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# Fourth Report on Jurisdictional Immunities of States and Their Property

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# JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

[Agenda item 6]

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## Fourth report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur

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## Introductory note

1. This is the fourth of a series of reports on the topic of jurisdictional immunities of States and their property, prepared and submitted by the Special Rapporteur for consideration and deliberation by the International Law Commission. The series was preceded by an earlier study presented by the Working Group on the topic in July 1978 in the form of an exploratory report.<sup>1</sup>

2. It may be helpful to recall briefly that the first of the series of reports on the subject was a preliminary report<sup>2</sup> giving a historical sketch of international efforts towards codification examining the sources of international law and possible contents of the law of State immunities, including the practice of States, international conventions, international adjudication, and opinions of writers as source materials, and an inquiry into initial questions, definitions, a viable inductive approach, the general rule of State immunity and possible exceptions to the general rule or limitations of State immunities, immunities from attachment and execution as well as other procedural questions and related matters.

3. The second report of the Special Rapporteur, submitted to the Commission at its thirty-second session, in 1980,<sup>3</sup> and the third report, to its thirty-third session, in 1981,<sup>4</sup> have each in turn been discussed by members of the Commission and have also received extensive consideration and been the object of deliberation the Sixth Committee during the thirty-fifth

and thirty-sixth sessions of the General Assembly.<sup>5</sup> They have each been prepared with the guidance of the Commission<sup>6</sup> on the basis of comments and observations of its members, as well as the views expressed by representatives of Governments within the Sixth Committee.<sup>7</sup>

4. The second and third reports contain altogether eleven draft articles, of which articles 1-5 form part I, entitled "Introduction", and articles 6-11—now reconstituted in five articles numbered 6-10—form part II, entitled "General principles". Of these eleven draft articles, the Commission has adopted provisionally, with the commentaries thereto,<sup>8</sup> article 1 (Scope of the present articles) and article 6 (State immunity), as follows:

### PART I

#### INTRODUCTION

##### *Article 1. Scope of the present articles*

**The present articles apply to questions relating to the immunity of one State and its property from the jurisdiction of another State.**

...

<sup>1</sup> A/CN.4/L.279/Rev.1, reproduced in part in *Yearbook* . . . 1978, vol. II (Part Two), pp. 153-155.

<sup>2</sup> *Yearbook* . . . 1979, vol. II (Part One), p. 227, document A/CN.4/323.

<sup>3</sup> *Yearbook* . . . 1980, vol. II (Part One), p. 199, document A/CN.4/331 and Add.1; for the discussion in the Commission, see *Yearbook* . . . 1980, vol. II (Part Two), pp. 138-141, paras. 111-122.

<sup>4</sup> *Yearbook* . . . 1981, vol. II (Part One), p. 125, document A/CN.4/340 and Add.1; for the discussion in the Commission, see *Yearbook* . . . 1981, vol. II (Part Two), pp. 154 *et seq.*, paras. 208-227.

<sup>5</sup> See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-fifth session of the General Assembly" (A/CN.4/L.326), paras. 311-326; and "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-sixth session of the General Assembly" (A/CN.4/L.339), paras. 156-179.

<sup>6</sup> See *Yearbook* . . . 1979, vol. II (Part Two), pp. 185-186, paras. 166-183; *Yearbook* . . . 1980, vol. II (Part Two), pp. 139-141, paras. 114-122.

<sup>7</sup> See footnote 5 above.

<sup>8</sup> *Yearbook* . . . 1980, vol. II (Part Two), pp. 141 *et seq.*, chap. VI, sect. B.

## PART II

## GENERAL PRINCIPLES

*Article 6. State immunity*

1. A State is immune from the jurisdiction of another State in accordance with the provisions of the present articles.

2. Effect shall be given to State immunity in accordance with the provisions of the present articles.

5. Other draft articles in part I (Introduction) are article 2 (Use of terms),<sup>9</sup> article 3 (Interpretative provisions),<sup>10</sup> article 4 (Jurisdictional immunities not within the scope of the present articles)<sup>11</sup> and article 5 (Non-retroactivity of the present articles).<sup>12</sup>

<sup>9</sup> *Article 2. Use of terms*

"1. For the purposes of the present articles:

"(a) 'immunity' means the privilege of exemption from, or suspension of, or non-amenability to, the exercise of jurisdiction by the competent authorities of a territorial State;

"(b) 'jurisdictional immunities' means immunities from the jurisdiction of the judicial or administrative authorities of a territorial State;

"(c) 'territorial State' means a State from whose territorial jurisdiction immunities are claimed by a foreign State in respect of itself or its property;

"(d) 'foreign State' means a State against which legal proceedings have been initiated within the jurisdiction and under the internal law of a territorial State;

"(e) 'State property' means property, rights and interests which are owned by a State according to its internal law;

"(f) 'trading or commercial activity' means:

"(i) a regular course of commercial conduct, or

"(ii) a particular commercial transaction or act;

"(g) 'jurisdiction' means the competence or power of a territorial State to entertain legal proceedings, to settle disputes, or to adjudicate litigations, as well as the power to administer justice in all its aspects.

"2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meaning which may be ascribed to them in the internal law of any State or by the rules of any international organization."

<sup>10</sup>*Article 3. Interpretative provisions*

1. "In the context of the present articles, unless otherwise provided,

"(a) the expression 'foreign State', as defined in article 2, paragraph 1(d) above, includes:

"(i) the sovereign or head of State,

"(ii) the central government and its various organs or departments,

"(iii) political subdivisions of a foreign State in the exercise of its sovereign authority, and

"(iv) agencies or instrumentalities acting as organs of a foreign State in the exercise of its sovereign authority, whether or not endowed with a separate legal personality and whether or not forming part of the operational machinery of the central government.

"(b) the expression 'jurisdiction', as defined in article 2, paragraph 1(g) above, includes:

"(i) the power to adjudicate,

"(ii) the power to determine questions of law and of fact,

"(iii) the power to administer justice and to take appropriate measures at all stages of legal proceedings, and

"(iv) such other administrative and executive powers as are normally exercised by the judicial, or administrative and police authorities of the territorial State.

"2. In determining the commercial character of a trading or commercial activity as defined in article 2, paragraph 1(f) above, reference shall be made to the nature of the course of conduct or particular transaction or act, rather than to its purpose."

<sup>11</sup> *Article 4. Jurisdictional immunities not within the scope of the present articles*

"The fact that the present articles do not apply to jurisdictional immunities accorded or extended to

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

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

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

6. In addition to the commentaries thereto included in the report of the Commission,<sup>13</sup> draft articles 1 and 6 have drawn some further comments. The compromise formulas such as the expression "*Questions relating to*" in draft article 1 and the phrase "*in accordance with the provisions of the present articles*" in draft article 6, paragraphs 1-2, are open to review at a subsequent stage, as the draft articles have been adopted provisionally to allow the work of the Special Rapporteur to proceed. At the suggestion of the Special Rapporteur, the Commission agreed to defer consideration of draft articles 2-5 until it was in a position to examine the remainder of the draft articles to be proposed on the topic. It was noted that draft articles 4-5 were submitted to serve as temporary signposts for the framework of the projected plan of the draft articles.<sup>14</sup> It has also become apparent from subsequent debate and decisions of the Commission that some of the provisions of draft article 2 (Use of terms), especially the expressions "territorial State" and "foreign State", have been abandoned, while the need for further clarification in draft article 3 (Interpretative provisions) may depend on the desirability of putting some of its provisions elsewhere, such as in the revised draft article 7, paragraph 3.<sup>15</sup>

7. Draft article 6 (State immunity), provisionally adopted by the Commission with commentary as the first article in part II (General principles), has continued to draw further comments in the Sixth Committee during subsequent sessions of the General Assembly,<sup>16</sup> especially as the main general principle preceding further draft articles in part II. Many suggestions have been made regarding alternative formulation of the draft article, and these should be considered by the Drafting Committee and the Commission itself in the course of its thirty-fourth session.

8. The new wording of draft article 7 (Obligation to give effect to State immunity),<sup>17</sup> article 8 (Consent of

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

"(v) permanent missions or delegations of States to international organizations in general.

"shall not affect:

"(a) the legal status and the extent of jurisdictional immunities recognized and accorded to such missions and representation of States under the above-mentioned conventions;

"(b) the application to such missions or representation of States or international organizations of any of the rules set forth in the present articles to which they would also be subject under international law independently of the articles;

"(c) the application of any of the rules set forth in the present articles to States and international organizations, non-parties to the articles, in so far as such rules may have the legal force of customary international law independently of the articles."

<sup>12</sup> *Article 5. Non-retroactivity of the present articles*

"Without prejudice to the application of any rules set forth in the present articles to which the relations between States would be subject under international law independently of the articles, the present articles apply only to the granting or refusal of jurisdictional immunities to foreign States and their property after the entry into force of the said articles as regards States parties thereto or States having declared themselves bound thereby."

<sup>13</sup> See footnote 8 above.

<sup>14</sup> *Yearbook . . . 1980*, vol. II (Part Two), pp. 139-140, para. 117.

<sup>15</sup> *Yearbook . . . 1981*, vol. II (Part Two), p. 157, para. 225.

<sup>16</sup> See footnote 5 above.

<sup>17</sup> *Article 7. Obligation to give effect to State immunity*

*Paragraph 1—Alternative A*

"1. A State shall give effect to State immunity under [as stipu-

(Continued on next page.)

State),<sup>18</sup> article 9 (Expression of consent),<sup>19</sup> and article 10 (Counter-claims)<sup>20</sup> is awaiting consideration by the Drafting Committee and the Commission. The revised versions of draft articles 7-10 were recast by the Special Rapporteur in the light of the rich and helpful debate at the various meetings of the Commission on the topic<sup>21</sup> and at the request of the Chairman of the Drafting Committee, with a view to assisting the Drafting Committee in the expedition of its consideration.

9. It should be noted at this juncture that draft articles 7-11, in their original versions as well as in their revised forms, have been the subject of extensive discussion and comments in the Sixth Committee,<sup>22</sup> even in the still unfinished or half-finished stage of the drafting exercise. The comments and observations within the Sixth Committee, even at this early stage of the draft articles, are so pertinent and serviceable for the current task awaiting the Drafting Committee and the Commission that it would appear useful to include a brief reference to them in this fourth report, which may provide a useful bridge between part II (General principles) and part III (Exceptions to State immunity) of the draft articles.

(Footnote 17 continued.)

lated in] article 6 by refraining from subjecting another State to the jurisdiction of its otherwise competent judicial and administrative authorities, [or] and by disallowing the [conduct] continuance of legal proceedings against another State.

*"Paragraph 1—Alternative B*

"1. A State shall give effect to State immunity under article 6 by refraining from subjecting another State to its jurisdiction [and] or from allowing legal proceedings to be conducted against another State, notwithstanding the existing competence of the authority before which the proceedings are pending.

"2. For the purpose of paragraph 1, a legal proceeding is considered [deemed] to be one against another State, whether or not named as a party, so long as the proceeding in effect seeks to compel that other State either to submit to local jurisdiction or else to bear the consequences of judicial determination by the competent authority which may [involve] affect the sovereign rights, interests, properties or activities of the State.

"3. In particular, a proceeding may be considered to be one against another State [when] if it is instituted against one of its organs, agencies or instrumentalities acting as a sovereign authority; or against one of its representatives in respect of acts performed by them as State representatives, or [if] it is designed to deprive another State of its public property or the use of such property in its possession or control."

NOTE: Paragraph 3 would constitute an alternative to the text of draft article 3, subparagraph 1(a).

<sup>18</sup>

*"Article 8. Consent of State*

"1. [Subject to part III of the draft articles] Unless otherwise provided in the present articles, a State shall not exercise jurisdiction in any legal proceeding against another State [as defined in article 7] without the consent of that other State.

"2. Jurisdiction may be exercised in a legal proceeding against a State which consents to its exercise."

<sup>19</sup>

*"Article 9. Expression of consent*

"1. A State may give its consent to the exercise of jurisdiction by the court of another State under article 8, paragraph 2, either expressly or by necessary implication from its own conduct in relation to the proceeding in progress.

"2. Such consent may be given in advance by an express provision in a treaty or an international agreement or a written contract, expressly undertaking to submit to the jurisdiction or to waive State immunity in respect of one or more types of activities.

"3. Such consent may also be given after a dispute has arisen by actual submission to the jurisdiction of the court or by an express waiver of immunity, [in writing, or otherwise] for a specific case before the court.

"4. A State is deemed to have given consent to the exercise of jurisdiction by the court of another State by voluntary submission if it has instituted a legal proceeding or taken part or a step in the proceeding relating to the merit, without raising a plea of immunity.

"5. A State is not deemed to have given such consent by voluntary submission or waiver if it appears before the court of another State in order specifically to assert immunity or its rights to property and the circumstances are such that the State would have been entitled to immunity, had the proceeding been brought against it.

"6. Failure on the part of a State to enter appearance in a proceeding before the court of another State does not imply consent to the exercise of jurisdiction by that court. Nor is waiver of State immunity to be implied from such non-appearance or any conduct other than an express indication of consent as provided in paragraphs 2 and 3.

"7. A State may claim or waive immunity at any time before or during any stage of the proceedings. However, a State cannot claim immunity from the jurisdiction of the court of another State after it has taken steps in the proceedings relating to the merit, unless it can satisfy the court that it could not have acquired knowledge of the facts on which a claim of immunity can be based, in which event it can claim immunity based on those facts if it does so at the earliest possible moment."

<sup>20</sup>

*"Article 10. Counter-claims*

"1. In any legal proceedings instituted by a State, or in which a State has taken part or a step relating to the merit, in a court of another State, jurisdiction may be exercised in respect of any counter-claim arising out of the same legal relationship or facts as the principal claim, or if, in accordance with the provisions of the present articles, jurisdiction could be exercised, had separate proceedings been instituted before that court.

"2. A State making a counter-claim in proceedings before a court of another State is deemed to have given consent to the exercise of jurisdiction by that court with respect not only to the counter-claim but also to the principal claim, arising out of the same legal relationship of facts [as the counter-claim]."

<sup>21</sup> *Yearbook . . . 1981*, vol. I, pp. 55 *et seq.*, 1653rd to 1657th meetings, and pp. 110 *et seq.*, 1663rd to 1665th meetings; see especially the summing-up by the Special Rapporteur, pp. 76-79, 1657th meeting, paras. 2-24, and pp. 120-121, 1665th meeting, paras. 1-3 and 5.

<sup>22</sup> See *Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 45th to 52nd meetings; and "Topical summary . . . thirty-sixth session" (A/CN.4/L.339), paras. 156-179.

## Draft articles on jurisdictional immunities of States and their property (continued)

### PART III. EXCEPTIONS TO STATE IMMUNITY

#### ARTICLE 11 (Scope of the present part)

##### A. General considerations of the scope of the present part

##### 1. LINKAGE BETWEEN GENERAL PRINCIPLES AND EXCEPTIONS TO STATE IMMUNITY

10. To proceed from part II (General principles) to part III (Exceptions to State immunity) without hav-

ing the final texts of all the draft articles in part II in hand is inevitably to presume and presuppose a number of propositions. While the draft articles in part II which were the subject of preliminary as well as substantive discussion by the Commission in the course of the thirty-third session may be pending consideration and final adoption by the Drafting Committee and provisional approval by the Commission, it is useful to recall some of the instructions and guidance given by the Commission and approved by the General Assem-

bly for past, current and future work on the topic to be completed and presented by the Special Rapporteur.

(a) *Source materials*

There can be no mistake as to the source materials to be consulted, which include not only national legislations, conventions, judicial decisions, State practice and opinions of writers, but also an important volume of information supplied by member Governments and their replies to the questionnaire.<sup>23</sup> These are the accepted sources of materials to be used and relied upon.<sup>24</sup>

(b) *Concentration on general principles*

The Special Rapporteur has been directed to concentrate first and foremost on the general principles<sup>25</sup> which he has endeavoured to incorporate in part II of the study on the topic, and are now included in the second and third reports. The areas of initial interest relating to the substantive contents and constitutive elements of the general rules of jurisdictional immunities of States are therefore treated in part II.

(c) *Extent of the application of State immunities*

It was also understood that the question of the extent of, or limitations on, the application of the rules of State immunity, which is the subject of current examination in part III, required an extremely careful and balanced approach, and that the exceptions identified in the preliminary report<sup>26</sup> were merely noted as possible exceptions, without any assessment or evaluation of their significance in State practice. As a timely reminder, these possible exceptions to the general rule of State immunity include:

1. Trading or commercial activity;
2. Contracts of employment;
3. Personal injuries and damage to property;
4. Ownership, possession and use of property;
5. Patents, trade marks and other intellectual property;
6. Fiscal liabilities and customs duties;
7. Shareholdings and membership of bodies corporate;
8. Ships employed in commercial service;
9. Arbitration.

(d) *The inductive method*

An inductive approach to the topic initially proposed and adopted by the Commission has received general approval by the General Assembly. Accordingly, the method and techniques employed in the preparation and presentation of reports and draft articles have been inductive in the sense that conclusions and propositions of law are to be drawn from the practice of States and

not in isolation from the living realities of customary international law. The task before the Commission includes a process of codification of existing practice and progressive development of rules of international law designed to reconcile, if not to resolve, the various conflicts of interests in the exercise of sovereign rights and powers by States. The Special Rapporteur has therefore endeavoured to proceed with the greatest caution, following the direction and guidance furnished by the Commission and the General Assembly. Deviation from the guidelines indicated would promote even greater theoretical controversies and divergencies of opinions which are more academic than practical.

2. OBSERVATIONS MADE IN THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY

11. Without submitting an article-by-article analysis of the comments and observations made by representatives of Governments in the General Assembly at its thirty-sixth session,<sup>27</sup> it might be useful to make succinct references to some of the salient points covered.

12. Most of the representatives who spoke on the topic considered it one of the most important subjects in the current programme of work of the Commission. They appreciated the useful synthesis of the abundant material concerning State practice found in the preliminary and second reports to the Commission. While a number of representatives noted with satisfaction the progress so far made by the Commission towards elaborating a set of draft articles on the topic on the basis of the reports submitted, some difficulties were expressed in an effort to assess the Commission's work at this stage. Some reservation of judgment has been sounded while awaiting submission of the draft articles contained in part III, which are intended to deal with exceptions or limitations upon the general principles of State immunity. This was not unnatural, owing to the unfinished nature of the draft articles in part II, still to be finalized by the Commission after consideration by the Drafting Committee.

13. Several views were expressed with respect to the nature and the scope of the topic, in an effort to identify problem areas facing the Commission which it must endeavour to avoid, circumvent or obviate in order to achieve progress in dealing with the subject. The main issues to be resolved in the treatment of part II (General principles) are many and varied.

(a) *The principle of State immunity as a general rule*

14. The question has been put time and again whether State immunity is a rule, a general rule, a general principle of international law, or rather an exception to a more fundamental norm of State sovereignty of which one aspect covers the exercise of various sovereign powers, territorial, national and jurisdictional. Differences of opinion continue to exist in this particular area. Reconciliation is possible, depending on how far back one wishes to trace the origin of State immunity. When dealing with principles of sovereignty—territorial, national or personal—immunity from jurisdiction can be viewed without hesitation as an exception to the general rule of State jurisdiction. But if one starts from the topic of State immunity, taking into account the

<sup>23</sup> The replies of Governments to the questionnaire which the Secretariat addressed to them on 2 October 1979, originally distributed as document A/CN.4/343 and Add.1-4, are reproduced in volume 20 of the United Nations Legislative Series, entitled *Materials on Jurisdictional Immunities of States and their Property* (Sales No. E/F.81.V.10), pp. 557 *et seq.*

<sup>24</sup> See the preliminary report, paras. 22-45 (*Yearbook . . . 1979*, vol. II (Part One), pp. 231 *et seq.*, document A/CN.4/323).

<sup>25</sup> See *Yearbook . . . 1979*, vol. II (Part Two), p. 186, para. 178.

<sup>26</sup> *Yearbook . . . 1979*, vol. II (Part One), pp. 241-243, document A/CN.4/323, paras. 68-81.

<sup>27</sup> See "Topical summary . . . thirty-sixth session" (A/CN.4/L.339), paras. 156-179.

general practice of States as evidence of customary international law, jurisdictional immunity of States could be viewed either as a rule, a general rule or a general principle which itself admits of some exceptions in State practice. Since the topic is entitled "Jurisdictional immunities of States and their property", the proposition is warranted that State immunity is a general rule, rather than an exception to a more fundamental norm of sovereignty, which it also inevitably is. It depends on the point of view from which the question under examination is being treated. Dispute as to the nature of State immunity as a general rule or an exception to the general rule could be resolved by reference to its context. Treating the topic of State immunity as such, it cannot appear otherwise than as a rule and not an exception to the rule. Indeed, even in dealing with aspects of State sovereignty, from the standpoint of the State claiming jurisdictional immunity it is asserting its own sovereignty and not an exception or waiver of its sovereign power. Viewed in that context, the application or non-application of State immunity represents the resolution of a conflict of sovereignties between States, an effort to harmonize conflicts of interests in the assurance of respect for national sovereignty. The maxim *par in parem imperium non habet* is a valid starting point and a convincing legal basis for the doctrine of State immunity.

(b) *The scope of the topic*

15. The question of scope has given rise to undue concern over the widening concept of immunities from jurisdiction, a situation which did not appear to be extraordinary since the definitional problems had not yet been fully discussed. Reference to draft article 2 (Use of terms) could afford some helpful guidance. The scope of the topic in this particular respect does not extend beyond the judicial jurisdiction, or adjudicatory jurisdiction, which could include the exercise of some administrative power in connection with pre-trial procedures and post-judgment execution orders. The apprehension that the draft articles in part II (General principles) could be regarded as recognition of wider immunities than hitherto admissible in State practice would appear to be without any valid ground or justification. No one is discussing the possibility, however remote, of immunity of one State from the overall sovereign power of another State. Even the maxim *par in parem imperium non habet* has never been interpreted with such liberality as to give a State unregulated freedom to exercise its sovereignty wherever it pleases and regardless of international law. Out of the context of adjudication, jurisdictional immunities would not appear to be very meaningful. A State does not normally exercise its sovereign power over another State without being responsible for its acts of domination. Nor can it exercise *imperium* within the territory of another State without the latter's consent. Such sovereign power, as adjudication of litigation, is being exercised by the court within and over its own territory, or territorial jurisdiction, or over everything found on its own territory or within its territorial limits, rather than being an exercise of sovereignty over or against another State, unless it is present there by mutual consent. In such event, the exercise of territorial judicial jurisdiction could be regulated by mutual agreement. This does not preclude the possibility of a

State performing activities not in the exercise of *imperium*, but on the same footing as any other person, national or foreign, natural or juridical, which are generally amenable or subject to the local or territorial jurisdiction. The fact that the activities are attributable to a foreign sovereign State does not necessarily imply the application of State immunity, especially where such activities bear no relation to the exercise of any sovereign power by that State.

(c) *The relevance of lack of consent as a matter of principle*

16. Doubts were expressed regarding the relevance of consent as a matter of principle. Fear was voiced lest State immunity could be regarded as more absolute and unqualified than it has hitherto been admitted even in the most generous State practice. A more thorough examination of the draft articles in part II will reveal the true identity of the relevance of lack of consent, which was presented not so much in the positive aspect of consent as in that of a requirement of jurisdiction, nor was consent as such put forward as the only admissible exception to State immunity, nor indeed was consent to be viewed as a sound basis upon which to found and exercise jurisdiction, territorial, national or otherwise. The draft articles, in particular articles 8-10, tend to support general principles which are stated diametrically differently from the proposition which could prompt such apprehension. While consent of State is not necessarily the foundation of jurisdiction, let alone an exception to the exercise of existing territorial jurisdiction, its absence has been put forward as an essential element of State immunity. This is practically the converse of the assertion that consent of the defendant State permits the exercise of jurisdiction, although it would as a consequence exclude or negate the application of State immunity. The reverse was actually suggested. Lack of consent is an ingredient or constitutive element of State immunity. It follows from this proposition that, conversely, the existence or expression or proof of consent precludes the claim of State immunity without itself constituting a basis for jurisdiction.

17. There could be varying degrees of consent, as there are several ways of expressing it: by words or by conduct, in advance or *in facie curiae*, generally or *ad hoc*. Consent is a neutral term, colourless but sufficiently positive to exclude immunity in case of its presence, although not necessarily adequate to found jurisdiction in every case. A more colourful and active expression of consent could take the form of actual initiation of a legal proceeding by a State. Bringing a counter-claim is a less aggressive form of expressing consent. Without taking the initiative of itself instituting a proceeding first, a State could nevertheless initiate a counter-claim in answer to the principal claim instituted against it. Such positive action by the State is tantamount to its submission to the jurisdiction of the forum of another State, although the extent of its volition is obviously far less than voluntary submission by the State instituting the initial proceedings.

18. While lip-service abounds in the writings of publicists and in judicial decisions with respect to significant consensual theories or the various theories of consent, such aspects have not been considered in part II since they belong more appropriately to part III. However,

the inductive approach has pre-empted premature treatment of any doctrine before an analytical examination of State practice has been made. As will be seen, the theories of consent, express and implied, have been advanced in explanation of, or as justification for, several instances of rejection or denial of State immunity, and as additional doctrinal or theoretical basis for an exception to State immunity in certain areas of State activities.

19. Consent of the State as such has never been regarded as a prerequisite for the exercise of jurisdiction by the court of another State, let alone a foundation of its jurisdiction. Rather it is its absence, or lack of consent, which is a prerequisite of State immunity. The presence, admission or expression in any form or manifestation of consent which is recognizable will operate to eliminate, exclude or remove the possibility of jurisdictional immunity. For this reason the question of the establishment of consent of State, which can be expressed by different methods and in different forms, such as voluntary submission, waiver, agreement and counter-claims, clearly forms part of the general principles of State immunities, and these methods are not truly exceptions to the general rule of State immunity, although by analogy they may have been so considered in the judicial practice of some States or in some national legislations or even international conventions or agreements, for consent could lead to the same result as exceptions, that is to say, the exercise of jurisdiction or denial of immunity. Nevertheless, in the ultimate analysis, in the present study lack of consent and not consent of State as such is treated as part and parcel of the general principles of State immunities. The question of consent of State in connection with the creation, constitution or scope of jurisdiction has not been studied in part II in the second and third reports, notwithstanding the expression of some reservation or even hesitating reactions to some aspects of consensual doctrine which could lend itself to strengthening "absolutism", long forsaken and exploded in the annals of international practice of States.

(d) *The interrelations between competence and State immunity*

20. Differences of view were also expressed regarding the relativity or relevance of competence in the sense of judicial or adjudicatory jurisdiction. In strict logic, the question of jurisdictional immunity of States does not and should not arise in cases where there is no jurisdiction in the circumstances to begin with. This proposition did not draw any objections from representatives of civil-law systems, where the court may declare itself incompetent in the face of a plea of jurisdictional immunity, declining jurisdiction either on the ground that the defendant is entitled to immunity or that the court is otherwise *incompétent*, that is, lacking the necessary jurisdiction or *compétence*. The distinction between *incompétence d'attribution* and *immunité de juridiction*, for instance, is not always drawn, and when it is, is often too fine to admit of adequate expression or precision, whereas logic tends to support the proposition that, in all cases where the courts have no jurisdiction, there is no need to question the possibility or legitimacy of a claim of State immunity. In actual practice, however, the pragmatic approach of the common-law tradition could not accord any priority to the

establishment of *compétence* or jurisdiction before proceeding to determine the applicability of the rule of State immunity. There is no established order of priority among the various grounds on which the litigant could challenge the exercise of jurisdiction by the court.

21. Without in any way attempting to establish or even suggest any order of priority, it is nevertheless submitted that the rules of competence of the court are very relevant in all cases, whether or not the question of State immunity is also involved. *A fortiori*, where there is a claim of State immunity, jurisdiction is highly relevant. Owing to the pre-eminent importance of the rule of State immunity, involving considerations not only of internal laws and national jurisprudence, but often also principles of international law and comity of nations or even diplomacy, the court is not particularly reluctant to examine a plea of State immunity in any given case, even if it were to reach the ultimate conclusion of jurisdiction negatively or positively. The court could uphold its jurisdiction in such a case by denying immunity. On the other hand, it could also decline jurisdiction on the ground of State immunity or on other grounds of lack of competence, or on the doctrine of "act of State", which involves an examination of the merits of the case.<sup>28</sup> Thus, a choice remains open in draft article 7 as to whether or not to add, in paragraph 1, alternative B, the phrase "notwithstanding the existing competence of the authority before which the proceedings are pending". The usefulness of such a phrase is indeed relative, according to whether or not it is included as a reminder of the relatively logical necessity of competence or the existence of jurisdiction so essentially relevant to jurisdictional immunity. Without the necessary jurisdiction, immunity would seem to hang in the air and could be upheld or confirmed only in principle or hypothetically, as there would in such a case be no jurisdiction from which the foreign State would or would not be immune.

(e) *The relative flexibility of State immunity*

22. Because of the relativity of consent, or rather expression thereof, which could at any time operate to frustrate a claim of State immunity, the rule or principles of State immunity must maintain a liberal measure of flexibility. It was noted that State immunity was never claimed to be a rule of *jus cogens*, and this is not unsupported in practice. There is no breach of international obligation for a State to over-extend the courtesy of non-exercise of jurisdiction or to accord State immunity beyond the extent recognized or required by international law. Indeed, several international instruments even provide for such latitude or flexibility, leaving the choice open to States in certain specified areas of the activities involved to withhold or uphold a claim of immunity. In point of fact, in the course of progressive evolution of State practice there has been no strong protest or international complaint or litigation by a State adjudged a debtor after its claim of immunity was denied, duly or otherwise.

<sup>28</sup> See, for instance, the case *Libyan-American Oil Company v. Socialist People's Libyan Arab Jamahiriya* (1980), U.S. Court of Appeals for the District of Columbia Circuit (*International Legal Materials* (Washington, D.C.), vol. XX, No. 1 (January 1981), p. 161).



23. It is also true that a State is buffered or cushioned by two phases of jurisdictional immunity, each being independent of the other, namely immunity from pre-trial jurisdiction, which extends to the trial up to final decision, and immunity from post-judgment measures of execution, in satisfaction of the judgment. A separate waiver is required in each case, so as to delay the effect of possible enforcement measures affecting a foreign State or its property. Both of these could conveniently be maintained so as to allow further moments of reflection and a breathing space for negotiations to achieve a meaningful settlement of a dispute involving a foreign State by pacific means that could be extrajudicial, or even extralegal. Far from being a rule of *jus cogens*, there is thus ample room for flexibility in the field of jurisdictional immunity of States.

(f) *The dual approach*

24. In an endeavour to verify the division or separation of areas of activities conducted by States which are immune from the jurisdiction and others which are amenable or subject to the jurisdiction of the competent authorities, a novel suggestion was made by a representative. Without having to predetermine the existence of a general rule of State immunities, it would not be impossible to proceed to examine State practice which could provide definite evidence of the two types of circumstances: cases where State immunity operates and cases of non-immunity. In other words, a search could be made at the same time to identify activities which are *acta jure imperii*, where State immunity applies, and activities which are *acta jure gestionis*, where State immunity is not applicable.

25. At first glance, this two-pronged or dual approach appears promising and deserves consideration in greater depth. The suggestion seems worthy of experiment, if not ultimate pursuit. It is respectfully submitted, however, without wishing to abandon any worthwhile suggestion, that the dual approach need not necessarily result in time-saving, although efforts would have to be redoubled. It could be likened to an endeavour "to burn the candle at both ends", indeed without being certain that it is the same candle and that "both ends" would eventually meet. Nor is it assured that there would be no overlapping or gap, or twilight zone or borderland where existing uncertainties would not only linger but would continue to be preserved and even to grow.

26. The dual approach would not appear to be consistent either with State practice or international agreements and conventions, which tend to recognize a general rule of State immunity, as adopted in draft article 6, while admitting the possibility of qualifications as to principles, and limitations as to exceptions to the general principles. Without ensuring greater speed or expedition in the progress of the Commission's work, since the expression *acta jure imperii* is not free from ambiguities, ambivalence and equivocation, such a two-pronged undertaking would in fact increase the burden of the task by more than doubling it. To increase the workload without essentially saving time would not appear to be a fruitful pursuit. Besides, the existing structure, half-way completed, would have to be completely dismantled and structured anew to prepare for results that do not seem to be any more certain or concrete than the path now mapped out and well

sign-posted, which is relatively assured to lead to tangible and positive results, whatever they may be.

(g) *The relations between the rules and the general exceptions*

27. The transition from part II (General principles) to part III (Exceptions to State immunity) could be made more harmonious by a provision establishing or clarifying the connecting link between the general principles set out in part II and the general exceptions contained in part III. This could further obviate the difficulties mentioned by one representative with regard to the formulation of draft article 6, which was stated in normative form on account of the phrase "in accordance with the provisions of the present articles". In his opinion, a rule of State immunity could be stated in more definite form, as in article 15 of the European Convention on State Immunity.<sup>29</sup> This formulation had the advantage of clarity, in the sense that the Convention stated all possible exceptions before the statement of a general rule. It should be observed, however, that the reverse could achieve the same result, as appears to be the case in article 1, "Immunity from jurisdiction", of the United Kingdom State Immunity Act 1978<sup>30</sup> and also in section 1604, "Immunity of a foreign State from jurisdiction", of the United States Foreign Sovereign Immunities Act of 1976.<sup>31</sup> The link between the general rule and the exceptions appears to have been missing only because the exceptions have not yet been fully stated, as consideration of part III is only starting. It was thus understandable that some reluctance was voiced before seeing or identifying and verifying the acceptability of the possible exceptions listed, which require careful and delicate consideration. The formulation of article 6 as adopted by the Commission, "in accordance with the provisions of the present articles", was intended to establish beyond doubt that the applicable law would be the law of the convention being elaborated and not the customary law. Indeed, if the draft articles envisaged are formulated to reflect accurately State practice on the subject, then the phrase in question would not have the effect of disqualifying the

<sup>29</sup>

"Article 15

"A Contracting State shall be entitled to immunity from the jurisdiction of the courts of another Contracting State if the proceedings do not fall within Articles 1 to 14; the court shall decline to entertain such proceedings even if the State does not appear." Council of Europe, *European Convention on State Immunity and Additional Protocol*, European Treaty Series, No. 74 (Strasbourg, 1972).

<sup>30</sup>The British Act of 1978 provides:

"PART I

"PROCEEDINGS IN UNITED KINGDOM BY  
OR AGAINST OTHER STATES  
"Immunity from jurisdiction

"1. (1) A State is immune from the jurisdiction of the courts of the United Kingdom *except* as provided in the following provisions of this Part of this Act.

(United Kingdom, *The Public General Acts, 1978*, part I, chap. 33, p. 715.)

<sup>31</sup>The United States Act of 1976 provides:

"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." (*United States Code, 1976 Edition*, vol. 8, title 28, chap. 97, p. 207).

norm stated in draft article 6 from being a basic rule of international law. All these preoccupations would disappear once the entire draft articles, including the provisions of part III, are completed.

28. In the meantime, these lingering doubts and hesitations could be eliminated by inserting a transitional provision to bridge the relationship between the general principles stated in part II and the general exceptions to be discussed in part III. In response to the concerns expressed and for the sake of greater clarity, an introductory provision might be in order to preface the ensuing provisions of part III.

#### B. Text of draft article 11

29. Draft article 11 reads as follows:

##### *Article 11. Scope of the present part*

Except as provided in the following articles of the present part, effect shall be given to the general principles of State immunity as contained in part II of the present articles.

#### ARTICLE 12 (Trading or commercial activity)

##### A. General considerations of the exceptions

###### 1. LIMITATIVE NATURE OF THE EXCEPTIONS

30. As has been recalled, the general rule of State immunity is formulated in draft article 6 in relative terms, since its application is qualified by the phrase "in accordance with the provisions of the draft articles" and is clearly limited by the exceptions contained in part III. Other general principles as stated in part II are equally subject in their application to the exceptions listed in part III. Thus, the obligation to give effect to State immunity in draft article 7, as a corollary to the general rule of State immunity, is also subject to each and every exception provided in part III. Similarly, lack of consent as an element of State immunity as mentioned in draft article 8, as well as the various methods of expressing consent illustrated in draft articles 9-10 which, if established, would operate to disqualify or nullify any claim of State immunity, would have no application in regard to any of the circumstances which constitute an exception to the general rule or principles of State immunities. Thus, according to the present formulation of rules and exceptions, the establishment of consent, which is inconsistent with State immunity, is not viewed as an exception to immunity; rather, in cases where there is clearly no consent or there is an apparent lack of consent which is a constitutive element of State immunity (draft article 8), the rule of State immunity still has no application if the circumstances fall within one of the exceptions to be examined in part III.

31. The exceptions appear to be limitative in nature; that is to say, they serve to restrict or limit the operation or 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 indeed the requirement of absence of consent or unwillingness to submit to jurisdiction. In the last instance, in spite of lack of consent and against the will of the foreign sovereign State, the exceptions to State immunities, when established, serve to clear the

path for the court to exercise its normal jurisdiction even in regard to an unwilling foreign sovereign State. In the circumstances falling within any of the accepted exceptions, the rule of State immunity as an obstacle to the exercise of jurisdiction is overcome or obviated or removed, regardless of the state of mind of the defendant and irrespective of its unwillingness or absence of consent to the institution or continuation of the proceedings.

#### 2. LEGAL BASIS FOR LIMITING STATE IMMUNITY

32. It is only in a manner of speaking that State immunity may be said to be restricted or limited, in the sense that it is not "absolute" or accorded in every type of circumstances, regardless of the capacity in which the State has acted or irrespective of the category of activities attributable to the State. The juridical basis for "non-immunity" may be described as the counterpart of the legal basis for "State immunity". If the exercise of *imperium* by a State was the basis for its immunity, then the absence of connection with *imperium*, or the non-exercise of sovereign power by the State, would afford the *raison d'être* for cases of "non-immunity". If it can be said that a State is immune on account of, or because of, or in respect of its acts or activities in the exercise of its sovereign power, or in the performance of its sovereign functions, then likewise that immunity ceases where no such sovereign act or activity or power or function of a State is involved or affected by the exercise or resumption or continuation of judicial authority by the court of another State. The criteria which may serve to circumscribe or limit the field of operation or to narrow or delineate the scope of application of the doctrine or rule of State immunity are many. It is the purpose of the present part of the articles to examine each of these criteria which tend to restrict the application of immunity in State practice.

33. Whatever the legal basis or justification for State immunity or for the corresponding obligation to recognize and to give effect to State immunity as earlier discussed in part II, it seems clear that the scope and extent of its application is limited thereby. Immunity operates as long as there is a legal basis for it. In the absence of such basis, there is no immunity. Thus, the reverse of legal justification for "immunity" is the legal basis for "non-immunity". For each and every type of limitation on State immunity or for each exception to the general rule of immunity, there appears to be an opposite case or a converse set of circumstances in which State immunity is not recognized and immunity need not be accorded. The justification for denial of State immunity in each of the cases of exceptions to State immunities is to be found accordingly in the nature of the activities of the State in question or the field of activities undertaken by or attributable to that State, in relation to which or in connection with which a dispute or cause of action has arisen.

34. These "opposites" or "converse cases" are often not as clear-cut as would be desirable. Yet in State practice they have been employed to distinguish between cases of "immunity" and those of "non-immunity". One way of justifying non-recognition of State immunity in a given case is the absence or non-existence of reasons or valid grounds for allowing State immunity in such a case. State immunity has therefore

been denied on several grounds, including, *inter alia*, the fact that the case concerned exclusively private-law activities or private acts which bear no relation to the public image or public and official functions of a State, or acts which can be performed and activities which are normally conducted by individuals or by States and individuals alike in the same or indistinguishable capacity or manner. The legal basis for "non-immunity" is to be found therefore in one or several of the distinctions which appear to have been worked out and countenanced in the judicial and governmental practice of States.

### 3. THE VARIOUS DISTINCTIONS

35. If the absence of State immunity can be based on several grounds which relate to the nature and types of activities attributable to a State, it is useful to examine even briefly some of the distinctions drawn between acts or activities to which State immunity is applicable and those not covered by immunity.

#### (a) Dual personality of the State

36. A State is sometimes said to be endowed with a double or dual personality. A State may assume the role of an *ente politico*,<sup>32</sup> or political entity, just as it can also do all other things like any other corporate entity vested with legal or juridical personality, *corpo morale*, "it being incumbent upon [the State] to provide for the administration of the public body and for the material interests of the individual citizens, it must acquire and own property, it must contract, it must sue and be sued, and in a word, it must exercise civil rights in like manner as any other juristic person or private individual" ("*un altro corpo morale o privato individuo qualunque*").<sup>33</sup>

#### (b) Dual capacity of the State

37. In a decision rendered by the Court of Appeals of Florence, a distinction has been recognized in the practice of States between the State as political power, *potere politico*, and as *persona civile*, or juristic person.<sup>34</sup> Denying immunity in an action for services rendered, while recognizing the principle of immunity based on the independence of States, the Corte di Cassazione of Florence said:

...; however, when these high prerogatives are not involved, when the Government, as a civil body, descends into the sphere of contracts and transactions so as to acquire rights and to assume obligations like any private person, then its independence is not pertinent. The State, when dealing solely with private transactions and obligations, must follow the rules of the common law.<sup>35</sup>

<sup>32</sup> See, for instance, a decision by the Corte di Cassazione of Turin in *Morellet v. Governo Danese* (1882) (*Giurisprudenza Italiana* (Turin), vol. XXXV, part 1 (1883), pp. 125 and 130-131).

<sup>33</sup> *Ibid.*, pp. 130-131, cited and trans. in the Harvard Law School draft convention on competence of courts in regard to foreign States, hereinafter called "the Harvard draft" (Harvard Law School, *Research in International Law*, part III, "Competence of Courts in regard to Foreign States" (Cambridge, Mass., 1932), published as *Supplement to The American Journal of International Law* (Washington, D.C.), vol. 26 (1932), pp. 481-482). See also *Hampohn v. Bey di Tunisi* (1887) (*Il Foro Italiano* (Rome), vol. XII (1887), part 1, pp. 485-486), cited and trans. in the Harvard draft, *op. cit.*, pp. 480-481.

<sup>34</sup> *Guttieres v. Elmilik* (1886) (*Il Foro Italiano* (Rome), vol. XI, part 1 (1886), pp. 913 and 919-921), a decision confirming that of the Court of Appeal of Lucca (1886) (*ibid.*, p. 490).

<sup>35</sup> Passage cited *in extenso* by the Court of Appeal of Lucca in *Hampohn v. Bey di Tunisi* (1887) (see footnote 33 above).

In truth, once the distinction between the Government as a body politic [*Governo ente politico*] and the Government as a civil entity [*Governo ente civile*] is admitted, once it is recognized that even a State may by reason of acts of purely administrative nature, without offence to its political sovereignty, be made subject to the jurisdiction of foreign courts, there can be nothing more correct than that the foreign State against whom in this capacity a proceeding is instituted, must be included in the category of foreigners contemplated . . . , the States being, in this respect, assimilated to other persons, physical or juristic, not forming part of the Italian Kingdom.<sup>36</sup>

#### (c) Acta jure imperii and acta jure gestionis

38. Allusion has earlier been made to the distinction that has become a catchword in State practice between *acta jure imperii*, on the one hand, for which States are immune, and *acta jure gestionis*, *jure privatorum*, on the other, for which no immunity is accorded. Thus, in a case involving a contract concluded by the consul as a State agent for the maintenance of a Greek subject sheltered in the asylum of Aversa, the Corte di Cassazione of Naples held that:

... the State does become subject to courts insofar as it operates within the sphere of civil transactions, and it has never been objected that the sovereignty of the State has been injured thereby; whereas the rationality of the law would suffer from the opposite theory whereby it [i.e. the State] would claim the power to pursue its rights as plaintiff, while remaining beyond the reach of such action on the part of others.<sup>37</sup>

This distinction between *atti d'impero* and *atti di gestione* has also been recognized in the practice of other States.<sup>38</sup> Expressions such as "*acts de gestion privée*" or activities "*jure et more privatorum*" and "*actes de puissance publique*" or "*actes de pouvoir*" have also

<sup>36</sup> *Ibid.*, pp. 920 and 922; cited and trans. in the Harvard draft, *op. cit.*, pp. 622-623. Cf. the decision of the Tribunal civil of Brussels in *Société pour la fabrication de cartouches v. Colonel Mutkuroff, Ministre de la guerre de la principauté de Bulgarie* (1888) (*Pandectes périodiques*, 1889 (Liege), p. 350, case No. 309), in which the court assumed jurisdiction against Bulgaria in respect of a contract for the purchase of bullets. It was held that, in making contracts with the Belgian company, Bulgaria acted as a private person, and as such submitted itself to all the civil consequences of the contracts.

<sup>37</sup> *Typaldos, Console di Grecia v. Manicomio di Aversa* (1886) (*Giurisprudenza Italiana* (Turin), vol. I (1886), p. 229); cited and trans. in the Harvard draft, *op. cit.*, pp. 624-625.

<sup>38</sup> See, for example, for Belgium, *Feldman v. Etat de Bahia* (1907) (*Pasicrisie belge, 1908* (Brussels), part 2, p. 55), cited in the Harvard draft, *op. cit.*, p. 484; and *Monnoyer et Bernard v. Etat français* (1927) (*Pasicrisie belge, 1927* (Brussels), part 3, pp. 129-132); cited in the Harvard draft, *op. cit.*, p. 615; in that case the Charleroi Tribunal civil observed that:

... in operating these services [the Office of Reconstruction at Valenciennes], the [French] State does not bring public authority ('la puissance publique') into play, but is doing something that can be done by individuals, and therefore acts as a civil or private person . . . having dealt with its contracting partner as an equal

...

"In giving judgment in the present case, although it involves the French State, the court in no way impairs the sovereignty of that country; it is simply giving judgment, as it would with respect to a French citizen, since in fact the action has been brought against the State as a result of acts performed by it, not *jure imperiae*, but *jure gestionis*, as so aptly expressed by Mr. Gianzana, an Italian author quoted by Rolin in his work *Traité du droit international* (vol. I, p. 219)."

Cf. the Egyptian cases cited by S. Sucharitkul in "Immunities of foreign States before national authorities", *Recueil des cours de l'Académie de droit international de La Haye, 1976-1*, vol. 149 (Leyden, Sijthoff, 1977), p. 138.

been used.<sup>39</sup> Others such as "*actes de gouvernement*", "*actes d'autorité*" and "*actes de souveraineté*" are not unfamiliar to those conversant with the French system of administrative law.<sup>40</sup>

39. In actual practice, the line of distinction to be drawn between *acta jure imperii* and *acta jure gestionis* does not appear to be readily visible in every case. Borderline cases are not infrequent, particularly since the traditional concept of State functions or governmental functions has fundamentally changed in consequence of the continuous extensions of functions performed or assumed by States.<sup>41</sup> It is in this borderland that controversy flourishes.

(d) *Public and private nature of State acts or activities*

40. Another type of distinction well known in the practice of States relates to the nature or character of the acts or activities performed by the States or their agencies, or otherwise attributable to the governmental authorities. Several similar terminologies have been used, such as "public" and "private" activities, "public-law authority" and "private-law transactions". Activities can be "governmental" or "non-governmental". Thus, in a jurisdiction, immunity was denied to a foreign sovereign on the ground that "even the national sovereign is subject to ordinary law for his obligations of a proprietary nature" and that the proceeding did not relate to acts done by the reigning sovereign "as head of his own State", for the engagements in question had their origin in "contracts and acts of a private nature".<sup>42</sup> Similarly, in another case involving a contract concluded by an accredited ambassador as agent of a foreign government for the purchase of property to be used as embassy buildings, the court assumed jurisdiction in respect of an act performed by the ambassador during his term of office as State agent. Although the contract touched an *instrumentum legati*, it was held to be "a private-law transaction for the acquisition of private rights".<sup>43</sup>

<sup>39</sup> See, for instance, a case concerning the S.S. "*Sumatra*": *Capitaine Hall, commandant le "Sumatra" v. Capitaine Bengoa, commandant le "Mercedes"* (1920) (*Journal du droit international* (Clunet) (Paris), vol. 48, p. 270), a vessel belonging to the British Crown but operated by a private individual for commercial voyages, where the Mixed Court of Appeal of Alexandria used the expressions "*dans la gestion de ses intérêts privés*" and "*complètement en dehors de son action politique*"; cited in the Harvard draft, *op. cit.*, p. 616. In the case *Zaki bey Gabra v. R.E. Moore Esq. et autre* (1927) (*Gazette des tribunaux mixtes d'Egypte* (Alexandria), vol. 17, No. 198 (April 1927), p. 104), the court opposed an "*acte de puissance publique*" to a "*contrat du droit privé*"; cited in the Harvard draft, *op. cit.*, p. 616.

<sup>40</sup> The terms "*acte d'autorité*" and "*acte de gouvernement*" are known to French jurists as being the criterion for the division of competence between administrative and civil tribunals and for designating government acts which are not subject to review by any court. See C. J. Hamson, "Immunity of foreign States: The practice of the French courts", *The British Year Book of International Law*, 1950 (London), vol. 27, p. 293.

<sup>41</sup> See, for example, a Netherlands decision in *F. Advokaat v. I. Schuddinck & den Belgischen Staat* (1923) (*Weekblad van het Recht* (The Hague, 1923), No. 11088); *Annual Digest of Public International Law Cases, 1923-1924* (London), vol. 2 (1933), case No. 69, pp. 133-134), accepting the distinction between acts *jure gestionis* and acts *jure imperii*, but which still held a public tug service to be a governmental function.

<sup>42</sup> *Carlo d'Austria v. Nobili* (1921) (*Giurisprudenza Italiana* (Turin), vol. I (1921), p. 472; summary and trans. in *Annual Digest . . .*, 1919-1922, vol. I (1932), case No. 90, p. 136).

41. This type of distinction as to the nature of the acts attributable to the State is not necessarily dissimilar from the distinction between *acta jure imperii* and *acta jure gestionis*, and may be considered as a different expression of the same kind of distinction with emphasis on the nature of the activities, public or private, governmental or non-governmental, while the characteristics of *jure imperii* may relate more generally to the sovereign authority or the governmental character of the State function or public capacity in which the State has acted. Accordingly, the distinction between *acta jure imperii* (public acts) and *acta jure gestionis* (private acts) could be said to be more comprehensive, or a collective division of State acts, whereas other variations found in State practice could be viewed as a "nuance" or a shade of difference in emphasis.<sup>44</sup>

42. Such distinctions have also been made regarding the "public" and "non-public" purposes of an act or property attributable to the State, *publicis usibus destinata*. In the actual application of such a distinction, which relates more to the ultimate objective or purpose and thereby depends on a subjective test rather than an objective criterion, difficulties and confusion have occurred.<sup>45</sup> The distinctions between the "governmental" and "non-governmental" nature of the acts or services or purposes have been drawn, although they in fact constitute but further variations of this same type of division of State acts.<sup>46</sup>

(e) *Commercial and non-commercial activities*

43. Another type of distinction has been drawn between acts or activities of a State of a "commercial nature" or "non-governmental nature" and those of "non-commercial" and/or "governmental" nature, or for commercial and non-commercial purposes. This distinction has opposed trading activities to non-trading

<sup>43</sup> See, for example, *Perucchetti v. Puig y Casaurano* (1928) (*Rivista di diritto internazionale* (Rome), XXth year, series III, vol. VII (1928), p. 521; *Annual Digest . . .*, 1927-1928 (London), vol. 4 (1931), case No. 247, p. 365). Compare recent jurisprudence in the Federal Republic of Germany where, in the case *X v. Empire of . . . [Iran]* (1963) (*Entscheidungen des Bundesverfassungsgericht* (Tubingen), vol. 16 (1964), p. 27; English trans. in *United Nations, Materials on Jurisdictional Immunities . . .*, (*op. cit.*), pp. 282 *et seq.*), a repair contract for an embassy heating system was held by the Federal Constitutional Court to lie outside the sphere of public authority and was to be regarded as a "non-sovereign act". See also the reply of the Federal Republic of Germany (*ibid.*, pp. 571-572) to question 6 of the questionnaire sent to Governments in 1979 (see footnote 23 above). See also C. C. A. Voskuil, "Decisions of Netherlands courts involving State immunity", *Netherlands International Law Review* (Leyden), vol. XX (1973), p. 302.

<sup>44</sup> See, for example, the reply of the United Kingdom to question 6 of the questionnaire addressed to Governments in 1979 (*United Nations, Materials on Jurisdictional Immunities . . .*, p. 624); the United Kingdom State Immunity Act 1978 distinguishes between acts which are performed in the exercise of sovereign authority and other acts not so performed. Cf. the reply of the United States of America to the same question, indicating that immunity does not extend to private acts (*ibid.*, pp. 630-631).

<sup>45</sup> This distinction was used in the practice of some common-law countries, especially the United Kingdom, and has proved less workable since in the ultimate analysis State property and all activities of States are "destined to public uses". Intentions, motives and purposes are often not distinguishable.

<sup>46</sup> The expression "used . . . on Governmental and non-commercial service" has been employed in some conventions, for example in article 3, para. 1, of the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (Brussels, 10 April 1926) with Additional Protocol (Brussels, 24 May 1934) (*League of Nations, Treaty Series*, vol. CLXXVI, p. 199).

activities of the State, and contrasted "commercial transactions" to the acts in the exercise of the governmental or sovereign authority of the State. Thus, in a case before the civil Court of Rome, a judgment was given in favour of an Italian merchant for goods sold and delivered to an aviation base in Gallipoli for the French Government.<sup>47</sup> This distinction has been further reinforced by a theory of implied consent to submit to the exercise of jurisdiction by the sovereignty controlling the territory into which a foreign State has transplanted itself.<sup>48</sup> A contract for the delivery of silk cocoons by a commercial agency of a foreign Government was held to "retain the character of trading operation" involving all its consequences, not excluding that of an implied renunciation.<sup>49</sup>

44. This distinction between "commercial" and "non-commercial" acts or activities of a State is sometimes associated with another more general type of distinction between "government or governmental and non-commercial" activities, on the one hand, and "commercial and non-governmental" activities on the other. The use of this double criterion indicates a sense of uncertainty and urgency in the search for some such distinctions to serve as a basis for limiting or restricting State immunities in a given set of circumstances. The opposition between "trading" and "non-trading" operations tends to cater for a similar solution in support of a restrictive trend which appears to have recently prevailed. Several expressions have also been used and adopted in the case laws of many jurisdictions as well as in national legislations—"commercial transaction", "trading operation", "trading activities", "acte de commerce" in the sense of "opération commerciale", or an "acte" having a "but commercial et d'intérêt privé", or a "recherche de bénéfices" inspired by an "idée de lucre et de spéculation" as distinguished from an "acte politique" having a "but d'intérêt international et politique".<sup>50</sup>

<sup>47</sup> *Storelli v. Governo della Repubblica Francese* (1924) (*Rivista di diritto internazionale* (Rome), XVIIth year, series III, vol. IV (1925), p. 236; and *Annual Digest* . . . 1923-1924 (London), vol. 2 (1933), case No. 66, p. 129).

<sup>48</sup> *Rivista* . . . , p. 239.

<sup>49</sup> *Tesini case: Rappresentanza commerciale dell'Unione Repubbliche Soviet v. Ditta Tesini e Malvezzi ed altri* (1924) (*Il Foro Italiano* (Rome), vol. L (1925), pp. 830, 835; and *Annual Digest* . . . 1925-1926 (London), vol. 3 (1929), case No. 127, p. 176). See also *Rappresentanza commerciale dell'URSS v. Società di Navigazione Generale "Gerolimich"* (1936) (*Il Foro Italiano*, vol. LXIII (1938), p. 1216; and *Annual Digest* . . . 1938-1940 (London), vol. 9 (1942), case No. 84, p. 247).

<sup>50</sup> See, for example, the case of the "Hungerford", where the decision of the Tribunal de Commerce of Nantes, in *Société maritime auxiliaire de transports v. Capitaine du vapeur anglais "Hungerford"* (1918) (*Revue de droit international privé* (Darras) (Paris), vol. XV (1919), p. 510), was reversed by the Court of Appeal of Rennes in *Capitaine Seabrook v. Société maritime auxiliaire de transports* (1919) (*ibid.*, vol. XVIII (1922-1923), p. 743), which found that the *Hungerford* was employed "dans un but d'intérêt politique, pour les besoins de la défense nationale, en dehors de toute idée de lucre et de spéculation . . ." (*ibid.*, p. 744); summary in *Annual Digest* . . . 1919-1922 (*op. cit.*), case No. 83, pp. 122-124. Cf. *Lakhowsky v. Office suisse des transports extérieurs* (1921) (*ibid.*, pp. 745 et seq.), where the Court of Appeal of Paris reversed the decision of the Tribunal de commerce de la Seine that a contract for the supply of goods to be imported into Switzerland was a commercial transaction ("acte de gestion") (*ibid.*, p. 746). Such hesitations persist throughout the historical development of French case-law; see an interesting commentary by D. Yiannopoulos in regard to the case *Corporación del Cobre v. Braden Copper Corporation et Société Le groupement d'importation des métaux* (1972), in *Revue générale de droit international public* (Paris), vol. 77 (1973), p. 1240. See also, for summary of

45. This distinction, which differentiates between commercial activities or trading operations conducted by a State in respect of which there is no jurisdictional immunity and other activities of a State of non-commercial or non-trading nature for which there could be State immunity, serves to restrict or limit the scope and extent of State immunity, rather than to extend it to every imaginable type of non-commercial activity which may still fall within the ambit of other categories of exceptions to the general rule of jurisdictional immunity. The various distinctions so far considered could each, or in combination, serve as a basis for denying or rejecting a claim of State immunity. Thus, an act or operation or activities performed or conducted by or on behalf of a State could answer the definition of "commercial transactions" or "trading activities", for which no immunity need be accorded. The grounds for "non-immunity" in cases of commercial transactions could equally be based on any one or two or more of the distinctions between the various types of activities of State, such as the dual personality of a State, as political entity and as a civil or corporate entity; "*Erat commerçant*", or the dual capacity in which a State may act as a sovereign authority or as a private person. Immunity could be denied in respect of commercial activities on the ground that such activities form part of a series of acts *jure gestionis*, or "*actes de gestion privée*" or "*actes d'administration*". Immunity could indeed be withheld in respect of trading activities on the basis of the private or private-law nature of the activities involved. A narrower but perhaps a more widely recognizable ground for disallowing a claim of State immunity appears to be, first and foremost, that of trading activities or commercial transactions.

## B. Trading or commercial activity as an exception to State immunity

### 1. IDENTIFIABILITY OF TRADING OR COMMERCIAL ACTIVITY

46. The most common place or common ground for an apparent exception to the rule of State immunity is likely to be classified as trading or commercial activities. An activity attributable to a State which could be qualified as "trading" or "commercial" is readily identifiable as acts, transactions, operation or course of conduct which may, with sufficient clarity, be generally visible, easily understood and as such, practically meaningful in the light of past experience. Because of the relative ease with which its content is understood and comprehensible, the term "trading or commercial activity" has been adopted for convenience sake as a starting point. Not unlike other terms which require precise definition, the expression has to be further clarified, as it has earlier received some clarification in connection with the use of terms in draft article 2, para. 1(f) (Use of terms)<sup>51</sup> and further practical guidance in draft article 3, para. 2 (Interpretative provisions).<sup>52</sup>

47. "Trading or commercial activity" has been defined as including not only a particular commercial transaction or a particular commercial act having a

this case in English, *International Legal Materials* (Washington, D.C.), vol. XII, No. 1 (1973), p. 182.

<sup>51</sup> See footnote 9 above.

<sup>52</sup> See footnote 10 above.

sufficiently close connection with the State of the forum but also an entire series of acts or transactions which constitute a regular course of commercial conduct. Thus a commercial transaction or operation or act or contract, or the combination of several of such activities, will be considered as forming part of conduct traditionally associated with trade or commerce. The idea of profit or speculation is not foreign to trading. It has sometimes been suggested that a criterion to be used in identifying or determining a "trading or commercial activity" is the objective nature or character of the particular act or transaction or course of conduct or activity, rather than its motivation or purpose. This objective criterion has been proposed as an initial step, since in most cases its application is decisive in determining the availability or applicability of State immunity. This is designed to promote precision, to ensure clarity and to remove uncertainties. It will be seen in the course of the examination of State practice whether this initial criterion will need further ramifications, and to what extent reference to the motive or purpose of a particular act or transaction will be needed to clarify what otherwise could appear to be doubtful cases of State activities that are predominantly non-commercial in essence and substance, although clearly commercial in regard to the nature of the transaction involved. A more detailed examination and the analysis of concrete cases in actual State practice will afford further guidance in the study of this topic.

48. It will be seen through the evolution of various case-laws that the same court at different periods and various courts of different systems have reached different conclusions regarding State immunities in the context of the exception which is entitled "trading and commercial activity". It is difficult for the courts to overlook completely the motivation of a particular transaction or contract, although its nature is clearly commercial or that of private law, especially when it is a contract for the purchase or supply of, for instance, materials for the establishment of an embassy,<sup>53</sup> construction materials for an army or navy or air force,<sup>54</sup> supplies for the maintenance of an army or a military base<sup>55</sup> or food supplies to relieve famine in an area suffering from natural calamity, for instance, to assist victims of flood or earthquake.<sup>56</sup> Hard cases need not

<sup>53</sup> See, for example, the ruling by the Federal Constitutional Court in the Federal Republic of Germany in the case *X v. Empire of . . . [Iran]* (1963) (see footnote 43 above).

<sup>54</sup> See, for example, the case *Gouvernement espagnol v. Casaux* (1849) (Dalloz, *Recueil périodique et critique de jurisprudence*, 1849 (Paris), part 1, p. 9), concerning the purchase of boots by the Spanish Government for the Spanish army. Cf. *Hanukiew case* (1933) (*Annual Digest . . . 1933-1934* (London), vol. 7 (1940), case No. 66, pp. 174-175), concerning the purchase of arms; and various loan cases, such as the Moroccan Loan, *Laurans v. Gouvernement du Maroc* (1934) (Sirey, *Recueil général des lois et des arrêts*, 1935 (Paris), part 1, pp. 103-104, and *Revue critique de droit international* (Darras) (Paris), vol. XXX (1935), p. 795). See also *Vavasseur v. Krupp* (1878) (United Kingdom, *The Law Reports, Chancery Division*, vol. IX (1878), p. 351).

<sup>55</sup> See, for example, the case *Trendtex Trading Corporation Ltd. v. The Central Bank of Nigeria* (1977) (*The All England Law Reports*, 1977, vol. 1, p. 881) concerning the order of cement for the construction of barracks in Nigeria. Cf. *Gugenheim v. State of Vietnam* (Appeals Court, Paris, 1955) (*International Law Reports*, 1955 (London), vol. 22 (1958), pp. 224-225) (judgment upheld by the Cour de Cassation, 1961 (*Revue générale de droit international public* (Paris), vol. 66 (1962), p. 654)) concerning the purchase of cigarettes for the Vietnamese national army.

<sup>56</sup> See, for example, *Egyptian Delta Rice Mills Co. v. Comisarta*

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 court has preferred to exercise jurisdiction, particularly in the field of trading. A caveat is therefore lodged to emphasize the need to approach certain sensitive areas 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 activity unclad with jurisdictional immunity. This objective criterion tends to be formal, and at times mechanical. Although useful and serviceable in most cases, it may need re-examination at closer range, since circumstances might require penetration of this test.

## 2. THE CURRENT PRACTICE OF STATES REGARDING TRADING OR COMMERCIAL ACTIVITY

49. An inductive approach requires an examination of State practice on this particular point of "trading or commercial activity", which is regarded as a first exception to State immunity. In any examination of State practice it is necessary to observe the evolutionary character of the practice of States in all related fields through the passage of time. State practice, like the evolution of legal principles and norms of international law, cannot be considered out of context of the time dimension. Time is an essential dimension, a constituent element of legal rules which are applicable only during a period which could have a more or less definite duration. The relativity of temporal existence and the application of a legal norm cannot be overlooked. As will be seen, in a particular legal system State practice changes, develops and evolves through time and with the passage of time. The practice of several countries does not necessarily follow the same pattern of evolution within the same time-frame. On the whole, the emerging trends represent the overall picture of State practice, judicial and governmental, as well as legislative and treaty practice. The application of the rule on State immunity is a two-way street in the sense that each State, each Government, is a potential recipient or beneficiary of State immunity as well as being in the position of having to fulfil the obligation to give effect to jurisdictional immunity enjoyed by another State.

50. The practice of States, in various forms, reflects the various factors, elements and developments in the extensions of functions or roles assumed by States in the field of economic activities. It will be seen that even from the very beginning, when the doctrine of State immunity was first conceived and applied, concern was voiced and reservation expressed with regard to trading or commercial activities. This was the case even in the most traditional of State practice favouring what could be viewed as the most unqualified recognition and application of State immunity.<sup>57</sup> One of the reasons for

*General de Abastecimientos y Transportes de Madrid* (1943) (*Annual Digest . . . 1943-1945* (London), vol. 12 (1949), case No. 27, pp. 103-104), cited in Sucharitkul, *loc. cit.*, p. 138 (see footnote 38 above, *in fine*).

<sup>57</sup> See, for example, the dictum of Lord Stowell in *The "Swift"* (1813) (J. Dodson, *Reports of Cases argued and determined in the High Court of Admiralty* (London, Butterworth, 1815), vol. I, p. 320):

"The utmost that I can venture to admit is, that, if the King traded, as some sovereigns do, he might fall within the operation of these statutes [Navigation Acts]. Some sovereigns have a monopoly of certain commodities, in which they traffick on the

(Continued on next page.)

allowing immunity to operate even in the earliest cases has been the absence of commercial nature of the act or activities involved.<sup>58</sup> A taint of commercial activity has been known to disqualify or nullify a claim of State immunity. In one of the earliest cases in which the exception of trading was recognized and applied in State practice,<sup>59</sup> the judge, Sir Robert Phillimore, observed:

. . . No principle of international law, and no decided case, and no dictum of jurists of which I am aware, has gone so far as to authorize a sovereign prince to assume the character of a trader, when it is for his benefit; and when he incurs an obligation to a private subject to throw off, if I may so speak, his disguise, and appear as a sovereign, claiming for his own benefit, and to the injury of a private person, for the first time, all the attributes of his character.<sup>60</sup>

51. It will also be seen that while the proposition that trading constitutes an exception to State immunity has encountered relatively little opposition, the actual application of that proposition has not been without doubts and hesitations. The same set of facts could be construed differently by different courts at various levels with surprisingly divergent or even opposing results. The same activity could be viewed as trading not entitled to State immunity or as non-commercial and therefore covered by State immunity.<sup>61</sup>

#### (a) *Judicial practice*

##### (i) *International adjudication*

52. As has been noted, the relativity and uncertainty of rules of State immunity, especially in respect of the scope and extent of their application in State practice, are in some measure accountable for the relative silence of judicial pronouncements on an international level. The only case recently decided by the International Court of Justice, in 1980,<sup>62</sup> which 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 trading or commercial activity connected with the premises of the embassy or the consulate. This may serve to illustrate the flexible nature of attitudes and positions of Governments. By not pursuing the matter on the international level, a State affected by an adverse judicial decision of a foreign court may remain silent at the risk of acquiescing in the judgment or the treatment given. States are none the less further protected by the second-stage immunity from seizure, attachment and execution in respect of their property once a judgment has been rendered or obtained which may affect them adversely. The relative paucity of judicial orders requiring execution may account for the absence of international litigation or adjudication. This does not preclude the existence of a rule of law on the subject.

##### (ii) *Judicial decisions of municipal courts*

53. An inductive approach to State practice on this particular issue of "trading or commercial activity" as an exception to State immunity has to be systematic as well as analytical, rather than historical or chronological. Inescapably, however, the relevance of time-span or time-frame, the temporal dimension, is often indicative if not determinative of the progressive phase of legal developments. An examination of the practice of each State may indicate a progressive development at different paces, backward as well as forward, not altogether uninfluenced by other relevant and material factors such as economic restructuring or political upheavals in a particular State or region. Case-law in each country tends to grow and evolve, bringing about changes and novelties that may for a time prevail. The current judicial practice may be said to point towards a clear reaffirmation of the exception of "trading or commercial activity" as fully endorsed by judicial decisions, and firmly reinforced if not directly assisted sometimes by national legislation, or even bilateral treaties and international or regional conventions.

54. State practice has continued to move in favour of a generally restrictive trend since the advent of State trading and the continuing expansion of State activities in the field of economic development. The epithet "absolute" in respect of immunity was unknown at the inception of the principles of State immunity. State practice, even at the very beginning, was never absolute, but carefully selected the categories of cases in which foreign States were immune, viz., foreign sovereigns, ambassadors, the passage of foreign armed forces or warships.<sup>63</sup> Trading was theoretically outside

(Footnote 57 continued.)

common principles that other traders traffick; and, if the King of England so possessed and so exercised any monopoly, I am not prepared to say that he must not conform his traffick to the general rules by which all trade is regulated." (*Ibid.*, p. 339.)

<sup>58</sup>For instance, neither 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) nor in *The "Prins Frederik"* (1820) (Dodson, *op. cit.*, vol. II (1815-1822), p. 451) was the ship in question a commercial vessel employed in commercial services.

<sup>59</sup>*The "Charkieh"* (1873) (United Kingdom, *The Law Reports, High Court of Admiralty and Ecclesiastical Courts*, vol. IV (1875), p. 59) was the first case where the commercial nature of the service or employment of a public ship was held to disentitle her from State immunities.

<sup>60</sup>*Ibid.*, pp. 99-100. This decision, with Sir Robert Phillimore's instructive judgment, was cited with approval by an absolutist writer, C. F. Gabba, "De la compétence des tribunaux à l'égard des souverains et des Etats étrangers", *Journal de droit international privé* (Clunet) (Paris), vol. 16 (1889), p. 539, and *ibid.*, vol. 17 (1890), p. 41. Cf. also his decision in *The "Parlement belge"* (1879) (United Kingdom, *The Law Reports, Probate Division*, 1879, vol. IV, p. 129).

<sup>61</sup>*The Parlement belge* itself (see footnote 60 above) was considered by Sir Robert Phillimore, after reviewing English and American cases, as being "neither a public ship of war nor a private vessel of pleasure", and thus not entitled to immunity. This decision was reversed by the Court of Appeal (1880) (United Kingdom, *The Law Reports, Probate Division*, 1880, vol. V, p. 197); see Lord Justice Brett (*ibid.*, p. 203).

<sup>62</sup>See the Judgment of the ICJ of 24 May 1980, *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 3, mentioned in the Special Rapporteur's second report (*Yearbook* . . .

1980, vol. II (Part One), p. 227, document A/CN.4/331 and Add. 1, para. 114); cf. the Permanent Court's decision of 15 June 1939 in *Société commerciale de Belgique, P.C.I.J., Series A/B*, No. 78, p. 160.

<sup>63</sup>See, e.g., Chief Justice Marshall in *The Schooner "Exchange" v. McFaddon and others* (1812) (Cranch, *op. cit.*, pp. 137-139, (see footnote 58 above)), who gave three instances of exception to the exercise of territorial jurisdiction:

- (1) The exemption of the person of the sovereign from arrest and detention within a foreign territory;
- (2) The immunity which all civilized nations allowed to foreign ministers; and
- (3) The implied cession of a portion of his territorial jurisdiction where he allows the troops of a foreign prince to pass through his dominion.

the operation of the doctrine of State immunity even at the very start,<sup>64</sup> although in the actual application of the general rule of State immunity, differing interpretations have been given to the same or similar type of State activities by various courts in the same and other countries at various times. The movement of State practice in its progressive evolution may be likened to that of a snake, which can move sideways by swinging and swaying its body to the left and right, with intermittent ups-and-downs in zig-zagging pattern.

55. Thus the case-law of countries such as Italy, Belgium and Egypt, 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 countries traditionally for a more unqualified doctrine of State immunity, such as the Federal Republic of Germany, the United States of America and the United Kingdom. The restrictive trends appear to prevail in every direction, with the result that the exception of "trading or commercial activity" may be said to have become firmly ensconced as a well-settled and established practice of customary international law. It is the first step of minimum exception, although not always unchallenged as a matter of practical necessity nor generally free from theoretical and doctrinal controversies. It should be emphasized, none the less, that the challenge to "trading or commercial activity" as an exception to State immunity has come from certain quarters as a matter of policy or principle without any evidence of contrary practice in terms of judicial decisions. Views of Governments are certainly relevant, and could influence legal developments in their own right. They may indeed provide a lead for judicial decisions in certain areas, as they have done in some countries where consent and reciprocity play a prominent role or where the determination of State immunity is considered as a responsibility shared by the courts and the political arms of the Government. The primary concern of this particular section of the report is the current evidence of judicial practice, a brief general survey of which on this point deserves close attention and careful examination. It should be observed at this point that the present inquiry is not confined to the practice of industrialized countries of the Western world, but is intended to cover all States generally. In any event, the Special Rapporteur is not expected to supplement what of judicial decisions with his own inventions or speculations.

### Italy

56. The States which in practice appear to have recognized trading or commercial activity as an exception to State immunity from the very beginning include Italy, Belgium and Egypt. The courts of Italy were the first, in 1882, to limit the application of State immunity to cases where the foreign State has acted as an "ente

*politico*" as opposed to a "corpo morale",<sup>65</sup> or in the capacity of a sovereign authority or political power (*potere politico*) as distinguished from a *persona civile*. State immunity was accorded only in respect of "atti d'impero", and not "atti di gestione".<sup>66</sup> The public nature of a State act was a criterion by which immunity was determined. Immunity was not recognized for private acts or acts of private law nature.<sup>67</sup> It was not unnatural that commercial activities of a foreign Government answering various denominations of the types of activities not covered by State immunity on the basis of the various distinctions made were held to constitute an exception to State immunity.<sup>68</sup>

57. In a case decided by the Court of Appeal of Genoa in 1925, the French Government was held responsible in respect of a contract to tow ships from Cattaro to La Spezia, apparently one of private law nature to be performed in Italy. "When a foreign State engages in a purely commercial activity," and, in the administration of its property, operates *more et jure privatorum*", said the Court, "it appears to be no different from any foreign juristic person."<sup>69</sup> The current practice of Italian courts follows the same line of restrictive principles, confining immunity to *atti di sovranità*. Thus, in a more recent case decided in 1955 concerning a United States military base established in Italy in accordance with the North Atlantic Treaty, the Court of Cassation granted immunity in respect of "l'attività pubblicistica" connected with the "funzioni pubbliche o politiche" of the United States Government.<sup>70</sup> Later decisions confirmed the application of such distinctions, holding, in one case, an employee of an overseas office of the United States Information Agency to be "un ente od ufficio statale americano . . . che agisce all'estero sotto la direzione ed il controllo del Segretario di Stato . . . per la persecuzione di fini pubblici sovrani dello Stato americano come tale" to be an "impiegato di uno Stato" and "per definizione impiegato pubblico",<sup>71</sup> and, in another case, holding the employment by the Romanian Government of an employee of an economic agency forming an

<sup>65</sup> *Morellet v. Governo Danese* (1882) (see footnote 32 above); cited in the Harvard draft, *op. cit.*, pp. 481-482.

<sup>66</sup> *Gutierrez v. Elmilik* (1886) (see footnote 34 above). See also *Hanspohn v. Bey di Tunisi* (1887) (see footnote 35 above) and *Typaldos, Console di Grecia v. Manicomio di Aversa* (1886) (see footnote 37 above).

<sup>67</sup> *Carlo d'Austria v. Nobili* (1921) (see footnote 42 above). Cf. *Perucchetti v. Puig y Casarauno* (1928) (see footnote 43 above).

<sup>68</sup> *Storelli v. Governo della Repubblica Francese* (1924) (see footnote 47 above) and the *Tesini* case (1924) (see footnote 49 above).

<sup>69</sup> *Governo Francese v. Serra ed altri* (1925) (*Rivista di diritto internazionale* (Rome), 17th year, series III, vol. IV (1925), p. 540): "Quando uno Stato estero estrinseca una attività meramente patrimoniale, e, amministrando i suoi beni, opera *more et jure privatorum*, non altrimenti esso appare che quale persona giuridica straniera" (cited and trans. in the Harvard draft, *op. cit.*, p. 480). Cf., on the other hand, *F. Advokaat v. I. Schuddinck & den Belgischen Staat* (1923) (see footnote 41 above), where the Netherlands court held a service of tug boats to be an act of public administration.

<sup>70</sup> *Department of the Army of the United States of America v. Gori Savellini* (1955) (*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).

<sup>71</sup> *De Ritis v. Governo degli Stati Uniti d'America* (1971) (*Rivista di diritto internazionale* (Milan), vol. LV (1972), pp. 483, at 485-486).

<sup>64</sup> According to Chief Justice Marshall (*ibid.*, p. 145): "A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction". When a sovereign "descended into the market place, he should be treated on a par with a private trader" (quoted in the Harvard draft, *op. cit.*, p. 473). See also *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).



integral part of the Romanian Embassy in Italy to be of a non-commercial character.<sup>72</sup>

### Belgium

58. The Belgian case-law was settled as early as 1857 in a trilogy of cases involving the guano monopoly of Peru.<sup>73</sup> A distinction was drawn between public and private activities of the State, and the Court of Appeal of Brussels was able to deny immunity in respect of activities connected with the business enterprise of Peru. Trading activities have since been regarded as an area where no immunity would be allowed. Thus, in another later case decided by the Court of Appeal of Gent in 1879,<sup>74</sup> the court refused the claim of immunity in an action for freight on guano shipped for Ostend. The principles on which sovereign immunity was based were not considered violated if the foreign Government engaged in commercial contracts. The court said:

... this principle [of the sovereignty of nations] may indeed be applicable when a government, within the limit of its *functions as a government*,\* takes measures in the interest of its preservation or for activities dictated by the general interest, but there can no longer be any question of it being applicable when a government sells guano and, either directly or through intermediaries, takes actions and enters into contracts which, always and everywhere, have been considered to be *commercial contracts*,\* subject to the jurisdiction of commercial courts; . . .<sup>75</sup>

59. This limitation concerning State trading has been followed in a number of subsequent decisions, such as one in a case concerning the selling of supplies to the Ottoman Government in 1910<sup>76</sup> and, another, the purchase of goods by a foreign Government for the purpose of resale on commercial lines to its nationals, in 1927.<sup>77</sup> Like the Italian courts, the Belgian courts since 1888 also have adopted the distinction between acts of the State in its sovereign (public) and civil (private) capacity, holding that, in concluding a contract for the purchase of bullets, Bulgaria acted as a private person and subjected itself to all the civil consequences of the contract.<sup>78</sup> Similarly, a contract to enlarge a railway station in Holland was held amenable to Belgian jurisdiction in 1903, not so much on account of any theory of consent, express or implied, but on the

<sup>72</sup> *Luna v. Repubblica socialista di Romania* (1974) (*ibid.*, vol. LVIII (1975), p. 597).

<sup>73</sup> The three cases were the following:

(1) *Etat du Pérou v. Kreglinger* (1857) (*La Belgique judiciaire* (Brussels), vol. XVII (1859), p. 331). Cf. E. W. Allen, *The Position of Foreign States before Belgian Courts* (New York, Macmillan, 1929). See also the decision of the Court of Appeal of Brussels of 30 December 1840 in the case *Société générale pour favoriser l'industrie nationale v. Syndicat d'amortissement, Gouvernement néerlandais et Gouvernement belge* (*Pasicrisie belge*, 1841 (Brussels), part 2, p. 33).

(2) "Peruvian Loans" case (1877) (*La Belgique judiciaire* (Brussels), vol. XXV (1877), p. 1185). The case was brought not against Peru but its exclusive agent for the sale of guano in Europe, the Dreyfus Brothers, of Paris.

(3) *Peruvian Guano Company v. Dreyfus et consorts et le Gouvernement du Pérou* (1880) (*ibid.*, vol. XXXIX (1881), p. 1394).

<sup>74</sup> *The Havre case: Rau, Vanden Abeele et Cie v. Duruty* (1879) (*Pasicrisie belge*, 1879 (Brussels), part 2, p. 175).

<sup>75</sup> *Ibid.*, p. 176; cited in the Harvard draft, *op. cit.*, p. 613.

<sup>76</sup> *Gouvernement imperial ottoman v. Gaspary* (1910) (*Pasicrisie belge*, 1911 (Brussels), part 3, p. 105).

<sup>77</sup> *Monnoyer et Bernard v. Etat français* (1927) (see footnote 38 above).

<sup>78</sup> *Société pour la fabrication de cartouches v. Colonel Mutkuroff*,

"*nature of the act*" and the capacity in which the State is involved in it".<sup>79</sup> The distinction between *acta jure imperii* and *acta jure gestionis* has been recognized by Belgian courts since 1907<sup>80</sup> and has been consistently applied in subsequent cases.<sup>81</sup>

### Egypt

60. The Mixed Courts of Egypt were consistent in their adherence to the Italo-Belgian practice of limited immunity. As early as 1920, a distinction between acts *jure gestionis* and *jure imperii* was recognized. In an action for damages for maritime collision involving a vessel belonging to the British Crown, the Mixed Court of Appeal of Alexandria denied the plea of immunity "*invoked by the State*", which *acted* "purely as a simple individual or a civil person".<sup>82</sup> In a long line of cases, immunity was not allowed in respect of commercial transactions. Thus the renting of a furnished villa was held, in a 1927 case, to be a "*contrat de droit privé*" as opposed to an "*acte de puissance publique*".<sup>83</sup> The operation of a State Railways Administration was also considered in a 1942 case to be an act of private administration as opposed to an "*acte de souveraineté*".<sup>84</sup> The courts applied an objective criterion of the "nature of the transaction" very strictly in denying immunity in respect of trading activities, holding the activities of the two organs of the Spanish Government to be "undertakings of a commercial character."<sup>85</sup> A contract for the purchase of an immovable property to be used as an "*hôtel diplomatique*" was also regarded as an "*acte de gestion*" and therefore subject to local jurisdiction.<sup>86</sup> Whether a State enterprise was separately incorporated or was integrated into the machinery of government of the foreign State, if its activity was that of a commercial enterprise having the character of a private undertaking, such as the

*ministre de la guerre de la principauté de Bulgarie* (1888) (see footnote 36 above).

<sup>79</sup> *Société anonyme des chemins de fer liégeois-luxembourgeois v. Etat néerlandais* (*Ministère du Waterstaat*) (1903) (*Pasicrisie belge*, 1903 (Brussels), part 1, p. 294); cited in the Harvard draft, *op. cit.*, pp. 613-614. See also the decision of the Tribunal civil de Bruxelles of 22 May 1901 (*Journal des tribunaux belges* (Brussels), 1901, p. 1127), where the court upheld jurisdiction and applied article 92 of the Constitution.

<sup>80</sup> *Feldman v. Etat de Bahia* (1907) (see footnote 38 above).

<sup>81</sup> See, for example, *Dhellemes et Masurel v. Banque centrale de la République de Turquie* (1963) (*Journal des tribunaux belges* (Brussels), 19 January 1964, p. 44); and *Socobelge et Etat belge v. Etat hellénique, Banque de Grèce, et Banque de Bruxelles* (1951) (*Journal du droit international* (Clunet) (Paris), vol. 79 (1952), pp. 244-266, notes of A. Devèze and M. R. Hennebicq). See also E. Suy, "L'immunité des Etats dans la jurisprudence belge", *L'immunité de juridiction et d'exécution des Etats* (Brussels, Institut de sociologie, 1971), pp. 279 et seq.; and L. Plouvier, "L'immunité de contrainte des Communautés européennes", *Revue belge de droit international* (Brussels), vol. IX (1973), p. 471.

<sup>82</sup> *The S.S. "Sumatra" case* (1920) (see footnote 39 above).

<sup>83</sup> *Zaki bey Gabra v. R. E. Moore Esq. et autre* (1927) (see footnote 39 above).

<sup>84</sup> *Gouvernement égyptien v. Chemins de fer de l'Etat palestinien* (1942) (*Bulletin de législation et de jurisprudence égyptiennes* (Alexandria), vol. 54 (1941-1942), part 2, p. 242).

<sup>85</sup> *Egyptian Delta Rice Mills Co. v. Comisaría General de Abastecimientos y Transportes de Madrid* (1943) (see footnote 56 above). The Mixed Courts were wound up in 1949.

<sup>86</sup> *S. E. Echref Badnjević ès qualité de Ministre de Yougoslavie en Egypte v. W. R. Fanner* (1947) (*Journal du droit international* (Clunet) (Paris), vols. 73-76 (1946-1949), p. 113).

National Saving Bank of France, the courts were prepared to exercise jurisdiction.<sup>87</sup>

61. The current case-law of post-war Egypt has confirmed the jurisprudence of the Mixed Courts. Jurisdictional immunities of foreign States constitute a question of "ordre public", or a matter of public policy.<sup>88</sup> Immunity is only accorded in respect of acts of sovereign authority<sup>89</sup> and does not extend to "ordinary acts" which are not related to the exercise of sovereignty and "commercial acts".<sup>90</sup>

#### France

62. Earlier French case-law was more inclined towards unlimited immunity. In the famous case decided in 1849 concerning the purchase of boots by the Spanish Government for the Spanish army, the court, basing immunity on the reciprocal independence of sovereign States, defined jurisdiction as "a right inherent in its sovereign authority, which another government cannot arrogate to itself without running the risk of adversely affecting their respective relations".<sup>91</sup> The attempted distinction between "Etat puissance publique" and "Etat personne privée" was rejected throughout the 19th century.<sup>92</sup> As late as 1912, the Court of Appeal of Paris still rejected the dual personality of the State. The court said:

No distinction should be made between the . . . public personality which would not be subject to foreign jurisdiction and the legal personality which would, on the contrary, be subject to it, since all the acts of a State can have only one goal and one end, which are always political, and its unity precludes such dualism.<sup>93</sup>

63. Amidst a general confusion created by longstanding controversies of theoretical importance between the Cour de Cassation and inferior courts, notably the Cour d'Appel de Paris, as regards the true nature of State immunity<sup>94</sup> as "immunité de juridiction"

<sup>87</sup> *Borg v. Caisse nationale d'épargne française* (1926) (*Gazette des tribunaux mixtes d'Égypte* (Alexandria), vol. 16, No. 185 (March 1926), p. 123); (*Annual Digest 1925-1926* (London), vol. 3 (1929), case No. 122, p. 171).

<sup>88</sup> See the reply of Egypt to question 3 of the questionnaire addressed to Governments in 1979, in United Nations, *Materials on Jurisdictional Immunities* . . . , p. 569; and decision 1173 of 1963 of the Cairo Court of First Instance, published on 8 June 1964.

<sup>89</sup> *Idem*, and the decisions of 29 March 1943 of the Tribunal de Commerce of Alexandria, of 12 May 1951 of the Civil Court of Alexandria and of 10 March 1960 of the Giza Court of First Instance.

<sup>90</sup> See the reply of Egypt to question 7 of the questionnaire, in United Nations, *Materials on Jurisdictional Immunities* . . . , p. 569.

<sup>91</sup> *Gouvernement espagnol v. Casaux* (1849) (see footnote 54 above). See, for example, E. W. Allen, *The Position of Foreign States before French Courts* (New York, Macmillan, 1929); and Hamson, *loc. cit.*, p. 293 (see footnote 40 above).

<sup>92</sup> See, for example, *Ministère public v. Demoiselle Masset* (1870) (Dalloz, *Recueil périodique et critique de jurisprudence* 1871 (Paris), part 2, p. 9), concerning the Tsar of Russia; *Héritiers de l'empereur Maximilien v. Lemaître* (1872) (*ibid.*, 1873, part 2, p. 24), concerning the Emperor Maximilien of Mexico; *Isabelle de Bourbon v. Mellerio* (1872) (*ibid.*, 1872, part 2, p. 124), concerning the ex-Queen of Spain Isabella II; *Wiercinski v. Seyyid Ali ben Hamond* (1916) (*Journal du droit international* (Clunet) (Paris), vol. 44 (1917), p. 1465), concerning the ex-Sultan of Zanzibar.

<sup>93</sup> *Gamen-Humbert v. Etai russe* (1912) (Dalloz, *Recueil périodique et critique de jurisprudence*, 1913 (Paris), part 2, p. 201, note by G. Gidel); the judgment was no doubt inspired by the decision of the Prussian Court of Jurisdictional Conflicts in *Hellfeld v. den Fiskus des russischen Reiches* (*Zeitschrift für Internationales Recht* (see footnote 120 below)).

<sup>94</sup> See J. P. Niboyet, "Immunité de juridiction et incompétence d'attribution", *Revue critique de droit international privé* (Paris), vol. XXXIX (1950), p. 139.

or "incompétence d'attribution", later French case-law attempted to qualify "immunité de juridiction" by confining immunity to cases in which the defendant acted in a capacity different from that of a State, such as an agent or mandataire of one of its nationals,<sup>95</sup> or a universal legatee,<sup>96</sup> and to restrict "incompétence d'attribution" on account of the function fulfilled, granting immunity only "ratione materiae".<sup>97</sup> French courts have in fact applied both theories concurrently so that immunity has been denied either *ratione personae* because of the non-sovereign capacity or quality in which the State acts, or *ratione materiae* because of the nature of the act in question. The overriding test preferred by the Cour de Cassation of "incompétence d'attribution", or "the nature of the act", has served to confine State immunity to State acts commonly designated as "actes de puissance publique, de gouvernement, d'autorité, de souveraineté, d'imperium" or "actes politiques" as opposed to "actes de commerce".<sup>98</sup>

64. Traces of certain limitations 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" could be found in the judgments of lower courts as early as 1890.<sup>99</sup> It was not until 1918 that a restrictive theory of immunity was formulated and adopted by French tribunals. Accepting the functional limitation of State immunity, the Cour d'Appel de Rennes declined jurisdiction in a case on the ground that the vessel was employed "not for a commercial purpose and for private interests, but . . . for the requirements of national defence, beyond any idea of profit or speculation . . ." <sup>100</sup> The first case in which the restrictive theory was applied with the result of non-immunity was the *Lakhowsky* case, decided in 1919, concerning the activities of the Office Suisse des Transports Extérieurs, holding the contract for the purchase of goods to be transported into Switzerland to be a commercial transaction, an "acte de

<sup>95</sup> See the *Vestwig* case: *Procureur général près la Cour de cassation v. Vestwig et autres* (1946) (Sirey, *Recueil général des lois et des arrêts*, 1947 (Paris), part 1, p. 137); *Crédit foncier d'Algérie et de Tunisie v. Restrepo et département d'Antioquia* (1922) (*Annual Digest* . . . 1919-1922 (London), vol. 1 (1932), case No. 201, p. 285), for an action against the chargé d'affaires of Colombia; see also the conclusions of Judge L. Lyon-Caen (*La Gazette du Palais* (Paris, 1923), 1st semester, p. 439).

<sup>96</sup> *Etat roumain v. Demoiselle Arricastre et autres* (Tribunal civil of Bordeaux, 1937) (*Revue critique de droit international* (Paris), vol. XXXIII (1938), p. 297, with a note by H. Batiffol, p. 300); (Court of Appeal of Poitiers, 1946) (*Journal du droit international* (Clunet) (Paris), vols. 73-76 (1946-1949), p. 6); *Héritiers de Plessis-Bellière v. Léon XIII, pape, comte Rampolla* . . . (Tribunal civil of Montdidier, 1892) (*Journal de droit international privé* (Clunet) (Paris), vol. 19 (1892), p. 447); (Cour d'appel of Amiens, 1893) (*ibid.*, vol. 20 (1893), p. 384); (Cour de cassation, 1894) (*ibid.*, vol. 21 (1894), p. 835).

<sup>97</sup> *Epoux Martin v. Banque d'Espagne* (1952) (*ibid.*, vol. 80 (1953), p. 654); see also *Banque d'Espagne de Burgos v. Banque d'Espagne de Barcelone et Banque de France* (1938) (*ibid.*, vol. 66 (1939), p. 70).

<sup>98</sup> See, for example, a note by J. B. Sialelli concerning the case *Epoux Martin v. Banque d'Espagne* (1952) (*loc. cit.*, pp. 656-657—see footnote 97 above); the article of J. P. Niboyet, *loc. cit.*, p. 139 (see footnote 94 above); a note by C. Rousseau concerning the *Hanukiew* case (1933) (*loc. cit.*, p. 249—see footnote 54 above); and a note by N. Politis concerning the case *Epoux Dessus v. Epoux Ricoy* (1907) (Dalloz, *Recueil périodique et critique de jurisprudence*, 1907 (Paris), part 2, p. 281).

<sup>99</sup> *Faucon et Cie v. Gouvernement grec* (1890) (*Journal du droit international privé* (Clunet) (Paris), vol. 17 (1890), p. 288).

<sup>100</sup> "Hungerford" case (1918) (1919) (see footnote 50 above).

commerce" subject to local jurisdiction.<sup>101</sup> On appeal, in 1921, the Cour d'Appel de Paris did not find the contract to be of commercial nature, not having a "but commercial", and that the transaction "was motivated by concerns of international interest and domestic policy excluding any profit-seeking and any idea of speculation . . .".<sup>102</sup> It was not until 1924, however, that the Tribunal de Commerce de Marseille was able to hold the activities of a foreign Government amenable to French jurisdiction, characterizing the contract of purchase of goods to be resold to its nationals on ordinary commercial lines as a "commercial transaction", forming part of the trading activities of the foreign Government. The operation of acts denominated "actes de commerce" "excludes any consideration concerning the exercise of the State's public authority, its independence and its sovereignty".<sup>103</sup>

65. The expression "actes de commerce" was used in this connection not in its technical sense of French procedure allocating jurisdiction between civil and commercial cases, but in the sense of "commercial transaction" or "trading activity". French courts as well as contemporary French commentators appear to have preferred this term because it is convenient, appropriate and familiar: "with it one is on relatively firm and familiar ground".<sup>104</sup> This theory of "acte de commerce" has influenced the main development in French case-law. A restrictive view of immunity based on this theory has been adopted in a long line of cases decided by the upper courts, especially in the so-called "Soviet cases",<sup>105</sup> starting in 1926 with the authorization of a saisie-arrêt by the Cour de Cassation against the assets of the Soviet Trade Delegation.<sup>106</sup> The Court observed:

Transactions of a commercial character extending to all fields can only be regarded as ordinary commercial transactions having nothing in common with the principle of sovereignty of States.<sup>107</sup>

66. The current jurisprudence of France may be said to be settled in its adherence to the restrictive principle

based on "trading activities". The more recent decisions of the last two or three decades serve to illustrate the difficulties inherent in the actual application of the theory of the "acte de commerce", with curiously divergent results. Thus, the purchase of cigarettes for a foreign army<sup>108</sup> and a contract for the survey of water distribution in Pakistan<sup>109</sup> were held to be "actes de puissance publique" for "service public", while a contract of commercial lease of an office for a tourist organization of a foreign Government<sup>110</sup> and the method of raising of public loans<sup>111</sup> gave rise to unending doubts and hesitations. Government guarantee of rents was regarded as an exercise of public authority,<sup>112</sup> as was the regulation of exchange control by a central bank.<sup>113</sup> Clearly, in principle, immunity was confined to acts of public authority, "actes de puissance publique", or acts performed in the interest of a public service. It is based on the nature of activity as distinct from the status of the entity which performs it. A rail transport was held to be within the category of "commercial activities" not entitled to State immunity.<sup>114</sup> The practical difficulty is likely to continue, with fluctuating results ranging from the exercise of jurisdiction to assess the adequacy of compensation given by a foreign government for expropriation<sup>115</sup> to the leasing of immovable properties and the floating of public loans.<sup>116</sup>

#### Federal Republic of Germany

67. 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 law activities, holding State immunity to "suffer at least certain exceptions".<sup>117</sup> Between 1905 and 1938, a more unlimited doctrine of immunity prevailed. The restrictive trend was reversed in a case concerning the Belgian State Railway in 1905<sup>118</sup> and the Finnish State Railway in 1925,<sup>119</sup> and the distinction

<sup>101</sup> *Lakhowsky v. Office suisse des transports extérieurs* (Tribunal de commerce de la Seine, 1919) (*Revue de droit international privé* (Darras) (Paris), vol. XVII (1921), p. 70). Immunity was limited to "activities being sovereign in nature or administrative activities, activities of public authority" (*ibid.*, p. 72).

<sup>102</sup> *Ibid.*, vol. XVIII (1922-1923), pp. 746-747.

<sup>103</sup> *Etat roumain v. Pascalet et Cie* (1924) (*Journal du droit international* (Clunet) (Paris), vol. 52 (1925), p. 113; J. P. Niboyet, *Traité de droit international privé français* (Paris, Sirey, 1949), vol. VI, part 1, p. 346).

<sup>104</sup> Thus Niboyet observed in his *Traité* (*op. cit.*), vol. VI, part 1, p. 350. He also said, in reply to E. Lémonon, Rapporteur for the topic of immunity of foreign States from jurisdiction and measures of execution at the Sienna meeting of the Institute of International Law (April 1952): "I feel it would be better to use the term *acte de commerce*, which is more in keeping with the modern activity of the State . . ." (*Annuaire de l'Institut de droit international*, 1952 (Basel), vol. 44, part I, pp. 130-131).

<sup>105</sup> See, for example, S. Sucharitkul, *State Immunities and Trading Activities in International Law* (London, Stevens, 1959), pp. 152-161; Hamson, *loc. cit.*, pp. 309 *et seq.* (see footnote 40 above); and A. Stoupinitzky, "Le statut de l'URSS—commerçant dans le droit conventionnel soviétique", *Revue de droit international et de législation comparée* (Paris), vol. XVII (1936), p. 801.

<sup>106</sup> *Société le Gostorg et Représentation commerciale de l'URSS v. Association France-Export* (1926) (Sirey, *Recueil général des lois et des arrêtés*, 1930 (Paris), part 1, p. 49; summary and trans. in *Annual Digest* . . ., 1925-1926 (London), vol. 3 (1929), case No. 125, p. 174).

<sup>107</sup> *Ibid.*, p. 175; see also Sirey, *Recueil général* . . ., pp. 49-50 for a note by Niboyet; and *Dalloz périodique* . . . 1929 (Paris), part 1, p. 75, for a note by R. Savatier. See also J. G. Castel, "Immunity of a foreign State from execution: French practice", *The American Journal of International Law* (Washington, D.C.), vol. 46 (1952), p. 520.

<sup>108</sup> *Gugenheim v. State of Vietnam* (1955) (1961): see footnote 55 above.

<sup>109</sup> *Société Transshipping v. Federation of Pakistan* (1966) (*International Law Reports* (London), vol. 47 (1974), p. 150).

<sup>110</sup> *Etat espagnol v. Société anonyme de l'Hôtel George V* (1970) (*ibid.*, vol. 52 (Cambridge, 1979), p. 317).

<sup>111</sup> *Montefiore v. Congo belge* (1955) (*ibid.*, 1955 (London), vol. 22 (1958), p. 226).

<sup>112</sup> *Société immobilière des Cités fleuries Lafayette v. United States of America* (1960) (*International Law Reports* (London), vol. 42 (1971), pp. 123-124).

<sup>113</sup> *Zavicha Blagojević v. Banque du Japon* (1974) (*Annuaire français de droit international*, 1975 (Paris), vol. XXI, p. 1040).

<sup>114</sup> *Administration des chemins de fer du Gouvernement iranien v. Société Levant Express Transport* (1969) (*International Law Reports* (Cambridge), vol. 52 (1979), p. 315).

<sup>115</sup> *Corporación del Cobre v. Braden Copper Corporation et Société Le groupement d'importation des métaux* (1972) and commentary by D. Yiannopoulos (see footnote 50 above, *in fine*).

<sup>116</sup> See, for example, Sir Ian Sinclair, "The law of sovereign immunity: Recent developments", *Recueil des cours* . . . 1980-II (Alphen aan den Rijn, Sijthoff and Noordhoff, 1981), vol. 167, pp. 170-175.

<sup>117</sup> *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 the Harvard draft, *op. cit.*, pp. 533-534. See also E. W. Allen, *The Position of Foreign States before German Courts* (New York, Macmillan, 1928).

<sup>118</sup> *Bardorf v. Belgische Staats- und Eisenbahnfiskus* (1905) (*Entscheidungen des Reichsgerichts in Zivilsachen* (Leipzig), vol. 162 (1906), p. 165).

<sup>119</sup> *Gehrcens v. Järnvägsstyrelsen* (1925) (*Hanseatische Rechts-*

*cial, industrial or financial fields*\*".<sup>136</sup> The type of practical difficulties encountered by the courts was illustrated in the judgment of a more recent case decided in 1968,<sup>137</sup> where the Court of Appeal of The Hague reversed the decision of the District Court and upheld jurisdiction, holding that the National Iranian Oil Company (NIOC) did not perform an act which *ex jure* must be regarded as a pure act of government.

71. The exception of trading activities was more clearly stated by the Hoge Raad (Netherlands Supreme Court) in 1973.<sup>138</sup> It was identified with relative ease in cases where "a foreign State engages in trade as an ordinary enterprise". The Supreme Court explained that the restrictive trend has been induced by the fact "that in many States the Government has increasingly deployed its activities in areas of society where the relations are governed by private law, and where, consequently, the State enters into a legal relationship on an equal footing with individuals".<sup>139</sup>

#### Austria

72. The practice of Austrian courts has followed a distinct zigzag path, starting with unqualified immunity in the nineteenth century, and changing over to restrictive immunity from 1907 until 1926, when unrestricted immunity was once again revived and followed, until 1950, when a more solid doctrine of restricted immunity was adopted which has been applied with consistency ever since. The Supreme Court of Austria, in a case decided in 1950,<sup>140</sup> reviewed existing authorities on international law before reaching a conclusion denying immunity, stating that "these authorities show that the exemption from national jurisdiction of *acta gestionis* of foreign States is no longer generally recognized and consequently no longer part of international law". The Court went on to say:

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.<sup>141</sup>

73. The principles enunciated in 1950 have been further refined in subsequent decisions of the Supreme Court.<sup>142</sup> A business undertaking owned by a foreign Government was obliged to conform its activities to local regulations. State immunity was not available.<sup>143</sup> In a case decided in 1961<sup>144</sup> the Supreme Court, citing practice of States and *opiniones doctorum*, concluded that the distinction between the performance of sovereign rights by the State and its entry into "a private legal relationship" was practical and not too difficult to make. "The solution . . . would be to take as a criterion not the ultimate purpose of the act but its inherent nature. In order for the nature of the act to be such as will afford its complete jurisdictional immunity, the act must be one which could not be performed by a private individual."<sup>145</sup> It is the act itself and not its purpose that is decisive of the question of State immunity.

#### United States of America

74. 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).<sup>146</sup> Initially, immunities of States were recognized only in respect of certain specified areas: (a) the immunity of the sovereigns from arrest and detention; (b) the immunity granted to foreign ministers; and (c) the immunity in respect of foreign troops passing through the territorial dominion. The 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. The same Chief Justice, in another case decided in 1824, supported the soundness of the principle "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

<sup>136</sup> *Nederlandse Rijnbank, Amsterdam v. Mühlig Union, Teplitz-Schönau* (1947) (*Na-oorlogse Rechtspraak* (Zwollen), vol. 3 (1947), No. 990; *Annual Digest* . . . , 1947 (London), vol. 14 (1951), case No. 27, p. 78).

<sup>137</sup> *N. V. Cabolent v. National Iranian Oil Company* (1968) (*Nederlandse Jurisprudentie* (Zwollen, 1969), No. 484; English trans. in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 344 *et seq.*).

<sup>138</sup> *Société européenne d'études et d'entreprises en liquidation volontaire v. Socialist Federal Republic of Yugoslavia* (1973) (*Netherlands Yearbook of International Law*, 1974 (Leyden), vol. V, p. 290, reproduced in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 355 *et seq.*).

<sup>139</sup> *Netherlands Yearbook* . . . , p. 293; United Nations, *Materials* . . . , p. 357. See also Voskuil, *loc. cit.*, p. 306 (see footnote 43 above, *in fine*).

<sup>140</sup> *Dralle v. Republic of Czechoslovakia* (*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. 747); this case has become a leading case cited outside Austria. The text of the decision of the Austrian Supreme Court is reproduced in English trans. in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 183 *et seq.*

<sup>141</sup> *Österreichische Juristen Zeitung* . . . , p. 347; and United Nations, *Materials* . . . , p. 195.

<sup>142</sup> See footnotes 144 and 145 below.

<sup>143</sup> Decision of the Administrative Tribunal of 13 January 1954 (*Amliche Sammlung*, No. 869; summary (in English) in *Journal du droit international* (Clunet) (Paris), vol. 83 (1956), p. 86), whereby immunity was refused to a business undertaking owned in Austria by a foreign Government for making and selling alcohol in violation of regulations concerning the State hard liquor monopoly.

<sup>144</sup> Decision of the Austrian Supreme Court of 10 February 1961 in *X [Holubek] v. Government of the United States* (*Juristische Blätter* (Vienna), vol. 84 (1962), p. 43; text reproduced in English trans. in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 203 *et seq.*).

<sup>145</sup> Extract of a note of 23 April 1928 addressed to the League of Nations by Switzerland, cited by the Court (*Juristische Blätter* . . . , p. 44; United Nations, *Materials* . . . , p. 205). See also the decision of the Austrian Supreme Court of 14 February 1963 in the case *X v. the Government of the Federal Republic of Germany* (*Entscheidungen des Österreichischen Obersten Gerichtshof in Zivilsachen*, 1963 (Vienna), vol. XXXVI, p. 71, No. 26; text reproduced in English trans. in United Nations, *Materials* . . . , pp. 207-209).

<sup>146</sup> See footnote 58 above.

sovereign character, and takes that of a private citizen".<sup>147</sup>

75. The first emphatic pronouncement of restrictive immunity based on the distinction between acts which are essentially private in nature and acts which have been generally characterized as public or governmental was made in 1921 by Judge Julian Mack<sup>148</sup> in a famous case concerning the "*Pesaro*". This distinction was supported by the State Department,<sup>149</sup> but was rejected by the Supreme Court in 1926,<sup>150</sup> revising Judge Mack's decision and favouring the view expressed by the Department of Justice.<sup>151</sup> The courts in later cases preferred to follow the suggestion of the political department of government.<sup>152</sup> It was not until the Tate Letter of 1952 that the official policy of the State Department was restated in general and in the clearest language in favour of a restrictive theory of immunity based upon a distinction between *acta imperii* and *acta gestionis*, and denying immunity in respect of *acta gestionis*.

76. Trading activities of a foreign State conducted by a trading corporation with separate legal personality have been denied sovereign immunity. Trading corporations owned or controlled by a foreign Government have been held amenable to the jurisdiction of United States courts regardless of the assertion by the foreign Government that they have been performing government functions,<sup>153</sup> and indeed even irrespective of the court's holding that the foreign corporations were performing essentially "public" duties as opposed to ordinary commercial operations<sup>154</sup> that are included in the category of activities for which the rule of immunity is not applicable. In most cases, such cor-

porations not identified as agents, organs or instrumentalities of government have been engaged in trading activities. Immunity has been refused, regardless of the extent of government interest in the trading corporations.<sup>155</sup>

77. An interesting trend was initiated in a more recent case decided in 1964,<sup>156</sup> where the Federal District Court rejected immunity in an action arising out of a contract for the carriage of wheat. According to this trend, the courts are disposed to deny 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.<sup>157</sup>

78. Since the adoption of the Foreign Immunities Act of 1976,<sup>158</sup> the courts have been left on their own without specific guidance or suggestion of immunity in a particular case from the State department. Pre-1976 judicial practice has thus been to a greater or lesser extent influenced by the "views" or "suggestion" of the executive branch of the government, especially if it is one favourable to the granting of immunity.<sup>159</sup> Even before the 1976 Act, the courts had to determine the question of State immunity raised by the parties to the dispute without any guidance or "suggestion" from the executive. In such cases,<sup>160</sup> the courts have faithfully followed the guidelines set out in the Tate Letter and subsequent case-law.

79. The Foreign Sovereign Immunities Act of 1976 provides legislative guidance for the courts with regard to the application of the exception of commercial activity carried on in the United States, or an act performed in the United States in connection with a commercial activity elsewhere, or an act outside the territory of the United States in connection with a commercial activity, causing a direct effect in the United States. "Commercial activity" is defined as either a regular course of conduct or a particular

<sup>147</sup> *Bank of the United States v. Planters' Bank of Georgia* (1824) (Wheaton, *op. cit.*, p. 907 (see footnote 64 above)); see also *State of Georgia v. City of Chattanooga, Tennessee* (1924) (*United States Reports*, vol. 264 (1924), pp. 472, at 482-483, opinion of the Court delivered by Justice Butler).

<sup>148</sup> The "*Pesaro*" (1921) (*United States of America, The Federal Reporter*, vol. 277 (1922), pp. 473, at 479-480, footnote 3); see also E. D. Dickinson, "The immunity of public ships employed in trade", *The American Journal of International Law* (Washington, D.C.), vol. 21 (January 1927), p. 108.

<sup>149</sup> Letter of 2 August 1921 from Mr. Nielsen, Solicitor for the Department of State, to Judge Julian W. Mack (see G. H. Hackworth, *Digest of International Law* (Washington, D.C.), U.S. Government Printing Office, 1941, vol. II, pp. 438-439).

<sup>150</sup> *Berizzi Brothers Co. v. S.S. "Pesaro"* (1926) (*United States Reports*, vol. 271 (1927), p. 562).

<sup>151</sup> See, for example, the letter of Attorney General Gregory of 25 November 1918, refusing to adopt Secretary of State Lansing's suggestion in his letter of 8 November 1918 (Hackworth, *op. cit.*, vol. II, p. 430).

<sup>152</sup> See Chief Justice Stone in *Republic of Mexico et al. v. Hoffman* (1945):

"It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." (*United States Reports*, vol. 324 (1946), p. 35.)

<sup>153</sup> See, for example, *Coale et al. v. Société coopérative suisse des charbons, Basle et al.* (1921) (*Annual Digest . . . , 1919-1922* (London), vol. 1 (1932), case No. 88, p. 133); *Dexter & Carpenter, Inc. v. Kunglig Järnvägsstyrelsen et al.* (1930) (*Annual Digest . . . , 1929-1930* (London), vol. 5 (1935), case No. 70, p. 109); *United States v. Deutsches Kalisyndikat Gesellschaft et al.* (1929) (*ibid.*, case No. 71, p. 110).

<sup>154</sup> See, for example, *Hannes v. Kingdom of Romania Monopolies Institute* (1940) (*Annual Digest . . . , 1938-1940* (London), vol. 9 (1942), case No. 72, pp. 198 *et seq.*); and *Compañía Española de Navegación, Marítima, S.A. v. The "Navemar" et al.* (1938) (*United States Reports*, vol. 303 (1938), p. 68).

<sup>155</sup> See, for example, *United States v. Deutsches Kalisyndikat Gesellschaft et al.* (1929) (see footnote 153 above); and *Ulen & Co. v. Bank Gospodarstwa Krajowego* (1940) (*Annual Digest . . . , 1938-1940* (*op. cit.*), case No. 74, p. 214).

<sup>156</sup> *Victory Transport Inc. v. Comisaría General de Abastecimientos y Transportes* (1964) (*United States of America, Federal Reporter, 2nd Series*, vol. 336 (1965), p. 354; *International Law Reports* (London), vol. 35 (1967), p. 110).

<sup>157</sup> Cf. the categories proposed by H. Lauterpacht, "The problem of jurisdictional immunities of foreign States", *The British Year Book of International Law, 1951* (London), vol. 28, pp. 236-238; and J. F. Lalive, "L'immunité de juridiction des Etats et des organisations internationales", *Recueil des cours . . . , 1953-III* (Leyden, Sijthoff, 1955), vol. 84, pp. 285-286).

<sup>158</sup> *United States Code, 1976 Edition*, vol. 8, title 28, sect. 97, p. 206 (text reproduced in *United Nations, Materials on Jurisdictional Immunities . . . , pp. 55 et seq.*).

<sup>159</sup> *Chemical Natural Resources v. Republic of Venezuela* (1966) (*International Law Reports* (London), vol. 42 (1971), p. 119); *Isbrandtsen Tankers v. President of India* (1970) (*International Legal Materials* (Washington, D.C.), vol. X, No. 5 (September 1971), p. 1046); *Amkor Corporation v. Bank of Korea* (1969) (*International Law Reports* (Cambridge), vol. 53 (1979), p. 291).

<sup>160</sup> See, for example, *Heaney v. Government of Spain and Gomero* (1971) (*International Legal Materials* (Washington, D.C.), vol. X, No. 5 (September 1971), p. 1038), where publicity was held to be a "strictly political or public act" (p. 1042); *Alfred Dunhill of London, Inc. v. Republic of Cuba* (1976) (*ibid.*, vol. XV, No. 4 (July 1976), p. 735), where four Justices of the United States Supreme Court noted: "In their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns." (pp. 746-747).

commercial transaction or act. The commercial character of an activity is determined by reference to the nature of the course of conduct or particular transaction, rather than by reference to its purpose. Subsequent litigations amply illustrate the difficulties inherent in the application of this exception of "trading activity", especially in borderline cases.<sup>161</sup>

#### United Kingdom

80. 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 immunity in any circumstance. In actual fact, British practice can now be said to have adopted a restrictive theory of immunity, particularly in respect of "commercial transactions" and "contracts to be performed in the United Kingdom" or "an industrial, commercial or financial activity". In connection with commercial activities of foreign States, notably in the field of shipping or maritime transport, the case-law fluctuated throughout the nineteenth century.<sup>162</sup> The decision that went furthest in the direction of restriction was *The "Charkieh"* (1873),<sup>163</sup> and in the opposite direction was *The "Porto Alexandre"* (1920).<sup>164</sup> The principle of unqualified immunity was applied in subsequent cases in respect of commercial shipping in 1924<sup>165</sup> and other trading activities, such as the ordinary commercial sale of a quantity of rye in 1957.<sup>166</sup>

81. Long before the final *coup de grâce* given by the House of Lords in the "*I Congreso del Partido*" case (1981),<sup>167</sup> judicial decisions of British courts abounded with opinions and dicta pronounced by members of the courts at all levels. Even in the House of Lords in *The "Cristina"* case (1938),<sup>168</sup> considerable doubts were

<sup>161</sup> See, for example, *International Association of Machinists and Aerospace Workers v. The Organization of the Petroleum Exporting Countries* (1979) (United States of America, *Federal Supplement*, vol. 477 (1979), p. 553; reproduced in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 503 *et seq.*); and cases compiled by the State Department: *Libyan American Oil Company v. Socialist People's Libyan Arab Jamahiriya* (1980) (see footnote 28 above), *Letelier v. Republic of Chile* (1980) (United States of America, *Federal Supplement*, vol. 488 (1980), p. 665), *New England Merchants National Bank v. Iran Power Generation and Transmission Co. et al.* (1980) (*ibid.*, vol. 495 (1981), p. 73).

<sup>162</sup> See Sucharitkul, *State Immunities and Trading Activities* . . . (*op. cit.*, footnote 105 above), pp. 53-71.

<sup>163</sup> See footnote 59 above; compare Sir Robert Phillimore's judgment in *The "Parlement belge"* case (1879) (see footnote 60 above).

<sup>164</sup> United Kingdom, *The Law Reports, Probate Division*, 1920, p. 30.

<sup>165</sup> *Compañía Mercantil Argentina v. United States Shipping Board* (1924) (*Annual Digest* . . . , 1923-1924 (London), vol. 2 (1933), case No. 73, p. 138).

<sup>166</sup> *Baccus S. R. L. v. Servicio Nacional del Trigo* (1956) (United Kingdom, *The Law Reports, Queen's Bench Division*, 1957, vol. 1, p. 438).

<sup>167</sup> *The All England Law Reports*, 1981, vol. 2, p. 1064 (Lord Wilberforce, Lord Diplock, Lord Edmund-Davies, Lord Keith of Kinkel, Lord Bridge of Harwich); see also the decision of the Court of Appeal in 1980 (Lord Denning and Lord Waller) (*ibid.*, vol. 1, p. 1092).

<sup>168</sup> 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. See H. Lauterpacht, "*The Cristina*", *The Law Quarterly Review* (London), vol. LIV (1938), p. 339; F. A. Mann, "Immunity of foreign States", *The Modern Law Review* (London), vol. II (1938), p. 57; R. Y. Jennings, "Recognition and government immunities", *ibid.*, vol. II (1939), p. 288.

thrown upon the soundness of the doctrine of immunity when applied to trading vessels. While Lord Atkin and Lord Wright<sup>169</sup> favoured an unrestricted rule of immunity, Lord Thankerton<sup>170</sup> and Lord Maugham declared themselves free to reconsider the decision in *The "Porto Alexandre"*. Lord Maugham was prepared to subject *The "Cristina"* to the jurisdiction of English courts, had she been a vessel employed by the Spanish Government in commercial voyages, and stated that "if *The Parlement Belge* had been used solely for trading purposes, the decision would have been the other way . . .". Lord Maugham concluded that there was practical unanimity of opinion "that, if Governments or corporations formed by them choose to navigate or trade as shipowners, they ought to submit to the same legal remedies and actions as any ship owner".<sup>171</sup>

82. Lord Maugham's misgivings about the decisions of *The "Porto Alexandre"* case (1920) have been widely quoted and followed in common-law countries outside the United Kingdom.<sup>172</sup> In *Dollfus Mieg et Cie S.A. v. Bank of England* (1950),<sup>173</sup> Sir Raymond Evershed M.R. agreed with Lord Maugham that "extent of the rule of immunity should be jealously watched".<sup>174</sup> On further appeal to the House of Lords in 1952, three out of four Law Lords concurred in the observation of Lord Maugham that the doctrine of immunity should not be extended.<sup>175</sup> Viscount Simon is another exponent of a restrictive theory of immunity. In *Sultan of Johore v. Abubakar, Tunku Aris Bendahara and others* (1952), Lord Simon in the Privy Council gave an opinion *per curiam* denying "that there has been finally established in England . . . any absolute rule that a foreign independent sovereign cannot be impleaded in our courts in any circumstances".<sup>176</sup> Another proponent of restrictive immunity is Lord Denning, who after a search among the accepted sources of international law concluded that there was no uniform rule in *Rahimtoola v. Nizam of Hyderabad* (1957),<sup>177</sup> where he observed:

. . . If the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so, because it does offend the dignity of a foreign sovereign to have such a dispute canvassed in the domestic court of another country but if the dispute concerns, for instance, the *commercial transactions* of the foreign Government (whether carried on by its own departments or agencies or by setting up separate legal entities), and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity.<sup>178</sup>

<sup>169</sup> United Kingdom, *The Law Reports, House of Lords* . . . , 1938, pp. 490 and 512, respectively.

<sup>170</sup> *Ibid.*, pp. 494-496; see also the opinion of Lord Macmillan, p. 498.

<sup>171</sup> *Ibid.*, pp. 519 and 522.

<sup>172</sup> See, for example, *The "Ramava"* (1941) (*Annual Digest* . . . , 1941-1942 (London), vol. 10 (1945), case No. 20, p. 91). In this Irish case, immunity was denied, Justice Hanna having thought that the decision of Sir Robert Phillimore in *The "Charkieh"* (1873) (see footnote 59 above) was never overruled.

<sup>173</sup> United Kingdom, *The Law Reports, Chancery Division*, 1950, p. 333.

<sup>174</sup> *Ibid.*, p. 356.

<sup>175</sup> *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).

<sup>176</sup> *Ibid.*, p. 1261, opinion of the Council at p. 1268; see also *The Law Quarterly Review* (London), vol. 68 (1952), p. 293.

<sup>177</sup> United Kingdom, *The Law Reports, House of Lords*, 1958, p. 379.

<sup>178</sup> *Ibid.*, p. 422.

83. Lord Denning reiterated his restrictive theory in *Thai-Europe Tapioca Service Ltd. v. Government of Pakistan, Ministry of Food and Agriculture, Directorate of Agricultural Supplies* (1975).<sup>179</sup> Apart from consent, he outlined four exceptions:

First, [there is] no immunity in respect of land situate in England.

Second . . . in respect of trust funds here or money lodged for the payment of creditors. . . .

Third . . . in respect of debts incurred here for services rendered to . . . property here. . . .

Fourth, [when] a foreign sovereign . . . enters into a commercial transaction\* with a trader here and a dispute arises which is properly within the territorial jurisdiction of [English] courts.<sup>180</sup>

84. Lord Denning's dicta and observations have been very well received outside the United Kingdom.<sup>181</sup> Finally, a forerunner of the ultimate reversal came with the decision of the Privy Council in the "*Philippine Admiral*" case in 1975.<sup>182</sup> The Judicial Committee of the Privy Council, for the first time, refused to follow the Court of Appeal in *The "Porto Alexandre"* case, and gave the following weighty reasons:

. . . In the first place, the Court decided the case as it did because its members thought they were bound to so decide by *The Parlement Belge*, whereas—as their Lordships think—the decision in *The Parlement Belge* did not cover the case at all. Secondly, although Lord Atkin and Lord Wright approved the decision in *The Porto Alexandre*, the other three Law Lords who took part in *The Cristina* case thought it was at least doubtful whether sovereign immunity should extend to state-owned vessels engaged in ordinary commerce. Moreover this Board in the case of *The Sultan of Johore* made it clear that it considered that the question was an open one. Thirdly, the trend of opinion in the world outside the Commonwealth since the last war has been increasingly against the application of the doctrine of sovereign immunity to ordinary trading transactions. Lastly, their Lordships themselves think that it is wrong that they should be so applied.<sup>183</sup>

85. In 1977, the Court of Appeal in *Trendtex Trading Corporation Ltd. v. The Central Bank of Nigeria*<sup>184</sup> held unanimously that the Central Bank was a separate entity and, by a majority of two to one, that the doctrine of sovereign immunity no longer applied to ordinary trading transactions and that the restrictive doctrine should be applied to actions *in personam* as well as actions *in rem*.<sup>185</sup> This emerging trend away from unlimited immunity culminated in the long-over-

due decision of the House of Lords in the "*I Congreso del Partido*" (1981).<sup>186</sup> Apart from the interesting peculiarities and niceties of English Admiralty rules and procedures such as sister ship jurisdiction, which will be examined in a separate connection,<sup>187</sup> this decision of the House of Lords put an end to some of the doubts and hesitations on matters of principle. Reinforced by the State Immunity Act 1978,<sup>188</sup> 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.

86. Although the law or judicial practice may have been settled in principle with regard to the exception of trading activity, the courts are still confronted in each case with the task of determining whether the element of governmental authority exercised in relation to the set of facts involved is such as to render the activity in question governmental and non-commercial. The courts still have to decide in a particular case whether in the application of the restrictive rule to follow an objective test of the "nature of the transaction" or the more subjective test of "public purpose" or the combination of both, or indeed the more formal test of "legislative intervention" by the foreign Government.

87. The dramatic change in the judicial practice of the United Kingdom as a principal common-law system is apt to produce changes in other common-law jurisdictions, especially within the Commonwealth of Nations. Such changes may take time to materialize. In Australia<sup>189</sup> and New Zealand, the repercussions of the English decision in the "*I Congreso del Partido*" case will be felt. Recently the Canadian case-law<sup>190</sup> has tended to follow the examples set by the United Kingdom and the United States<sup>191</sup> by adopting appropriate legislation to assist the courts to ensure a practice that will be more harmonious and consistent with the current trend.<sup>192</sup> Likewise, recent developments in the case-law of India deserve a close examination.<sup>193</sup>

#### Pakistan

88. Pakistan and India share a similar Code of Civil Procedure—section 86, paragraph 1 of which provides that:

<sup>179</sup> *The All England Law Reports*, 1975, vol. 3, p. 961.  
<sup>180</sup> *Ibid.*, pp. 965–966. See also the Supreme Court of Ontario in *Harold W. M. Smith v. United States Securities and Exchange Commission* (1976) (*International Legal Materials* (Washington, D.C.), vol. XV, No. 2 (March 1976), p. 319 and particularly pp. 323–324).

<sup>181</sup> See, for example, the opinion of Justice Owen in the Court of Appeal of Quebec in *Venne v. Democratic Republic of the Congo* (1969) (Canada, *The Dominion Law Reports, Third Series* (Toronto), vol. 5 (1969), p. 128): an action to recover fees for services provided in designing a pavilion at Expo-67 was allowed to proceed.

<sup>182</sup> *Owners of the ship "Philippine Admiral" v. Wallem Shipping (Hong Kong), Ltd.* (1975) (*The All England Law Reports*, 1976, vol. 1, p. 78).

<sup>183</sup> *Ibid.*, p. 95.

<sup>184</sup> See footnote 55 above. The *Trendtex* case was settled before it reached the House of Lords, so that many issues remained unresolved. The case *Uganda Co. (Holdings) Ltd. v. Government of Uganda* (1978) (*Lloyd's Law Reports*, 1979 (London), vol. 1, p. 481) illustrates one such unsatisfactory result.

<sup>185</sup> See the difference between the incorporation theory and the transformation theory of international law as part of English law. See also A. O. Adede, "The United Kingdom abandons the doctrine of absolute sovereign immunity", *Brooklyn Journal of International Law*, vol. VI, No. 2 (1980), p. 197.

<sup>186</sup> See footnote 167 above; see the judgment pronounced by Lord Wilberforce (*loc. cit.*, pp. 1066–1078), Lord Edmund-Davies concurring in favour of dismissing the appeal in the "*Marble Islands*" case (pp. 1080–1082), and dissenting opinions of Lord Diplock (pp. 1078–1080), on the one hand, and of Lord Keith and Lord Bridge (pp. 1082–1083), on the other, both in favour of allowing the appeal.

<sup>187</sup> Immunities of public vessels or State-owned ships employed in commerce will be considered under a separate heading.

<sup>188</sup> United Kingdom, *The Public General Acts, 1978*, part 1, chap. 33, p. 715 (reproduced in United Nations, *Materials on Jurisdictional Immunities of States* . . . , pp. 41 *et seq.*); see the reply of the United Kingdom to question 3 of the questionnaire sent to Governments in 1979 (United Nations, *Materials* . . . , pp. 621–622). See also F. A. Mann, "The State Immunity Act 1978", *The British Year Book of International Law*, 1978 (London), vol. 49, p. 43.

<sup>189</sup> See, for example, Sinclair, *loc. cit.*, pp. 190–192 (see footnote 116 above).

<sup>190</sup> *Ibid.*, pp. 192–193.

<sup>191</sup> See the United Kingdom State Immunity Act 1978 (see footnote 188 above) and the United States of America Foreign Sovereign Immunities Act of 1976 (see footnote 158 above).

<sup>192</sup> See footnote 221 below.

<sup>193</sup> See, for example, Sinclair, *loc. cit.*, pp. 194–195.

No rulers of a foreign State may be sued in any court otherwise competent to try the suit except with the consent of the Central Government in writing by a Secretary to that Government.<sup>194</sup>

The courts in Pakistan, like those in India,<sup>195</sup> had occasions to consider the relationship between this provision and general international law. In 1971, the Court of Karachi was not inclined to follow the rules of interpretation adopted by English courts, but rather to have recourse to prevalent religious and spiritual standards in interpreting and enforcing laws.<sup>196</sup> It was regarded as permissible and not uncommon, even in secular States, to fill the gaps in international law by normal considerations and taking recourse to Islamic law.

89. The Supreme Court of Pakistan, in a breathtaking decision in *A. M. Qureshi v. Union of Soviet Socialist Republics and another* (1981),<sup>197</sup> took occasion to review and survey 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. It was observed in conclusion by Justice Karam Elahee Chauhan (with four other judges concurring):

The upshot, in my view, of this discussion is that:

(1) Section 86 of the Civil Procedure Code does not bar the suit filed by the appellant against the respondents;

(2) That there is no positive rule of Customary International [law] which can be pleaded as a bar of jurisdiction to the maintainability of the suit. On the other hand, the rule of International Law followed by most States at present and which rule, in my view, should be followed by the Courts of Pakistan is that acts of a commercial nature are not immune from the jurisdiction of the Municipal Courts. Therefore, the plaintiff's suit was maintainable and the decision to dismiss it as incompetent is erroneous and deserves to be set aside.<sup>198</sup>

### Argentina

90. An examination of the case-law of Argentina reveals a trend in favour of a restrictive doctrine of State immunity. The courts recognized and applied the principle of sovereign immunity in various cases with regard to sovereign acts of a foreign Government.<sup>199</sup> The exception of trading activity was confirmed in *The*

"*Aguila*"<sup>200</sup> in respect of a contract of sale to be performed and complied with within the jurisdictional limits of the Argentine Republic. 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".<sup>201</sup>

### Chile

91. The case-law of Chile appears to have firmly recognized the principle of sovereign immunity without drawing any distinction between the various acts or activities of a foreign State. Recent decisions have confirmed a uniform doctrine on broad and practically unrestricted recognition of the jurisdictional immunities of foreign States.<sup>202</sup> The Supreme Court of Justice in 1975 annulled the final judgment of 16 January 1969 rendered by the Fifth Santiago Superior Departmental Court in *A. Senerman v. Republic of Cuba*, on the ground that "... in regulating the jurisdictional activity of different States the limit imposed on this activity, in regard to the subjects, is that which determines that a sovereign State must not be subject to the jurisdictional power of the courts of another State".<sup>203</sup> There has been no decision directly on the possibility of an exception in respect of trading activities.

### Philippines

92. The Supreme Court of the Philippines has had several occasions to consider and give judgments on various general aspects of State immunities. However, the question directly in point, namely the possible exception of trading activity, has not yet come before the Supreme Court.<sup>204</sup>

#### (b) Governmental practice

93. An examination of the governmental practice of States in regard to the application of State immunities and trading activities should cover several aspects, including the role played by the executive in influencing judicial decisions, and the views of the Governments on the subject and not only in connection with a plea of sovereign immunity submitted by a foreign Government, but also the extent to which a State is prepared to forego the privilege of sovereign immunity and to

<sup>194</sup> India, Ministry of Law, Justice and Company Affairs, *The Code of Civil Procedure, 1908* (as modified up to 1 May 1977), p. 32; Pakistan, Ministry of Law and Parliamentary Affairs, *The Pakistan Code* (Karachi), vol. V (1908-1910), p. 53.

<sup>195</sup> See, for example, *Kashani v. United Arab Republic* (1965) (*The Indian Journal of International Law* (New Delhi), vol. 6 (1966), p. 51; *The American Journal of International Law* (Washington, D.C.), vol. 60 (1966), p. 861); see also Sinclair, *loc. cit.*, p. 194.

<sup>196</sup> *The Secretary of State of the United States of America v. Messrs. Gammon-Layton* (1971) (*All Pakistan Legal Decisions* (Lahore), vol. XXIII (1971), p. 314).

<sup>197</sup> *Ibid.*, vol. XXXIII (1981), p. 377.

<sup>198</sup> *Ibid.*, p. 453.

<sup>199</sup> See, for example, *Baima y Bessolino v. Gobierno del Paraguay* (1916) (Argentina, *Fallos de la Corte Suprema de Justicia de la Nación* (Buenos Aires), vol. 123, p. 58); *United States Shipping Board v. Dodero Hermanos* (1924) (*ibid.*, vol. 141, p. 127); and *Zubiarre v. Gobierno de Bolivia* (1899) (*ibid.*, vol. 79, p. 124); also documentation submitted by Argentina concerning its national legislation (English trans. in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 3-4) and the decisions of national courts (*ibid.*, pp. 73-74).

<sup>200</sup> *Ministro Plenipotenciario de Chile v. Fratelli Lavarello* (1892) (Argentina, *Fallos de la Corte Suprema de Justicia de la Nación* (Buenos Aires), vol. 47, p. 248).

<sup>201</sup> Extract of the decision in United Nations, *Materials on Jurisdictional Immunities* . . . , p. 73; see also I. Ruiz Moreno, *El Derecho Internacional Público ante la Corte Suprema* (Editorial Universitaria de Buenos Aires, 1941).

<sup>202</sup> Three of the four cases cited in the documentation submitted by Chile (United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 250-251) concerned the years 1968 and 1969 and, respectively, a labour dispute and preventive injunctions.

<sup>203</sup> This decision of the Supreme Court of 2 June 1975 is more directly in point; it establishes a doctrine of sovereign immunity without delimiting its scope of application (*ibid.*, p. 251). Similarly, Brazil's reply to question 3 of the questionnaire sent to Governments in 1979 states that "Brazilian courts consider the doctrine of immunity of States as absolute" (*ibid.*, p. 562) but does not give any reference to a specific decision.

<sup>204</sup> See an interesting survey of decisions of the Philippines Supreme Court (*ibid.*, pp. 360 *et seq.*).



conclude such agreements in the form of bilateral or multilateral treaties.

(i) *The role of the executive*

94. Within a given jurisdiction, the political branch of the Government or the executive as represented by the Ministry of Foreign Affairs or the Ministry of Justice could have a part to play in the determination of questions of jurisdictional immunities of foreign States. The practice is well-known, for instance, in the United States, of "views" or "suggestions" given to the trial courts in particular instances. Whether or not and to what extent the "views" or "suggestions" of the executive will be followed in each case depends ultimately on the court itself. In the United States, the "Tate Letter" of 1952<sup>205</sup> may be considered a classic example of a general policy or guidelines given by the Government for the judiciary. After reviewing comparative case-law, the "Tate Letter" clearly indicated the intention of the Government "to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity".<sup>206</sup>

95. Quite apart from the declaration of a policy or guidelines in general such as the "Tate Letter" and specific "views" or "suggestions of immunity" given in particular cases, the executive could bring about changes in legal decisions by introducing new rules in the form of legislation. As will be seen, this has been done in the United States of America in 1976, the United Kingdom in 1978, Pakistan in 1981, and is being done in Canada, and contemplated in Singapore and Barbados.

(ii) *Views of Governments*

96. The views of Governments on the topic can be deduced from the prevailing internal laws on the subject. In the absence of specific legislation, they could be expressed either in a particular case or as a general policy and guidelines as in the Tate Letter. The governmental practice as evidenced by the views of the executive can be found sometimes in the form of advices and legal opinions, such as is the practice in the United Kingdom,<sup>207</sup> the Federal Republic of

<sup>205</sup> Letter of 19 May 1952 to Acting Attorney General Perlman from the Acting Legal Adviser of the Department of State, J. B. Tate (United States of America, *The Department of State Bulletin* (Washington, D.C.), vol. XXVI, No. 678 (23 June 1952), pp. 984-985). See also W. W. Bishop, Jr., "New United States policy limiting sovereign immunity", *The American Journal of International Law* (Washington, D.C.), vol. 47 (1953), p. 93; and L. M. Draschler, "Some observations on the current status of the Tate Letter", *ibid.*, vol. 54 (1960), p. 790.

<sup>206</sup> See Sinclair, *loc. cit.*, pp. 161-162; Sucharitkul, *Recueil des cours* . . . , 1976-1, pp. 158-161 (see footnote 38 above, *in fine*). See the cases *United States of Mexico et al. v. Schmuck et al.* (1943) (*Annual Digest* . . . , 1943-1945 (London), vol. 12 (1949), case No. 21, p. 75); *Ex parte Republic of Peru* (1943) (*United States Reports*, vol. 318 (1943), p. 578); *The "Katingo Hadjipatera"* (1941) (United States of America, *Federal Supplement*, vol. 40 (1942), pp. 546-548; on appeal, *Federal Reporter, Second Series*, vol. 119 (1941), p. 1022; *certiorari denied, United States Reports*, vol. 313 (1941), p. 593); *Republic of Mexico et al. v. Hoffman* (1945) (see footnote 152 above); *The "Martin Behrman"* (1947) (*Annual Digest* . . . , 1947, vol. 14 (1951), case No. 26, p. 75); and *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes* (1964) (see footnote 156 above).

<sup>207</sup> See, for example, Lord McNair, *International Law Opinions* (Cambridge University Press, 1956), vol. I, p. 71.

Germany<sup>208</sup> and other countries. Source materials are not readily available except in the official files of the ministries of foreign affairs or of justice or the Attorney General's office. They are to be found also in the materials submitted by Member Governments as well as in replies to the questionnaire on specific questions. For instance, the Governments of Czechoslovakia,<sup>209</sup> the German Democratic Republic<sup>210</sup> and Poland<sup>211</sup> have expressed their views favouring an unrestricted theory of immunity in preference to a distinction being made between *acta jure imperii* and *acta jure gestionis*, which is not always workable.

97. While the views of Governments on a particular question of international law clearly have a bearing on legal developments, they do not as such afford evidence of customary rules of international law, save to the extent that they have been incorporated in judicial decisions or legislation, or indeed, treaty provisions. None the less, the wishes of Governments are material and should be taken into consideration. They are certainly relevant in relation to the possibility of implied waiver or implied consent, and could be conditioned by differing results due to the application of the principle of reciprocity. Reciprocity appears to operate to limit or restrict immunity, rather than extend its application, in the wake of increasing tendencies to deny State immunity in several identified areas of activities such as trading.

(iii) *Treaty practice*

98. 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. Thus, the treaty practice of the Soviet Union amply demonstrates its willingness to have the commercial relations carried on by separate enterprises or trading organizations regulated by competent territorial authorities.<sup>212</sup> 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 the permissiveness of deviation or derogation from such rules through bilateral agreements, an accumulation of such bilateral treaty practices could combine to corroborate the evidence of existence of a general practice of States in support of the limitations agreed upon, which could ripen into accepted exceptions in international practice. This view was substantiated by a member of the

<sup>208</sup> See, for example, the note of 24 August 1964 addressed to the Ambassador of Colombia in the Federal Republic of Germany by the Acting Legal Counsel of the Colombian Government, Mr. H. Ruiz Varela (English trans. in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 79 *et seq.*); and the note of 7 August 1979 to the Secretary-General of the United Nations from the Chargé d'affaires of the Permanent Mission of the Federal Republic of Germany (see footnote 128 above).

<sup>209</sup> United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 82-83.

<sup>210</sup> *Ibid.*, pp. 84-85.

<sup>211</sup> *Ibid.*, pp. 90-91.

<sup>212</sup> See footnote 214 below for a list of treaties between socialist countries containing provisions on jurisdictional immunities of States.

Commission regarding the practice of his own country.<sup>213</sup>

99. An example typical 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 at Peking on 23 April 1958.<sup>214</sup> 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 the receiving 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.

100. A comparable provision of article 10 of the Agreement with France of 1951,<sup>215</sup> typical of treaties concluded between the Soviet Union and developed countries, reads:

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.

101. Another set of treaties concluded by the Soviet

<sup>213</sup>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 in 1953 and with the USSR in 1957 (*Yearbook . . . 1981*, vol. I, p. 63, 1654th meeting, para. 23).

<sup>214</sup>United Nations, *Treaty Series*, vol. 313, p. 135. Cf. treaties signed 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. 134-139.

<sup>215</sup>United Nations, *Treaty Series*, vol. 221, p. 95. See, for example, the case *Société le Gostorg et Représentation commerciale de l'URSS v. Association France-Export* (1926) (see footnote 106 above). Cf. 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.

Union with developing countries also contain provisions recognizing the exception of commercial transactions. Thus, paragraph 3 of the exchange of letters of 2 December 1953 concerning the Trade Agreement between the Soviet Union and India<sup>216</sup> reads:

It was agreed that the commercial transactions entered into or guaranteed in India by the members of the Trade Representations 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 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.

102. This limitation on State immunity in respect of commercial transactions is consistently maintained in practically all treaties and agreements concluded not only by the Soviet Union but also by a host of non-socialist countries. The conglomeration of such treaty provisions appears to suggest a clear evidence of emerging State practice in favour of the practicality of the exception of trading as a restriction on State immunity. The emerging rules of customary international law seem to have been crystallized in the direction of such an exception. This trend is further countenanced by international efforts towards codification of the subject under examination, some of which have already born fruit in the form of multilateral or regional conventions (see paras. 108-116 below).

#### (iv) National legislation

103. The question of jurisdiction of the courts of a particular country is provided for in a number of different types of legislation, statutes, basic law or constitutions.<sup>217</sup> Of greater relevancy to the current study is a special type of specific legislation, laws and decrees dealing with jurisdictional immunities of foreign States in particular. It is of the greatest interest to note that recent legislation of this category invariably contains a provision with regard to the exception of trading activity or commercial transaction. Thus, sections 1604 and 1605 of the Foreign Sovereign Immunities Act of 1976 of the United States<sup>218</sup> provide:

#### Section 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United

<sup>216</sup>United Nations, *Treaty Series*, vol. 240, p. 157. See the corresponding 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.

<sup>217</sup>See, for example, Legislative Decree No. 189 of 1 April 1952 of the Syrian Arab Republic (A/CN.4/343/Add.1, pp. 1-3); and excerpts from relevant laws of Yugoslavia reproduced in English in United Nations, *Materials on Jurisdictional Immunities . . .*, pp. 69-70.

<sup>218</sup>See footnote 158 above. See also United States of America, Department of the Treasury, Internal Revenue Service, "Income of foreign governments: Notice of proposed rulemaking" (*Federal Register*, vol. 43, No. 158 (15 August 1978), pp. 36111-36114); reproduced in United Nations, *Materials on Jurisdictional Immunities . . .*, pp. 63 et seq.

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;

104. Without commenting in detail on the above provision, which also delineates the questions of jurisdiction that could be exercised by the courts of the United States or of the states, it is interesting to compare the provisions of similar legislation in other countries. The State Immunity Act 1978 of the United Kingdom<sup>219</sup> contains the following provisions:

*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) falls to be performed wholly or partly in the United Kingdom.

105. Pakistan also issued an ordinance, No. VI of 1981, entitled the State Immunity Ordinance, 1981<sup>220</sup> which, like the United Kingdom State Immunity Act 1978, contains several exceptions from immunity, one of which is "Commercial transactions and contracts to be performed in Pakistan". The relevant provision reads:

5. (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, falls to be performed wholly or partly in Pakistan.

106. The expression "commercial transaction" is defined in subsection (3) 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.

107. It should be noted that similar legislation has recently been adopted by the Canadian Parliament<sup>221</sup> and Singapore<sup>222</sup> and is being contemplated in Barbados<sup>223</sup> and St. Kitts.<sup>224</sup> Similarly, the States which have ratified the European Convention on State Immunity 1972 (Austria, Belgium, Cyprus and United Kingdom) have adopted internal legislation or made necessary declarations to give effect to the provisions of the Convention.<sup>225</sup>

3. INTERNATIONAL CONVENTIONS AND EFFORTS TOWARDS CODIFICATION

108. Under this heading, a brief survey will be made of efforts towards international codification of the topic or allied subject by private non-governmental circles as well as by governmental bodies. Recent efforts culminating in international conventions deserve an early mention.

(a) *The European Convention on State Immunity (1972)*<sup>226</sup>

109. The European Convention on State Immunity, 1972 came into force on 11 June 1976 following ratifications by Austria, Belgium and Cyprus. The United Kingdom is the fourth signatory to ratify. Article 7 of the Convention 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.

(b) *The International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (Brussels, 1926)*<sup>227</sup>

110. The Brussels Convention of 1926, as Gilbert Gidel, the Rapporteur, puts it, "avait pour raison

<sup>221</sup>See Canada, An Act to provide for State immunity in Canadian courts (*State Immunity Act*), entry into force 15 July 1982 (*The Canada Gazette, Part III* (Ottawa), vol. 6, No. 15 (22 June 1982), p. 2949, chap. 95); section 5 of the Act provides:

"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."

<sup>222</sup>*State Immunity Act 1979* (26 October 1979), reproduced in United Nations, *Materials on Jurisdictional Immunities* . . . pp. 28 et seq.

<sup>223</sup>See the information communicated to the Secretariat by the Government of Barbados, *ibid.*, pp. 74-75.

<sup>224</sup>See Sinclair, *loc. cit.*, p. 266.

<sup>225</sup>See, for example, the declarations of Austria (reproduced in English in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 5-6).

<sup>226</sup>Council of Europe, *European Convention on State Immunity and Additional Protocol*, European Treaty Series, No. 74 (Strasbourg, 1972); and *Explanatory Reports on the European Convention on State Immunity and the Additional Protocol* (Strasbourg, 1972).

See also M. O. Wiederkehr, "La Convention européenne sur l'immunité des Etats", *Annuaire français de droit international*, 1974, vol. XX, p. 925; I. M. Sinclair, "The European Convention on State immunity", *The International and Comparative Law Quarterly* (London), vol. 22 (1973), pp. 254.

<sup>227</sup>League of Nations, *Treaty Series*, vol. CLXXVI, p. 199, and *Additional Protocol* (Brussels, 1934) (*ibid.*, p. 215).

<sup>219</sup>See footnote 188 above. See also the *State Immunity (Overseas Territories) Order 1979* (United Kingdom, *Statutory Instruments 1979*, part I, p. 1130, No. 458; reproduced in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 53 et seq.), which gives added precision to the meaning of "territory" in connection with the contractual obligation to be performed by the State.

<sup>220</sup>*The Gazette of Pakistan* (Islamabad), 11 March 1981 (text reproduced in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 20 et seq.).

d'être essentielle les navires publics engagés dans des opérations commerciales".<sup>228</sup> Its main object was clearly to assimilate the position of State-exploited merchant ships to that of private vessels of commerce in regard to the question of immunities. 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 equipments.

(c) *Regional intergovernmental bodies*

111. While the efforts of the Council of Europe culminated in the entry into force of the European Convention on State Immunity (1972), similar efforts have also been or are being pursued in other regions. The Central American States, the Inter-American Council and the Caribbean States have been considering similar projects.<sup>229</sup> It is not insignificant to note the contribution made in this field by the Asian-African Legal Consultative Committee, which set up a Committee on Immunity of States in respect of Commercial and other Transactions of a Private Character. In 1960, the AALCC adopted the final report of the Committee. The final report records 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 Organisations 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 organisations 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.<sup>230</sup>

4. CONTRIBUTIONS FROM NON-GOVERNMENTAL CIRCLES

112. Reflecting in a way a clearly emerging trend in the opinions of writers are the results of efforts towards formulation of rules of international law on the subject by private non-governmental circles in the form of draft

codes, draft conventions and resolutions. The following endeavours have contributed substantially to the advancement of legal developments and should not escape present notice.

(a) *Resolutions of the Institute of International Law*

113. 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".<sup>231</sup> 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.<sup>232</sup>

On 30 April 1954, the Institute adopted new resolutions 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.

(b) *Draft code of the International Law Association*

114. 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\* . . .".<sup>233</sup> More recently, the International Law Association took occasion to restudy the problem at its 45th Conference (Lucerne, 1952); the problem is under re-examination by the Association.

(c) *Harvard draft convention on competence of courts in regard to foreign States, 1932*

115. The Harvard Research Center has prepared a number of draft conventions and commentaries for the "Research in International Law" of the Harvard Law School. Article 11 of the 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

<sup>228</sup>G. Gidel, *Le droit international public de la mer* (Chateauroux, Mellottée, 1932), vol. II, p. 362. See also the provisions of the 1958 Geneva Conventions on the Law of the Sea, especially section III of the Convention on the Territorial Sea and the Contiguous Zone (United Nations, *Treaty Series*, vol. 516, p. 214) and article 9 of the Convention on the High Seas (*ibid.*, vol. 450, p. 86).

<sup>229</sup>See, for example, the letter of the Government of Barbados to the Secretariat, stating that it was "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" (reproduced in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 74-75).

<sup>230</sup>Asian-African Legal Consultative Committee, *Report on the Third Session (Colombo, 20 January to 4 February 1960)* (New Delhi) [n.d.], 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.

<sup>231</sup>Article 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)* (Basel, 1957), pp. 14-15).

<sup>232</sup>*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 Niboyet, was more in keeping with the modern activity of the State (*ibid.*, p. 131) and "with it, one is on relatively firm and familiar ground" (*Traité (op. cit.)*, vol. VI, part 1, p. 350); see also footnote 104 above.

<sup>233</sup>K. Strupp, "Réforme et codification du droit international: Projet d'une convention sur l'immunité en droit international", *International Law Association, Report of the Thirty-fourth Conference (Vienna, 1926)* (London, 1927), pp. 426 et seq.

respect of a trading or commercial activity of another State even though it may be partly or wholly carried on in the latter's territory.

(b) Increasingly, there appears to be stronger support and justification for disallowing immunity and therefore for the court of one State to exercise its territorial competence or subject-matter jurisdiction as respects the activities of another State in a commercial, industrial or financial field.

(c) The problem of defining the notion of "trading or commercial activity" is one that seems difficult to avoid in this particular connection, although on earlier occasions in relation to diplomatic immunities<sup>289</sup> and regulation of international trade<sup>290</sup> there appears to have been no compelling necessity for such a definition, as a general notion of trade is well understood. On the other hand, other endeavours, notably the Harvard draft<sup>291</sup> and national legislation such as the Pakistan State Immunity Ordinance, 1981,<sup>292</sup> have found it useful to insert a provision on use of terms or a definition provision. The expression necessarily covers a single isolated transaction, such as a contract of sale or purchase of goods or services, as well as a series of acts or a course of conduct, or the operation of a business enterprise or organization.

<sup>289</sup> There was no definition provision in regard to the private trading activities of a diplomatic agent in the 1961 Vienna Convention on Diplomatic Relations (United Nations, *Treaty Series*, vol. 500, p. 95), either in article 31 of the convention or in the commentary to draft article 29 proposed by the Commission (*Yearbook* . . . 1958, vol. II, pp. 98-99, document A/3859).

<sup>290</sup> There was found to be no necessity for a definition of "State trading enterprise" in the General Agreement on Tariffs and Trade (GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No.: GATT/1969-1)). The wider term "public commercial enterprise" as defined by article 54 of the Havana Charter of 1947 refers to agencies of government engaging in trade as well as to trading enterprises referred to in article 46 in connection with restrictive business practices. Article 29, paras. 1-2, of the Charter distinguish between ordinary sales and purchases, and imports of products purchased for governmental purposes not with a view to commercial resale. (For the text of the Charter, see *United Nations Conference on Trade and Employment*, Havana, 21 November 1947-24 March 1948, *Final Act and Related Documents* (E/CONF.2/78), sect. II.)

<sup>291</sup> See article 11 of the Harvard draft, *op. cit.*, p. 597 (see footnote 33 above).

<sup>292</sup> See section 5, subsection (3) of the Ordinance (see paras. 105-106 and footnote 220 above).

(d) Even with a well-defined concept of trading or commercial activity, there may still be a need for the adoption of further criteria to identify or facilitate the designation or classification of an activity as "trading or commercial" by reference either to the *nature of the activity*, or to its *purpose*, or to both the nature and the purpose, primarily the nature and if need be also the underlying public or governmental object of a particular activity or transaction.<sup>293</sup>

(e) Another practical test consists in the assimilation of the position of a State to that of a private person or enterprise carrying on a trade or business in the territory of another State. Implied consent or implied waiver of immunity has also been advanced as an added justification for an assimilative theory.

(f) The idea of profit-making or speculation of lucrative gains is not altogether alien to the notion of trade or commerce, although it is not always a realizable condition of fact. A further question that can be pertinently asked relates to the extent, if any, to which the notion of profit can be considered relevant to the determination of the non-public character or the private and commercial nature of a transaction or activity.<sup>294</sup>

(g) Reciprocity has furnished a further justification for mutual limitation of State immunity in respect of trading.

## 2. TEXT OF DRAFT ARTICLE 12

121. Draft article 12 reads as follows:

### Article 12. Trading or commercial activity

1. **In the absence of agreement to the contrary, a State is not immune from the jurisdiction of another State in respect of proceedings relating to any trading or commercial activity conducted by it, partly or wholly in the territory of that other State, being an activity in which private persons or entities may there engage;**

2. **Paragraph 1 does not apply to transactions concluded between States, nor to contracts concluded on a government-to-government basis.**

<sup>293</sup> See draft article 2, para. 1(f) (footnote 9 above), and draft article 3, para. 2 (footnote 10 above).

<sup>294</sup> See, for example, article 26 of the Harvard draft, *op. cit.*, p. 716.