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CHAPTER II

DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-THIRD SESSION

JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

CHAPTER II

CONTENTS (continued)

CONTENTS (continued)

PART III

PROCEEDINGS IN WHICH STATE IMMUNITY CANNOT BE INVOKED

(1) State immunity is a general principle which the inductive method based on the practice of States has shown to be limited in several categories of proceedings. These proceedings in which a State cannot invoke immunity are addressed in this part of the draft articles.

(2) The provisions of Part III appear to be limitative in nature; that is to say, they restrict or limit the application of a general rule of State immunity, whether it is the active rule for the State claiming immunity or its corollary, the obligation to give effect to immunity or to implement the first general rule, or the requirement of absence of consent or unwillingness to submit to jurisdiction. These non-immunity provisions, when established, clear the path for the court to exercise jurisdiction even in regard to an unwilling foreign sovereign State. Thus, in the circumstances falling within any of the provisions, the claim of State immunity, as an obstacle to the exercise of jurisdiction, is removed regardless of the unwillingness of the defendant to give consent for the institution or continuation of proceedings against it. 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.

(3) Having regard to these provisions, State immunity may be said to be restricted or limited in the sense that it is not "absolute" or to be accorded in all circumstances, regardless of the capacity in which the State has acted or irrespective of the category of activities attributed to the State. It is also important to note that the juridical basis for "non-immunity" may be

described as the counterpart of the legal basis for "State immunity". That is to say, if the exercise of imperium by a State is the basis for immunity, then the absence of connection with the imperium or activity not pertaining to the sovereignty of the State would afford the raison d'être for cases of "non-immunity".

(4) Whatever the legal basis or justification for State immunity, or for the corresponding obligation to recognize and give effect to it as envisaged in Part II of the present draft articles, it seems clear that the extent and scope of State immunity are limited. Immunity operates as long as there is a legal basis for it. Thus, for each and every type of limitation on State immunity or for each exception to the general rule of State immunity, there appears to be an opposite case or a converse set of circumstances in which State immunity is upheld. These "opposite" or "converse" cases are often not as clear-cut as might be desirable in the formulation of the "restrictive" view of State immunity.

(5) It may be helpful to keep in mind, therefore, that the justification for denial of State immunity in each case of exceptions to State immunity is to be found in the nature and, as appropriate, the purpose of the activities of the State in question, in the field of activities undertaken by the State and in relation to which a dispute or cause of action has arisen (see para. (7) below). According to the "absolute" view of State immunity, however, immunity is complete and all exceptions are necessarily traceable to the consent of the State given either expressly, verbally or in writing, or tacitly by implication based on conduct and legal presumptions.

(6) On the whole, what is to be kept in mind is the fact 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.

(7) 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 Committee, 81/ have been drawn up on the basis of consideration of the following factors: dual personality of the State, 82/ dual capacity of the State, 83/ acta jure imperii and acta jure gestionis, 84/ which also relate to the public and private nature of State acts, 85/ and commercial and non-commercial activities. 86/

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.

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

82/ Idem, para. 36.

83/ Idem, para. 37.

84/ Idem, paras. 38-39.

85/ Idem, paras. 40-42.

86/ Idem, paras. 43-45.

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, consequently to the change made in article 2 (Use of terms), paragraph 1 (c). It constitutes the first substantive article of Part III, dealing 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 11-14, 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 87/ and adopted a formula in an attempt to take into account the interests and views of all countries with different systems and practices.

87/ 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 contained in document A/CN.4/410 and Add.1-5, and the Commission's discussion at its forty-first session, Official Records of the General Assembly: Forty-fourth Session, Supplement No. 10 (A/44/10), paras. 489-498.

(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. 88/

(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 food-exporting country on a State-to-State basis as a

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88/ See, for example, Brazil: Republic of Syria v. Arab Republic of Egypt (Supreme Court, undated) (extraits in French in Journal du droit international, 1988, vol. 115, 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 breaking 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 the 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.

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 on its own behalf, and not on behalf of the parent State. If a State enterprise or other entity acts merely as alter ego of the State, the commercial transaction is

regarded as having been conducted by the State, and the immunity of the State from the jurisdiction of the court of another State cannot be invoked. 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 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 unique to the 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 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.

(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. 89/ 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 deletion 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

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89/ See Yearbook ... 1986, vol. II (Part Two), p. 11.

deletion should not be interpreted to mean that a State may invoke immunity in a proceeding before a court of another State which relates to fiscal obligations arising from commercial transactions. Namely, the non-immunity of a State under paragraph 1 of article 10 in connection with commercial transactions is extended to fiscal matters arising from commercial transactions.

(b) Legal basis of "commercial transactions" as an exception to 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 transaction", 90/ it is useful to provide here, in a condensed form, a chronological survey of State practice relating to this question. Since article 10 is the first substantial article of Part III dealing with specified areas of activities with respect to which State immunity would not apply, it is logical to include also a brief comment on the limitative nature of such specified areas as envisaged in all the remaining draft articles of Part III.

(14) Through the inductive approach, an attempt has been made to ascertain the development, over time, of State practice with respect to this exception. It is evident that, throughout the evolution of various bodies of case law, the same court at different periods and various courts of different systems have reached different conclusions regarding State immunity in the context of the exception originally entitled "trading or commercial activity". The same set of facts could be construed differently by different courts at various levels with surprisingly divergent or even opposing results. Thus the same activity could be viewed as trading or commercial and therefore not entitled to State immunity, or as non-commercial and therefore entitled to State immunity. 91/

90/ Article 10 has to be read in conjunction with article 2, para. 1 (c), on the definition of "commercial transaction", and article 2, para. 2, on the interpretation of that definition. The commentaries to these provisions should also be taken into consideration.

91/ 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).

(15) It is indeed difficult for the courts to determine the motivation of a particular transaction or contract. It cannot, however, be completely ignored, especially when it is a contract for the purchase or supply of, for instance, materials for the establishment of an embassy, 92/ construction materials for an army, navy or air force, 93/ supplies for the maintenance of any army or military base, 94/ or food supplies to relieve famine in an area suffering natural calamity or to assist victims of floods or earthquakes. 95/ Difficult cases need not make bad law, although they may serve to obscure some of the finer lines of delineation between cases where immunity is applicable and those where the courts have preferred to exercise jurisdiction in the field of activities involving commercial contracts or transactions. A caveat is therefore necessary to emphasize the need to approach certain sensitive

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92/ See, for example, the decision of 30 April 1963 of the Federal Constitutional Court (Federal Republic of Germany) in X v. Empire of ... [Iran] (Entscheidungen des Bundesverfassungsgericht) (Tübingen), vol. 16 (1964), p. 27; English trans. in United Nations, Materials on Jurisdictional Immunities ..., pp. 282 et seq.).

93/ See, for example, 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 Government for the Spanish army. Cf. Hanukiew v. Ministère de l'Afghanistan (1933) (Annual Digest and Reports of Public International Law Cases (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 (1934) (Sirey, Recueil général des lois et des arrêts, 1935 (Paris), part 1, p. 103). See also Vavasseur v. Krupp (1898) (United Kingdom, The Law Reports, Chancery Division, vol. IX (1978), p. 351).

94/ See, for example, Trendtex Trading Corporation Ltd. v. The Central Bank of Nigeria (1977) (The All England Law Reports, 1977, 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.

95/ See, for example, Egyptian Delta Rice Mills Co. v. Comisaréa 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, Recueil des cours de l'Académie de droit international de La Haye, 1976-I, vol. 149 (Leiden, Sijthoff, 1977), p. 138.

issues with the greatest caution, lest an important act of sovereign authority to ensure the safety and security of nationals of a State be misconstrued as a simple commercial transaction, unprotected by jurisdictional immunity. 96/

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

(16) This brief survey, of which a more detailed version has been submitted to the Commission, 97/ begins by mentioning one of the earliest cases, The "Charkieh" (1873), 98/ 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:

96/ See, for example, Khan v. Fredson Travel Inc (1982) (133 D.L.R. (3d) 632. Ontario High Court. Canadian Yearbook of International Law, vol. XXI, p. 376 (1983)) in which passengers, resident in Ontario, who had been on a Pakistan International Airlines aircraft that had been hijacked over Pakistan, while en route from Karachi to Peshawar, brought an action for breach of contract against their Ontario travel agent and the airline, and in negligence against the airline and the Government of Pakistan for failing to institute adequate safety checks at Karachi airport. The Government of Pakistan was held to have sovereign immunity. The court held that, even assuming, which was not clear, that the restrictive view of sovereign immunity was held in the law of Ontario, the operation of an airport could not be described as a commercial operation any more than a port or harbour operated for the public good. It stated further that, unlike the other Canadian cases relied on by the plaintiff, involving acts done by a foreign State in Canada, this case dealt with the failure of a sovereign State to perform acts within its own territorial limits.

97/ See the fourth report of the former Special Rapporteur submitted to the Commission at its thirty-fourth session (Yearbook ... 1982, vol. II (Part One)), paras. 49-92; and the second report of the Special Rapporteur submitted to the Commission at its forty-first session (A/CN.4/422 and Corr.1), paras. 2-19.

98/ United Kingdom, The Law Reports, High Court of Admiralty and Ecclesiastical Courts, vol. IV (1875), p. 59.

"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." 99/

(17) State practice has continued to move in favour of such a "restrictive" view of State immunity since the advent of State trading and the continuing expansion of State activities in the field of commercial development. Thus, even at the very beginning, the "absolute" immunity view was theoretically excluded from the area of trading and economic development, although the actual application of the rule in concrete cases remained problematic owing to different interpretations given to similar types of State activities in various courts at various times.

(18) 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. The only case recently decided by the International Court of Justice (ICJ), in 1980, 100/ that has a direct bearing on the question of inviolability rather than the usual type of jurisdictional immunity of State property did not touch upon the exception of "commercial transactions" connected with the premises of the embassy or the consulate. This may serve to illustrate the flexible nature of attitudes and positions of Governments. Nevertheless, by not pursuing the

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99/ Ibid., pp. 99-100. 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.

100/ See the Judgment of ICJ of 24 May 1980, United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980, p. 3, mentioned in the second report of the former Special Rapporteur (Yearbook ... 1980, vol. II (Part One)), p. 199 (document A/CN.4/331 and Add.1), para. 114. Cf. the decision of the Permanent Court of International Justice (PCIJ) of 15 June 1939, Société commerciale de Belgique, P.C.I.J., Series A/B. No. 78, p. 160.

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.

(19) From the judicial decision of municipal courts, it can be seen that the movement of State practice in its progressive evolution towards the "restrictive" view of State immunity has taken the character of a snake, which can move sideways by swinging and swaying its body to the left and right with intermittent ups and downs in a zigzagging pattern.

(20) Thus the practice of States such as Italy, 101/ Belgium 102/

101/ 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 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 de Tunisi (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. In a case in 1955 concerning a United States military base established in Italy, the Corte di Cassazione granted immunity in respect of an attività pubblicistica connected with the funzioni pubbliche o politiche of the United States Government (see Department of the Army of the United States of America v. Gori Savellini (Rivista di diritto internazionale (Milan), vol. XXXIX (1956), pp. 91-92, and International Law Reports, 1956 (London), vol. 23 (1960), p. 201)). Cf. La Mercantile v. Regno di Grecia (1955) (Rivista di diritto internazionale (Milan), vol. XXXVIII (1955), p. 376, and International Law Reports, 1955 (London), vol. 22 (1958), p. 240). More recently, in Banco de la Nación c. Credito Varesino (Corte di Cassazione, 19 October 1984) (Rivista di diritto internazionale privato e processuale, 1985, vol. 21, 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.

102/ Belgian case law was settled as early as 1857 in a trilogy of cases involving the guano monopol of Peru. These cases are: (a) Etat du Pérou v. Kreglinger (1857) (see footnote 78 above); cf. E. W. Allen, The Position of

and Egypt 103/ 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 Germany, 104/ the

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Foreign States before Belgian Courts (New York, Macmillan, 1929), p. 8; (b) the "Peruvian Loans" case (1877) (Passicrisie 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 (1980) (ibid., 1881, part 2, p. 313). In these three cases, a distinction was drawn between public and private activities of the State of Peru 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, 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, 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) (ibid., 1908, part 2, p. 55).

103/ 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.).

104/ The practice of German courts has followed a somewhat zigzag course. It 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" (hereinafter called "the Harvard draft") (Cambridge, Mass., 1932), published as Supplement to the American Journal of International Law (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; International Law Reports, 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

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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 ... [Iran] (1963) (see footnote 92 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 (see footnote 12 above).

105/ 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) (W. Cranch, Reports of Cases argued and adjudged in the Supreme Court of the United States (New York, 1911), vol. VII (3rd ed.), p. 116). Initially, immunities of States were recognized only in respect of certain specified cases: (a) immunity of sovereigns from arrest and detention; (b) immunity granted to foreign ministers; (c) immunity in respect of foreign troops passing through the territorial dominion. Territorial jurisdiction was exempted as a matter of implied consent on the part of the local sovereign and immunity was accordingly considered to be an exception to the attributes of every sovereign Power. As such, it should be restrictively construed, from the point of view of the territorial sovereign. In Bank of the United States v. Planters' Bank of Georgia (1824) (H. Wheaton, Reports of Cases argued and adjudged in the Supreme Court of the United States (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 The American Journal of International Law (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). The Supreme Court reversed the decision and preferred the view expressed by the Department of Justice. 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.

In the long line of cases since the Tate Letter, an interesting trend was instituted more recently, in 1964, in Victory Transport Inc. v. Comisaréa General de Abastecimientos y Transportes (United States of America, Federal Reporter, 2nd Series, vol. 336 (1965), p. 354; see also International Law Reports (London), vol. 35 (1967), p. 110). The Federal District Court rejected immunity in an action arising out of a contract for the carriage of wheat, denying immunity unless it is plain that the activity in question falls within one of the following categories of strictly political and public acts: (a) internal administrative acts, such as expulsion of aliens; (b) legislative acts, such as nationalization; (c) acts concerning the armed forces; (d) acts concerning diplomatic activity; (e) public loans.

Since the adoption of the Foreign Sovereign Immunities Act of 1976 (see footnote 74 above), United States courts have been left to decide alone 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. U.S. Court of Appeals, 9th Cir., 6 January 1987. The American Journal of International Law vol. 81, p. 660 (1987)) where the Court of Appeals for the Ninth Circuit held that the issuance of certificates of deposit was a commercial activity for purposes of the Foreign Sovereign Immunities Act. The court focused on the contract for the sale of the certificates of deposit, rather than the failure to perform due to Government exchange control regulations. Similarly in Rush-Presbyterian-St. Luke's Medical Center v. The Hellenic Republic (U.S. Court of Appeals, 7th Cir., 14 June 1989), the Court of Appeals held that Greece's contract to reimburse the hospital and organ bank for the costs of kidney transplants performed on its nationals in the United States was a commercial activity for purposes of the Foreign Sovereign Immunities Act. However, in De Sanchez v. Banco Central de Nicaragua (720 F.2d 1385. U.S. Court of Appeals, 5th Cir., 19 September 1985. The American Journal of International Law vol. 80, p. 658 (1986)), the Court of Appeals held that the Nicaraguan Central Bank's issuance of the check to payee seeking to redeem the certificate of deposit payable in US dollars involved the sovereign activity of regulating the sale of foreign exchange and did not fall under the commercial activity exception to sovereign immunity. The court discussed the relevance of considering the purpose of a transaction within the context of the objective nature test for determining the commercial character of an activity, as well as the relationship between the contract and the breach for purposes of determining immunity. Also in Gregorian v. Izvestia (871 F.2d 1515 U.S. Court of Appeals, 9th Cir., 12 April 1989), the Court of Appeals held that Izvestia's reporting or commenting on events constituted governmental and not commercial activity for purposes of the Foreign Sovereign Immunities Act. See also Harris Corporation v. National Iranian Radio and Television and Bank Melli Iran (U.S. Court of Appeals, 11th Circ. 22 November 1982, ILR. 72, P. 172 (1987)); America West

and the United Kingdom. 106/

Airlines, Inc. v. GPA Group, Ltd. (877 F.2d 793. U.S. Court of Appeals, 9th Cir., 12 June 1989); MOL Inc. v. The People's Republic of Bangladesh (U.S. Court of Appeals, 9th Circ. 3 July 1984, ILR 80, p. 583 (1989)).

106/ In view of the recent reversal of a long line of cases allowing State immunity even in respect of trading activity of a foreign Government, it is no longer fashionable to state that British courts have consistently upheld jurisdictional immunities in any circumstances. In connection with the commercial activities of a foreign State, notably in the field of shipping or maritime transport, the case law fluctuated throughout the nineteenth century. The decision which went furthest in the direction of restricting immunity was that of The "Charkieh" case (1873) (see the fourth report of the former Special Rapporteur submitted to the Commission at its thirty-fourth session (Yearbook ... 1982, vol. II (Part One)), 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) (Annual Digest of Public International Law Cases, 1923-1924 (London), vol. 2 (1933), case No. 73, p. 138), and other trading activities, such as the ordinary sale of a quantity of rye in Baccus S.R.L. v. Servicio National del Trigo (1956) (United Kingdom, The Law Reports, Queen's Bench Division, 1957, vol. 1, p. 438).

Long before the final coup de grâce given by the House of Lords in the "I Congreso del Partido" case (1981) (The All England Law Reports, 1981, vol. 2, p. 1064), judicial decisions of British courts abounded with opinions and dicta pointing in the direction of restrictive immunity. Even in The "Cristina" case (1938) (United Kingdom, The Law Reports, House of Lords, Judicial Committee of the Privy Council, 1938, p. 485; Annual Digest ..., 1938-1940 (London), vol. 9 (1942), case No. 86, p. 250), considerable doubts were 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) (United Kingdom, The Law Reports, Chancery Division, 1950, p. 333), United States of America and Republic of France v. Dollfus Mieg et Cie S.A. and Bank of England (1952) (The All England Law Reports, 1952, vol. 1, p. 572), Sultan of Johore v. Abubakar, Tunku Aris Bendahara and others (1952) (ibid., 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"

(21) 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, 107/

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case, in which the decision in the "Parlement belge" case (1880) (see footnote 91 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 (see footnote 94 above), 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 1978 (see footnote 73 above), which came before the House of Lords for a decision in 1981 in the "I Congreso del Partido" case. 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 64, p. 268 (1983)).

107/ 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 (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. In the case of the "Hungerford", the first in which this theory was applied, the Court of Appeal of Rennes declined jurisdiction on the grounds that the vessel in question was employed "not for a commercial purpose and for private interest but ... for the requirements of national defence, beyond any idea of profit or speculation". The Court did not, however, find that the contract itself was of a commercial nature; see Société maritime auxiliaire de transports v. Capitaine du vapeur anglais "Hungerford" (Tribunal de commerce of Nantes, 1918) (Revue de droit international privé (Darras) (Paris), vol. XV (1919), p. 510) and Capitaine Seabrook v. Société maritime auxiliaire de transports (Court of Appeal of Rennes, 1919) (ibid., vol. XVIII (1922-1923), p. 743). In 1924, in Etat roumain v. Pascalet et Cie (Journal du droit international (Clunet) (Paris), vol. 52 (1925), p. 113), the Tribunal de commerce of Marseilles established that the operation of acts denominated actes de commerce excluded any consideration concerning the exercise of the State's public authority, its independence and its sovereignty.

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

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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) (see footnote 94 above) and Société Transshipping v. Federation of Pakistan (1966) International Law Reports (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; reproduced in United Nations, Materials on Jurisdictional Immunities ..., pp. 267 et seq.) and Montefiore v. Congo belge (1955) (International Law Reports, 1955 (London), vol. 22 (1958), p. 226). In Banque camerounaise de développement c. Société des Etablissements Robler (Cour de cassation 18 November 1986) (Journal du droit international, 1987, vol. 114, p. 632) involving the aval guaranteed by the Banque camerounaise de développement, a public bank, on bills on 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 c. S.A. Tunzini Nessi Entreprises Equipements (Tribunal de Paris, 29 November 1982) (Recueil Dalloz-Sirey, 1983, Inf. rap., p. 302) in which the Iranian State Bank Tejarat, after granting credit to the construction company Tunziran, attempted to collect its debt through the counter-guarantee given by a French bank. The French corporation Tunzini, shareholder and creditor of Tunziran, opposed its own debt and obtained provisional attachment of the funds to be paid by the French bank to the Iranian bank. The court upheld the attachment order and held that the Iranian bank could not invoke immunity from jurisdiction, because it did not participate in any act de puissance publique or in any act accomplished in the interest of public service.

108/ 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) (Weekblad van het Recht (The Hague, 1923), No. 11088; Annual Digest ..., 1923-1924 (London), vol. 2 (1933), case No. 69, p. 133), E.C.E. de Froe v. USSR (1932) (Weekblad van het Recht (The Hague, 1932),

and Austrian 109/ courts.

No. 124453; Annual Digest ..., 1931-1932 (London), vol. 6 (1938), case No. 87, p. 170) and The "Garbi" (1938) (Weekblad van het Recht en Nederlandse Jurisprudentie (Zwollen, 1939), No. 96; 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 (Zwollen, 1942), No. 757; Annual Digest ..., 1919-1942 (op. cit.), 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 (Zwollen, 1943), No. 600; 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, 1974 (Leiden), vol. V, p. 290; reproduced in United Nations, Materials on Jurisdictional Immunities ..., pp. 355 et seq.). 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, vol XX, pp. 285, at 287-290 (1989)).

109/ The practice of Austria, like that of Germany, has also 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 (Osterreichische Juristen Zeitung (Vienna), vol. 5 (1950), p. 341, case No. 356; English trans. in United Nations, Materials on Jurisdictional Immunities ..., p. 183 et seq.), 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." (Osterreichische Juristen Zeitung ..., p. 347; United Nations, Materials ..., p. 195).

(22) The judicial practice of a certain number of developing countries can also be said to have adopted restrictive immunity. Egypt, as already noted, 110/ was the pioneer in this field. In recent years, the judicial practice of Pakistan 111/ and Argentina 112/ has provided examples of acceptance of restrictive immunity, while in the case of the Philippines, 113/

110/ See footnote 103 above.

111/ 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.

112/ An examination of the case law of Argentina reveals a trend in favour of a restrictive doctrine of State immunity. 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 Nacion (Buenos Aires), vol. 123, p. 58), United States Shipping Board v. Dodero Hermanos (1924) (ibid., vol. 141, p. 127) and Zubiaurre v. Gobierno de Bolivia (1899) (ibid., vol. 79, p. 124); all cases referred to in United Nations. Materials on Jurisdictional Immunities ..., pp. 73-74. The exception of trading activities was confirmed in The "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 Fallos ..., vol. 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 ..., p. 73). See also I. Ruiz Moreno, El Derecho Internacional Público ante la Corte Suprema (Editorial Universitaria de Buenos Aires, 1941)

113/ See the fourth report of the former Special Rapporteur (see footnote 97 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, p. 87 (1985)), 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 also in Chile. See the fourth report of the former Special Rapporteur (see footnote 97 above), para. 91.

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

(23) A number of Governments have recently enacted legislation dealing comprehensively with the question of 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 114/ of the United States of America and in the State Immunity Act

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114/ This Act contains the following provisions:

"Section 1604. Immunity of a foreign State from jurisdiction

"Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign State shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

"Section 1605. General exceptions to the jurisdictional immunity of a foreign State

"(a) A foreign State shall not be immune from the jurisdiction of courts of the United States or of the States in any case:

"...

"(2) in which the action is based upon a commercial activity carried on in the United States by the foreign State; or upon an act performed in the United States in connection with a commercial activity of the foreign State elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign State elsewhere and that act causes a direct effect in the United States;"

(See United Nations, Materials on Jurisdictional Immunities ..., pp. 57-58.)

1978 115/ of the United Kingdom. The latter Act has, on this point, been

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115/ This Act contains the following provision:

"Exceptions from immunity

"...

"3. (1) A State is not immune as respects proceedings relating to:

"(a) a commercial transaction entered into by the State; or

"(b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) fails to be performed wholly or partly in the United Kingdom.

"(2) This section does not apply if the parties to the dispute are States or have otherwise agreed in writing; and subsection (1) (b) above does not apply if the contract (not being a commercial transaction) was made in the territory of the State concerned and the obligation in question is governed by its administrative law.

"(3) In this section "commercial transaction" means:

"(a) any contract for the supply of goods or services;

"(b) any loans or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and

"(c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority;

but neither paragraph of subsection (1) above applies to a contract of employment between a State and an individual." (Ibid., p. 42.)

followed closely by Pakistan, 116/ Singapore 117/

116/ The State Immunity Ordinance, 1981 contains the following provisions:

"5. Commercial transactions and contracts to be performed in Pakistan

"(1) A State is not immune as respects proceedings relating to:

"(a) a commercial transaction entered into by the State; or

"(b) an obligation of the State which by virtue of a contract, which may or may not be a commercial transaction, fails to be performed wholly or partly in Pakistan."

The expression "commercial transaction" is defined in subsection (3) of section 5 as meaning:

"(a) any contract for the supply of goods or services;

"(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and

"(c) any other transaction or activity, whether of a commercial, industrial, financial, professional or other similar character, into which a State enters or in which it engages otherwise than in the exercise of its sovereign authority."

(The Gazette of Pakistan (Islamabad), 11 March 1981; text reproduced in United Nations, Materials on Jurisdictional Immunities ..., pp. 21-22.)

117/ Singapore's State Immunity Act, 1979 contains in section 5, subsection (1), paragraph (b), a similar provision to that of the Pakistan ordinance above, except that it excludes from this exception contracts of employment between a State and an individual (Singapore, 1979 Supplement to the Statutes of the Republic of Singapore, reproduced in United Nations, Materials on Jurisdictional Immunities ..., p. 29).

and South Africa 118/ and partly by Australia 119/ and Canada. 120/

118/ The South Africa Foreign States Immunities Act of 1981 (section 4 (1)) contains the following provision:

"4. (1) A foreign State shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to:

(a) a commercial transaction entered into by the foreign State; or

(b) an obligation of the foreign State which by virtue of a contract (whether a commercial transaction or not) fails to be performed wholly or partly in the Republic." (Ibid., p. 36)

119/ The Australian Foreign States Immunities Act of 1985 (Section II (1) and (2)) contains the following provisions:

"Commercial transactions

11. (1) A foreign State is not immune in a proceeding in so far as the proceeding concerns a commercial transaction.

(2) Sub-section (1) does not apply:

(a) if all the parties to the proceeding:

(i) are foreign States or are the Commonwealth and one or more foreign States; or

(ii) have otherwise agreed in writing, or

(b) in so far as the proceeding concerns a payment in respect of a grant, a scholarship, a pension or a payment of a like kind." (I.L.M. vol. 25 1986, p. 715)

120/ In the "Act to provide for State immunity in Canadian courts" (State Immunity Act) (The Canada Gazette, Part III (Ottawa), vol. 6, No. 15 (22 June 1982), p. 2949, chap. 95), section 5 provides simply that: "A foreign State is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign State."

(iii) A survey of treaty practice

(24) 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. 121/ 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. 122/ 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. 123/ 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.

121/ See for example, the Agreement between the Government of Australia and the Government of the People's Republic of China on the reciprocal encouragement and protection of investments of 11 July 1988, which provides, inter alia:

"ARTICLE VII

LIMITATIONS ON IMMUNITY

Any question arising in relation to an investment or activity associated with an investment of a national of either Contracting Party concerning immunity from the jurisdiction of the Courts in any proceeding, the procedure for service of initiating process or immunity from execution shall be resolved in accordance with the law of the Contracting Party which has admitted the investment."

122/ See footnote 124 below for a list of treaties between socialist countries containing provisions on jurisdictional immunities of States.

123/ 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).

(25) A typical example of the provisions contained in a series of treaties concluded by the Soviet Union with socialist countries is furnished by the Treaty of Trade and Navigation with the People's Republic of China, signed in Peking on 23 April 1958. 124/ With regard to the legal status of the trade delegation of the Union of Soviet Socialist Republics in China and the Chinese trade delegation in the Soviet Union, article 4 of the annex provides:

"The Trade Delegation shall enjoy all the immunities to which a sovereign State is entitled and which relate also to foreign trade, with the following exceptions only, to which the Parties agree:

"(a) Disputes regarding foreign commercial contracts concluded or guaranteed under article 3 by the Trade Delegation in the territory of State shall, in the absence of a reservation regarding arbitration or any other jurisdiction, be subject to the competence of the courts of the said State. No interim court orders for the provision of security may be made;

"(b) Final judicial decisions against the Trade Delegation in the aforementioned disputes which have become legally valid may be enforced by execution, but such execution may be levied only on the goods and claims outstanding to the credit of the Trade Delegation."

124/ United Nations, Treaty Series, vol. 313, p. 135. Cf. concluded by the USSR with Romania (1947) (ibid., vol. 226, p. 79); Hungary (1947) (ibid., vol. 216, p. 247); Czechoslovakia (1947) (ibid., vol. 217, p. 35); Bulgaria (1948) (ibid., p. 97); the German Democratic Republic* (1957) (ibid., vol. 292, p. 75); Mongolia (1957) (ibid., vol. 687, p. 237); Albania (1958) (ibid., vol. 313, p. 261); Viet Nam (1958) (ibid., vol. 356, p. 149); the Democratic People's Republic of Korea (1960) (ibid., vol. 399, p. 3); Czechoslovakia (1973) (ibid., vol. 904, p. 17). The relevant provisions of these treaties are reproduced in English in United Nations, Materials on Jurisdictional Immunities ..., pp. 134-140.

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* Through accession of the German Democratic Republic to the Federal Republic of Germany with effect from 3 October 1990, the two German States have united to form one sovereign State. As from the date of unification, the Federal Republic of Germany acts in the United Nations under the designation of "Germany".

(26) The comparable provisions of article 10 of a 1951 agreement with France, typical of treaties concluded between the Soviet Union and developed countries, 125/ and of paragraph 3 of the exchange of letters of 1953 between the Soviet Union and India, 126/ which is an example of such agreements between the Soviet Union and developing countries, provide further illustrations of treaty practice relating to this exception.

125/ Article 10 contains the following provision:

"The Trade Delegation of the Union of Soviet Socialist Republics in France shall enjoy the privileges and immunities arising out of article 6 above, with the following exceptions:

"Disputes regarding commercial transactions ... concluded or guaranteed in the territory of France by the Trade Delegation of the Union of Soviet Socialist Republics under the first paragraph of article 8 of this Agreement shall, in the absence of a reservation regarding arbitration or any other jurisdiction, be subject to the competence of the French courts and be settled in accordance with French law, save as otherwise provided by the terms of individual contracts or by French legislation.

"No interim orders may, however, be made against the Trade Delegation.

"..."

(United Nations, Treaty Series, vol. 221, p. 95.)

See, for example, Société le Gostorg et Représentation commerciale de l'URSS v. Association France-Export (1926) (Sirey, Recueil général des lois et des arrêts, 1930 (Paris), part 1, p. 49; summary and trans. in Annual Digest ..., 1925-1926 (London), vol. 3 (1929), case No. 125, p. 174). See also similar provisions in treaties concluded by the USSR with Denmark (1946) (United Nations, Treaty Series, 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.

126/ Paragraph 3 reads as follows:

"It was agreed that the commercial transactions entered into or guaranteed in India by the members of the Trade Representation including those stationed in New Delhi shall be subject to the jurisdiction of the Courts of India and the laws thereof unless otherwise provided by agreement between the contracting parties to the said transactions. Only

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

(27) One regional convention, the 1972 European Convention on State Immunity, 127/ and one global convention, the 1926 Brussels Convention, 128/ addressed the question of commercial contracts as an exception to State immunity. While article 7 of the European Convention is self-evident in addressing the issue, 129/ it needs to be observed that the main object of

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the goods, debt demands and other assets of the Trade Representation directly relating to the commercial transactions concluded or guaranteed by the Trade Representation shall be liable in execution of decrees and orders passed in respect of such transactions. It was understood that the Trade Representation will not be responsible for any transactions concluded by other Soviet Organizations direct, without the Trade Representation's guarantee."

(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.

127/ See footnote 12 above.

128/ International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (Brussels, 1926) and Additional Protocol (Brussels, 1934) (League of Nations, Treaty Series, vol. CLXXVI, pp. 199 and 215; United Nations, Materials on Jurisdictional Immunities ..., pp. 173 et seq.).

129/ 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."

(ibid., p. 158.)

article 1 of the Brussels Convention 130/ 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.

(28) 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. 131/ Another important development concerns the work of the Organization of American States 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 1983, 132/ which contains a provision limiting immunity in regard to "claims relative to trade or commercial activities undertaken in the State of the forum". 133/ The draft

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130/ 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."

131/ 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 1978] and in addition is spearheading efforts for a Caribbean Convention on State Immunity." (United Nations, Materials on Jurisdictional Immunities ..., pp. 74-75).

132/ 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). The text was distributed at the 1983 session of the Commission as document ILC(XXXV)/Conf. Room Doc. 4. See also International Legal Materials (Washington, D.C.), vol. XXII, No. 2 (1983), p. 292.

133/ 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.

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. It is also important to note the contribution made in this field by the Asian-African Legal Consultative Committee (AALCC), which set up a Committee on Immunity of States in respect of Commercial and Other Transactions of a Private Character. In 1960, AALCC adopted the final report of the Committee, in which it was recorded that all delegations except that of Indonesia "were of the view that a distinction should be made between different types of State activity and immunity to foreign States should not be granted in respect of their activities which may be called commercial or of private nature". Although a final decision was postponed, the following recommendations were made:

> "(i) State Trading Organizations which have a separate juristic entity under the Municipal Laws of the country where they are incorporated should not be entitled to the immunity of the State in respect of any of its activities in a foreign State. Such organizations and their representatives could be sued in the Municipal Courts of a foreign State in respect of their transactions or activities in their State.
>
> "(ii) A State which enters into transactions of a commercial or private character ought not to raise the plea of sovereign immunity if sued in the courts of a foreign State in respect of such transactions. If the plea of immunity is raised it should not be admissible to deprive the jurisdiction of the Domestic Courts." 134/

The Committee has since continued its deliberation on the topic. 135/

134/ Asian-African Legal Consultative Committee, Report on the Third Session (Colombo, 20 January to 4 February 1960) (New Delhi), p. 68. See also M. M. Whiteman, Digest of International Law (Washington, D.C.), U.S. Government Printing Office, 1968, vol. 6, pp. 572-574.

135/ See, for example, 1990 Report of the Meeting of Legal Advisers on Jurisdictional Immunities of States and Their Property and International Rivers (Doc. No. AALCC/XXIX/90/20), para. 25.

(v) Contributions from non-governmental bodies

Institute of International Law

(29) The Hamburg draft resolution of 1891 contains a provision limiting the application of immunities in certain cases, notably "actions relating to a commercial or industrial establishment or to a railway, operated by the foreign State in the territory". 136/ A similar provision is contained in article 3 of the final draft resolution adopted by the Institute in 1951:

> "The courts of a State may hear cases involving a foreign State whenever the act giving rise to the case is an acte de commerce, similar to that of an ordinary individual, and within the meaning of the definition accepted in the countries involved in the case." 137/

On 30 April 1954, the Institute adopted another resolution on the immunity of foreign States from jurisdiction and execution, confirming immunity in regard to acts of sovereignty but upholding jurisdiction relating to an act which, under the lex fori, is not an act of sovereign authority. 138/ The Institute is currently considering a new resolution in view of the fact that the problems concerning jurisdictional immunity of States continue to constitute a substantial source of difficulty in the relations of States. 139/

136/ Art. 4, para. 3, of the "Projet de règlement international sur la compétence des tribunaux dans les procès contre les Etats, souverains ou chefs d'Etat étrangers" (Institute of International Law, Tableau général des résolutions (1873-1956), op. cit. (Basel, Editions juridiques et sociologiques, 1957), pp. 15-16).

137/ Annuaire de l'Institut de droit international, 1952 (Basel), vol. 44, part I, p. 37. The expression gestion patrimoniale, used in the original draft, was replaced by the term actes de commerce, which, according to J. P. Niboyet, was more in keeping with the modern activity of the State (ibid., p. 131) and because "with it, one is on relatively firm and familiar ground" (Traité de droit international privé français (Paris, Sirey, 1949), vol. VI, part 1, p. 350).

138/ See Institute of International Law, Tableau général des résolutions (1873-1956), op. cit., pp. 17-18.

139/ See Yearbook of the Institute of International Law, vol. 63, Part II, session of Santiago de Compostela 1989.

International Law Association

(30) Article III of the Strupp draft code of 1926, prepared for the International Law Association, also enumerates certain exceptions to the doctrine of State immunity, including "especially for all cases where the State [or the sovereign] acts not as the holder of public authority, but as a person in private law, particularly if it engages in commerce." 140/ The problem was re-examined by the International Law Association during its conference at Montreal in 1982.

(31) The draft articles for a convention on State immunity prepared by the Committee on State Immunity of the International Law Association and adopted, with modifications, by the Association at Montreal in 1982 141/ contain an interesting provision on this exception. Article III, "Exceptions to Immunity from Adjudication", provides:

> "A foreign State shall not be immune from the jurisdiction of the forum State to adjudicate in the following instances inter alia:
>
> "...
>
> "B. Where the cause of action arises out of:
>
> 1. A commercial activity carried on by the foreign State; or
>
> 2. An obligation of the foreign State arising out of a contract (whether or not a commercial transaction but excluding a contract of employment) unless the parties have otherwise agreed in writing.
>
> ..."

The Association has also resumed its work on jurisdictional immunities of States with a view to addressing important current issues, such as, inter alia, State-owned trading companies. 142/

140/ K. Strupp, "Réforme et codification du droit international, ILA, Projet d'une convention sur l'immunité en droit international". Report of the Thirty-fourth Conference, Vienna, 1926 (London, 1927), pp. 426 et seq.

141/ ILA, Report of the Sixtieth Conference, Montreal, 1982 (London, 1983), pp. 7-8.

142/ See, International Law Association Queensland Conference (1990), International Committee on State Immunity. First Report on Developments in the field of State Immunity since 1982.

Harvard Research Institute

(32) The Harvard Research Center has prepared a number of draft conventions with commentaries for the "Research in International Law" of the Harvard Law School. Article 11 of the 1932 Harvard draft convention on competence of courts in regard to foreign States of 1932 subjects a foreign State to local jurisdiction:

> "... when, in the territory of such other State, it engages in an industrial, commercial, financial or other business enterprise in which private persons may there engage, or does an act there in connection with such an enterprise wherever conducted, and the proceeding is based upon the conduct of such enterprise or upon such act." 143/

International Bar Association

(33) At the Seventh Conference of the International Bar Association in Cologne in 1958, the American Bar Association proposed a draft resolution incorporating a restrictive doctrine of State immunity. At its Eighth Conference in Salzburg in July 1960, the International Bar Association adopted a resolution spelling out the circumstances in which immunity might be limited. 144/ The resolution closely resembles the corresponding provisions of the Harvard draft convention, while paragraph 1 clearly endorses the restrictive principle of the Brussels Convention of 1926. 145/

(34) It may be said from the foregoing survey that while the precise limits of jurisdictional immunities in the area of "commercial transaction" 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 appears to be consistent with the emerging trend in the practice of a growing number of States.

143/ Harvard draft, op. cit. (footnote 104 above), p. 597.

144/ See International Bar Association, Eighth Conference Report, Salzburg, July 1960 (The Hague, Martinus Nijhoff, 1960), pp. 8-10.

145/ See W.H. Reeves, "Good fences and good neighbours: Restraints on immunity of sovereigns", American Bar Association Journal (Chicago, Ill.), vol. 44, No. 6, 1958, p. 521.

(35) The distinction made between a State and certain of its entities performing commercial transactions in the matter of State immunity from foreign jurisdiction set out in the rule formulated in paragraph (3) appears also to be generally supported by the recent treaties 146/ and national

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146/ See, for example, the European Convention on State Immunity, article 27:

"CHAPTER V. GENERAL PROVISIONS

Article 27

1. For the purposes of the present Convention, the expression 'Contracting State' shall not include any legal entity of a Contracting State which is distinct therefrom and is capable of suing or being sued, even if that entity has been entrusted with public functions.

2. Proceedings may be instituted against any entity referred to in paragraph 1 before the courts of another Contracting State in the same manner as against a private person; however, the courts may not entertain proceedings in respect of acts performed by the entity in the exercise of sovereign authority (acta jure imperii).

3. Proceedings may in any event be instituted against any such entity before those courts if, in corresponding circumstances, the courts would have had jurisdiction if the proceedings had been instituted against a Contracting State."

See also, Union of Soviet Socialist Republics-United States Agreement on Trade Relations of 1 June 1990, article XII (1):

"ARTICLE XII

DISPUTE SETTLEMENT

1. Nationals, companies and organizations of either Party shall be accorded national treatment with respect to access to all courts and administrative bodies in the territory of the other Party, as plaintiffs, defendants or otherwise. They shall not claim or enjoy immunity from suit or execution of judgment, proceedings for the recognition and enforcement of arbitral awards or other liability in the territory of the other Party with respect to commercial transactions; they also shall not claim or enjoy immunities from taxation with respect to commercial transactions, except as may be provided in other bilateral agreements."

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

legislation 147/ as well as by the judicial

147/ See, for example, the United Kingdom State Immunity Act of 1978, section 14 (1), (2) and (3):

"Supplementary provisions

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

(a) the sovereign or other head of that State in his public capacity;

(b) the government of that State; and

(c) any department of that government,

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

(2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if:

(a) the proceedings relate to anything done by it in the exercise of sovereign authority; and

(b) the circumstances are such that a State (or, in the case of proceedings to which section 10 above applies, a State which is not a party to the Brussels Convention) would have been so immune.

(3) If a separate entity (not being a State's central bank or other monetary authority) submits to the jurisdiction in respect of proceedings in the case of which it is entitled to immunity by virtue of subsection (2) above, subsections (1) to (4) of section 13 above shall apply to it in respect of those procedures as if references to a State were references to that entity."

Similar provisions are also found in the Singapore State Immunity Act of 1979, section 16 (1), (2) and (3); in the Pakistan State Immunity Ordinance of 1981, section 15 (1), (2) and (3); in the South Africa Foreign States Immunities Act of 1981, section 1 (2) and 15; and in the Canada Act to provide for State immunity in Canadian Courts of 1982, section 2, 3 (1), 11 (3) and 13 (2).

As regards the Australia Foreign Immunities Act of 1985, it provides in section 3 (1) that:

" ...

'separate entity', in relation to a foreign State, means a natural person (other than an Australian citizen), or a body corporate or corporation sole (other than a body corporate or corporation sole that has been established by or under a law of Australia), who or that -

(a) is an agency or instrumentality of the foreign State; and

(b) is not a department or organ of the executive government of the foreign State."

Although this Act distinguishes a "separate entity" from a "foreign State", Section 22 provides that [t]he preceding provisions of Part II [Immunity from jurisdiction], other than subparagraph 11 (2) (a) (i), subsection 16 (1) and subsection 17 (3), apply in relation to a separate entity of a foreign State as they apply in relation to the foreign State.

The approach of the United States Foreign Sovereign Immunities Act of 1976 is slightly different from that of the above cited legislation. It first recognizes the various entities in question as a "foreign State" in accordance with the provisions of section 1603 (a) and (b):

"Section 1603. Definitions

"For purposes of this chapter:

"(a) A 'foreign State', except as used in section 1608 of this title, includes a political subdivision of a foreign State or an agency or instrumentality of a foreign State as defined in subsection (b).

"(b) An 'agency or instrumentality of a foreign State' means any entity:

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

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

"(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title, nor created under the laws of any third country."

The Act then denies State immunity so long as the claims are connected with the "commercial activities" exception to sovereign immunity provided under section 1605 of the Act. When the entity is not entitled to invoke immunity

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under the provisions of section 1605 and other relevant sections, "the foreign State shall be liable in the same manner and to the same extent as a private individual under like circumstances", as provided under section 1606.

In this connection, reference may also be made to section 452 of the third Restatement, which provides as follows:

> "A claim against a State instrumentality in respect of which the instrumentality is not immune may be brought against that instrumentality, and in special circumstances against the State itself, but a claim against one State instrumentality may not be brought against another instrumentality of the State, except where the instrumentality sued is the agent or principal of the instrumentality whose activity has given rise to the claim." (Third statement, vol. I, p. 399)

National legislation specially relevant in the present context are those recently enacted in several socialist States. See, for example, the Law of the Union of Soviet Socialist Republics on State enterprises (amalgamations), dated 30 June 1987 (Vedomosti Verkhovnogo soveta SSR, 1 July 1987, No. 26 (2412), (Text 385, pp. 427-463) (section 1 (1), (2) and (6)):

> "1. The State enterprise (amalgamation) and its tasks. (1) State enterprises (amalgamations [groups of enterprises]), along with cooperative enterprises, are the main components of a single national economic complex. Enterprises (amalgamations) play the central role in developing the economic potential of the country and in attaining the supreme goal of social production under socialism - the fullest possible satisfaction of the people's growing material, cultural and intellectual needs.
>
> This law defines the fundamentals of organization and activity and the legal status of State enterprises and amalgamations (hereinafter referred to as enterprises except in cases where specific features of amalgamations are treated).
>
> ...
>
> The enterprise is a legal entity: it enjoys rights and performs duties related to its activity, possesses a separate part of the people's property, and has an independent balance sheet.
>
> ...
>
> (6) The State shall not be responsible for the obligations of the enterprise. The enterprise shall not be responsible for the obligations of the State or of other enterprises, organizations and institutions."

See also, 1987 Decree on the Procedure for the Creation 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 13 January 1987. No. 49. SP SSSR (1987), No. 9, item 40; as amended by Decree No. 352 of 17 March 1988

practice 148/ of States, although specific approaches or requirements may

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and No. 385, 6 May 1989. Svod zakonov SSSR, IX. 50-19; SP 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).

148/ In the United States of America, some of the pre-Foreign Sovereign Immunities Act cases put emphasis on the status of the State entity concerned, rather than on the nature of the activity in question. After the passage of the Act, the emphasis shifted to the functional character of the entity's activity in the particular case. (See, for example, Matter of SEDCO, Inc. (543 F. Supp. 561. U.S. District Court, S.D. Texas, 30 March 1982); O'Connel Machinery Co. v. M.V. "Americana" 734, F. 2d 115. U.S. Court of Appeals, 2d Cir., 4 May 1984). See, however, First National City Bank v. Banco Para el Comercial Exterior de Cuba (1983) (103 S.Ct. 2591, 17 June 1873. A.J.I.L., vol. 78, p. 230 (1984)). Although the case did not directly touch upon the problem of jurisdictional immunities, in responding to the plea that as a substantive matter the Foreign Sovereign Immunities Act prohibited holding a foreign instrumentality owned and controlled by a foreign government responsible for action taken by that government, the court held that the language and history of the Act clearly established that the Act was not intended to affect the substantive law determining the liability of a foreign State or instrumentality or attribution of liability among instrumentalities of a foreign State. The court further stated that government instrumentalities established as juridical entities distinct and independent from their State should normally be treated as such, unless that presumption was overcome in certain circumstances. In the case, the court found that the United States bank defending a claim on a letter of credit by the Foreign Trade Bank of Cuba was permitted to set off its own claim against the Cuban State arising out of the expropriation of its assets, as the latter bank was considered to have acted as alter ego for the State. See also Foremost-McKesson, Inc. v. Islamic Republic of Iran (905 F. 2d 438. U.S. Court of Appeals, D.C. Cir., 15 June 1990), and Kalamazoo Spice Extraction Company v. The Provisional Military Government of Socialist Ethiopia (U.S. Foreign Sovereign Immunities Act; 26 August 1985. I.L.M., vol. 24, p. 1277 (1985)). Cf. Edlow International Co. v. Nuklearna Elektrarna Krsko (441, F. Supp. 827 (D.D.C. 1977), I.L.R. vol. 63 (1982) p. 100).

For the judicial practice of the United Kingdom which has generally adopted an approach based on the structure, rather than on the nature, of the

activity concerned, 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. 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, Trendex Trading Corp. v. Central Bank of Nigeria (1977) (see footnote 94 above) in which the Court of Appeal rules that the C.B.N. 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 Hondlu Zagranicznego Rolimpex (Court of Appeal (1978) Q.B. 176, House of Lords (1979) A.C. 351, I.L.R. 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 (I.L.R., vol. 64 (1983) p. 63), and Bouchard v. J.L. Le Saux Ltée (1984), 45 O.R. (2d) 792. Ontario Supreme Court (Master's Chambers) (Canadian Yearbook of International Law, vol. XXIII, pp. 416-17 (1985)).

In the former case, in which 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. The court said:

> "There is a real separation in our opinion between the State of New York and the Authority. The Authority is set up to carry on what has all the earmarks of a commercial activity. There is no indication in the statute that it is not to be independent in establishing policy and carrying out its responsibility - it 'stands on its own feet' and 'acts on its own initiative'. The provision in the statute declaring that it was 'performing a governmental function' does not, therefore, imply that

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> the Authority was a mere functionary of the State. The context of the statute is, in our opinion, wholly against that view. An alter ego is another self, a reasonably exact counterpart. We think it is clear that that description does not fit the Authority in relation to the State." (ibid., p. 68).

The court appeared therefore to have relied on the status of the entity, thus subscribing to the structuralist approach.

In the latter case, however, the Senior Master, in reaching 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, 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 which seems to adhere largely to the functional approach see, for example, Corporacion del Cobre v. Braden Copper Corporatic and Société Groupement d'Importation des Métaux (I.L.R., vol. 65 (1984), p. 57) in which the Tribunal de grande instance of Paris rejected the plea of jurisdictional immunity while granting the application for vacation of the garnishments by the applicant Corporation. The Court stated as follows:

> "[t]he Chilean Copper Corporation appears, according to the Chilean legal texts which created it and which regulated its status, as being a national institution having its own legal personality, formally distinct from the central power of the State. Its single specialized vocation is to promote the production and commercialization of copper and its by-products, to ensure the regulation and control of the interior and exterior copper market. ... In order to realize its objective the Chilean Copper Corporation operates exclusively in international transactions using the means and forms of the private law of business. Thus the contracts of sale signed with Tréfimétaux and the Groupement d'Importation des Métaux exclude any recourse to the procedures which are usually associated with public power." (ibid., p. 59).

A similar judgement was rendered in Société des Ets. Poclain and Cie d'Assurances la Concorde v. Morflot USSR and Others (I.L.R., vol 65 (1984), p. 67) in which the Tribunal de Commerce of Paris, rejecting the plea of jurisdictional immunity by a Soviet shipping company, Morflot, based on the reason that the Morflot was a branch of the Soviet Ministry of the Merchant Marine, held that: in reality Morflot was a shipping company with its own legal personality which had carried out ordinary commercial operations in France and could be compared to a French nationalized industry. (ibid., p. 69). In contrast to these cases, the Court of Cassation seems to have employed a functional, as well as structural test. Thus in Société Nationale

des Transports Routiers v. Compagnie Algérienne de Transit et d'Affretement Serres et Pilaire and Another (I.L.R., vol. 65 (1984), p. 83) the Court of Appeal 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." (ibid., p. 85).

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) (I.L.R., vol. 65 (1984) 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 juristic person 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 (I.L.R., vol. 65 (1984), 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 Prejudgment Attachment Proceedings against

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the Complainant. 37 WM Zeitschrift für Wirtschafts- und Bankrecht 722 (1983) (Federal Constitutional Court, 12 April 1983. English translation in I.L.M., vol. 22, p. 1279 (1983)).

For the judicial practice of Switzerland which seems to have also relied on the functional as well as structural criterion see, for example, Banque Centrale de la République de Turquie v. Weston Compagnie de Finance et d'Investissement SA (1978) (I.L.R., vol. 65 (1984), p. 417), in which the Federal Tribunal held as follows:

> "The complainant describes itself as a limited company with its own legal personality governed by Turkish private law. At least 51 per cent of the shares are required to be held by the Turkish State. The complainant fulfils the functions of a bank of issue and a central bank. Its governor is appointed by the Council of Ministers on the recommendation of the Board of Directors. The appellant is accordingly not legally identifiable with the Republic of Turkey. ... There is quite old case law of the Federal Tribunal to the effect that entities with their own legal personality according to the law of their seat are not entitled to invoke immunity. ... Whether these decisions can be followed is certainly open to question. Today in general terms both in Swiss and foreign jurisprudence, economic factors bear more weight than in the past. Legal form is often discarded completely in the face of economic realities ... ." (ibid., p. 422)

So stating, the Court 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 like a private bank as far as the transaction in question was concerned.

Whereas in Banco de la Nación Lima v. Banco Cattolica del Veneto, (1984) (I.L.R., vol. 82 (1990), p. 10) concerning the attachment of the funds held by a State-owned Peruvian bank, the Switzerland Federal Tribunal rejected the claim of immunity. The judgement of 1984 said:

> "It appears from the jurisprudence ... that entities which, according to the law of the State in which they have their seat, possess their own distinct legal personality cannot take refuge behind the immunity of the State from which they emanate. ... Recent legal writers seem to be unanimous in rejecting the extension of immunity to independent entities such as the appellant ... entities endowed with their own

vary among them. 149/

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;

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distinct legal personality cannot in principle invoke State immunity, the only possible exceptions being cases where such entities acted in the exercise of sovereign authority." (ibid., pp. 11-13).

See also Swissair v. X and Another (1985) (Federal Tribunal, I.L.R., vol. 82 (1990), p. 36) and Banque du Gothard v. Chambre des Recours en Matière Pénale du Tribunal d'Appel du Canton du Tessin and Another (1987) (Federal Tribunal, I.L.R., vol. 82, p. 50). In the latter case the bank deposits of the Vatican City Institute were dealt with in the same manner as that of 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, I.L.R., vol. 45 (1972) p. 85); Italy: Hungarian Papal Institute v. Hungarian Institute (Academy) in Rome (Court of Cassation, 1960, I.L.R., 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.

149/ See C. Schreuer, State Immunity: Some Recent Development, 1988, pp. 92-124.

(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 for 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. 150/ 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 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

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150/ See subparagraph 1 (c) of draft article 2.

in the application of its administrative 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 administrative 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, etc., 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 residency 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. 151/

151/ See, for example, S. c. Etat indien (Tribunal fédéral, 22 May 1984) (Annuaire suisse de droit international, 1985, vol. 41, p. 172 concerning the dismissal of a locally recruited Italian national originally employed by the Embassy of India to Switzerland as a radio-telegraphist, 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 the Swiss courts had jurisdiction over the case.

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 or an exception to State 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 administrative 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 or another exception to the general rule of State 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 to cover those employees of a foreign State recruited outside the State of the forum for work to be performed in that State within the scope of the present article.

(7) Examples of the application of the rule of non-immunity as contained in paragraph 1 are contracts of employment of individuals for the cleaning or maintenance of an office, a library, a cemetery or a museum. In short, the State of the forum has an interest in protecting its labour force, especially for employees of lower echelons performing menial tasks, such as those of domestic servants.

(8) 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, thus permitting the exercise of administrative jurisdiction or indeed disciplinary or supervisory jurisdiction by the employer State, as envisaged for instance in the provisions of a number of status of forces agreements. Respect for treaty régimes 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.

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

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

(10) 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. 152/ Officials of established accreditation are, of course, covered by

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152/ 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, pp. 298-299 (1986-1987)); Console generale belga in Napoli v. Esposito (Corte di Cassazione (Sezioni Unite), 3 February 1986, No. 666, ibid.); Panattoni c. Repubblica federale di Germania (Corte di Cassazione, 15 July 1987) (Rivista di diritto internazionale, 1988, vol. 71, p. 902).

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 82, p. 1 (1990)); Germany: Conrades v. United Kingdom of Great Britain and Northern Ireland (Hanover Labour Court. 4 March 1981, ILR 65, p. 205, (1984)); Belgium: Portugal v. Goncalves, Civil Court of Brussels (Second Chamber) (11 March 1982, ILR 82, p. 115 (1990)); Switzerland: Tsakos v. Government of the United States of America (Labour Tribunal of Geneva. 1 February 1972, ILR 75, p. 78 (1987)); United Kingdom: Sengupta v. Republic of India (Employment Appeal Tribunal. 17 November 1982, ILR 64, p. 352 (1983)).

this 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.

(11) Paragraph 2 (b) is designed to confirm the existing practice of States 153/ in support of the rule of immunity in the exercise of the

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153/ See, for example, in the judicial practice of Italy, the interesting decision rendered in 1947 by the United Sections of the Supreme Court of Cassation in Tani v. Rappresentanza commerciale in Italia dell'U.R.S.S. (Il Foro Italiano (Rome), vol. LXXI (1948), p. 855; Annual Digest and Reports of Public International Law Cases, 1948 (London), vol. 15 (1953), p. 141, case No. 45), 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 (Rivista di diritto internazionale (Milan), vol. XXXIX (1956), pp. 91-92; International Law Reports, 1956 (London), vol. 23 (1960), p. 201), the Court of Cassation 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), 25th year (1933), p. 240; Annual Digest ..., 1933-1934 (London), vol. 7 (1940), p. 178, case No. 69), concerning an action for wrongful

discretionary power of appointment or non-appointment by the State of an individual to any official post or employment position. This includes actual

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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 ..., 26th year (1934), p. 110) (Court of Cassation, 1934) (Annual Digest ..., 1933-1934, op. cit., p. 177, case No. 68); 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". However, 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, p. 435 (1988)) 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 has 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. c. Guinea Ecuatorial (Tribunal Supremo, 10 February 1986, abstract in Revista Española de Derecho Internacional, 1988, vol. 40, II, 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. c. Sudáfrica (Tribunal Supremo, 1 December 1986, abstract in Revista Española de Derecho Internacional, 1988, vol. 40, II, p. 11) in which the court upheld the

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 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 were referred to in the subparagraph and which were legitimately within the discretionary power of the employer State.

(12) 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

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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 c. Office commercial du Portugal (1980) (Tribunal du travail de Bruxelles, abstract in Revue belge de droit international, 1986, vol. 19, p. 368) which related to an employment contract between a Portuguese national and the Portuguese public entity Fundo de Fomenteo de Exportacao. 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 priveé. Immunity was therefore denied.

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. Besides, 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.

(13) 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 onmatters 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.

(14) 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.

(15) 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. 154/

(16) One member withdrew the reservations he had expressed at the previous session concerning the inclusion of article 11 in the draft articles.

(17) Another member, however, had serious reservations about the provision of paragraph 2 (c) which seemed to mean that persons who were neither nationals nor habitual residents of the State of the forum would not enjoy any legal protection.

154/ With regard to the provision of paragraph 2 (c) of article 11, see for example, the United Kingdom State Immunity Act 1978 (The Public General Acts, 1978, part 1, chap. 33, p. 715; reproduced in United Nations, Materials on Jurisdictional Immunities ..., pp. 41 et seq.) 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 Pakistan's State Immunity Ordinance, 1981 (The Gazette of Pakistan (Islamabad), 11 March 1981; reproduced in United Nations, Materials ..., pp. 20 et seq.), subsection (2) (b) of section 6 of Singapore's State Immunity Act, 1979 (1979 Supplement to the Statutes of the Republic of Singapore; reproduced in United Nations, Materials ..., pp. 28 et seq.), subsection (1) (b) of section 5 of South Africa's Foreign States Immunities Act, 1981 (reproduced in United Nations, Materials ..., pp. 34 et seq.), section 12 (3) of Australia's Foreign States Immunities Act of 1985 and paragraph 2 (b) of article 5 of the 1972 European Convention on State Immunity (Council of Europe, European Convention on State Immunity and Additional Protocol, European Treaty Series (Strasbourg), No. 74 (1972)) are worded in similar terms.

The United Kingdom State Immunity Act 1978 (sect. 4, subsect. (2) (a)), Pakistan's State Immunity Ordinance, 1981 (sect. 6, subsect. (2) (a)), Singapore's State Immunity Act, 1979 (sect. 6, subsect. 2 (a)), South Africa's Foreign States Immunities Act, 1981 (sect. 5, subsect. (1) (c)) and the 1972 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.

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 delict 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. 155/

(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.

155/ See the State practice cited in the fifth report of the former Special Rapporteur (Yearbook ... 1983, vol. II, Part One; A/CN.4/363 and Add.1, paras. 76-99). See also, Australia Foreign States Immunities Act of 1985, Section 13.

(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 persons 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. 156/

156/ 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. I.L.M., vol. 30, p. 421 (1991).

See also, Olsen v. Mexico (729 F.2d 641 U.S. Court of Appeals, 9th Cir., 30 March 1984. As amended 16 July 1984); Frolova v. Union of Soviet Socialist Republics (761 F.2d 370. U.S. Court of Appeals, 7th Cir., 1 May 1985); Gerritsen v. De La Madrid (819 F.2d 1511. U.S. Court of Appeals, 9th Cir., 18 June 1987); Helen Liu v. The Republic of China (Court of Appeals, 9th Cir., 29 December 1989, I.L.M., vol. 29, p. 192 (1990)). 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 (U.S. Court of Appeals, 9th Cir., 30 December 1983, I.L.R. 81, p. 543 (1990)); Perez et al v. The Bahamas, Court of Appeals, District of Columbia Circuit. 28 April 1981, I.L.R. 63, p. 601 (1982); Berkovitz v. Islamic Republic of Iran and Others. U.S. Court of Appeals, 9th Cir., 1 May 1984, I.L.R. 81, p. 552 (1990); Argentina Republic v. Amerada Hess Shipping Corp. (488 U.S. 428. U.S. Supreme Court, 23 January 1989. A.J.I.L., vol. 83, p. 565 (1989)).

(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 letter-bombs or export of explosives, fireworks or dangerous substances which could explode or cause damage through negligence, inadvertence or accident, or indeed with intent to inflict physical injury upon a person or cause damage to tangible property. Thus cases of shooting or firing across a boundary or of spill-over across the border of shelling as a result of an armed conflict, which constitute clear violations of the territory of a neighbouring State under public international law, 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. 157/

157/ 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.

(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 158/ 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. 159/

(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 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

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158/ 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; I.L.R., 1956 (London), vol. 23 (1960), p. 205); in the Federal Republic of Germany, in Immunity of United Kingdom from Jurisdiction (Germany) (1957) (I.L.R., 1957 (London), 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), p. 164, case No. 44); in Austria, in Holubek v. Government of the United States (1961) (Juristische Blätter (Vienna), vol. 84 (1962), p. 43; I.L.R. (London), vol. 40 (1970), p. 73); in Canada in Carrato v. United States of America (1982) (141 D.L.R. (3d) 456. Ontario High Court; The Canadian Yearbook of International Law, vol. XXII, p. 403 (1984)); 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 (I.L.M., vol. 24, p. 427 (1985)).

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

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), 160/ 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, 161/ is formulated in language

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160/ See article 6 and the commentary thereto.

161/ See the fifth report of the former Special Rapporteur (Yearbook ... 1983, vol. II (Part One), p. 25, document A/CN.4/363 and Add.1, paras. 116-140). For judicial decisions, reference may be made to the decision of a Tokyo court in Limbin Hteik Tin Lat v. Union of Burma (1954) and to the dictum of the court (ibid., para. 117), as well as to 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). For the English doctrine of trust, see the cases cited in paras. 120-122 of the 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 (Supreme Court, undated) (extraits in French in Journal du droit international, 1988, vol. 115, 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 breaking of the union between the two States. By a one-vote majority, immunity from jurisdiction prevailed in the Court's split decision on the ground of diplomatic immunity. For relevant legislative provisions, reference may be

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. In other official languages, an equivalent expression is used which indicates the existence of competence of the court in the actual instance before it. It is understood that the court is competent for this purpose by virtue of the applicable rules of private international law.

(4) Paragraph (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

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made to section 56 of Hungary's Law Decree No. 13 of 1979 (ibid., para. 125), to article 29 of Madagascar's Ordinance No. 62-041 of 19 September 1962 (ibid., para. 126), to section 14 of Australia's Foreign States Immunities Act of 1985 and to the replies to the Secretariat's questionnaire (ibid., paras. 127-128). See also for other legislative provisions, international conventions and international opinions (ibid., paras. 130-139). See also comments and observations of Governments analysed in the present Special Rapporteur's preliminary report (A/CN.4/415 and Corr.1 and 2, paras. 1, 2 and 7-9).

interest" in this paragraph gives rise to some difficulties of translation from the English original into other official languages. The law of property, especially real property or immovable property, contains many peculiarities and niceties within each municipal legal system. Even in the English usage, 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) Paragraph (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, i.e., the forum rei sitae.

(6) Paragraph (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 members of the Commission, the present paragraph (c) combines original paragraph 1, subparagraphs (c), (d) and (e) adopted on first reading into one paragraph.

(7) Former paragraph 2, 162/ 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 instituting a proceeding against a State where 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.

(8) One member considered that the provisions of the article were too general and that in particular the notion of "interest" which was not clearly understood outside the common law system would make its application difficult in other legal systems.

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.

162/ Yearbook ... 1986, vol. II, (Part Two), p. 10.

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. 163/

(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.

(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:

163/ See, for example, the Universal Copyright Convention revised at Paris on 24 July 1971 (United Nations, Treaty Series, vol. 943, p. 178). There is also a United Nations specialized agency, the World Intellectual Property Organization (WIPO), involved in this field.

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 régime 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. 164/

(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

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164/ Domestic legislation adopted since 1970 supports this view; see section 7 of the United Kingdom State Immunity Act 1978 (see footnote 154 above); section 9 of the Singapore's State Immunity Act, 1979 (ibid.); section 8 of Pakistan's State Immunity Ordinance, 1981 (ibid.); section 8 of South Africa's Foreign States Immunities Act, 1981 (ibid.); section 15 of Australia's Foreign States Immunities Act of 1985 (ibid.). The United States Foreign Sovereign Immunities Act of 1976 (United States Code, 1976 Edition, vol. 8, title 28, chap. 97, p. 206; reproduced in United Nations, Materials on Jurisdictional Immunities ..., pp. 55 et seq.) 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 1972 European Convention on State Immunity (see footnote 154 above), 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) (Österreichische Juristen Zeitung (Vienna), vol. 5 (1950), p. 341, case No. 356; International Law Reports, 1950 (London), vol. 17 (1956), p. 155, case No. 41; Journal du droit international (Clunet) (Paris), vol. 77 (1950), p. 749; reproduced (in English) in United Nations, Materials ..., pp. 183 et seq.).

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, etc., must materialize in the territory of the State of the forum. Secondly, such a copyright, etc., of the 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, including any developing State, is free to pursue its own policy within its own territory. Infringement of such rights in 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, i.e. 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 collectivities 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 or the exception to State 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 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 criterion more easily identifiable, 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.

(8) It has become increasingly clear from the practice of States 165/ 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).

165/ 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's 1978 Act (The Public General Acts, 1978, part 1, chap. 33, p. 715; reproduced in United Nations, Materials on Jurisdictional Immunities ...., pp. 41 et seq.); section 10 of Singapore's 1979 Act (ibid.); section 9 of Pakistan's 1981 Ordinance (ibid.); section 9 of South Africa's 1981 Act (ibid.); and section 16 of Australia's 1985 Foreign Immunities Act.

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's 1976 Act (The United States Code, 1976 Edition, vol. 8, title 28, chap. 97, p. 206; reproduced in United Nations, Materials on Jurisdictional Immunities...., pp. 55 et seq.), section 1605 (a) (2), in the 1972 European Convention (see footnote 12 above), and in the Inter-American Draft Convention on Jurisdictional Immunity of States (OEA/Ser.G-CP/doc.1352/83 of 30 March 1983; distributed at the Commission's thirty-fifth session as document ILC (XXXV)/Conf.Room Doc.4).

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.

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 166/ 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.

166/ 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.

(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). 167/ The present article should not be interpreted to recognize 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 168/ 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) 169/ and its Additional Protocol (1934) 170/ 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.

167/ United Nations, Treaty Series, vol. 439, p. 193.

168/ See, for example, 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.

169/ League of Nations, Treaty Series, vol. CLXXVI, p. 199.

170/ Ibid., p. 214.

(6) The text of article 16 as provisionally adopted on first reading 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) 171/ and the 1982 United Nations Convention on the Law of the Sea, 172/ in which ships are classified according to their use, i.e. 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.

171/ United Nations, Treaty Series, vol. 450, p. 11.

172/ Official Records of the Third United Nations Conference on the Law of the Sea, vol. XVII (United Nations publication, Sales No. E.34.V.3), p. 157, document A/CONF.62/122.

(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 passengers by sea. The carriage of goods by sea constitutes an important subject in international trade law. Its study has been undertaken by UNCITRAL, and a standard convention or legislation on maritime law or the law of carriage of goods by sea 173/ 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 off-shore 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

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173/ See the 1978 United Nations Convention on the Carriage of Goods by Sea (Yearbook of the United Nations Commission on International Trade Law, vol. IX (1978) (United Nations publication, Sales No. E.80.V.8), p. 212).

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 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 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 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. 174/

(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 unabated problem of ship-based marine pollution. In consideration of the fact that this

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174/ See the sixth report of the former Special Rapporteur, Yearbook ... 1984, vol. II (Part One), pp. 30 et seq., document A/CN.4/376 and Add.1 and 2, paras. 136-230.

See also for recent legislative practice, South Africa Foreign States Immunities Act of 1981 (section 11); United States Act to amend the Foreign Sovereign Immunities Act with respect to admiralty jurisdiction, 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, pp. 417-18 (1985); the Netherlands: USSR v. I.C.C. Handel-Maatschappij (see footnote 148 above); the United States of America: Transamerican Steamship Corp. v. Somali Democratic Republic (767 F.2d 998. U.S. Court of Appeals, D.C. Cir., 12 July 1985, A.J.I.L. vol. 80, p. 357 (1986)); China National Chemical Import and Export Corporation and Another v. M/V Lago Hualaihue and Another (District Court, Maryland. 6 January 1981, ILR 63, p. 528 (1982)).

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 frivilous 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) As regards the substantive scope of article 16, one Government suggested that the Commission considers the question of State-owned or State-operated aircraft engaged in commercial service. 175/ At the request of some members the Drafting Committee briefly considered this question.

(18) 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); 176/

(b) Convention for the Unification of Certain Rules Relating to International Carriage by Air, Warsaw, 1929 (see arts. 1, 2 and the Additional Protocol); 177/

(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); 178/

175/ See the comment by Switzerland, A/CN.4/415 and Corr. 1 and 2, p. 101.

176/ International Civil Aviation Organization (ICAO), document 7300/6.

177/ League of Nations, Treaty Series, vol. XI, p. 173, and United Nations, Treaty Series, vol. 478, p. 371.

178/ ICAO, document 7632.

(d) Convention supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, Guadalajara, 1961; 179/

(e) Convention on the International Recognition of Rights in Aircraft, Geneva, 1948 (see arts. XI, XII and XIII); 180/

(f) Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, Rome, 1952 (see arts. 1, 2, 20, 23 and 26); 181/

(g) Convention on Offences and Certain Other Acts Committed on Board Aircraft, Tokyo, 1963 (see art. 1); 182/

(h) Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 1970 (see art. 3); 183/

(i) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 1971 (see art. 4). 184/

According to the above treaties, the rules concerning civil aviation apply to all aircraft, including State-owned or operated aircraft. It may be inferred therefore that aircraft would not enjoy State immunity on the ground of ownership or operation by a State. The only category of aircraft which are excluded from the application of the civil aviation rules under those treaties are aircraft used in the military, customs or police services. That category of aircraft would then presumably enjoy jurisdictional immunity of the State. These treaties however do not deal expressly with the question of jurisdictional immunity of State aircraft, and the case law in this field is very scanty. Moreover, the legal status of specific types of aircraft, such as presidential planes, civil aircraft chartered by government authorities for relief operations is by no means clear and would require further analysis. Recognizing that the question would call for more time and study,

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179/ ICAO, document 8181.

180/ ICAO, document 7620.

181/ ICAO, document 7364.

182/ ICAO, document 8364.

183/ ICAO, document 8920.

184/ ICAO, document 8966.

the Commission, while noting the importance of the problem, simply took note of the views exchanged in the Drafting Committee.

(19) Some members of the Commission also raised the question of a space object in the Drafting Committee. The following treaties are relevant to the space activities and space object:

(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; 185/

(b) Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space 1968; 186/

(c) Convention on International Liability for Damage Caused by Space Objects (Liability Convention) 1972; 187/

(d) Convention on Registration of Objects Launched into Outer Space 1975; 188/

(e) Agreement Governing the Activities of States on the Moon and Other Celestial Bodies. 189/

Under these treaties, States bear international responsibility for their national activities in outer space 190/ and each State that launches an object into outer space is internationally liable for damage to another State or natural or juridical person caused by such object. 191/ A Launching State is absolutely liable to pay compensation for such damage. 192/ A claim for compensation must be presented to a Launching State through diplomatic channels 193/ and such a presentation of a claim does not require prior

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185/ U.N.T.S., vol. 610, p.205.

186/ United Nations document, A/RES/2777(XXVI) (F.872).

187/ U.N.T.S., vol. 672, p. 118.

188/ United Nations document, A/RES/3235(XXIX).

189/ I.L.M., vol. XVIII, p. 1434.

190/ See, for example, article VI of the 1967 Outer Space Treaty.

191/ See, for example, article VII of the 1967 Outer Space Treaty.

192/ See, for example, article II of the 1972 Liability Convention.

193/ See, for example, article IX of the 1972 Liability Convention.

exhaustion of local remedies. 194/ It is noted that article XI, paragraph 2, of the Liability Convention provides that "Nothing in this Convention shall prevent a State or natural or juridical persons it might represent, from pursuing a claim in the courts or administrative tribunals or agencies of a launching State ...." This may be interpreted simply to mean that a State or natural or juridical persons who have suffered damage is not prevented from presenting a claim before a court of a launching State. The immunity of the Launching State from the jurisdiction of the court of the victim State would not be affected in that case.

(20) Under the present treaty régime, therefore, a claim arising from space activity or launching of space objects and brought against a State or its nationals would be settled through diplomatic channels as a matter of international responsibility. It should be also said that the launching of space objects in outer space is still an activity carried out by relatively few States. As to the damage caused by a space object to another State, there has been only one case where the Government of Canada presented a claim against the Soviet Union in connection with the "COSMOS-954" incident in 1987 and that claim has been settled through diplomatic negotiation. 195/ The Commission thus simply took note of the exchange of views in the Drafting Committee.

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.

194/ See, for example, article XI of the 1972 Liability Convention.

195/ I.L.M., vol. 18 (1979), pp. 899-930.

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. 196/

196/ See the sixth report of the former Special Rapporteur, A/CN.4/376, 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. I.L.M., vol. 26, p. 1004 (1987)); Societe Europeene D'Etudes et D'Entreprises v. Yugoslavia, Et Al. Court of Cassation (18 November 1986. English translation, I.L.M. vol. 26, p. 377 (1986)). 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. Translation in I.L.M., vol. 28, p. 687 (1989)).

See further the United States Foreign Sovereign Immunities Act of 1976, as amended in 1988: 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 section 1605 (a) of the United States Foreign Sovereign Immunities Act by adding a new paragraph (6) covering arbitration:

"Section 1605. General exceptions to the jurisdictional immunity of a foreign State

"(a) A foreign State shall not be immune from the jurisdiction of courts of the United States or of the States in any case:

"(6) in which the action is brought, either to enforce an agreement made by the foreign State with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been

(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

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brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.".

Section 1610 (a) is amended by adding the following new paragraph (6):

Sec. 8. Section 1610 (a) of title 28, United States Code, is amended by:

(1) Striking out the period at the end of paragraph (5) and inserting in lieu thereof ",or"; and

(2) Adding at the end thereof the following:

"(6) the judgement is based on an order confirming an arbitral award rendered against the foreign State, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement.".

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 the International Centre for Settlement of Investment Disputes (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 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 compromissary 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. One government suggested that the exercise of supervisory jurisdiction by a court of another State should be extended to include the recognition and enforcement of an arbitral award. 197/ After consideration, the Drafting Committee decided not to include such a provision as it was a matter that pertained more to immunity from execution, which is dealt with in Part IV of the present draft articles, and accordingly had no place in the present article. Namely, article 18, paragraph 1 states, in part, that "No measures of constraint, such as attachment, arrest and execution against property may be taken in connection with a proceeding before a court ...." and paragraph 1 (a) (ii) of the same article refers to "an arbitration agreement" as a consent to the measures of constraint. Therefore, "recognition of the award" by the competent court may be interpreted as being included among the measures of constraint referred to in article 18, paragraph 1. One member expressed reservations with regard to the article, as it did not appear to provide for enforcement of the agreement to arbitrate. As stated above, however, the question of enforcement of an arbitration award should be interpreted as being covered in article 19 together with constraint measures, such as attachment, arrest and execution.

(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

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197/ For a study of State practice in this respect, see the Second Report of the Special Rapporteur, A/CN.4/422/Add.1, paras. 7-15.

treaties between States 198/ 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), 199/ 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. 200/

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

199/ United Nations, Treaty Series, vol. 575, p. 159.

200/ See, for example, Maritime International Nominees Establishment v. Republic of Guinea (United States of America, intervenor) (1982) (Federal Reporter, 2nd Series, vol. 693 (1983), p. 1094); Guinea v. Maritime International Nominees Establishment (Bergium, Court of First Instance of Antwerp. 27 September 1985, I.L.M., vol. 24, p. 1639 (1985)); Senegal v. Seutin as Liquidator of the West African Industrial Concrete Co. (SOABI) (France, Court of Appeal of Paris. 5 December 1989. I.L.M., vol. 29, p. 1341 (1990)); Socialist Libyan Arab Popular Jamahiriya v. Libyan American Oil Company (LIAMCO) (Switzerland, Federal Supreme Court, First Public Law Department. 19 June 1980, ILR 62, p. 228

(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.

(1982)); Tekno-Pharma AB v. State of Iran (Sweden, Svea Court of Appeal. 24 May 1972, ILR 65, p. 383 (1984)); Libyan American Oil Company v. Socialist People's Arab Republic of Libya (Sweden, Svea Court of Appeals. 18 June 1980, ILR 62, p. 225 (1982)); Libyan American Oil Company v. Socialist People's Libyan Arab Jamahiriya, formerly Libyan Arab Republic (U.S. District Court, District of Columbia. 18 January 1980, ILR 62, p. 220 (1982)).
See, however, Popular Revolutionary Republic of Guinea v. Atlantic Triton Company (France, Court of Cassation (First Civil Chamber). 18 November 1986, ILR 82, p. 76 (1990)), 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.
