating the vessel could allow the operator, which is in many cases a State enterprise, to appear in its place to answer the complaint or claim made. The practice is slowly evolving in this direction through bilateral arrangements.

(11) Paragraph 2 enunciates the rule of State immunity in favour of warships and naval auxiliaries, even though such vessels may be employed occasionally for the carriage of cargoes for such purposes as to cope with an emergency or other natural calamities. Immunity is also maintained for other government ships such as police patrol boats, customs inspection boats, hospital ships, oceanographic survey ships, training vessels and dredgers, owned or operated by a State and used or intended for use in government non-commercial service. A similar provision is found in article 3 of the 1926 International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels. The word "exclusively" was introduced on second reading in line with article 96 of the 1982 United Nations Convention on the Law of the Sea. Some members, however, expressed reservations about the retention of the second half of the text beginning with the words "nor does it apply" on the ground that the reference to "other ships owned or operated by a State and used exclusively on government non-commercial service", was unnecessary and illogical in light of the provision of paragraph 1. One member also expressed reservations about the use of the word "service" in paragraph 2, stating that it should be replaced by the word "purposes" as in paragraph 1; since paragraph 2 forms a consequential provision of paragraph 1, it would be confusing to use different terms for those corresponding provisions.

(12) It is important to note that paragraphs 1, 2 and 4 apply to "use" of the ship. The application of the criterion of use of the ship, which is actual and current is thus clarified. The criterion of intended use, which was included in the text adopted provisionally on first reading, has been eliminated, for paragraph 1 presupposes the existence of a cause of action relating to the operation of the ship and such a cause of action is not likely to arise if the ship is not actually in use. The Commission therefore retained on second reading only the criterion of actual use, all the more because the criterion of intended use was considered very vague and likely to give rise to difficulties in practice. For the same reason, the criterion of intended use has been eliminated also from paragraphs 2 and 4. Some members, however, expressed reservations about the deletion of that criterion. One member pointed out that State A could order from a shipbuilding yard in a State B a ship intended for commercial use. After its construction, the ship would sail from a port in State B to a port in State A, during which the ship, though intended for commercial purposes, would not be actually used for carriage of cargo. In his view, deletion of "intended for use", therefore created a lacuna in that respect.

(13) The expression "before a court of another State which is otherwise competent in any proceeding" is designed to refer back (*renvoyer*) to the existing jurisdiction of the courts competent under the internal law, including the maritime law, of the forum State, which may recognize a wide variety of causes of action and may allow a possible choice of proceedings, such as *in personam* against the owner and operator or *in rem* against the ship itself, or suits in admiralty or actions to enforce a maritime lien or to foreclose a mortgage. A court may be competent on a variety of grounds, including the presence of the ship at a port of the forum State, and it need not be the same ship as the one that caused damage at sea or had other liabilities but a similar merchant ship belonging to the same owner. Courts in common-law systems generally recognize the possibility of arrest or seizure of a sister ship *ad fundandam jurisdictionem*, but

[163] See the United Nations Convention on the Carriage of Goods by Sea.

once bond is posted the ship would be released and the proceedings allowed to continue. As stated earlier, however, the present article should not be interpreted to recognize this common law practice as a universally applicable practice. Thus the expression "any proceeding" refers to "any type of proceeding", regardless of its nature, whether *in rem*, *in personam*, in admiralty or otherwise. The rules enunciated in paragraphs 1 and 2 are supported by State practice, both judicial, legislative and governmental, as well as by multilateral and bilateral treaties.[164]

(14) Paragraph 3 sets out some examples of the proceedings which relate to the operation of ships "used for other than government non-commercial purposes" under paragraph 1. Paragraph 3 (*d*) has been introduced on second reading in response to a suggestion put forward by a Government in the Sixth Committee at the forty-fifth session of the General Assembly. Although the provisions of paragraph 3 are merely illustrative, the Commission deemed it appropriate to include this additional example in view of the importance attached by the international community to environmental questions and of the problem of ship-based marine pollution. In consideration of the fact that this subparagraph was not contained in the text of former article 18 adopted on first reading, both the Commission and the Drafting Committee discussed the question in some detail. Since subparagraph (*d*), like subparagraphs (*a*) to (*c*), serves merely as an example of the claims to which the provisions of paragraph 1 would apply, it does not affect the substance or scope of the exception to State immunity under paragraph 1. Nor does the subparagraph establish substantive law concerning the legitimacy or receivability of a claim. Whether or not a claim is to be deemed actionable is a matter to be decided by the competent court. The words "consequences of" are intended to convey the concern of some members that unqualified reference to pollution of the marine environment from ships might encourage frivolous claims or claims without tangible loss or damage to the claimant. One member, indeed, considered that a more qualified wording such as "injurious consequences" would have been necessary and he therefore reserved his position on the subparagraph. Some other members, on the other hand, felt that this concern was unjustified since no frivolous or vexatious claims would be entertained by a court and that furthermore it was not the function of rules of State immunity to prevent claims on the basis of their merits.

(15) Paragraph 4 provides for the rule of non-immunity applicable to a cargo belonging to a State and used or intended for use for commercial non-governmental purposes. Paragraph 5 is designed to maintain immunity for any cargo, commercial or non-commercial, carried on board the ships referred to in paragraph 2, as well as for any cargo belonging to a State and used, or intended for use, in government non-commercial service. This provision maintains immunity for, *inter alia*, cargo involved in emergency operations such as food relief or transport of medical supplies. It should be noted that, in paragraph 5, unlike in paragraphs 1, 2 and 4, the word "intended for use" has been retained because the cargo is not normally used while it is on board the ship and it is therefore its planned use which will determine whether the State concerned is or is not entitled to invoke immunity.

(16) Paragraphs 6 and 7 apply to both ships and cargoes and are designed to strike an appropriate balance between the State's non-immunity under paragraphs 1 and 4 and a certain protection to be afforded the State. Paragraph 6 reiterates that States owning or operating ships engaged in commercial service may invoke all measures of defence, prescription and limitation of liability that are available to private ships and cargoes and their owners. The rule enunciated in paragraph 6 is not limited in its application to proceedings relating to ships and cargoes. States may plead all available means of defence in any proceedings in which State property is involved. Paragraph 7 indicates a practical method for proving the government and non-commercial character of the ship or cargo, as the case may be, by a certificate signed in normal circumstances by the accredited diplomatic representative of the State to which the ship or cargo belongs. In the absence of an accredited diplomatic representative, a certificate signed by another competent authority, such as the Minister of Transport or the consular officer concerned, shall serve as evidence before the court. The communication of the certificate to the court will of course be governed by the applicable rules of procedure of the forum State. The words "shall serve as evidence" does not " however refer to irrebuttable evidence.

(17) Article 16 does not deal with the issue of immunity of States in relation to aircraft or space objects. Hence it cannot be applied to aircraft or space objects.[165]

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[164] See the sixth report of the former Special Rapporteur (footnote 13 above), paras. 136-230.

See also for recent legislative practice, the South Africa Foreign States Immunities Act of 1981 (section 11) (footnote 51 above); the United States Act to amend the Foreign Sovereign Immunities Act with respect to admiralty jurisdiction of 1988, Public Law 100-640, 102 stat. 3333 (section 1605 (*b*), as amended, and section 1610 as amended).

For the recent judicial practice see, for example, Canada: *Lorac Transport Ltd.* v. *The Ship "Atra"* (1984) (9 D.L.R. (4th) 129, Federal Court, Trial Division, *Canadian Yearbook of International Law*, vol. XXIII (1985), pp. 417-418; The Netherlands: *USSR* v. *I.C.C. Handel-Maatschappij*; the United States of America: *Transamerican Steamship Corp.* v. *Somali Democratic Republic* (767 F.2d, p. 998, United States Court of Appeals, D.C. Cir., 12 July 1985, AJIL (Washington, D.C.), vol. 80 (1986), p. 357); *China National Chemical Import and Export Corporation and Another* v. *M/V Lago Hualaihue and Another* (District Court, Maryland. 6 January 1981, ILR (London), vol. 63, (1982) p. 528).

[165] This issue was discussed in the Drafting Committee and referred to in the Commission (see *Yearbook . . . 1991*, vol. I, 2221st meeting, paras. 82-84).

Treaties relating to international civil aviation law include the following:

(*a*) Convention on International Civil Aviation, Chicago, 1944 (see, in particular, chapters I and II);

(*b*) Convention for the Unification of Certain Rules Relating to International Carriage by Air, Warsaw, 1929 (see arts. 1, 2 and the Additional Protocol);

(*c*) Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, The Hague, 1955 (see art. XXVI);

(*d*) Convention supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air

(*Continued on next page.*)

Article 17. Effect of an arbitration agreement

If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

(*a*) the validity or interpretation of the arbitration agreement;

(*b*) the arbitration procedure; or

(*c*) the setting aside of the award;

unless the arbitration agreement otherwise provides.

Commentary

(1) Draft article 17 deals with the rule of non-immunity relating to the supervisory jurisdiction of a court of another State which is otherwise competent to determine questions connected with the arbitration agreement, such as the validity of the obligation to arbitrate or to go to arbitration or to compel the settlement of a difference by arbitration, the interpretation and validity of the arbitration clause or agreement, the arbitration procedure and the setting aside of arbitral awards.[166]

(2) The draft article as provisionally adopted on first reading included two expressions "commercial contract" and "civil or commercial matter" in square brackets as alternative confines of the exception relating to an arbitration agreement. Those expressions have now been replaced by the term "commercial transaction" in line with the provision of article 2, paragraph 1 (*c*).

(3) The expression "the court which is otherwise competent" in this context refers to the competence of a court, if any, to exercise supervisory jurisdiction under the internal law of the State of the forum, including in particular its rules of private international law, in a proceeding relating to the arbitration agreement. A court may be competent to exercise such supervisory jurisdiction in regard to a commercial arbitration for one or more reasons. It may be competent in normal circumstances because the seat of the arbitration is located in the territory of the State of the forum, or because the parties to the arbitration agreement have chosen the internal law of the forum as the applicable law of the arbitration. It may also be competent because the property seized or attached is situated in the territory of the forum.

(4) It should be pointed out in this connection that it is the growing practice of States to create conditions more attractive and favourable for parties to choose to have their differences arbitrated in their territory. One of the attractions is an endeavour to simplify the procedures of judicial control. Thus the United Kingdom and Malaysia have amended their legislation regarding supervisory jurisdiction applicable to arbitration in general. The fact remains that, in spite of this trend, many countries, such as Thailand and Australia, continue to maintain more or less strict judicial control or supervision of arbitration in civil, commercial and other matters taking place within the territory of the forum State. Thus it is possible, in a given instance, either that the court which is otherwise competent may decline to exercise supervisory jurisdiction, or that it may have its jurisdiction restricted as a result of new legislation. Furthermore, the exercise of supervisory jurisdiction may have been excluded, at least in some jurisdictions, by the option of the parties to adopt an autonomous type of arbitration, such as the arbitration of ICSID or to regard arbitral awards as final, thereby precluding judicial intervention at any stage. The proviso "unless the arbitration agreement otherwise provides" is designed to cover the option freely expressed by the parties concerned which may serve to take the arbitration procedure out of domestic judicial control. Some courts may still insist on the possibility of supervision or control over arbitration despite the expression of unwillingness on the part of the parties. In any event, agreements to arbitrate are binding on the parties thereto, although their enforcement may have to depend, at some point, on judicial participation.

(5) For the reasons indicated, submission to commercial arbitration under this article constitutes an expression of consent to all the consequences of acceptance of the obligation to settle differences by the type of arbitration clearly specified in the arbitration agreement. Normally, the relevant procedural matters—for example the

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(*Footnote 165 continued.*)

Performed by a Person Other than the Contracting Carrier, Guadalajara, 1961;

(*e*) Convention on the International Recognition of Rights in Aircraft, Geneva, 1948 (see arts. XI, XII and XIII);

(*f*) Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, Rome, 1952 (see arts. 1, 2, 20, 23 and 26);

(*g*) Convention on Offences and Certain Other Acts Committed on Board Aircraft, Tokyo, 1963 (see art. 1);

(*h*) Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 1970 (see art. 3);

(*i*) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 1971 (see art. 4).

Treaties relevant to space activities and space objects include the following:

(*a*) Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty) 1967;

(*b*) Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space 1968 (General Assembly resolution 2345 (XXII));

(*c*) Convention on International Liability for Damage Caused by Space Objects (Liability Convention) 1972;

(*d*) Convention on Registration of Objects Launched into Outer Space 1975;

(*e*) Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (General Assembly resolution 34/68).

[166] See the sixth report of the former Special Rapporteur (footnote 13 above), paras. 247-253. See, for example, France: Court of Cassation decision in *Southern Pacific Properties Ltd.* et al. v. *Arab Republic of Egypt* (6 January 1987; ILM (Washington, D.C.), vol. 26 (1987), p. 1004); *Société Européenne d'Etudes et d'Entreprises* v. *Yougoslavie* et al., (Court of Cassation, 18 November 1986, ILM (Washington, D.C.), vol. 26 (1986), p. 377). See also Switzerland: Decisions of the Court of Justice of Geneva and the Federal Tribunal (Excerpts) Concerning Award in *Westland Helicopters Arbitration* (19 July 1988, ibid., vol. 28 (1989), p. 687).

See further the United States Foreign Sovereign Immunities Act of 1976 (footnote 40 above); the United States has since adopted an Act to Implement the Inter-American Convention on International Commercial Arbitration of 1988, Public Law 100-669, 102 stat. 3969, amending sections 1605 (*a*) and 1610 (*a*) of the United States Foreign Sovereign Immunities Act of 1976.

venue and the applicable law—are laid down in the arbitration agreement. Thus, the court which was appointed pursuant to such an agreement would deal with the question of immunity rather than the court of any other State, and the arbitration procedure prescribed in the arbitration agreement would govern such matters as referred to in subparagraphs (*a*)-(*c*). It is merely incidental to the obligation to arbitrate undertaken by a State that a court of another State, which is otherwise competent, may be prepared to exercise its existing supervisory jurisdiction in connection with the arbitration agreement, including the arbitration procedure and other matters arising out of the arbitration agreement or arbitration clause.

(6) Consent to arbitration is as such no waiver of immunity from the jurisdiction of a court which would otherwise be competent to decide the dispute or difference on the merits. However, consenting to a commercial arbitration necessarily implies consent to all the natural and logical consequences of the commercial arbitration contemplated. In this limited area only, it may therefore be said that consent to arbitration by a State entails consent to the exercise of supervisory jurisdiction by a court of another State, competent to supervise the implementation of the arbitration agreement.

(7) It is important to note that the draft article refers to "arbitration agreement" between a State and a foreign natural or juridical person, and not between States themselves or between States and international organizations. Also excluded from this article are the types of arbitration provided by treaties between States[167] or those that bind States to settle differences between themselves and nationals of other States, such as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 1965), which is self-contained and autonomous, and contains provisions for execution of the awards. This does not prevent States and international organizations from concluding arbitration agreements that may entail consequences of submission to the supervisory jurisdiction of the forum State.

(8) It should also be added that, of the several types of arbitration available to States as peaceful means of settling various categories of disputes, only the type between States and foreign natural and juridical persons is contemplated in this article. Arbitration of this type may take any form, such as arbitration under the rules of the International Chamber of Commerce or UNCITRAL, or other institutionalized or ad hoc commercial arbitration. Submission of an investment dispute to ICSID arbitration, for instance, is not submission to the kind of commercial arbitration envisaged in this draft article and can in no circumstances be interpreted as a waiver of immunity from the jurisdiction of a court which is otherwise competent to exercise supervisory jurisdiction in connection with a commercial arbitration, such as an International Chamber of Commerce arbitration or an arbitration under the aegis of the American Arbitration Association.[168]

(9) The article in no way seeks to add to or detract from the existing jurisdiction of the courts of any State, nor to interfere with the role of the judiciary in any given legal system in the judicial control and supervision which it may be expected or disposed to exercise to ensure the morality and public order in the administration of justice needed to implement the arbitral settlement of differences. Only in this narrow sense is it correct to state that submission to commercial arbitration by a State entails an implied acceptance of the supervisory jurisdiction of a court of another State otherwise competent in matters relating to the arbitration agreement.

PART IV

STATE IMMUNITY FROM MEASURES OF CONSTRAINT IN CONNECTION WITH PROCEEDINGS BEFORE A COURT

(1) The first three parts—"Introduction", "General principles" and "Proceedings in which State immunity cannot be invoked"—having been completed, the draft should also contain a fourth part concerning State immunity from measures of constraint in connection with proceedings. Immunity in respect of property owned, possessed, or used by States in this context is all the more meaningful for States in view of the recent growing practice for private litigants, including multinational corporations, to seek relief through attachment of property owned, possessed or used by developing countries, such as embassy bank accounts or funds of the central bank or other monetary authority, in proceedings before the courts of industrially advanced countries.

(2) Part IV of the draft is concerned with State immunity from measures of constraint upon the use of property, such as attachment, arrest and execution, in connection with a proceeding before a court of another State. The expression "measures of constraint" has been chosen as a generic term, not a technical one in use in any particular internal law. Since measures of constraint vary considerably in the practice of States, it would be difficult, if not impossible, to find a term which covers each and every possible method or measure of constraint in all legal systems. Suffice it, therefore, to mention by way of

[167] See, for example, the Agreement between Japan and the People's Republic of China concerning the Encouragement and Reciprocal Protection of Investment, article 11.

[168] See, for example, *Maritime International Nominees Establishment* v. *Republic of Guinea* (United States of America, intervenor) (1982) (*The Federal Reporter*, 2nd Series, vol. 693 (1983), p. 1094); *Guinea* v. *Maritime International Nominees Establishment* (Belgium, Court of First Instance of Antwerp, 27 September 1985, ILM (Washington, D.C.), vol. 24 (1985), p. 1639); *Senegal* v. *Seutin as Liquidator of the West African Industrial Concrete Co. (SOABI)* (France, Court of Appeal of Paris, 5 December 1989, ILM (Washington, D.C.), vol. 29 (1990), p. 1341); *Socialist Libyan Arab Popular Jamahiriya* v. *Libyan American Oil Company (LIAMCO)* (Switzerland, Federal Supreme Court, First Public Law Department, 19 June 1980, ILR (London), vol. 62 (1982), p. 228); *Tekno-Pharma AB* v. *State of Iran* (Sweden, Svea Court of Appeal, 24 May 1972, ibid., vol. 65 (1984), p. 383); *Libyan American Oil Company* v. *Socialist People's Arab Republic of Libya* (Sweden, Svea Court of Appeal, 18 June 1980, ibid., vol. 62 (1982), p. 225); *Libyan American Oil Company* v. *Socialist People's Libyan Arab Jamahiriya, formerly Libyan Arab Republic* (United States District Court, District of Columbia, 18 January 1980, ibid., p. 220). See, however, *Atlantic Triton Company* v. *Popular Revolutionary Republic of Guinea and Société guinéenne de pêche (Soguipêche)* (France, Court of Cassation, First Civil Chamber, 18 November 1986, ibid., vol. 82 (1990), p. 83), in which the court took the position that the exclusive character of ICSID arbitration set forth in article 26 of the ICSID Convention did not prevent a party to an ICSID proceeding from seeking in the French courts provisional measures in the form of attachment.

example the more notable and readily understood measures, such as attachment, arrest and execution. The problem of finding readily translatable terms in the official languages is indubitably multiplied by the diversity of State practice in the realm of procedures and measures of constraint.

(3) Part IV is of special significance in that it relates to a second phase of the proceedings in cases of measures of execution, as well as covering interlocutory measures or pre-trial or prejudgement measures of attachment, or seizure of property *ad fundandam jurisdictionem*. Part IV provides in general, but subject to certain limitations, for the immunity of a State from all such measures of constraint in respect of the use of its property in connection with proceedings before a court of another State.

Article 18. State immunity from measures of constraint

1. No measures of constraint, such as attachment, arrest and execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(*a*) the State has expressly consented to the taking of such measures as indicated:

(i) by international agreement;

(ii) by an arbitration agreement or in a written contract; or

(iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen;

(*b*) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or

(*c*) 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 and has a connection with the claim which is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed.

2. Consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint under paragraph 1, for which separate consent shall be necessary.

Commentary

(1) Article 18 concerns immunity from measures of constraint only to the extent that they are linked to a judicial proceeding. Theoretically, immunity from measures of constraint is separate from jurisdictional immunity of the State in the sense that the latter refers exclusively to immunity from the adjudication of litigation. Article 18 clearly defines the rule of State immunity in its second phase, concerning property, particularly measures of execution as a separate procedure from the original proceeding.

(2) The practice of States has evidenced several theories in support of immunity from execution as separate from and not interconnected with immunity from jurisdiction.[169] Whatever the theories, for the purposes of this article, the question of immunity from execution does not arise until after the question of jurisdictional immunity has been decided in the negative and until there is a judgement in favour of the plaintiff. Immunity from execution may be viewed, therefore, as the last bastion of State immunity. If it is admitted that no sovereign State can exercise its sovereign power over another equally sovereign State (*par in parem imperium non habet*), it follows *a fortiori* that no measures of constraint by way of execution or coercion can be exercised by the authorities of one State against another State and its property. Such a possibility does not exist even in international litigation, whether by judicial settlement or arbitration.[170]

(3) Article 18 is a merger and a reformulation of former articles 21 and 22 as provisionally adopted on first reading. Former article 21 dealt with State immunity from measures of constraint and former article 22 with consent to such measures. Since the ideas expressed in those two articles were closely related, the Commission agreed to the proposal of the Special Rapporteur for the merger, which was supported by many members as well as Governments. In this manner, the principle of non-execution against the property of a State at any stage or phase of proceedings is clearly set out, followed by the exceptions to that principle.

Paragraph 1

(4) The measures of constraint mentioned in this article are not confined to execution but cover also attachment and arrest, as well as other forms of *saisie*, *saisie-arrêt* and *saisie-exécution*, including enforcement of arbitral award, sequestration and interim, interlocutory and all other prejudgement conservatory measures, intended sometimes merely to freeze assets in the hands of the defendant. The measures of constraint indicated in paragraph 1 are illustrative and non-exhaustive.

(5) The property protected by immunity under this article is State property, including, in particular, property defined in article 19. The original text of the *chapeau* of former article 21 and of paragraph 1 of former article 22 as provisionally adopted on first reading contained the phrase [, or property in which it has a legally protected interest,], over which there were differences of view among members of the Commission. In their written

[169] See the jurisprudence cited in the former Special Rapporteur's seventh report (footnote 13 above), paragraphs 73-77. See also the second report of the present Special Rapporteur (footnote 17 above), paragraphs 42-44. Citing Schreuer (*State Immunity: Some Recent Developments*, p. 125) (see footnote 143 above), the Special Rapporteur observed that there were some writers who argued that allowing plaintiffs to proceed against foreign States and then to withhold from them the fruits of successful litigation through immunity from execution might put them into the doubly frustrating position of being left with an unenforceable judgement with expensive legal costs, although the majority views of Governments as well as writers were that immunity from measures of constraint was separate from the jurisdictional immunity of a State.

[170] See, for example, in the *Société Commerciale de Belgique* case, the judgement of PCIJ of 15 June 1939 concerning the arbitral awards of 3 January and 25 July 1936 (*P.C.I.J. Series A/B, No. 78*, p. 160) and the decision of 30 April 1951 of the Tribunal civil of Brussels (*Journal de droit international* (Clunet) (Paris), vol. 79 (1952), p. 244).

submissions, a number of Governments criticized the phrase as being vague and permitting a broadening of the scope of immunity from execution. The bracketed phrase was therefore deleted and replaced by the words "property of a State".

(6) The word "State" in the expression "proceeding before a court of another State" refers to the State where the property is located, regardless of where the substantive proceeding takes place. Thus, before any measures of constraint are implemented, a proceeding to that effect should be instituted before a court of the State where the property is located. Of course, in some special circumstances, such as under a treaty obligation, no further court proceeding may be required for execution once there is a final judgement by a court of another State party to the treaty.

(7) The principle of immunity here is subject to three conditions, the satisfaction of any of which would result in non-immunity: (*a*) if consent to the taking of measures of constraint is given by international agreement, in an arbitration agreement or in a written contract, or by a declaration before the court or by a written communication after a dispute between the parties has arisen; or (*b*) if the property has been allocated or earmarked by the State for the satisfaction of the claim; or (*c*) if the property is specifically in use or intended for use by the State for other than government non-commercial purposes.[171] Subparagraph (*c*) further provides that, for there to be no immunity, the property must have a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed.

[171] For the case law, international opinion, treaties and national legislation dealing with immunity from measures of constraint, see the seventh report of the former Special Rapporteur (footnote 13 above), paragraphs 33-82, and the second report of the Special Rapporteur (footnote 17 above), paras. 42-44.

For recent legislation, see further the Australia Foreign States Immunities Act of 1985 (section 30-35) ; the South Africa Foreign States Immunities Amendment Act of 1988 (section 14 (*b*)) (footnote 51 above); the United States Act to Implement the Inter-American Convention on International Commercial Arbitration (footnote 166 above).

For recent cases concerning the provision of paragraph 1 (*a*), see for example, with respect to the requirement of express consent by international agreement under subparagraph (i), *O'Connell Machinery Co.* v. *MV Americana and Italia Di Navigazione, SpA* (footnote 142 above), in which, despite an express waiver of immunity in article XXIV (6) of the Italy-United States Treaty of Friendship, Commerce and Navigation, 1965, the Court did not interpret the treaty as providing for waiver of prejudgement attachment. See also, *New England Merchants National Bank* v. *Iran Power Generation and Transmission Co.*, et al. (502 F. Supp. 120, United States District Court for the Southern District of New York, 26 September 1980, AJIL (Washington, D.C.), vol. 75 (1981), p. 375); *E-Systems Inc.* v. *Islamic Republic of Iran and Bank Melli Iran* (United States District Court, Northern District, Texas, 19 June 1980, ILR (London), vol. 63, (1982) p. 424).

With regard to the requirement of express consent in a written contract under subparagraph (ii), see, for example, *Libra Bank Limited* v. *Banco Nacional de Costa Rica* (1982) (676 F.2d, p. 47, United States Court of Appeals, 2nd Cir., 12 April 1982, ILM (Washington, D.C.), vol. 21 (1982), p. 618), in which the court held that a written waiver by a foreign State of any right of immunity from suit with respect to a loan agreement constitutes an explicit waiver of immunity for prejudgement attachment for purposes of the Foreign Sovereign Immunities Act, section 1610 (*d*) (1). See, however, on the requirement of express consent by an arbitration agreement under subparagraph (ii), *Birch Shipping Corp.* v. *Embassy of Tanzania* (1980) (Misc. No. 80-247, United States District Court, District of Columbia, 18 November 1980, AJIL (Washington, D.C.), vol. 75 (1981), p. 373) in which the court found that the defendant in its submission to arbitration had implicitly agreed to waive immunity, including entry of judgement on any resulting award.

Cf. cases concerning measures of constraint in connection with ICSID proceedings: *Popular Revolutionary Republic of Guinea and Société guinéenne de pêche (Soguipêche)* v. *Atlantic Triton Company* (France, Court of Appeal of Rennes, Second Chamber, 26 October 1984, ILR (London), vol. 82 (1990), p. 76); *Atlantic Triton Company* v. *Popular Revolutionary Republic of Guinea and Société guinéenne de pêche (Soguipêche)* (see footnote 168 above); *Senegal* v. *Seutin as Liquidator of the West African Industrial Concrete Co. (SOABI)* (ibid.); *Benvenuti et Bonfant SARL* v. *Government of the People's Republic of the Congo* (France, Court of Appeal of Paris, 26 June 1981, ILR (London), vol. 65 (1984), p. 88); *Société Benvenuti et Bonfant* v. *Banque commerciale congolaise* (France, Cour de Cassation, 21 July 1987, *Journal du droit international* (Clunet) (Paris), vol. 115 (1988), p. 108); *Guinea* v. *Maritime International Nominees Establishment* (see footnote 168 above); *Liberian Eastern Timber Corporation (LETCO)* v. *The Government of the Republic of Liberia* (United States District Court for the Southern District of New York, 12 December 1986, ILM (Washington, D.C.), vol. 26 (1987), p. 695).

For recent cases concerning the provision of paragraph 1 (*c*), see, for example, *Islamic Republic of Iran and Others* v. *Société Eurodif and Others* (France, Court of Cassation, First Civil Chamber, 14 March 1984, ILR (London), vol. 77 (1988), p. 513) in which the court stated that notwithstanding the fact that foreign States enjoyed immunity from execution as a matter of principle, the immunity could be set aside where the assets attached had been allocated for a commercial activity of a private law nature upon which the claim was based. See also, *General National Maritime Transport Company* v. *Société Marseille Fret* (France, Court of Cassation, First Civil Chamber, 4 February 1986, ibid., p. 530); *Re Royal Bank of Canada and Corriveau* et al. (Canada, Ontario High Court, 22 October 1980, ibid., vol. 64 (1983), p. 69); *Banque du Gothard* v. *Chambre des Recours en Matière Pénale du Tribunal d'Appel du Canton du Tessin and Another* (footnote 142 above); *Giamahiria araba libica popolare socialista* v. *Rossbeton Officine Meccaniche s.r.l. e Libyan Arab Airlines, Ministero degli affari esteri e Ministero di grazia e giustizia* (Italy, Corte di Cassazione, 25 May 1989, *Rivista di diritto internazionale privato e processuale* (Padua), vol. XXVI (1990), p. 663); Cf. *International Consolidated Companies Inc.* v. *Nigerian National Petroleum Corporation* (Italy, Tribunale di Taranto, 18 December 1987, order, *Rivista* . . . (Milan), vol. LXXII (1989), p. 110).

On the question of the measures of constraint involving the property of State enterprises, see for example, *In the Matter of Constitutional Complaints of the National Iranian Oil Company Against Certain Orders of the District Court and the Court of Appeals of Frankfurt in Prejudgement Attachment Proceedings against the Complainant* (footnote 142 above), in which the court found that there exists no general rule of international law mandating that accounts maintained in domestic banks and designated as accounts of a foreign government agency with separate legal personality be treated as property of the foreign State. The court indicated additionally that general international law does not require absolute immunity from execution of accounts standing in the name of the foreign State itself, but that immunity of accounts of a foreign Government held in banks located in the forum is to be accorded only if the account itself at the time of the levy is designed to be used for internationally protected governmental purposes. In *Société Nationale Algérienne de Transport et de Commercialisation des Hydrocarbures (Sonatrach)* v. *Migeon* (France, Court of Cassation, First Civil Chamber, 1 October 1985, ILM (Washington, D.C.), vol. 26 (1987), p. 998); ILR (London), vol. 77 (1988), p. 525), the court stated that, while the assets of a foreign State were not subject to attachment unless they had been allocated for a commercial activity under private law upon which the claim was based, the assets of a State-owned entity which was legally distinct from the foreign State concerned could be subjected to attachment by all debtors of that entity, of whatever type, provided that the assets formed part of a body of funds allocated for a principal activity governed by private law. See also, *Société Air Zaire* v. *Gauthier and van Impe* (France, Court of Appeal of Paris, First Chamber, 31 January 1984, ibid., p. 510).

In some legal systems, a sufficient legal relationship between the subject-matter and the State of the forum is also required for its courts to consider any order of attachment against property of a foreign State which is located in the territory of the State of the forum. See, for example, *Socialist Libyan Arab Popular Jamahiriya* v. *Libyan American Oil Company (LIAMCO)* (see footnote 168 above).

(8) The phrase "the taking of such measures, as indicated:" in paragraph 1 (*a*) refers to both the measures of constraint and the property. Thus express consent can be given generally with regard to measures of constraint or property, or be given for particular measures or particular property, or, indeed, be given for both measures and property.

(9) Once consent has been given under paragraph 1 (*a*), any withdrawal of that consent may only be made under the terms of the international agreement (subparagraph (i)) or of the arbitration agreement or the contract (subparagraph (ii)). However, once a declaration of consent or a written communication to that effect (subparagraph (iii)) has been made before a court, it cannot be withdrawn. In general, once a proceeding before a court has begun, consent cannot be withdrawn.

(10) Under paragraph 1 (*b*), the property can be subject to measures of constraint if it has been allocated or earmarked for the satisfaction of the claim or debt which is the object of the proceeding. This should have the effect of preventing extraneous or unprotected claimants from frustrating the intention of the State to satisfy specific claims or to make payment for an admitted liability. Understandably, the question whether particular property has or has not been allocated for the satisfaction of a claim may in some situations be ambiguous and should be resolved by the court.

(11) The use of the word "is" in paragraph 1 (*c*) indicates that the property should be specifically in use or intended for use by the State for other than government non-commercial purposes at the time the proceeding for attachment or execution is instituted. To specify an earlier time could unduly fetter States' freedom to dispose of their property. It is the Commission's understanding that States would not encourage and permit abuses of this provision, for example by changing the status of their property in order to avoid attachment or execution. The words "for commercial [non-governmental] purposes" included in the text adopted on first reading have been replaced by the phrase "for other than government non-commercial purposes" in line with the usage of that phrase in article 16.

Paragraph 2

(12) Paragraph 2 makes more explicit the requirement of separate consent for the taking of measures of constraint under part IV. Consent under article 7 of part II does not cover any measures of constraint but is confined exclusively to immunity from the jurisdiction of a court of a State in a proceeding against another State.[172]

[172] For a more detailed account of the judicial and treaty practice of States and government contracts, see the former Special Rapporteur's seventh report (footnote 13 above), paras. 85-102. In some jurisdictions, for example in Switzerland, execution is based on the existence of a sufficient connection with Swiss territory (*Binnenbeziehung*). See, for example, *Greek Republic* v. *Walder and others* (1930) (*Recueil officiel des arrêts du Tribunal fédéral suisse, 1930*, vol. 56, p. 237; *Annual Digest . . ., 1929-1930* (London), vol. 5 (1935), case No. 78, p. 121); J.-F. Lalive, "Swiss law and practice in relation to measures of execution against the property of a foreign State", *Netherlands Yearbook of International Law* (Alphen aan den Rijn), vol. X (1979), p. 160; and I. Sinclair, "The law of sovereign immunity: Recent developments", *Collected Courses . . . , 1980-II* (Alphen aan den Rijn, Sijthoff and Noordhoff, 1981), vol. 167, p. 236. See also Lord Denning's observations in *Thai-Europe Tapioca Service Ltd.* v. *Government of Pakistan, Ministry of Food and Agriculture, Directorate of Agricultural Supplies* (1975) (footnote 45 above). On the requirement of a separate or second consent to execution, see the judgement of the Court of Appeal of Aix-en-Provence in *Banque d'Etat tchécoslovaque* v. *Englander* (1966) (*Annuaire français de droit international, 1967* (Paris), vol. 13, p. 825; ILR (London), vol. 47 (1974), p. 157)—however, this judgement was set aside by the Court of Cassation (1969) (*Journal du droit international* (Clunet) (Paris), vol. 96 (1969), p. 923; ILR (Cambridge), vol. 52 (1979), p. 335); and *Clerget* v. *Représentation commerciale de la République démocratique du Viet Nam* (1969) (*Annuaire français de droit international, 1970* (Paris), vol. 16, p. 931).

Article 19. Specific categories of property

1. 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 under paragraph 1 (*c*) of article 18:

(*a*) property, including any bank account, which is used or intended for use for the purposes 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 for military purposes;

(*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.

2. Paragraph 1 is without prejudice to paragraph 1 (*a*) and (*b*) of article 18.

Commentary

Paragraph 1

(1) Article 19 is designed to provide some protection for certain specific categories of property by excluding them from any presumption or implication of consent to measures of constraint. Paragraph 1 seeks to prevent any interpretation to the effect that property classified as belonging to any one of the categories specified is in fact property specifically in use or intended for use by the State for other than government non-commercial purposes under paragraph 1 (*c*) of article 18. The words "in particular" suggest that the enumeration in subparagraphs (*a*) to (*e*) is merely illustrative.

(2) This protection is deemed necessary and timely in view of the trend in certain jurisdictions to attach or freeze assets of foreign States, especially bank accounts,[173] assets of the central bank[174] or other *instru-*

[173] See, for example, *Birch Shipping Corp.* v. *Embassy of Tanzania* (1980) (footnote 171 above); the decision of 13 December 1977 of the Federal Constitutional Court of the Federal Republic of Germany in *X* v. *Republic of the Philippines* (United Nations, *Materials on Jurisdictional Immunities . . .*, p. 297); and *Alcom Ltd.* v. *Republic of*

menta legati[175] and specific categories of property which equally deserve protection. Each of these specific categories of property by its very nature, must be taken to be in use or intended for use for governmental purposes removed from any commercial considerations.

(3) Property listed in paragraph 1 (*a*) is intended to be limited to that which is in use or intended for use for the "purposes" of the State's diplomatic functions.[176] This obviously excludes property, for example, bank accounts maintained by embassies for commercial purposes.[177] Difficulties sometimes arise concerning a "mixed account" which is maintained in the name of a diplomatic mission, but occasionally used for payment, for instance, of supply of goods or services to defray the running costs of the mission. The recent case law seems to suggest the trend that the balance of such a bank account to the credit of the foreign State should not be subject to an attachment order issued by the court of the forum State because of the non-commercial character of the account in general.[178] Property listed in paragraph 1 (*a*) also excludes property which may have been, but is no longer, in use or intended for use for diplomatic or cognate purposes. The expressions "missions" and "delegations" also include permanent observer missions and observer delegations within the meaning of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

(4) The word "military", in the context of paragraph 1 (*b*), includes the navy, air force and army.[179]

(5) With regard to paragraph 1 (*c*), the Special Rapporteur suggested the addition of the words "and used for monetary purpose" at the end of the paragraph,[180] but they were not included for lack of general support.[181]

(6) The purpose of paragraph 1 (*d*) is to protect only property characterized as forming part of the cultural heritage or archives of the State which is owned by the State.[182] Such property benefits from protection under the present articles when it is not placed or intended to be placed on sale.

(7) Paragraph 1 (*e*) extends such protection to property forming part of an exhibition of objects of cultural or scientific or historical interest belonging to the State.[183] State-owned exhibits for industrial or commercial purposes are not covered by this subparagraph.

Paragraph 2

(8) Notwithstanding the provision of paragraph 1, the State may waive immunity in respect of any property belonging to one of the specific categories listed, or any part of such a category by either allocating or earmarking the property within the meaning of article 18 (*b*), paragraph 1, or by specifically consenting to the taking of measures of constraint in respect of that category of its property, or that part thereof, under article 18 (*a*), paragraph 1. A general waiver or a waiver in respect of all property in the territory of the State of the forum, without mention of any of the specific categories, would not be sufficient to allow measures of constraint against property in the categories listed in paragraph 1.

PART V

MISCELLANEOUS PROVISIONS

Article 20. Service of process

1. Service of process by writ or other document instituting a proceeding against a State shall be effected:

(*a*) in accordance with any applicable international convention binding on the State of the forum and the State concerned; or

(*b*) in the absence of such a convention:

Colombia (1984) (*The All England Law Reports, 1984*, vol. 2, p. 6). See, also, *Banco de la Nación Lima* v. *Banco Cattolica del Veneto* (footnote 142 above).

[174] See, for example, *Hispano Americana Mercantil S.A.* v. *Central Bank of Nigeria* (1979) (*Lloyd's Law Reports, 1979*, vol. 2, p. 277; reproduced in United Nations, *Materials on Jurisdictional Immunities . . .*, p. 449); *Re Royal Bank of Canada and Corriveau* et al. (1980) (footnote 171 above); *Libra Bank Ltd.* v. *Banco Nacional de Costa Rica* (1982) (ibid.); and *Trendtex Trading Corporation Ltd.* v. *Central Bank of Nigeria* (1977) (footnote 53 above). See also, *Libyan Arab Socialist People's Jamahiriya* v. *Actimon SA* (Switzerland, Federal Tribunal, 24 April 1985, ILR (London), vol. 82 (1990), p. 30). Cf. *Banque Compafina* v. *Banco de Guatemala* et al. (United States District Court for the Southern District of New York, 23 March 1984, ILM (Washington, D.C.), vol. 23 (1984), p. 782).

[175] See, for example, the *Romanian legation* case (1949) (*Revue hellénique de droit international* (Athens), vol. 3 (1950), p. 331); and, in a case concerning a contract of employment at the Indian Embassy in Berne, J. Monnier, "Note à l'arrêt de la première Cour civile du Tribunal fédéral du 22 mai 1984 dans l'affaire S. contre Etat indien", *Annuaire suisse de droit international* (Zurich), vol. 41 (1985), p. 235.

[176] See, for example, *Alcom Ltd.* v. *Republic of Colombia* (1984) (footnote 173 above). See also, *Republic of "A" Embassy Bank Account Case* (Austria, Supreme Court, 3 April 1986, ILR (London), vol. 77 (1988), p. 489); *M. K.* v. *State Secretary for Justice, Council of State, President of the Judicial Division* (Netherlands, 24 November 1986, KG (1987) No. 38, AROB tB/S (1986) No. 189). Cf. *Benamar* v. *Embassy of the Democratic and Popular Republic of Algeria* (Italy, Corte di Cassazione, plenary session, 4 May 1989, AJIL (Washington, D.C.), vol. 84 (1990), p. 573).

[177] See, for example, *Griessen* (Switzerland, Federal Tribunal, 23 December 1982, ILR (London), vol. 82 (1990), p. 5).

[178] See, for example, *Benamar* v. *Embassy of the Democratic and Popular Republic of Algeria* (footnote 176 above); *Birch Shipping Corporation* v. *Embassy of Tanzania* (footnote 171 above). See, however, *Republic of "A" Embassy Bank Account Case* (footnote 176 above).

[179] See, for example, *Wijsmuller Salvage BV* v. *ADM Naval Services* (Netherlands, District Court of Amsterdam, 19 November 1987, KG (1987), No. 527, S&S (1988) No. 69).

[180] *Yearbook. . . . 1990*, vol. II (Part Two), para. 219.

[181] Ibid., p. 42, para. 227.

[182] See, for example, *Italian State* v. *X and Court of Appeal of the Canton of the City of Basel* (Switzerland, Federal Tribunal, 6 February 1985, ILR (London), vol. 82 (1990), p. 30).

[183] See, for example, the note dated 26 October 1984 of the Département fédéral des affaires étrangères, Direction du droit international public, of Switzerland (*Annuaire suisse du droit international*, vol. 41 (1985), p. 178).

(i) by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned; or

(ii) by any other means accepted by the State concerned, if not precluded by the law of the State of the forum.

2. Service of process referred to in paragraph 1 (*b*) (i) is deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs.

3. These documents shall be accompanied, if necessary, by a translation into the official language, or one of the official languages, of the State concerned.

4. Any State that enters an appearance on the merits in a proceeding instituted against it may not thereafter assert that service of process did not comply with the provisions of paragraphs 1 and 3.

Commentary

(1) Article 20 relates to a large extent to the domestic rules of civil procedure of States. It takes into account the difficulties involved if States are called upon to modify their domestic rules of civil procedure. At the same time, it does not provide too liberal or generous a regime of service of process, which could result in an excessive number of judgements in default of appearance by the defendant State. The article therefore proposes a middle ground so as to protect the interests of the defendant State and those of the individual plaintiff.

Paragraph 1

(2) Paragraph 1 is designed to indicate the normal ways in which service of process can be effected when a proceeding is instituted against a State. Three categories of means by which service of process is effected are provided: first, if an applicable international convention binding upon the State of the forum and the State concerned exists, service of process shall be effected in accordance with the procedures provided for in the convention. Then, in the absence of such a convention, service of process shall be effected either (*a*) by transmission through diplomatic channels or (*b*) by any other means accepted by the State concerned. Thus, among the three categories of the means of service of process provided under paragraph 1, an international convention binding both States is given priority over the other two categories. The variety of means available ensures the widest possible flexibility, while protecting the interests of the parties concerned.[184]

Paragraphs 2 and 3

(3) Since the time of service of process is decisive for practical purposes, it is further provided in paragraph 2 that, in the case of transmission through diplomatic channels or by registered mail, service of process is deemed to have been effected on the day of receipt of the documents by the Ministry of Foreign Affairs. Paragraph 3 further requires that the documents be accompanied, if necessary, by a translation into the official language, or one of the official languages, of the State concerned. The Special Rapporteur made a proposal in this connection to add at the end of paragraph 3 the phrase "or at least by a translation into one of the official languages of the United Nations" so that when translation into a language not widely used gave rise to difficulties on the part of the authority serving the process, translation into one of the official languages of the United Nations might be acceptable. The proposal was however not adopted.

Paragraph 4

(4) Paragraph 4 provides that a State which has entered an appearance on the merits, that is to say without contesting any question of jurisdiction or procedure, cannot subsequently be heard to raise any objection based on non-compliance with the service of process provisions of paragraphs 1 and 3. The reason for the rule is self-evident. By entering an appearance on the merits, the defendant State effectively concedes that it has had timely notice of the proceeding instituted against it. The defendant State is, of course, entitled at the outset to enter a conditional appearance or to raise a plea as to jurisdiction.

Article 21. Default judgement

1. A default judgement shall not be rendered against a State unless the court has found that:

(*a*) the requirements laid down in paragraphs 1 and 3 of article 20 have been complied with;

(*b*) a period of not less than four months has expired from the date on which the service of the writ or other document instituting a proceeding has been effected or deemed to have been effected in accordance with paragraphs 1 and 2 of article 20; and

(*c*) the present articles do not preclude it from exercising jurisdiction.

2. A copy of any default judgement rendered against a State, accompanied if necessary by a translation into the official language or one of the official languages of the State concerned, shall be transmitted to it through one of the means specified in para-

[184] Cf. European Convention on State Immunity, article 16, paras. 1-3.

For the relevant provisions in national legislation, see for example, the United States Foreign Sovereign Immunities Act of 1976 (section 1608 (*a*)-(*d*)) (footnote 40 above); the United Kingdom State Immunity Act of 1978 (section 12 (1), (2), (3), (6) and (7)); the Singapore State Immunity Act of 1979 (section 14 (1), (2), (3), (6) and (7)); the Pakistan State Immunity Ordinance of 1981 (section 13 (1), (2), (3) and (6)); the South Africa Foreign States Immunities Act of 1981 (section 13 (1), (2), (3), (6) and (7)); the Australia Foreign States Immunities Act of 1985 (sections 23 to 26) (footnote 52 above) (ibid.); the Canada Act to Provide for State Immunity in Canadian Courts of 1982 (section 9) (footnote 57 above).

With regard to recent judicial practice, see for example, *Garden Contamination Case (1)* (Federal Republic of Germany, Provincial Court (Landgericht) of Bonn, 11 February 1987, ILR (London), vol. 80 (1989), p. 367); *New England Merchants National Bank and Others* v. *Iran Power Generation and Transmission Company and Others* (see footnote 171 above); *International Schools Service* v. *Government of Iran* (United States District Court, New Jersey, 19 January 1981, ILR (London), vol. 63 (1982), p. 550); *Velidor* v. *L.P.G Benghazi* (653 F.2d, p. 812, United States Court of Appeals, Third Circuit, 30 June 1981, ILM (Washington, D.C.), vol. 21 (1982), p. 621).

graph 1 of article 20 and in accordance with the provisions of that paragraph.

3. The time-limit for applying to have a default judgement set aside shall not be less than four months and shall begin to run from the date on which the copy of the judgement is received or is deemed to have been received by the State concerned.

Commentary

(1) There appears to be an established practice requiring proof of compliance with the procedure for service of process and of the expiry of the time-limit before any judgement may be rendered against a foreign State in default of appearance. There is also a further requirement that such a judgement, when rendered in default of appearance, should be communicated to the State concerned through the same procedure or channel as the service of process.[185]

Paragraph 1

(2) Default judgement cannot be entered by the mere absence of a State before a court of another State. The court must establish that certain conditions have been met before rendering its judgement. These conditions are set out in paragraph 1. A proper service of process is a precondition for making application for a default judgement to be given against a State. Under paragraph 1 (*a*), even if the defendant State does not appear before a court, the judge still has to be satisfied that the service of process was properly effected in accordance with paragraphs 1 and 3 of article 20. Paragraph 1 (*b*) gives added protection to States by requiring the expiry of not less than four months from the date of service of process. The expiry period which was three months in the text adopted on first reading has been changed to four months on second reading. The judge, of course, always has the discretion to extend the minimum period of four months if the domestic law so permits. Paragraph 1 (*c*) further requires a court to determine on its own initiative that the State concerned was not immune from the jurisdiction of the court. This provision, which has been introduced on second reading in response to a suggestion made in the Sixth Committee and supported by several delegations, provides an important safeguard in line with the provision of paragraph 1 of article 6. The new paragraph 1 (*c*), however, has no bearing on the question of the competence of the court, which is a matter for each legal system to determine.

Paragraph 2

(3) Paragraph 2 is designed to ensure that a copy of any default judgement is transmitted to a State in conformity with the procedure and means established under paragraph 1 of article 20.

Paragraph 3

(4) Paragraph 3 is designed to ensure effective communication with the State concerned and to allow adequate opportunities to the defendant State to apply to have a default judgement set aside, whether by way of appeal or otherwise. If any time-limit is to be set for applying to have a default judgement set aside, another period of not less than four months must have elapsed before any measure can be taken in pursuance of the judgement. The period was three months in the text adopted on first reading but has been changed to four months on second reading.

Article 22. Privileges and immunities during court proceedings

1. Any failure or refusal by a State to comply with an order of a court of another State enjoining it to perform or refrain from performing a specific act or to produce any document or disclose any other information for the purposes of a proceeding shall entail no consequences other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal.

2. A State shall not be required to provide any security, bond or deposit, however described, to guarantee the payment of judicial costs or expenses in any proceeding to which it is a party before a court of another State.

Commentary

Paragraph 1

(1) Article 22, which is a merger of former articles 26 and 27 provisionally adopted on first reading, provides for immunity of a State from measures of coercion and procedural immunities in a court of another State.

(2) States, for reasons of security or their own domestic law, may sometimes be prevented from submitting certain documents or disclosing certain information to a court of another State. States should therefore not be subject to penalties for protecting their national security or for complying with their domestic law. At the same time, the legitimate interests of the private litigant should not be overlooked.[186]

[185] Cf. European Convention on State Immunity, article 16, para. 7.

Comparable provisions are found, for example, in: the United States Foreign Sovereign Immunities Act of 1976 (section 1608 (*e*)) (see footnote 40 above); the United Kingdom State Immunity Act of 1978 (section 12 (4) and (5)); the Singapore State Immunity Act of 1979 (section 14 (4) and (5)); the Pakistan State Immunity Ordinance of 1981 (section 13 (4) and (5)); the South Africa Foreign States Immunities Act of 1981 (section 13 (4) and (5)); the Australia Foreign States Immunities Act of 1985 (sections 27 and 28) (see footnote 51 above); South Africa Foreign States Immunities Amendment Act of 1988 (section 13 (5)); the Canada Act to Provide for State Immunity in Canadian Courts of 1982 (section 10) (see footnote 57 above).

For the recent judicial practice, see, for example, *Azeta BV* v. *Republic of Chile* (Netherlands, District Court of Rotterdam, 5 December 1984, Institute's Collection No. 2334); *Murphy* v. *Republic of Panama d.b.a Air Panama International* (751 F. Suppl., p. 1540, United States District Court, Southern District, Florida, 12 December 1990).

[186] Cf. European Convention on State Immunity, articles 17 and 18.

(*Continued on next page.*)

(3) Paragraph 1 speaks of "no consequences" being entailed by the conduct in question, although it specifies that the consequences which might ordinarily result from such conduct in relation to the merits of the case would still obtain. This reserves the applicability of any relevant rules of the internal law of the State of the forum, without requiring another State to give evidence or produce a document.

(4) Courts are bound by their own domestic rules of procedure. In the domestic rules of procedure of many States, the refusal, for any reason, by a litigant to submit evidence would allow or even require the judge to draw certain inferences which might affect the merits of the case. Such inferences by a judge under the domestic rules of procedure of the State of the forum, when permitted, are not considered a penalty. The final sentence specifies that no fine or pecuniary penalty shall be imposed.

Paragraph 2

(5) The procedural immunities provided for in paragraph 2 apply to both plaintiff States and defendant States. Some reservations were made regarding the application of those procedural immunities in the event of the State being plaintiff in a proceeding before a court of another State since, in some systems, security for costs is required only of plaintiffs and not defendants.

(*Footnote 186 continued.*)

For the relevant provisions in national legislation, see, for example: The Australia Foreign States Immunities Act of 1985 (section 29); the Pakistan State Immunity Ordinance of 1981 (section 14, 14 (2) (*a*), (3) and (4)); the Singapore State Immunity Act of 1979 (section 15 (1), (2), (3) and (5)); the South Africa Foreign States Immunities Act of 1981 (section 14 (1) (*a*) and (2)); the United Kingdom State Immunity Act of 1978 (section 13 (1), (2*a*), (3) and (5)) (footnote 51 above).