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

Topic:  
**Jurisdictional immunities of States and their property**

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# JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

[Agenda item 7]

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

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### Introductory note

1. The present report is the third in a series of reports on the topic of jurisdictional immunities of States and their property, prepared by the Special Rapporteur and submitted for consideration by the International Law Commission. The series of reports was preceded by a study submitted to the Commission in July 1978, in the form of an exploratory report, by the Working Group on jurisdictional immunities of States and their property.<sup>1</sup> The Special Rapporteur submitted his first report, of preliminary nature, in June 1979<sup>2</sup> and his second report in June 1980.<sup>3</sup>

2. The preliminary report identified the types of source materials to be examined, outlined international efforts towards codification, projected a rough analytical skeleton of possible contents of the law of State immunity, and underlined the possibility and practicability of draft

articles on the topic. It was discussed by the Commission during its thirty-first session.<sup>4</sup> The Special Rapporteur was asked to clarify the general principles and the content of the basic rules governing the subject and to endeavour with utmost caution to define the limits of immunities and determine the exceptions to them. Emphasis was placed on the need for detailed analysis of the practice and legislation of all States, and particularly those with different social systems and the developing States.<sup>5</sup> The topic was further discussed in the Sixth Committee of the General Assembly, which recommended that the Commission:

continue its work on jurisdictional immunities of States and their property, taking into account information furnished by Governments and replies to the questionnaire addressed to them, as well as views expressed on the topic in debates in the General Assembly.<sup>6</sup>

<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.

<sup>4</sup> *Yearbook . . . 1979*, vol. II (Part Two), p. 186, paras. 177–183.

<sup>5</sup> See the statement at the Sixth Committee, in 1979, by the Chairman of the thirty-first session of the Commission, Mr. Šahović (*Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee, 38th meeting, para. 30*).

<sup>6</sup> Draft resolution A/C.6/34/L.21, adopted by consensus by the Sixth Committee and adopted without a vote on 17 December 1979 by the General Assembly as resolution 34/141.

3. Pursuant to the recommendation by the General Assembly, the Special Rapporteur continued his study and examination of the source materials on the topic, including information furnished by Governments and replies to the questionnaire circulated by the Secretariat on 2 October 1979.<sup>7</sup> The second report was prepared on the basis of available source materials, in the light of the debates which had taken place in the Sixth Committee and the views expressed by various representatives as well as the direction of emerging trends indicated by the Commission. In the second report, the Special Rapporteur proposed six draft articles, with an appropriate analysis of source materials leading to the formulation of the provision of each article. Articles 1 to 5 formed part I of the draft, entitled "Introduction", and article 6 was the first article of part II, entitled "General Principles".

4. The second report was discussed by the Commission in the course of its thirty-second session. At the close of a considerable debate, the Commission provisionally adopted articles 1 and 6, entitled, respectively, "Scope of the present articles" and "State immunity".<sup>8</sup> In that report four other draft articles were also tentatively proposed, namely, 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> These four draft articles were submitted on a purely tentative basis as indications to the Commission of the current thinking as regards the framework of the topic, including possible definitional problems relating to it. The Commission was asked to suspend substantive consideration of these four articles until such time as it would approach the final stages of its work on the draft articles.

To facilitate consideration of draft articles to be proposed in the present report, it would seem useful to reproduce below for ready reference the texts of draft articles 1 and 6, which have been provisionally adopted,

<sup>7</sup> Two circular notes were sent out to Governments of Member States, the first note of 18 January 1979 requesting information on legislation and practice on the subject, and the second, of 2 October 1979, seeking replies to a questionnaire on various aspects of the topic.

<sup>8</sup> *Yearbook . . . 1980*, vol. II (Part Two), pp. 138 *et seq.*, chap. VI, paras. 11–113 and sect. B.

<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 1961 Vienna Convention on Diplomatic Relations,

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

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

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

"(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."

and to set out in footnotes the texts of the remaining four draft articles in part I, which will be considered at a later stage of the Commission's work.

**Draft articles on jurisdictional immunities of States and their property**

PART I  
INTRODUCTION

*Article 1. Scope of the present articles*

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

...

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. The topic was further discussed by representatives in the Sixth Committee during the thirty-fifth session of the General Assembly, with mixed reactions to some of the draft articles, including those on which the Commission had been asked to defer consideration. The debates that took place in the Sixth Committee generated further thoughts, reflecting a rich variety of views and theories, which are broadly divergent and inviting unending comments and observations in diverse directions.<sup>13</sup> The Special Rapporteur was asked to clarify and identify further general principles or rules of State immunity, bearing in mind the special nature of the topic as noted by

<sup>13</sup> See "Topical summary, prepared by the Secretariat, of the discussion of the report of the International Law Commission in the Sixth Committee during the thirty-fifth session of the General Assembly" (A/CN.4/L.326), paras. 311-326.

the Commission, which, more than other topics hitherto studied by it, touches on the realm of internal law as well as that of private international law, and heeding the note of caution sounded to the effect that the primary task of the Special Rapporteur was the search for rules of public international law on State immunities. As evidence of such rules, the judicial and other practice of States continue to be examined as further source materials, information and replies to the questionnaire continue to be supplied by Governments. The Sixth Committee proposed a draft resolution which was adopted by the General Assembly as resolution 35/163 on 15 December 1980, and read in part as follows:

*The General Assembly,*  
*Having considered* the report of the International Law Commission on the work of its thirty-second session,

...

*Noting further with appreciation* the progress made by the International Law Commission in the preparation of draft articles ... on jurisdictional immunities of States and their property ...

...

4. *Recommends* that, taking into account the written comments of Governments and views expressed in debates in the General Assembly, the International Law Commission should, at its thirty-third session:

...

(e) Proceed with the preparation of draft articles ... on jurisdictional immunities of States and their property, taking into account the replies to the questionnaires addressed to Governments as well as information furnished by them;

...

6. Encouraged by the urgent need to clarify the general rules of State immunity and inspired by the instructive resolution of the General Assembly, the Special Rapporteur has continued, along the lines indicated in his second report,<sup>14</sup> the study and preparation of further draft articles in part II (General principles) with subsequent adjustments and readjustments as guided by the deliberations of the Commission, the Sixth Committee and comments of Governments.

<sup>14</sup> *Yearbook ... 1980*, vol. II (Part One), p. 214, document A/CN.4/331 and Add.1, paras. 60-64.

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

PART II. GENERAL PRINCIPLES

*Article 6. State immunity*

[Provisionally adopted by the Commission at its thirty-second session]<sup>15</sup>

**ARTICLE 7 (Rules of competence and jurisdictional immunity)**

**A. Relationship between competence and immunity**

7. In draft article 6, the rule of State immunity has been formulated from the standpoint of the State receiving or

benefiting from State immunity. A State is said to be "immune from the jurisdiction of another State". This formulation restates jurisdictional immunity as a general rule or general principle, rather than an exception to a more basic norm or fundamental principle of territorial sovereignty or territoriality. It is to be recalled that the discussions within the Commission and the Sixth Committee have revealed the existence of several theories and differing views regarding the concept of State immunity.<sup>16</sup>

<sup>15</sup> For the text and commentary thereto, see *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.* See also para. 4 above.

<sup>16</sup> See footnote 13 above. See also an article by S. M. Schwebel on the work of the thirty-second session of the Commission in *American Journal of International Law* (Washington, D.C.), vol. 74, No. 4 (October 1980), pp. 961 and 967.

Adherence to a more fundamental and original concept of sovereignty is not uncommon among developing States and socialist States hinging on a more absolute notion of sovereignty, and hence of State immunity. Sharing a notion of absolute sovereignty, one view regards State immunity as an inevitable exception to the territorial sovereignty of a State exercising its normal competence, while another view considers jurisdictional immunity to be a direct application of the very principle of absolute sovereignty of the State claiming to be immune. *Par in parem imperium non habet*. The two views are not necessarily irreconcilable. The Commission, in fact, adopted an objective concept or a more orthodox formulation of draft article 6 restating a general rule of State immunity,<sup>17</sup> as confirmed in the practice of States, following in a sense an inductive method of approach to the question of jurisdictional immunity.<sup>18</sup>

8. It would seem pointless for all practical purposes to have to make reference to a more basic principle of sovereignty each time a new study is made of any topic of international law. The same could likewise be said of perfunctory reference to a more fundamental norm such as *pacta sunt servanda*, or indeed "the principle of consent of States", to which practically all subsidiary rules of international law may be traceable. Such retrospective investigation appears to be neither salutary nor helpful. It might on analysis even prove to be less than accurate, if not altogether misleading. The question is where to begin and where to stop in the process of retrogression.<sup>19</sup>

9. In draft article 7, an attempt is made to turn the statement of the rule of State immunity the other way round, or to reformulate the same rule from the opposite standpoint, namely, from the point of view of the State giving or granting jurisdictional immunity. To switch the proposition around, a new point of departure is warranted. Emphasis is placed not so much on the sovereignty of the State claiming immunity, but more precisely on the independence and sovereignty of the State that is required by international law to recognize and accord jurisdictional immunity to another State. Since immunity under draft article 6 is expressly *from* the "jurisdiction of another

State", there is a clear and unmistakable presupposition of the existence of "jurisdiction" of that other State over the matter under consideration, as otherwise, it would be totally unnecessary to invoke the rule of State immunity. There is, as such, an indispensable and inseparable link between State immunity and the existence of jurisdiction of another State, as defined by its rules of competence.

10. The same initial proposition could well be formulated in reverse, taking the jurisdiction or competence of a State as a starting-point and, after having established the firmness of existing competence or soundness of jurisdiction, the new formulation could stipulate an obligation to refrain from exercising such competence or jurisdiction in so far as it involves, concerns or otherwise affects another State unwilling to submit to its jurisdiction. This restraint on the competence is prescribed as a proposition of international law and should be exercised in accordance with detailed rules to be examined and clarified in subsequent draft articles.<sup>20</sup> From the point of view of the absolute sovereignty of the State exercising its competence in accordance with its own internal law, any restraint or suspension of that exercise based on a requirement of international law could be viewed as a limitation of its absolute competence, which, in most cases, places restriction on its territorial supremacy or otherwise constitutes an exception to its general rules of State competence. The first prerequisite to any question involving jurisdictional immunity is therefore the existence of a valid competence primarily under its own internal law rules of competence and, in the ultimate analysis, the assumption and exercise of such competence not conflicting with any basic norms of public international law. It is then and only then that the applicability of State immunity may come into play.<sup>21</sup> There appears to be a close relationship between the existence of State competence on the matter under consideration and the consequential possibility of a claim of jurisdictional immunity. Without competence, there is no necessity to proceed to initiate, let alone substantiate, the claim of State immunity.<sup>22</sup>

#### 1. THE RELEVANCE OF THE RULES OF COMPETENCE UNDER INTERNAL LAW

11. The first and primary question to be examined and clarified is evidently the competence of the State authority

<sup>17</sup> *Yearbook . . . 1980*, vol. II (Part Two), pp. 142 *et seq.*, paras. (1), (2), (55)–(60) of the commentary to article 6, and particularly para. (17). See also the statement of Mr. Pinto, Chairman of the thirty-second session of the Commission, introducing the Commission's report at the Sixth Committee (*Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, twenty-fifth meeting, paras. 60–65).

<sup>18</sup> See the statement by Mr. Tsuruoka, representative of Japan in the Sixth Committee, on 13 November 1980:

"The Commission should attempt to formulate the principles through an inductive approach, after analysing trends which would be found in the practice of States, in national legislation [as exemplified by the recent laws of the United Kingdom and the United States], and in such international conventions as the European Convention on State Immunity." (*Ibid.*, 48th meeting, para. 40).

<sup>19</sup> As the topic is entitled "Jurisdictional immunities of States and their property", the Special Rapporteur has suggested that the rule of State immunity affords a convenient starting-point without tracing back too far into history to search for the more fundamental principles of international law from which the concept of State immunity may be said to have evolved.

<sup>20</sup> This obligation to refrain from exercising jurisdiction against a foreign State is regarded as a general rule, but not as unqualified. Its application should be in accordance with "the provisions of the present articles".

<sup>21</sup> It is suggested that in normal circumstances the court should be satisfied that it is competent before proceeding to examine the plea of jurisdictional immunity. In actual practice, there is no established order of priority for the court in its examination of jurisdictional questions raised by parties. There is often no rule requiring the court to exhaust its consideration of other pleas or objections to jurisdiction before deciding the question of jurisdictional immunity. See below, para. 21: The "act of State" doctrine.

<sup>22</sup> Questions of competence are governed by internal law, although in practice the court is generally competent to determine the extent and limits of its own jurisdiction. It is easy to overlook questions of competence and to decide the question of immunity without ascertaining the existence of a sound foundation for jurisdiction if uncontested on other grounds.

called upon to pronounce judgement in a given case or to take measures affecting the sovereignty or sovereign authority of another State by thus exercising competence against its sovereign will. Under the internal law of each country—be it constitutional law or basic law or law on the organization of the courts of justice, such as a Judicature Act or a Code of Civil Procedure—the competence or jurisdiction of a court of law or a tribunal is established or defined; each court, being master of its own procedure, is also judge of the extent or limits of its own jurisdiction, which is ordinarily regulated by its own rules of competence.<sup>23</sup>

12. Jurisdiction or competence of a State authority in judicial or administrative matters is generally limited by the territorial confines of that State.<sup>24</sup> State competence is generally territorial, in the sense that every object, or person or property physically present within or connected with the territory of a State is subject to its territorial jurisdiction. Competence of a State within its territorial confines may be regarded as largely absolute and practically supreme, recognizing no superior power other than the rules of public international law.<sup>25</sup> But State competence is not always exclusively founded on physical presence within the territory or association with the territory. Jurisdiction is not exclusively territorial.<sup>26</sup> There are other foundations of jurisdiction or State authority, based on other links or connections, such as public policies,<sup>27</sup> fiscal considerations,<sup>28</sup> the artificial concept of nationality of persons,<sup>29</sup> natural and juridical, of

vessels,<sup>30</sup> aircraft,<sup>31</sup> and space craft<sup>32</sup> and even of multinational corporations.<sup>33</sup> The concept of a State authority being a *forum prorogatum* is also not unreal<sup>34</sup> in the field of contract or international agreement, where the choice of law and of jurisdiction could be predetermined by the parties<sup>35</sup> or left for subsequent selection by mutual agreement,<sup>36</sup> not necessarily tied to any conceptual notion of territory or propriety of the *forum* or the law chosen by litigants, freely but not always deliberately.

13. Inasmuch as jurisdiction of a national authority or competence of a State organ may not be exclusively territorial, that is to say, not founded exclusively upon territorial sovereignty, but may extend beyond the territorial limits, being extraterritorial<sup>37</sup> or otherwise based on the subject-matter of vital interests to the State concerned,<sup>38</sup> or on the express volition of the parties involved,<sup>39</sup> with or without calculated deliberations, State immunity is not necessarily an exception to the principle

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jurisdiction other than territorial. The term "national" generally includes individuals as well as corporate bodies or juristic personalities such as corporations and limited companies.

<sup>30</sup> A State has jurisdiction over vessels flying its flags, wherever they may find themselves. See, for instance, arts. 92 and 94 of the draft convention on the law of the sea (A/CONF.62/L.78 and Corr.3 and 8).

<sup>31</sup> A State has jurisdiction over the aircraft registered under its own legal system, regardless of their location, whether on the ground or in flight.

<sup>32</sup> A State has sovereign authority over its own spacecraft even when in flight in the outer space or in orbit. Its jurisdiction is extraterritorial when the spacecraft physically leaves the atmosphere within its national jurisdiction.

<sup>33</sup> The question of nationality of claim is relevant to the possible exercise of certain rights or power in regard to transnational or multinational corporations. In fact, several States could share the duty of protection.

<sup>34</sup> Without any territorial or other dimensional links, the court of a State may have jurisdiction to entertain a case involving aliens as a preferred court, or a *forum contractus* or a *forum prorogatum*.

<sup>35</sup> Most legal systems allow the parties to grant jurisdiction to any court by agreement, either before or after the dispute has arisen.

<sup>36</sup> Such agreement could be implied in some jurisdictions when the defendant submits to proceedings in a court which would otherwise have no jurisdiction to deal with them. See, for instance, *The "Gemma"* (1899) (United Kingdom, *The Law Reports, Probate Division* (1899), p. 285) and *The "Duplex"* (*ibid.* (1912), p. 8).

<sup>37</sup> As the fiction of territory applies to vessels, the jurisdiction of the flag State is not entirely extraterritorial, since a floating territory is clearly under a State's territorial jurisdiction even though on the high seas or within the territorial sea of another State. The fiction of territoriality does not apply to other types of craft such as hovercraft, aircraft and spacecraft. It is not inaccurate to describe jurisdiction over such craft as extraterritorial when outside the limits of the national jurisdiction of its registry.

<sup>38</sup> Nationality has been alluded to as a possible point of contact in the foundation of State jurisdiction. The notion of *forum connexitatis* or substantial connection of actions is a further illustration of jurisdiction without territorial connection, such for instance as the case of joint debtors under a contract or joint-tortfeasors where only one is present within the territory. Jurisdiction over an air carrier in a case of international transport of goods or persons by air furnishes another example of jurisdiction based on grounds other than territorial.

<sup>39</sup> Freedom of contract to a large extent allows the parties to choose the applicable law as being the proper law of the contract as well as the court of law to which the dispute is to be submitted, provided always that the rules of competence of the chosen forum permit such a choice (*prorogatio fori*). Most legal systems recognize an agreement of the

(Continued on next page.)

<sup>23</sup> This practice is logical and inevitable, but it does not mean that the court is thereby empowered to enlarge or expand its own jurisdiction beyond the limits set by its rules of competence.

<sup>24</sup> "Jurisdiction" and "competence" are aptly distinguished in some juridical systems. Italian authors use the term "*giurisdizione*" in the international sense, as between different States, while "*competenza*" refers to the intraterritorial competence, in the geographical sense as well as in the matters or amount of money or seriousness of issues involved. In France, it is not unusual to oppose the *compétence générale*, the jurisdiction of a country as a whole, to the intraterritorial *compétence spéciale*. The principle of territoriality or territorial sovereignty recognizes the validity of national jurisdiction or *compétence générale* over the entire length and breadth of the territory of a State.

<sup>25</sup> For instance, in the case of the S.S. "*Lotus*" (*P.C.I.J., Series A, No. 10*, Judgment No. 9, 1927, pp. 68–69), Bassett Moore said:

"It is an admitted principle of international law that a nation possesses and exercises within its own territory an absolute and exclusive jurisdiction, and that any exception to this right must be traced to the consent of the nation, either express or implied (*Schooner "Exchange"* v. *McFaddon* (1812), 7 Cranch 116, 136)."

See G.H. Hackworth, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1941), vol. II, chap. VI: "National jurisdiction—supremacy of territorial sovereign", pp. 1–2.

<sup>26</sup> One of the bases for jurisdiction is the supreme authority of the territorial sovereign. The clearest dimension of State jurisdiction is territorial.

<sup>27</sup> "Public policies", "public interests", "*ordre public*" and similar expressions have been used to describe another dimension of State jurisdiction which could be extraterritorial or non-territorial.

<sup>28</sup> Fiscal considerations, tax policies, development or investment incentives could provide further grounds for a State to exercise jurisdiction to preserve and protect its national existence.

<sup>29</sup> A State has the right as well as the duty to protect the interests of its nationals wherever they may be. Nationality is a distinct basis for

of territorial sovereignty. Admittedly, in most cases, jurisdictional immunity is the consequence of a direct confrontation between the two aspects of sovereignty, territorial and national; but when the competence to be exercised is not based on territory but is extraterritorial, or founded on the will of the contractors or the parties concerned, then it is with greater accuracy to express State immunity in terms of a rule of international law rather than an exception to the principle of territorial sovereignty. It becomes more clearly visible as a manifestation of the sovereignty of the foreign State and a direct application of that principle of absolute and indivisible sovereignty or equality of States.<sup>40</sup>

14. As States are free and sovereign not only within their own territorial limits but also in regard to the creation of their own constitutive elements, including the definition and delimitation of the powers to be ascribed or attributed to their organs, instrumentalities or agencies in the field of adjudication or administration of justice,<sup>41</sup> it occurs not infrequently that conflicts can and do arise, not only in the sphere of substantive laws on any topic, but also in the physical and material scope of their jurisdictions and competence.<sup>42</sup> Under its rules of competence, a State is competent to determine and define the extent and geographical limits of its own jurisdiction in matters of adjudication and legal proceedings. Its definition and determination within the territorial confines is absolute and unchallenged by another State except as otherwise dictated by principles of international law.<sup>43</sup> A State also

has exclusive competence over marine and submarine areas within national jurisdiction, although not an absolute authority as over other areas under territorial sovereignty.<sup>44</sup> Areas beyond national jurisdiction can be under shared jurisdiction or the competence of an international authority by international law or international agreement.<sup>45</sup> In addition to the territory or the areas within its territorial jurisdiction, a State has sovereign power and authority over its own nationals, natural and juridical, and exercises sovereignty over vessels flying its flag as well as aircraft and spacecraft of its nationality, wherever they may be—on the high seas, in the territory of another State, in the lower or upper atmosphere, in space and outer space or in orbit, or on the surface of any celestial bodies.<sup>46</sup> The advance of science and technology is making room for further progress in the regulation of concurrence and conflicts of jurisdiction in all these areas over countless matters of common interest to States.<sup>47</sup> For this purpose, States individually and together have endeavoured to harmonize or regularize, if not to adjust, this concurrence of jurisdiction and potential areas of conflicts of competence, through their own rules of competence and with the assistance of unification efforts such as the Hague Conference on questions of private international law.<sup>48</sup> Over and above regulations by State internal law and uniform rules of private international law, international legal order must be sustained and maintained on the sound legal basis of applicable rules of public international law.<sup>49</sup>

15. Without attempting to enquire in depth into the intricacies of international law over and above the

(Footnote 39 continued.)

parties as to the competence of the court (cf. R. Graupner, "Contractual stipulations conferring exclusive jurisdiction upon foreign courts in the law of England and Scotland", *The Law Quarterly Review* (London), vol. 59, No. 235 (July 1943), p. 227. This is particularly true if the cause of action arises from a contract. For practically all non-contractual cases, voluntary submission to the jurisdiction by the defendant precludes him from raising subsequent objection to it.

<sup>40</sup> As has been seen, in private international law, jurisdictional immunities of foreign States have been viewed as exceptions to the rules of competence. (See for instance M. Wolff, *Private International Law*, 2nd ed. (Oxford, Clarendon Press, 1950), pp. 52–63, chap. IV: "Delimitation of the jurisdiction", and in particular, pp. 60–63, "Principles governing the competence of the courts". In public international law, they are but applications of general rules of State immunity.

<sup>41</sup> The composition or organization of the judiciary within a legal system is a matter within the national authority or exclusive sovereignty of the State. Each State has its own laws or statutes to regulate the administration of justice within its boundary, and even beyond in certain classes of cases.

<sup>42</sup> Owing to the fact that each State has its own rules of competence which are designed to respond adequately to its political, economic and social needs, disputes of a transnational nature with several foreign components or elements have arisen. The danger of lack of a competent authority to adjudicate has been negated by an increase in the competence with widening scope of national jurisdiction, with the result that such transnational disputes or cases with foreign elements come under or fall within the concurrent competence of more than one legal system. The problem is one of concurrence or conflict of jurisdiction which has to be solved primarily within a legal system in accordance with its own conflict rules.

<sup>43</sup> The question of nationality, for instance, is determined in the first instance by the State whose nationality is in question. A State has the power to legislate and decide on its own nationality in so far as it does not infringe upon an accepted norm of international law.

<sup>44</sup> National jurisdiction could extend beyond the territorial boundaries of a State, although not necessarily exclusive sovereignty.

<sup>45</sup> As far as the notion of sovereignty could extend from the landed territory into submarine areas and the ocean floors, there appears to be a diminishing scope of sovereign authority, from absolute sovereignty to exclusive sovereignty, exclusive fisheries rights, and jurisdiction other than territorial sovereignty. Beyond the limits of national jurisdiction, the concept of common heritage of mankind applies. The exploration and exploitation of resources beyond national jurisdiction is subject to international regulation, without which a lawless state of chaos would almost certainly prevail.

<sup>46</sup> See, for instance, arts. 92 and 94 of the draft convention on the law of the sea (see footnote 30 above); art. 17 of the Chicago Convention on International Civil Aviation of 7 December 1944 (United Nations, *Treaty Series*, vol. 15, p. 308); art. 3 of the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention of 14 September 1963 (*ibid.*, vol. 704, pp. 222–223).

<sup>47</sup> There are still countless areas of conflicts of jurisdiction as yet unregulated by universal conventions of universal character.

<sup>48</sup> See, for instance, *Actes et documents de la Conférence de La Haye de droit international privé* (The Hague, Printing Office, series published since 1893); Max-Planck Institut (Hamburg), *Sources of International Uniform Law* (Alphen aan den Rijn, Sijthoff & Noordhoff), vols. I–IV (published since 1971); UNIDROIT, *Uniform Law Cases* (Milan—to 1971), then *Uniform Law Review* (Rome—biannual).

<sup>49</sup> See, for instance, the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies (General Assembly resolution 2222 (XXI) of 19 December 1966, annex) and the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (General Assembly resolution 34/68 of 5 December 1979, annex).

differing sets of rules of competence within each State, or indeed, examining in any detail the rules of private international law regulating such conflict or concurrence of jurisdiction, suffice it for present purposes to rest the proposition squarely on this solid but hazy ground, and clearly to confirm the statement of the rule that the question of jurisdictional immunity of a State presupposes the establishment of a firm legal foundation of competence or jurisdiction of the authority of another State to entertain the legal proceedings in question or to consider the dispute under litigation. Reference is to be made to the rules of competence of the State authority in order to determine the legal basis of its jurisdiction. This is a condition precedent to the determination of the question of State immunity in any given situation. The rules of competence under internal law are therefore directly relevant to the applicability of the rule of State immunity in international law and practice.<sup>50</sup>

## 2. RELATIVITY OF COMPETENCE AND IMMUNITY

### (a) "Competence" before "immunity"

16. The foregoing analysis of legal thinking suggests a certain relativity between the established competence of State authority and an obligation on the part of the State to withhold or suspend the exercise of competence by its authority; in other words, the duty to grant jurisdictional immunity to another State. Competence and immunity are two closely related notions. Competence is relative to immunity. Absence of competence produces the same effect as an application of the rule of State immunity. But the two cases are distinguishable. As has been observed,<sup>51</sup> competence is a *sine qua non* of jurisdictional immunity. Lack of competence, non-competence or absence of competence eliminates the need to claim or establish a claim of jurisdictional immunity. While it is desirable for the purpose of the current study to distinguish absence of competence or lack of jurisdiction on the part of the authoritative State from recognition by that State of the existence of immunity of another State, the distinction is often hard to draw and is sometimes blurred. There may even be a small gap in between.

<sup>50</sup> The question of choice of law and choice of jurisdiction is also relevant as part of the conflict rules within the scope of the rules of competence or principles of judicial jurisdiction. See, for instance, R. H. Graveson, *Comparative Conflict of Laws* (Amsterdam, North-Holland Publishing Company, 1977), vol. I; W. Reese, "General course on private international law", *Recueil des cours de l'Académie de droit international de La Haye, 1976-11* (Leyden, Sijthoff, 1977), p. 9; J. P. Niboyet, *Traité de droit international privé français*, vol. IV: "La territorialité", and vol. V: "La territorialité" (*fin*) and "L'extra-territorialité" (Paris, Sirey, 1947 and 1948). It should be observed that, in actual practice, a court does not always direct its attention to the question of its competence or jurisdiction when a claim of jurisdictional immunity has been raised without advancing other grounds for objecting to the jurisdiction. Unquestionably, an act of State of a foreign Government could be more than procedural.

<sup>51</sup> See above, paras. 11-15: "The relevance of the rules of competence under internal law".

### (b) "Competence" or "jurisdiction"

17. When a municipal court declares itself incompetent in a legal proceeding, it can do so on the ground that the court lacks the necessary power or competence to try the case. In several jurisdictions, it is possible for a different court in the same system to have the power or competence to examine the question under consideration, but it could also well be that the judicial authority of that country has no authority or that the matter lies beyond or outside the scope altogether of the jurisdiction of the territory in which the cause of action is brought or the legal proceeding instituted. Thus, the expression "jurisdiction", when used in the sense of the power or authority to administer justice or to lay down the law "*juris-dictio*", is closely identified with the term "competence", although it should be observed that in some legal systems both expressions are commonly used but not always with the same implication, as they may serve to identify two slightly and technically different scopes or layers of judicial authority or spheres of power to administer justice. The term "jurisdiction" is ordinarily wider than "competence", but for the purpose of this study, the two are used interchangeably. When the authority is incompetent or lacks the necessary competence, it follows in all cases that it has no jurisdiction or is without jurisdiction. When, conversely, in a given case the authority in question does not have jurisdiction to entertain the motion submitted, it clearly has no competence. It is in this larger sense and not in any finer sense of attribution or distribution of judicial power within a particular legal system that the two expressions "jurisdiction" and "competence" are used here, without drawing a line of technical or legal distinction between them. It is well understood that the term "conflict or concurrence of jurisdiction" is more widely used with reference to conflict in an international domain, while the expression "conflict or concurrence of competence" is more often used to denote intranational or interdepartmental division or allocation of authority. The use in such circumstances is by no means uniform in all jurisdictions. In fact, no fundamental difference could be attributed to the two terms which have been in use in the practice of States. "Jurisdiction" is common in common law systems, where "competence" is rare but not unknown, while in civil law systems, both expressions are in current use, sometimes having essentially the same notion of authority, whereas at other times a thin distinction is drawn, but with little or no significance for present purposes in an international context.

### (c) "Immunity" and "no-power"

18. The analysis of jural relationship has presented a difficult but not insoluble problem. An analyst once described "right" as being correlative with the corresponding "duty", whatever the content of the right or the duty.<sup>52</sup> In the same pattern of correlativity, "power"

<sup>52</sup> See J. Stone, *The Province and Function of Law* (Cambridge, Mass., Harvard University Press, 1950), chap. V: "Hohfeld's fundamental legal conceptions", where jural correlatives and jural opposites

(Continued on next page.)

has been correlated to "liability"; and the opposite of "liability", which is "immunity", is correlative to "no-power" or "disability". Thus, in a theory of jural relationship, if "a State has immunity from the jurisdiction from another State", the same expression could be stated correlatively from the standpoint of the other State as: "Another State has 'no-power' to exercise its jurisdiction over a State". This is an accurate reconstruction of the sentence in so far as it does not indicate lack of jurisdiction itself but rather "disability" or "no-power" to exercise the jurisdiction it ordinarily has over that other State.

### 3. LACK OF COMPETENCE ON GROUNDS OTHER THAN JURISDICTIONAL IMMUNITY

19. As has been predicated (para. 17 above), the existence of competence or jurisdiction precedes the question of jurisdictional immunity. Immunity follows the existence of jurisdiction or competence, but with "no-power" to exercise that competence or jurisdiction. Lack of competence is relative to immunity in that both produce the same result of no decision in substance, but the former, while comprehending the latter, is not necessarily identified with it. The gap between lack of competence of the local authority and immunity of a foreign State from local jurisdiction is represented by a host of varying grounds on which a State authority may find itself incompetent or without jurisdiction to deal with the matter submitted to it for consideration and judgement. It is beyond the scope of the present study to enquire into the various grounds under every internal legal system for the judicial authority to decline jurisdiction or to consider itself without competence or jurisdiction to decide the question before it. The practice of States varies from jurisdiction to jurisdiction regarding the grounds to justify non-exercise of power to decide the case, or to determine that the authority in question has no competence or is without jurisdiction. Suffice it to give a few illustrations for some of the less well-known grounds relating to absence of competence or unwillingness of the authority to exercise the judicial discretion, which are notionally close to jurisdictional immunity and yet conceptually dissociated from immunity.

#### (a) Lack of legal personality or capacity to litigate

20. A case of non-exercise of jurisdiction sometimes confused with immunity, although far removed from it, is the anomalous situation in a legal system where the Government *eo nomine* cannot be sued *qua* Government, not because it is entitled to any measure of jurisdictional immunity but simply because the court does not recognize the capacity of bringing the defendant to trial before it, lacking as it does the juridical personality of capacity to litigate under the internal law of the State in which the

proceeding is instituted.<sup>53</sup> Recognition of juridical personality or capacity to sue and be sued before national authority is a matter strictly and exclusively within the province and function of the authority concerned. In the case of a law court or judicial authority, it is a question of application of the internal law on which the trial court is competent. In a number of instances, the judiciary of a State still jealously guards its autonomy and independence. This is sometimes demonstrated by the unwillingness or refusal of the court to follow the lead of the executive in matters involving the recognition of a legal status of a foreign entity claiming immunity, regardless of the fact that the executive power or the Government of the State has or has not extended *de facto* or *de jure* recognition of the foreign State or foreign Government concerned.<sup>54</sup>

#### (b) The "act of State" doctrine

21. In the practice of some States, notably the United States of America, another ground has developed on the basis of which courts decline jurisdiction or declare themselves powerless to decide the case before them. The courts tend to be shy when called upon to adjudicate or decide upon questions involving the legal validity or lawfulness or legality of an act of a foreign State in a domain which is clearly within its sovereign authority, whether or not it is within the limit or extent permissible by international law. American courts have in some instances refused to decide or determine the claim by one party because the decision or determination of that claim inevitably includes a judgement on the lawfulness or propriety of a sovereign act of another State.<sup>55</sup> This so-called "act of State" doctrine in United States practice should not be confused or identified with the "act of State" under the English constitutional law, under which an act of the sovereign Power or its agent, if acting *intra vires*,

<sup>53</sup> See, for instance, *Phya Preeda Narubate v. H.M. Government* (1947); the Dika (Supreme) Court of Thailand rejected a claim against the Government not for any immunity but for lack of legal personality and capacity to sue and be sued under internal law. Compare the disability or lack of capacity of an enemy alien to institute legal proceedings in some legal systems. An action can, however, be brought against such person who could thereupon counter-claim to the extent of a set-off. (Thailand, *Supreme Court Decisions*, No. 724/2490 (1947).

<sup>54</sup> See, for instance, the judgement of the Court of Appeal of Amsterdam of 30 April 1942 in the case *Weber v. Union of Soviet Socialist Republics* (*Annual Digest and Reports of Public International Law Cases, 1919-1942* (London), vol. 11, case No. 74, p. 140), holding that non-recognition of the USSR on the part of the Netherlands Government does not affect the position of the USSR as a recognized State under the immunity rule.

<sup>55</sup> See, for example, *Banco Nacional de Cuba v. Sabbatino, Receiver, et al.* (1964) *United States Reports*, vol. 376, p. 398) concerning Cuban nationalizations alleged to be in violation of international law, and *Banco Nacional de Cuba v. First National City Bank of New York* (1970) (United States of America, *The Federal Reporter*, 2nd series, vol. 431, p. 394). See also *Bernstein v. N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij* (1954) (*ibid.*, vol. 210, p. 375). For an interesting article on the subject, see J. Combacau, "La doctrine de 'l'act of State' aux Etats-Unis, développements récents", *Revue générale de droit international public* (Paris), vol. LXXVII, No. 1 (January-March 1973), p. 35.

(Footnote 52 continued.)

are discussed with interesting commentary on W.N. Hohfeld's *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (see footnote 61 below).

cannot by its very nature be questioned by any court of law in the realm. The American doctrine of "act of State" is to be distinguished from the English original version, which is purely English constitutional practice.<sup>56</sup> The United States doctrine refers to non-actionability of a sovereign act of a foreign Government under international law, a matter which lies essentially outside the competence or jurisdiction of a local or municipal court. It will be seen that this defect of competence goes more deeply to the merits of the case than the defect resulting from the rule of State immunity, which is merely suspensive and is curable by a number of measures indicating the willingness or agreement of the foreign State to submit to the local jurisdiction. Jurisdictional immunity is in this sense far more relative—and even subjective—than the American "act of State" doctrine.

(c) *The rules of competence in private international law*

22. To state at the outset<sup>57</sup> that the examination of any question of jurisdictional immunity should be preceded by a positive confirmation of the existence of a valid jurisdiction or competence of the trial court or the State authority dealing with the case under its own internal law is to admit that under its own conflict rules or rules of competence in private international law the decision of a court not to proceed with the trial could be a direct result of the finding or consideration by the court that there is a defect in the jurisdiction or the competence. Several grounds have been recognized, which may differ from jurisdiction to jurisdiction and vary from jurisprudence to jurisprudence, for the court's reluctance or refusal to proceed with further consideration of a case which, with the presence of a foreign element, has entered the realm of private international law. In a case involving another State or its property, the matter could fall within the competence of the court only if its rules of competence are satisfied. Otherwise, there could be lack of competence on the part of the local or municipal court on one of the grounds provided by its set of rules of competence under its conflict rules or rules of private international law.

23. Thus, it is not unnatural that in some of the replies to the questionnaire circulated to Governments,<sup>58</sup> in regard

to States which have no specific legislation on jurisdictional immunities, an answer could be found, in any event partially, in the assimilation of the position of a foreign State to that of a foreign entity in an action in similar circumstances. This is a practical test, first and foremost, to verify the existence of jurisdiction or soundness of competence under internal law before proceeding to establish State immunity because the foreign entity or alien in question happens to be a foreign sovereign or State. The rules of competence in private international law, largely internal law, contain many clear grounds on which the court is required to decline jurisdiction for lack of competence. Some of these grounds have been mentioned above (paras. 20–21). It would be neither practical nor desirable even to enumerate or quickly to glance through all of the various grounds on which a court of law could base its determination that it lacks jurisdiction or competence to adjudicate the matter in question. Defects in competence may relate to the subject-matter being essentially beyond the court's scope of competence; to the physical presence of an object or person being outside the territorial limit of the competence, or its absence from the territorial domain; to lack of the most significant contact; to the rule regarding the chosen forum (*forum prorogatum*); or the most convenient forum (*forum conveniens*); or to such other rules relating to priority of concurrent jurisdictions that would induce the court to be reluctant to exercise jurisdiction or pass judgement in a case before it.

24. It should be observed at this point that the present study does not seek to give an exhaustive list of the various grounds that have been used by municipal courts to base their lack of jurisdiction or competence under their own conflict rules. State immunity or jurisdictional immunity of a foreign State could be listed among such grounds, whether the reasoning behind it may be found in a principle of public international law, such as dignity, independence, sovereignty and equality of States, or on grounds of internal law or private international law limitations inherent in the rules of competence, or a combination of both. It is not impossible in the light of State practice to view State immunity as a rule of public international law as well as a private international law limitation of jurisdiction according to the rules of competence under internal law. The difference in most cases could be academic, except in the common law jurisdictions where the doctrine of precedent could play a determinative part. For instance, according to the theory of incorporation, an English court could follow the development of an international law rule; but if the transformation theory is adopted, the doctrine of *stare decisis* would require the court to adhere more strictly to precedent, regardless of the change that may have occurred in the evolution of rules of international law.<sup>59</sup> To a large extent, this potential difference has been minimized

<sup>56</sup> The "act of State" doctrine in English practice refers to the unquestionability of an act performed by a government agent, acting within its delegated power, and represents absence of judicial control over the executive in certain domains where constitutional and conventional practice allows large discretion to be exercised by the executive. See, for instance, *Buron v. Denman* (1848) (United Kingdom. *The Exchequer Reports*, vol. II (1849), p. 167), describing an "act of State" as an act done by the sovereign power of a country or its agent either previously authorized or subsequently ratified. Such an act cannot be questioned or made the subject of legal proceeding in any court of law. See *Sobhuza II v. Miller* (1926) (United Kingdom. *The Law Reports, House of Lords, Judicial Committee of the Privy Council* (1926), p. 518).

<sup>57</sup> A cross reference could usefully be made to paras. 11–15 above: "The relevance of the rules of competence under internal law".

<sup>58</sup> See, for instance, the reply of the Government of Tunisia with selected provisions of national legislation (February 1981) (United Nations Legislative Series, *Materials on Jurisdictional Immunities and their Property* (Sales No. E/F.81.V.10), pp. 614–616).

<sup>59</sup> The incorporation theory, deriving from *Barbuit's case* (1737) (*British International Law Cases* (London), vol. 6 (1967), p. 261) holds that rules of general international law are incorporated into English law automatically and considered to be part of English law

(Continued on next page.)

in this context by the adoption of an English act of Parliament in 1978.<sup>60</sup>

## B. Absence of power to compel a State to submit to the jurisdiction of another State

### 1. NO COMPULSORY JURISDICTION OVER FOREIGN STATES

25. The general relationship between "immunity" of a State and the correlative "no-power" of another State (see para. 18 above) is further explained by a more precise formulation of another consequential proposition.<sup>61</sup> As "A State is immune from the jurisdiction of another State", it follows that no State has the power to make another State submit to its jurisdiction. This absence of power could also be expressed in terms of an obligation on the part of a State not to exercise sovereign authority or a duty to suspend its jurisdiction over another State against its will. In other words, the courts of a State should not compel another unwilling State to submit to its jurisdiction. This absence of compulsory jurisdiction over a foreign State or the lack of power to compel submission of another State to its jurisdiction is sometimes rendered in English as "an obligation not to implead a foreign sovereign" or a duty to refrain from exercising jurisdiction in a proceeding which impleads a foreign State or requires a foreign State to submit to local jurisdiction against its will.

26. The relativity of State immunity is thus further intensified by the subjective element inherent in the willingness of a State over which jurisdiction is otherwise exercisable within the norms of competence. It will be seen in subsequent draft articles how this relativity of jurisdictional immunity is highlighted by a search for clearer rules on the ultimate expression of consent<sup>62</sup> or voluntary submission to the jurisdiction<sup>63</sup> or waiver of immunity<sup>64</sup> or counter-claims.<sup>65</sup>

(Footnote 59 continued.)

unless they are in conflict with an act of Parliament. The transformation theory, deriving its authority from the cases *The Queen v. Keyn* (1876) (United Kingdom, *The Law Reports, Exchequer Division*, vol. II (1877), p. 63) and *Chung Chi Cheung v. The King* (1938) (United Kingdom, *The Law Reports, House of Lords, Judicial Committee of the Privy Council*, 1939, p. 160), requires that rules of general international law should not be considered to be part of English law except insofar as they have already been adopted by judicial decisions, or acts of Parliament, or long-established custom. See Lord Denning in *Trendtex Trading Corporation Ltd. v. The Central Bank of Nigeria* (1977) (*International Legal Materials* (Washington, D.C.), vol. XVI, No. 3 (May 1977), p. 471):

"I now believe that the doctrine of incorporation is correct. Otherwise I do not see that our courts could ever recognize a change in the rules of international law. It is certain that international law does change. I would use of international law the words which Galileo used of the earth: 'But it does move.'" (*Ibid.*, p. 479.)

<sup>60</sup> *State Immunity Act 1978* (United Kingdom, *The Public General Acts, 1978*, part 1, chap. 33, p. 715).

<sup>61</sup> "Immunity" and "disability" are jural correlatives. Disability is the equivalent of a "no-power" to impose liability on the other party. See W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven, Yale University Press, 1923).

<sup>62</sup> See draft article 8, para. 58 below.

<sup>63</sup> See draft article 9, para. 71 below.

<sup>64</sup> See draft article 11, para. 92 below.

<sup>65</sup> See draft article 10, para. 81 below.

### 2. INADMISSIBILITY OF ACTIONS IMPLEADING A FOREIGN STATE

27. A State is said to be impleaded when an attempt is made to compel it against its will to submit to the jurisdiction of another State. There are various ways in which a State can be thus impleaded or implicated in a litigation or a legal proceeding before the court of another State.

#### (a) Institution of proceedings against a foreign State

28. A State is indubitably impleaded if, against its will, a legal proceeding is instituted against it in its own name and the State does not wish to become party to that proceeding. A State is not impleaded if it is willing to have the dispute litigated or the matter judicially settled by the competent authority of another State. The act of impleading presupposes the absence of consent on the part of the State against which the proceeding is instituted. The question of immunity arises only when the defendant State is unwilling or does not consent to be proceeded against. There will be no impleading if the State agrees to become party to the proceeding. The element of the will or intent is determinative of the question of compulsion. Without the power to compel submission to the jurisdiction, the State of the forum is obliged to refrain from exercising its competence or jurisdiction.

29. Although, in the practice of States, jurisdictional immunity has been granted more frequently in cases where no State has been named as party to the proceeding, in reality there is a surprising collection of instances of direct implication in proceedings in which States are actually named as defendants.<sup>66</sup> For the purpose of State immunity, a definition of "State" may be needed. Whatever the definition, it is clear from the practice of States that the expression "State" for the purposes of the present articles includes, in the first place, fully sovereign and independent foreign States, but by extension also entities that are sometimes not completely foreign and at other times are not fully independent or are only partially sovereign.<sup>67</sup> Certainly the cloak of State immunity covers all foreign

<sup>66</sup> See, for instance, *F. Advocaat v. I. Schuddinck & den Belgischen Staat* (1923) (*Annual Digest . . . , 1923-1924* (London), vol. 2, case No. 69, p. 133); *United States of America v. Republic of China* (1950) (*International Law Reports, 1950* (London), vol. 17, case No. 43, p. 168); *The "Hai Hsuan"*—*United States of America v. Yong Soon Fe and another* (1950) (*ibid.*, case No. 44, p. 170); *Stato di Grecia v. Di Capone* (1926) (*Rivista di diritto internazionale* (Rome), series III, vol. VI (1927), p. 103); *Pauer v. Hungarian People's Republic* (1956) (*International Law Reports, 1957* (London), vol. 24 (1961), p. 211); *Alfred Dunhill of London, Inc. v. Republic of Cuba* (1976) (*International Legal Materials* (Washington, D.C.), vol. XV, No. 4 (July 1976), p. 735).

<sup>67</sup> The practice of some States appears to support the view that semi-sovereign States or even colonial dependencies are treated within the same constitutional units as foreign sovereign States. British courts, for instance, have consistently declined jurisdiction in actions against member States within the Commonwealth and semi-sovereign States dependent on the United Kingdom. Thus, the Maharaja of Baroda was regarded as "a sovereign prince over whom British courts have no jurisdiction": *Gaekwar of Baroda State Railways v. Hafiz Habib-ul-Haq* (1938) (*Annual Digest . . . , 1938-1940* (London), vol. 9, case

(Continued on next page.)

States regardless of their form of government, whether a kingdom, empire or republic, a federal union, a confederation of States or otherwise.<sup>68</sup>

(b) *Proceedings against the central Government or head of a foreign State*

30. A State need not be expressly named as party to a litigation to be directly impleaded. For instance, an action against the Government of a State clearly impleads the State itself as, for all practical purposes, the central Government is identified or identifiable with it. A State is generally represented by the Government in most if not all of its international relations and transactions. The central Government is therefore the State itself, and a proceeding against the Government *eo nomine* is not distinguishable from a direct action against the State.<sup>69</sup> State practice has long recognized the practical effect of a suit against a foreign Government as identical with a proceeding against the State.<sup>70</sup>

(Footnote 67 continued.)

No. 78, p. 233). United States courts have adopted the same view with regard to their own dependencies: *Kawananakoa v. Polyblank* (1907) (*United States Reports*, vol. 205 (1921), p. 349), wherein the territory of Hawaii was granted sovereign immunity; and also, by virtue of their federal Constitution, with respect to member States of the Union: *Principality of Monaco v. Mississippi* (1934) (*Annual Digest . . . , 1933-1934* (London), vol. 7, case No. 61, p. 166; cf. Hackworth (*op. cit.*), vol. II, p. 402). French courts have similarly upheld immunity in cases concerning semi-sovereign States and member States within the French Union: *Bey of Tunis et consorts v. Ahmed-ben-Aïad* (1893) (*Dalloz, Recueil périodique et critique de jurisprudence, 1894* (Paris), part 2, p. 421); and other cases concerning the "Gouvernement chérifien", for instance, *Laurans v. Gouvernement impérial chérifien et Société marseillaise de crédit* (1934) (*Revue critique de droit international* (Darras) (Paris), vol. 30, No. 4 (October-December 1935), p. 795, and a note by Mme S. Basdevant-Bastid, pp. 796 et seq.). See also *Duff Development Company Ltd. v. Government of Kelantan and another* (1924) (United Kingdom, *The Law Reports, House of Lords, Judicial Committee of the Privy Council, 1924*, p. 797).

<sup>68</sup> See, for instance, *Dralle v. Republic of Czechoslovakia* (1950) (*International Law Reports, 1950* (London), vol. 17, case No. 41, p. 155); *Etat espagnol v. Canal* (1951) (Clunet, *Journal du droit international* (Paris), 79th year, No. 1 (January-March 1952), p. 220); *Patterson-MacDonald Shipbuilding Co., McLean v. Commonwealth of Australia* (1923) (United States of America, *The Federal Reporter*, vol. 293 (1924), p. 192); *De Froe v. The Russian State, now styled "The Union of Soviet Socialist Republics"* (1932) (*Annual Digest . . . , 1931-1932* (London), vol. 6, case No. 87, p. 170); *Irish Free State v. Guaranty Safe Deposit Company* (1927) (*Annual Digest . . . , 1925-1926* (London), vol. 3, case No. 77, p. 100); *Kingdom of Norway v. Federal Sugar Refining Co.* (1923) (United States of America, *The Federal Reporter*, vol. 286 (1923), p. 188); *Iptrade International S.A. v. Federal Republic of Nigeria* (1978) (*id.*, *Federal Supplement*, vol. 465 (1979), p. 824); *40 D 6262 Realty Corporation and 40 E 6262 Realty Corporation v. United Arab Emigrates Government* (1978) (*ibid.*, vol. 447 (1978), p. 710); *Kahan v. Pakistan Federation* (1951) (United Kingdom, *The Law Reports, King's Bench Division, 1951*, vol. II, p. 1003); *Venne v. Democratic Republic of the Congo* (1969) (Canada, *The Dominion Law Reports, Third series*, vol. 5, p. 128).

<sup>69</sup> See, for example, *Lakhowsky v. Swiss Federal Government and Colonel de Reynier* (1921) (*Annual Digest . . . , 1919-1922* (London), vol. 1, case No. 83, p. 122); *U Kyaw Din v. His Britannic Majesty's Government of the United Kingdom and the Union of Burma* (1948) (*Annual Digest . . . , 1948* (London), vol. 15, case No. 42, p. 137); *Etienne v. Government of the Netherlands* (1947) (*Annual Digest . . . , 1947* (London), vol. 14, case No. 30, p. 83).

<sup>70</sup> Sovereign immunity has sometimes been accorded to colonial dependencies of foreign States on the ground that the actions in effect

31. A foreign sovereign or a head of a foreign State is also entitled to State immunity on the ground that, like the central Government, the crown, the reigning monarch, the sovereign head of State or indeed a head of State is covered by the cloak of State immunity. In point of fact, it is not accurate to state that in some countries the practice of allowing immunities in favour of foreign sovereigns or foreign potentates had developed well before that in respect of a foreign State or Government.<sup>71</sup> State immunity, as it is understood today, may be said in some jurisdictions to have been an extension of sovereign immunity. States have come to be identified with their reigning sovereigns, who were in their own right entitled to immunity; or to put it in reverse, the sovereign heads of State have been identified with the States they represent.<sup>72</sup>

(c) *Proceedings against political subdivisions of a foreign State*

(i) *Absence of uniform State practice*

32. It is important to note that there is neither uniformity nor consistency in the practice of States on the precise legal status of political subdivisions of a foreign State before national authority. On the whole, State practice seems to suggest a trend in favour of local jurisdiction. Political subdivisions of a foreign State, such as member States of a federal union, and part-sovereign States, such as protected States which lack full external sovereignty, are apparently in danger of not being clothed with State immunity, being neither sovereign States nor one of the recognized agencies of the central Government. An action against a political subdivision of a foreign State is therefore not automatically regarded as an action against the State itself. Such action does not necessarily implead the foreign State of which the political subdivision forms part. Such autonomous entities, lacking international personality and external sovereignty, and not being identified with the federal union or the federation, may be

impleaded the foreign Governments, States being identifiable with their Governments. See, for instance, *The "Martin Behrman"—Isbrandtsen Co. v. Netherlands East Indies Government* (1947) (*Annual Digest . . . , 1947* (London), vol. 14, case No. 26, p. 75); *Van Heyningen v. Netherlands Indies Government* (1948) (*Annual Digest . . . , 1948* (London), vol. 15, case No. 43, p. 138).

<sup>71</sup> See, for instance, Lord Campbell in *Wadsworth v. Queen of Spain and De Haber v. Queen of Portugal* (1851) (United Kingdom, *Queen's Bench Reports*, vol. XVII (1855), p. 171, p. 206; cf. *Hullett v. King of Spain* (1828) (R. Bligh, *New Reports of Cases Heard in the House of Lords* (London), vol. II (1828), p. 31); and *Duke of Brunswick v. King of Hanover* (1844) (C. Clark and W. Finnelly, *House of Lords Cases*, vol. II (1848-1850) (London), p. 1); *Mighell v. Sultan of Johore* (1893) (United Kingdom, *The Law Reports, Queen's Bench Division, 1894*, vol. I, p. 149).

<sup>72</sup> Common law judges are inclined to refer to foreign States as foreign sovereigns for purposes of State immunities. See for instance, Lord Justice Jenkins in *Kahan v. Pakistan Federation* (1951) (see footnote 68 above); Lord Denning in *Rahimtoola v. Nizam of Hyderabad* (1957) (*International Law Reports, 1957* (London), vol. 24 (1961), p. 175). See also article 1, para (a) of part I of the Harvard Draft Convention Prepared for the Codification of International Law under the Auspices of the Harvard Law School, in *Supplement to The American Journal of International Law* (Washington, D.C.), vol. 26, No. 3 (July 1932), p. 475.

proceeded against in their own name without implicating the foreign State concerned.

(ii) *Actions not impleading a sovereign State*

33. A judgement of the French Cour de cassation in 1933, in a case concerning the state of Ceará of the Republic of Brazil, is illustrative of the general attitude of municipal courts in regard to autonomous entities such as political subdivisions of a foreign State.<sup>73</sup> The practice of American, French, Italian and Belgian courts generally supports the view that such political subdivisions are subject to local jurisdiction for lack of external sovereignty and international personality, being distinguishable from the central Government.<sup>74</sup> It should be observed, on the other hand, that on occasions which are not infrequent, political subdivisions of a State or even colonial dependencies are treated, as a mark of courtesy, with a privileged status within the same federal union by fictitiously assimilating the position of the domestic entities to that of a foreign sovereign State.<sup>75</sup>

<sup>73</sup> *Etat de Ceará v. Dorr et autres* (1932) (Daloz, *Recueil périodique et critique de jurisprudence*, 1933 (Paris), part 1, p. 196). The Court said:

“Whereas this rule [of incompetence] is to be applied only when it is invoked by an entity which shows itself to have a personality of its own in its relations with other countries, considered from the point of view of public international law; whereas such is not the case of the state of Ceará, which, according to the provisions of the Brazilian Constitution, legitimately relied upon by the lower courts, and whatever its internal status in the sovereign confederation of the United States of Brazil of which it is a part, and is deprived of diplomatic representation abroad, does not enjoy from the point of view of international political relations a personality of its own . . .” (*ibid.*, p. 197).

<sup>74</sup> For the practice of the United States of America, see, for instance, *Molina v. Comisión Reguladora del Mercado de Henequén* (1918) (Hackworth (*op. cit.*), vol. II, pp. 402–403), where Yucatán, a member State of the United States of Mexico, was held amenable to the jurisdiction of the United States courts; *Schneider v. City of Rome* (1948) (*Annual Digest . . .*, 1948 (London), vol. 15, case No. 40, p. 131), where jurisdiction was assumed against the defendant, a political subdivision of the Italian Government exercising substantial governmental powers. See, however, *Sullivan v. State of São Paulo* (1941) (*Annual Digest . . .*, 1941–1942 (London), vol. 10, case No. 50, p. 178), where the State Department had recognized the claim of immunity.

For France, see, for instance, *Ville de Genève v. Consorts de Civry* (1894), (Sirey, *Recueil général des lois et des arrêts*, 1896 (Paris), part 1, p. 225); *Crédit foncier d'Algérie et de Tunisie v. Restrepo et département d'Antioquia* (Clunet, *Journal du droit international*, 50th year (January–February 1923), p. 857); *Dumont v. State of Amazonas* (1948) (*Annual Digest . . .*, 1948 (London), vol. 15, case No. 44, p. 140).

For Italy, see, for instance, *Somigli v. Etat de São Paulo du Brésil* (1910) (Darras, *Revue de droit international privé et de droit pénal international* (Paris), vol. VI, p. 527), where São Paulo was held amenable to Italian jurisdiction in respect of a contract to promote immigration to Brazil.

For Belgium, see, for instance, *Feldman v. Etat de Bahia* (1907) (*Pasicrisie belge 1908* (Brussels), vol. II, p. 55 (see also *Supplement to The American Journal of International Law*, vol. 26, No. 3 (July 1932), p. 484)), where Bahia was denied immunity although under the Brazilian Constitution it was regarded as a sovereign State.

<sup>75</sup> See, for instance, *Kawanakao v. Polybank* (1907) (see footnote 67 above), where the territory of Hawaii was considered to be sovereign for the purpose of State immunity. The Court said:

“The doctrine [of sovereign immunity] is not confined to powers that are sovereign in the full sense of judicial theory, but normally is

(iii) *Actions impleading a foreign State*

34. It is not difficult to envisage circumstances in which political subdivisions of a foreign State may in fact be exercising the sovereign authority assigned to them by the federal union, and actions may be brought against them for acts performed by them on behalf of the foreign State. Such proceedings could be regarded as in effect impleading a foreign State. There are cases where, dictated by expediency or otherwise,<sup>76</sup> the courts have refrained from entertaining suits against such autonomous entities, holding them to be an integral part of the foreign Government.<sup>77</sup>

35. Whatever the status of political subdivisions of a foreign State, there is nothing to preclude the possibility of such autonomous entities being constituted, or acting as organs of the central Government, or as State agencies performing sovereign acts of the foreign State.<sup>78</sup> Despite

extended to those that in actual administration originate and change at their will the law of contract and property, from which persons within the jurisdiction derive their rights.” (*Op. cit.*, p. 349.)

See also a series of cases concerning the Philippine Islands: *Bradford v. Chase National City Bank of New York* (1938) (*Annual Digest . . .*, 1938–1940 (London), vol. 9, case No. 17, p. 35). See also *Hans v. Louisiana* (1890) (*United States Reports*, vol. 134 (1910), p. 1), *South Dakota v. North Carolina* (1904) (*ibid.*, vol. 192, p. 286); *United States v. North Carolina* (1890) (*ibid.*, vol. 136, p. 211); *Rhode Island v. Massachusetts* (1846) (B.C. Howard, *Reports of Cases argued and adjudged in the Supreme Court of the United States*, 1846, 2nd ed., vol. IV (1909), p. 591); and cases cited above in footnotes 67 and 69. See, however, *Commonwealth of Australia v. New South Wales* (1923) (*Annual Digest . . .*, 1923–1924 (London), vol. 2, case No. 67, p. 131):

“The appellation ‘sovereign State’ as applied to the construction of the Commonwealth Constitution is entirely out of place, and worse than unmeaning.”

<sup>76</sup> For instance, in the case *Sullivan v. State of São Paulo* (1941) (see footnote 74 above), Judge Clark suggested that immunity could be grounded on the analogy with member States within the United States; Judge Learned Hand expressed his doubts whether every political subdivision of a foreign State was immune which exercised substantial governmental power. See also *Yale Law Journal* (New Haven, Conn.), vol. 50, No. 6 (April 1941), pp. 1088 *et seq.*; *Cornell Law Quarterly Review* (Ithaca, N.Y.), vol. 26 (1940–1941), pp. 72 *et seq.*; *Harvard Law Review* (Cambridge, Mass.), vol. LV, No. 1 (November 1941), p. 149; *Michigan Law Review* (Ann Arbor, Mich.), vol. 40, No. 6 (April 1942), pp. 911 *et seq.*; *Southern California Law Review* (Los Angeles, Calif.), vol. 15 (1941–1942), p. 258. This was the most commented case of that time.

<sup>77</sup> In *Van Heyningen v. Netherlands Indies Government* (1948) (see footnote 70 above), the Supreme Court of Queensland (Australia) granted immunity to the Netherlands Indies Government. Judge Philip said:

“In my view, an action cannot be brought in our courts against a part of a foreign sovereign State. Where a foreign sovereign State sets up as an organ of its Government a governmental control of part of its territory which it creates into a legal entity, it seems to me that that legal entity cannot be sued here, because that would mean that the authority and territory of a foreign sovereign would be subjected in the ultimate result to the jurisdiction and execution of this court.” (*Op. cit.*, p. 140.)

<sup>78</sup> This possibility was pointed out by Pillet, commenting on a French case denying immunity, *Ville de Genève v. Consorts de Civry* (1894) (Sirey, *Recueil . . .* 1896 (see footnote 74 above), pp. 225 *et seq.*). See also *Rousse v. Maber v. Banque d'Espagne* (1937) (Sirey, *Recueil général des lois et des arrêts*, 1938 (Paris), part 2, p. 17), where the Court of Appeal of Poitiers envisaged the same possibility; Rousseau, in his note (*ibid.*, pp. 17–23), thought that provincial autonomies such as the Basque Government might at the same time be “an executive organ

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the rarity of such cases, it should be permissive, and to some extent obligatory, for States to withhold jurisdiction in actions against foreign State agencies which happen to be political subdivisions forming part of the central Government. A constituent State of a federal union normally enjoys no immunity as a sovereign State, unless it can establish that the action brought against it in fact impleads the foreign State. This uncertain status of political subdivisions of States is further preserved by regional agreements such as the 1972 European Convention on State Immunity.<sup>79</sup>

(d) *Proceedings against organs, agencies or instrumentalities of a foreign State*

36. Proceedings against organs, agencies or instrumentalities of a foreign State may, as indeed they often do, implead the foreign State concerned, especially in regard to the activities performed by them in the exercise of the sovereign authority of the State. Organs, agencies or instrumentalities of a foreign State may vary in their formation, constituent components, functions and activities, depending on the political, economic and social structures of the State and their ideological considerations. It is not possible to examine every variety or variation of the organs, agencies and instrumentalities of a State. It is nevertheless useful to illustrate some of the more usual denominations and practical examples which, for convenience's sake, may be grouped under two headings: subsidiary organs and departments of government, and agencies or instrumentalities of State.

(i) *Subsidiary organs and departments of government*

37. Just as the State is represented by its Government, which is identified with it for most practical purposes, the Government is often composed of subsidiary organs and departments or ministries to act on its behalf. Such organs of State and departments of government can be and often are constituted as separate legal entities within the internal legal system of the State. Lacking as they do international legal personalities as a sovereign entity, they could nevertheless represent the State of act on behalf of the central Government of the State, which they in fact compose as integral parts. Such State organs or departments of government comprise the various ministries of a Government,<sup>80</sup> including the armed forces,<sup>81</sup> the subordinate divisions or departments within each ministry, such as

(Footnote 78 continued.)

of a decentralized administrative unit". Compare the English Court of Appeal in *Kahan v. Pakistan Federation* (see footnote 68 above). See also *Huttinger v. Upper Congo-Great African Lakes Railways Co. et al.* (1934) (*Annual Digest . . . 1933-1934* (London), vol. 7, case No. 65, pp. 172-173), and the cases cited in footnote 70 above.

<sup>79</sup> Council of Europe, *European Convention on State Immunity*, European Treaty Series No. 74 (Strasbourg, 1972). The Convention came into force on 11 June 1976, as between Austria, Belgium and Cyprus. Article 28 (1) confirms non-enjoyment of immunity by the Constituent States of a Federal State, but paragraph (2) permits the Federal State to make a declaration that its constituent States may invoke the provisions of the Convention.

<sup>80</sup> See, for instance, *Bainbridge v. The Postmaster-General* (1905) (United Kingdom, *The Law Reports, King's Bench Division*, 1906, vol. 1, p. 178); *Henon v. Egyptian Government and British Admiralty*

embassies,<sup>82</sup> special missions<sup>83</sup> and consular posts,<sup>84</sup> and offices, commissions, or councils<sup>85</sup> which need not form part of any ministry but are themselves autonomous State organs answerable to the central Government or to one of its departments, or are administered by it. Other principal organs of the State such as the legislative and the judiciary of a foreign State would be equally identifiable with the State itself if an action is instituted against either of them in their sovereign capacity.

(ii) *Agencies or instrumentalities of State*

38. There is in practice no hard and fast line to be drawn between agencies or instrumentalities of State and State organs and departments of Government under the previous heading. The expression "agencies or instrumentalities" indicates the interchangeability of the two terms.<sup>86</sup> Proceedings against an agency of a foreign Government<sup>87</sup>

(1947) (*Annual Digest . . . 1947* (London), vol. 14, case No. 28, p. 78); *Triandafilou v. Ministère public* (1942) (*The American Journal of International Law* (Washington, D.C.), vol. 39, No. 2 (April 1945), p. 345); *Piascick v. British Ministry of War Transport* (1943) (*Annual Digest . . . 1943-1945* (London), vol. 12, case No. 22, p. 87); and *Turkish Purchases Commission case* (1920) (*Annual Digest . . . 1919-1922* (London), vol. 1, case No. 77, p. 114).

<sup>81</sup> See, for example, in *The Schooner "Exchange" v. McFaddon* (1812) the opinion of Chief Justice Marshall (W. Cranch, *Reports of Cases argued and adjudged in the Supreme Court of the United States* (New York, 1911), vol. VII, 3rd ed., pp. 135-137). See also various "Status of Forces Agreements" and "Foreign Visiting Forces Acts".

<sup>82</sup> Embassies are subsidiary organs of the State, being part of the Ministry of Foreign Affairs or the Foreign Office of the sending State. Their status is governed by the 1961 Vienna Convention on Diplomatic Relations. (United Nations, *Treaty Series*, vol. 500, p. 95).

<sup>83</sup> Special missions are also covered by State immunity as contained in the 1969 Convention on Special Missions (General Assembly resolution 2530 (XXIV) of 8 December 1969, annex). See also the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (*Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207).

<sup>84</sup> See the 1963 Vienna Convention on Consular Relations (United Nations, *Treaty Series*, vol. 596, p. 261).

<sup>85</sup> See, for instance, *Mackenzie-Kennedy v. Air Council* (1927) (United Kingdom, *The Law Reports, King's Bench Division*, 1927, vol. 11, p. 517); *Graham and others v. His Majesty's Commissioners of Public Works and Buildings* (1901) (*ibid.*, 1901, vol. II, p. 781); *Société Viajes v. Office national du tourisme espagnol* (1936) (*Annual Digest . . . 1935-1937* (London), vol. 8, case No. 87, p. 227); *Telkes v. Hungarian National Museum* (1942), No. 11 (*Annual Digest . . . 1941-1942* (London), vol. 10, case No. 169, p. 576).

<sup>86</sup> See, for instance, the United States of America's Foreign Sovereign Immunities Act of 1976 (*United States Code, 1976 Edition*, vol. 8, title 28, chap. 97), which, in section 1603 (b), defines "agency or instrumentality of a foreign state" as an entity "(1) which is a separate legal person, (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title nor created under the laws of any third country."

<sup>87</sup> See, for example, *Krajina v. The Tass Agency and another* (1949) (*Annual Digest . . . 1949* (London), vol. 16, case No. 37, p. 129) compare *Compañía Mercantil Argentina v. United States Shipping Board* (1924) (*Annual Digest . . . 1923-1924* (London), vol. 2, case

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or an instrumentality of a foreign State, whether or not incorporated as a separate entity,<sup>88</sup> could be considered as impleading the foreign State, particularly when the cause of action relates to the activities conducted by the agency or instrumentality of State in the exercise of the sovereign authority of that State.<sup>89</sup>

(e) *Proceedings against State agents or representatives of a foreign Government*

39. It is not likely that the types of beneficiaries or categories of recipients of State immunities so far listed in this study are exhaustive or in any way comprehensive of the growing list of persons and institutions to which State immunity applies. Another important group of persons who, for want of a better terminology, will be called agents of State or representatives of Government should also be mentioned. Proceedings against such persons in their official or representative capacity, such as personal sovereigns, ambassadors and other diplomatic agents, consular officers and other representatives of Government, may be said to implead the foreign State they represent, particularly in respect of an act performed by such representatives on behalf of the foreign Government in the exercise of their official functions.<sup>90</sup>

(Footnote 87 continued.)

No. 73, p. 138), and *Baccus S.R.L. v. Servicio Nacional del Trigo* (1956) (United Kingdom, *The Law Reports, Queen's Bench Division, 1957*, vol. 1, p. 438), in which Lord Justice Jenkin observed:

"Whether a particular ministry or department or instrument, call it what you will, is to be a corporate body or an unincorporated body seems to me to be purely a matter of governmental machinery." (*Ibid.*, p. 466)

<sup>88</sup> For a different view, see the opinions of Lord Justices Cohen and Tucker in *Krajina v. The Tass Agency* (1949) (see footnote 87 above), and in *Baccus S.R.L. v. Servicio Nacional del Trigo* (1956) (see footnote 87 above), where Lord Justice Parker said:

"I see no ground for thinking that the mere constitution of a body as a legal personality with the right to make contracts and to sue and be sued is wholly inconsistent with it remaining and being a department of State." (*Op. cit.*, p. 472.)

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

"Instrumentalities like the national banks or the federal reserve banks, in which there are private interests, are not departments of the Government. They are private corporations in which the Government has an interest." (*Ibid.*, pp. 425-426) See, however, the certificate of the United States Ambassador regarding the status of the U.S. Shipping Board in the case *Compañía Mercantil Argentina* (1924) (cited in footnote 87 above).

<sup>89</sup> See *Dollfus Mieg et Cie v. Bank of England* (1950) and *United States of America and Republic of France v. Dollfus Mieg et Cie and Bank of England—Gold bars case* (1952) (*Annual Digest . . . , 1949* (London), vol. 16 (1955), case No. 36, p. 103), and *Monopole des tabacs de Turquie et al. v. Régie co-intéressée des tabacs de Turquie* (1930) (*Annual Digest . . . , 1929-1930* (London), vol. 5 (1935), case No. 79, p. 123).

<sup>90</sup> The fact that the immunities enjoyed by representatives of Government, whatever their specialized qualifications as diplomatic or consular officials or otherwise, are in the ultimate analysis State immunities has never been doubted. Rather, it has been unduly overlooked. Recently, however, evidence of their connection is reflected in some of the replies and information furnished by Governments. The Jamaican legislation and Moroccan decision on diplomatic immunities and Mauritian law on consular immunities are outstanding reminders of the closeness of identities between State immunities and other types of immunities traceable to the State.

(i) *Immunities ratione materiae*

40. Actions against such representatives or agents of a foreign Government in respect of their official acts are essentially proceedings against the State they represent. The foreign State, acting through its representatives, is immune *ratione materiae*. Such immunities characterized as *ratione materiae* are accorded for the benefit of the State and are not in any way affected by the change or termination of the official functions of the representatives concerned. Thus, no action will be successfully brought against a former representative of a foreign State in respect of an act performed by him in his official capacity. State immunity survives the termination of the mission or the office of the representative concerned. This is so because the immunity in question not only belongs to the State but is also based on the sovereign nature or official character of the activities, being an immunity *ratione materiae*.<sup>91</sup>

(ii) *Immunities ratione personae*

41. Two types of beneficiaries of the State immunities enjoyed by representatives of Government and State agents deserve special attention, namely, personal sovereigns and ambassadors and diplomatic agents.<sup>92</sup> Apart from immunities *ratione materiae* by reason of the activities or the official functions of the representatives, personal sovereigns and ambassadors are entitled, to some extent in their own right, to immunities *ratione personae* in respect of their persons or of activities that are personal to them and unconnected with their official functions. The immunities *ratione personae*, unlike immunities *ratione materiae*, which continue to survive after the termination of the official functions, will no longer be operative once the public offices are vacated or terminated. All activities of the sovereigns and ambassadors which do not relate to their official functions are subject to review by the local jurisdiction, once the sovereigns or ambassadors have relinquished their posts.<sup>93</sup> Indeed, even such immunities

<sup>91</sup> Immunities *ratione materiae* may outlive the tenure of office of the representatives of a foreign State. They are nevertheless subject to the qualifications and exceptions to which State immunities are ordinarily subject in the practice of States. See, for instance, *Carlo d'Austria v. Nobili* (1921) (*Annual Digest . . . , 1919-1922* (London), vol. 1, case No. 90, p. 136) and *La Mercantile v. Regno de Grecia* (1955) (*International Law Reports, 1955* (London), vol. 22, p. 240), where the contract concluded by the Greek Ambassador for the delivery of raw materials was imputable to the State, and therefore subject to the local jurisdiction.

<sup>92</sup> Historically speaking, immunities of sovereigns and ambassadors have developed even prior to State immunities. They are in State practice regulated by different sets of principles of international law. It is submitted, in strict theory, that all jurisdictional immunities are traceable to the basic norm of State sovereignty. See S. Sucharitkul, *State Immunities and Trading Activities in International Law* (London, Stevens, 1959), chaps. 1 and 2; E. Suy, "Les bénéficiaires de l'immunité de l'Etat", *L'immunité de juridiction et d'exécution des Etats* (Brussels, Actes de colloques des Centres de droit international de l'Institut de Sociologie de l'Université de Bruxelles, 1971), pp. 257 *et seq.*

<sup>93</sup> Thus in *The Empire v. Chang and others* (1921) (*Annual Digest . . . , 1919-1922* (London), vol. 1, case No. 205, p. 288), the Supreme Court of Japan confirmed the conviction of former employees of the Chinese Legation in respect of offences committed during their

inure not for the personal benefit of sovereigns and ambassadors but for the benefit of the States they represent, to enable them to fulfil their representative functions or for the effective performance of their official duties.<sup>94</sup> This proposition is further reflected, in the case of diplomatic agents, in the rule that diplomatic immunities can only be waived by an authorized representative of the sending State and with proper governmental authorization.<sup>95</sup>

(f) *Proceedings affecting State property or property in the possession or control of a foreign State*

42. Without closing the list of beneficiaries of State immunities, it is necessary to note that actions involving seizure or attachment of public properties or properties belonging to a foreign State or in its possession or control have been considered, in the practice of States, to be proceedings which implead the foreign sovereign or seek to compel the foreign State to submit to the local jurisdiction. Such proceedings include not only actions *in rem* or in admiralty against State-owned or State-operated vessels for defence purposes and other peaceful uses,<sup>96</sup> but

(Footnote 93 continued.)

employment as attendants there, but unconnected with their official duties. See also *Léon v. Díaz* (1892) (Clunet, *Journal du droit international privé* (Paris), vol. 19, p. 1137), concerning a former Minister of Uruguay in France, and *Laperdrix et Penquer v. Kouzouboff et Belin* (1926) (*ibid.*, vol. 53 (January–February 1926), pp. 64–65), where an ex-secretary of the United States Embassy was ordered to pay an indemnity for injury in a car accident.

<sup>94</sup> See, for example, the judgment of the Court of Geneva in the case *V... et Dicker v. D...* (1927) (*ibid.*, vol. 54 (January–February 1927), p. 1179), where an action by the mother and newly-born child was allowed to proceed against an ex-diplomat. Commenting on the decision, Noël-Henry said:

“the real basis of immunity is the necessity of the function. Consequently, the principle is that the diplomat is covered by immunity only when he is fulfilling his functions... When he has relinquished his post, he can be sued, except in connexion with acts performed by him in the fulfilment of his functions; moreover, it is not so much the immunity of the diplomat that is involved as the immunity of the Government which he represents.” (*Ibid.*, p. 1184.)

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

<sup>95</sup> See, for instance, *Dessus v. Ricoy* (1907) (Clunet, *Journal du droit international privé* (Paris), vol. 34 (1907), p. 1086), where the Court said:

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

See also *Reichenbach et Cie v. Mme Ricoy* (1906) (*ibid.*, p. 111; *Cotenet et Cie v. dame Raffalovich* (1908) (*ibid.*, vol. 36 (1909), p. 150); the *Grey case* (*ibid.*, vol. 80 (1953), p. 887); and *Procureur général près de la Cour de cassation v. S. E. le Docteur Franco-Franco* (1954) (*ibid.*, vol. 81, No. 1 (1954), p. 786). See also the provisions of the 1961 Vienna Convention on Diplomatic Relations (see footnote 82 above).

<sup>96</sup> See in this connection the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (Brussels, 1926) (League of Nations, *Treaty Series*, vol. CLXXVI, p. 199); the Convention on the Territorial Sea and the

also measures of prejudgement attachment or seizure (*saisie conservatoire*) as well as execution or measures in satisfaction of judgement (*saisie exécutoire*). The post-judgement or execution order will not be considered in the present part of the report, since it concerns not only immunity from jurisdiction but, beyond that, also immunity from execution, a further stage in the process of jurisdictional immunities.<sup>97</sup>

43. As has been seen, the law of State immunities has developed in the practice of States, not from proceedings directly instituted against foreign States or Governments in their name, but more indirectly through a long line of actions for the seizure or attachment of vessels for maritime liens or collision damages or salvage services.<sup>98</sup> State practice has been rich in instances of State immunities in respect of their men-of-war,<sup>99</sup> visiting forces,<sup>100</sup> armaments and weapons,<sup>101</sup> and aircraft.<sup>102</sup> The criterion for the foundation of State immunity is not limited to the claim of title or ownership by the foreign Government,<sup>103</sup> but clearly encompasses cases of properties in actual possession or control of a foreign State.<sup>104</sup> The Court should not so exercise its jurisdiction as to put a foreign sovereign to election between being deprived of property, or else submitting to the jurisdiction of the Court.<sup>105</sup>

Contiguous Zone (Geneva, 1958) (United Nations, *Treaty Series*, vol. 516, p. 205), the Convention on the High Seas (Geneva, 1958) (*ibid.*, vol. 450, p. 11) and the draft convention on the law of the sea (A/CONF.62/L.78 and Corr.3 and 8).

<sup>97</sup> Immunities from execution will form the subject of another study which the Special Rapporteur expects to submit later.

<sup>98</sup> See, for example, *The Schooner “Exchange” v. McFaddon* (1812) (see footnote 81 above); *The “Prins Frederik”* (1820) (J. Dodson, *Reports of Cases argued and determined in the High Court of Admiralty* (1815–1822) (London), vol. II (1828), p. 451); *The “Charkieh”* (1873) (United Kingdom, *The Law Reports, High Court of Admiralty and Ecclesiastical Courts*, vol. IV (1875), p. 97).

<sup>99</sup> See, for example, *The “Constitution”* (1879) (United Kingdom, *The Law Reports, Probate Division*, vol. IV, p. 39); *The “Ville de Victoria”* and *The “Sultan”* (1887) (cf. G. Gidel, *Le droit international public de la mer* (Paris, Sirey, 1932), vol. II, p. 303); *“El Presidente Pinto”* (1891) and *“Assari Tewfik”* (1901) (cf. C. Baldoni, “Les navires de guerre dans les eaux territoriales étrangères”, *Recueil des cours de l’Académie de droit international de la Haye*, 1938—III (Paris, Sirey, 1938), pp. 247 et seq.

<sup>100</sup> See, for example, *The Schooner “Exchange” case* (1812) and the Status of Forces Agreements, mentioned in footnote 81 above.

<sup>101</sup> See, for example, *Vavasseur v. Krupp* (1878) (United Kingdom, *The Law Reports, Chancery Division*, vol. IX (1878), p. 351).

<sup>102</sup> See, for example, the case *Hong Kong Aircraft—Civil Air Transport Inc. v. Central Air Transport Corp.* (1953) (United Kingdom, *The Law Reports, House of Lords, Judicial Committee of the Privy Council*, 1953, p. 70).

<sup>103</sup> See, for example, *Juan Ysmael & Co. v. Government of the Republic of Indonesia* (1954) (*International Law Reports*, 1954 (London), vol. 21 (1957), p. 95), and also cases involving bank accounts of a foreign Government, such as *Trendtex* (1977) (see footnote 59 above).

<sup>104</sup> See, for example, *The “Philippine Admiral”* (1975) (*International Legal Materials* (Washington, D.C.), vol. XV, No. 1 (January 1976), p. 133).

<sup>105</sup> *Dollfus Mieg et Cie v. Bank of England* (1950) (see footnote 89 above).

### C. Text of article 7

44. Article 7 could read as follows:

**Article 7. Rules of competence and jurisdictional immunity**

**1. A State shall give effect to State immunity under article 6 by refraining from submitting another State to its jurisdiction, notwithstanding its authority under its rules of competence to conduct the proceedings in a given case.**

ALTERNATIVE A

**2. A legal proceeding is considered to be one against another State, whether or not named as a party, so long as the proceeding in fact impleads that other State.**

ALTERNATIVE B

**2. In particular, a State shall not allow a legal action to proceed against another State, or against any of its organs, agencies or instrumentalities acting as a sovereign authority, or against one of its representatives in respect of acts performed by them in their official functions, or permit a proceeding which seeks to deprive another State of its property or of the use of property in its possession or control.**

ARTICLE 8 (Consent of State)

**A. The relevance of consent and its consequences**

45. In part II of the draft articles, on general principles, article 6 enunciates the rule of State immunity, while article 7 sets out the contents of its correlative, or the corresponding obligation of restraint on the part of another State endowed with jurisdiction under its own internal law and in accordance with its own rules of competence as generally recognized and internationally accepted. Following from these two propositions, a third logical element in the general concept of State immunity to be examined is the notion of "consent".<sup>106</sup> Consent of the State against which jurisdiction is to be exercised or is being exercised, or the lack of such consent or absence thereof, is vitally relevant, if not indeed determinative in the consideration of any questions relating to jurisdictional immunity.

I. ABSENCE OF CONSENT AS  
AN ESSENTIAL ELEMENT OF STATE IMMUNITY

46. As has been intimated in article 6 on State immunity and more clearly indicated in article 7 on the obligation to

refrain from submitting another State to its jurisdiction, the absence or lack of consent on the part of the State against which the court of another State has been asked to exercise jurisdiction is presumed. State immunity under Article 6 does not apply if the State in question has consented to the exercise of jurisdiction by the court of another State. There will be no obligation under article 7 on the part of a State in compliance with its rules of competence to refrain from exercising jurisdiction over or against another State which has consented to such exercise. The obligation to refrain from submitting another State to its jurisdiction is not an absolute obligation. It is distinctively qualified by the phrase "without its consent", or is conditional upon the absence or lack of consent on the part of the State against which the exercise of jurisdiction is being sought.

47. Consent, the absence of which has thus become an essential element of State immunity is worthy of the closest attention. The obligation to refrain from exercising jurisdiction against another State or to implead another sovereign government is based on the assertion or presumption that such exercise is *without consent*. Lack of consent appears to be presumed rather than asserted in every case. State immunity applies, on the understanding that the State against which jurisdiction is to be exercised does not consent, or is not willing to submit to the jurisdiction. This unwillingness or absence of consent is generally assumed, unless the contrary is indicated. The court exercising jurisdiction against an absent foreign State cannot and does not generally assume or presume that there is consent or willingness to submit to its jurisdiction. There must be proof or evidence of consent to satisfy the exercise of existing jurisdiction or competence against another State. Any formulation of the doctrine of State immunity or its corollary is incomplete without reference to the notion of consent or rather the lack of consent as a constitutive element of State immunity or the correlative duty to refrain from submitting another State to local jurisdiction.

48. Express reference to absence of consent as a *conditio sine qua non* of the application of State immunity is borne out in the practice of States. Some of the answers to the questionnaire circulated to member States clearly illustrate this link between the absence of consent and the permissible exercise of jurisdiction.<sup>107</sup> The expression "*without consent*" in connection with the obligation to decline the exercise of jurisdiction is sometimes rendered in judicial references as "against the

<sup>107</sup> See, for example, the reply of Trinidad and Tobago (June 1980) to question 1 of the questionnaire addressed to Governments:

"The common law of the Republic of Trinidad and Tobago provides specifically for jurisdictional immunities for foreign States and their property and generally for non-exercise of jurisdiction over foreign States and their property *without their consent*\*. A court seized of any action attempting to implead a foreign sovereign or State would apply the rules of customary international law dealing with the subject." (United Nations, Legislative Series, *Materials on Jurisdictional Immunities of States and their Property* (Sales No. E/F.81.V.10), p. 610.)

<sup>106</sup> The notion of "consent" is also relevant to the theory of State immunity in another connection. The territorial or receiving State is sometimes said to have consented to the presence of friendly foreign forces passing through its territory and to have waived its normal jurisdiction over such forces. See, for example, Chief Justice Marshall in *The Schooner "Exchange" v. McFaddon* (1812) (see footnote 81 above).

will of the sovereign State" or "against the unwilling sovereign".<sup>108</sup>

## 2. CONSENT AS AN ELEMENT PERMITTING EXERCISE OF JURISDICTION

49. If the lack of consent operates as a bar to the exercise of jurisdiction, it is interesting to examine the effect of consent by the State concerned. In strict logic it follows that the existence of consent on the part of the State against which legal proceedings are instituted should operate to remove this significant obstacle to the assumption and exercise of jurisdiction. If absence of consent is viewed as an essential element constitutive of State immunity, or conversely as entailing disability or no-power on the part of an otherwise competent court to exercise its existing jurisdiction, the expression of consent by the State concerned eliminates this impediment to the exercise of jurisdiction. With the consent of the sovereign State, the court of another State is thus enabled or empowered to exercise its jurisdiction by virtue of its general rules of competence, as though the foreign State were an ordinary friendly alien capable of bringing an action and being proceeded against in the ordinary way, without calling into play any doctrine or rule of State or sovereign immunity. Consent amounts therefore to a prior condition permissive of the exercise of normal competence by the territorial authority or local court. It is conceivable that in some instances consent may even give rise to jurisdiction, it is in such circumstances constitutive of competence itself. As such, consent could in some circumstances provide a legal basis or ground or justification or indeed the foundation for jurisdiction, not only an opportunity or facility for the assumption or exercise of existing jurisdiction.<sup>109</sup>

### B. The expression of consent to the exercise of jurisdiction

50. The implication of consent as a legal theory in partial explanation or rationalization of the doctrine of State immunity refers more generally to the consent of the State not to exercise its normal jurisdiction against another State or to waive its otherwise valid jurisdiction over another State without the latter's consent. The notion

of consent therefore comes into play in more ways than one, with particular reference in the first instance to the State consenting to waive its jurisdiction, so that another State is immune from such jurisdiction, and to the instances under consideration, in which the existence of consent to the exercise of jurisdiction by another State precludes the application of the rule of State immunity.

51. In the circumstances under consideration—that is in the context of the State against which legal proceedings have been brought—there appear to be several recognizable methods of expressing or signifying consent. In this particular connection, consent should not be taken for granted, nor readily implied. Any theory of "implied consent" as a possible exception to the general principles of State immunities outlined in this part should be viewed, not as an exception in itself, but rather as an added explanation or justification for an otherwise valid and generally recognized exception. There is therefore no room for implying the consent of an unwilling State which has not expressed its consent in a clear and recognizable manner. Nor is the implication of consent of an involuntary State admissible in this context as an exception to State immunity. The existence or expression or proof of consent of the State in litigation is extinctive of immunity itself and not in any sense an exception thereto. It remains to be seen how such consent would be given or expressed so as to remove the obligation of the court of another State to refrain from the exercise of its jurisdiction against an equally sovereign State.

### 1. CONSENT GIVEN IN WRITING FOR A SPECIFIC CASE

52. An easy and indisputable proof of consent is furnished by the State expressing its consent in writing on an *ad hoc* basis for a specific case before the authority when a dispute has already arisen. A State is always free to communicate the expression of its consent to the exercise of jurisdiction by the court of another State in a legal proceeding against itself or in which it has an interest, by giving evidence of such consent in writing, properly executed by one of its authorized representatives, such as an agent or counsel, or through diplomatic channels or any other generally accepted channels of communication. By the same method, a State could also make known its unwillingness or lack of consent, or give evidence in writing that tends to disprove any allegation or assertion of consent.<sup>110</sup>

### 2. CONSENT GIVEN IN ADVANCE IN A WRITTEN AGREEMENT

53. Consent of State could be given in advance in general, or for one or more categories of disputes or cases. Such expression of consent is binding on the part of the

<sup>108</sup> See, for example, Lord Atkin in *The "Cristina"* (1938) (*Annual Digest . . . 1938-1940* (London), vol. 9, case No. 86, p. 250):

"The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted into our domestic law, which seem to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign, that is, *they will not by their process make him against his will a party to legal proceedings*\* whether the proceedings involve process against his person or seek to recover from him specific damages." (*Ibid.*, p. 252.)

<sup>109</sup> Thus, Article 61 of the Fundamentals of Civil Procedure of the USSR and the Union Republics, approved in the Law of the Union of Soviet Socialist Republics dated 8 December 1961, provides: "The filing of a suit against a foreign State, the collection of a claim against it and the attachment of the property located in the USSR may be permitted *only*\* with the *consent*\* of the competent organs of the State concerned." (United Nations, *Materials on Jurisdictional Immunities . . . (op. cit.)*, p. 40.)

<sup>110</sup> See, for instance, statements submitted in writing to the Court by accredited diplomats in *Krajina v. Tass Agency* (1949); cf. *Compañía Mercantil Argentina v. United States Shipping Board* (1924) and *Baccus S.R.L. v. Servicio Nacional del Trigo* (1956) (cases cited in footnote 87 above).

State giving it in accordance with the manner and circumstances in which consent is given and subject to the limitations prescribed by its expression. The nature and extent of its binding character depend on the party invoking such consent. For instance, if consent is expressed in the provision of a treaty concluded by States, it is certainly binding on the consenting State, and State parties entitled to invoke the provisions of the treaty could avail themselves of the expression of such consent. The law of treaties upholds the validity of the expression of consent to jurisdiction as well as the applicability of other provisions of the same treaty. Consequently, privity of treaty precludes non-parties from the benefit or advantage to be derived from the provisions of the treaty. If, likewise, consent is expressed in a provision of an international agreement concluded by States and international organizations, the permissive effect of such consent is available to all parties including international organizations. On the other hand, the extent to which individuals and corporations non-parties to the treaty or international agreement may successfully invoke one of the provisions of the treaty is either negative or non-existent.

54. Indeed, the practice of States does not go so far as to support the proposition that the court of a State is bound to exercise its existing jurisdiction over or against another sovereign State which has previously expressed its consent to such jurisdiction in the provision of a treaty or an international agreement, or indeed in the express terms of a contract with the individual or corporation concerned. While the State, having given consent in any of these ways, may be bound by its own expression under international law or internal law or by application of a rule of estoppel, the exercise of jurisdiction or the decision to exercise or not to exercise jurisdiction is exclusively within the province and function of the trial court itself. In other words, the rules regarding the expression of consent by the State involved in a litigation are not absolutely binding on the court of another State, which is free to continue to refrain from exercising jurisdiction for reasons it is not obliged to disclose. The court could and must devise its own rules and satisfy its own requirements regarding the manner in which such a consent could be given with desired consequences. The court may refuse to recognize the validity of consent either given in advance and not at the time of the proceeding, not before the competent authority, or not given *in facie curiae*.<sup>111</sup> Care should therefore be taken that the proposition to be formulated in draft article 8 should be discretionary and not mandatory as far as the court is concerned. The court may or may not exercise its jurisdiction. Customary international law or international usage recognizes the exercisability of

jurisdiction by the Court against another State that has expressed its consent in no uncertain terms, but actual exercise of such jurisdiction is exclusively within the discretion or the power of the court, which could require a more rigid rule for the expression of consent.

### 3. CONSENT TO THE JURISDICTION BY CONDUCT OF THE STATE

55. While it is necessary to exclude any implication of consent in this particular connection of non-application of State immunity in the event of consent to submit to the jurisdiction, the expression of consent or its communication in any event must be explicit. Consent could be evidenced by positive conduct of the State; it cannot be presumed to exist by sheer implication, nor by mere silence, acquiescence or inaction on the part of that State. A clear instance of conduct or action amounting to the expression of assent or concurrence or agreement or approval or consent to the exercise of jurisdiction is illustrated by the entry of appearance by or on behalf of the State contesting the case on the merit. Such conduct may be in the form of a State requesting to be joined as party to the litigation, irrespective of the degree of its preparedness or willingness to be bound by the decision or the extent of its prior acceptance of subsequent enforcement measures or execution of judgement.<sup>112</sup> There is clearly an unequivocal evidence of consent to the assumption and exercise of jurisdiction by the court, if and when the State knowingly enters an appearance in answer to a claim of right or to contest a dispute involving the State or over a matter in which it has an interest, and when such entry of appearance is unconditional and unaccompanied by a plea of State immunity, despite the fact that other objections may have been raised against the exercise of jurisdiction in that case on grounds recognized either under the general conflict rules or under the rules of competence of the trial court, other than by reason of jurisdictional immunity.

56. By choosing to become a party to a litigation before the court of another State, a State clearly consents to the exercise of such jurisdiction, regardless of whether it is a plaintiff or a defendant or indeed in an *ex parte* proceeding or an action *in rem* or in a proceeding seeking to attach or seize a property which belongs to it or in which it has an interest, or a property which is in its possession or control. A State does not, however, consent to the exercise of jurisdiction of another State by entering a conditional appearance or by appearing expressly to contest or challenge jurisdiction on the grounds of sovereign immunity or State immunity, although such appearances accompanied by further contentions on the merit to establish its

<sup>111</sup> See, for example, *Duff Development Co. Ltd. v. Government of Kelantan* (1924) (see footnote 67 above, *in fine*): by assenting to the arbitration clause in a deed, or by applying to the courts to set aside the award of the arbitrator, the Government of Kelantan did not submit to the jurisdiction of the High Court in respect of a later proceeding by the company to enforce the award. See also *Kahan v. Pakistan Federation* (1951) (see footnote 68 above, *in fine*) and *Baccus S.R.L. v. Servicio Nacional del Trigo* (1956) (see footnote 87 above).

<sup>112</sup> Although, for practical purposes, F. Laurant in his *Le droit civil international*, (Brussels, Bruylant-Christophe, 1881), vol. III, pp. 80-81, made no distinction between "power to decide" (jurisdiction) and "power to execute" (execution), consent by a State to the exercise of the power to decide by the court of another State cannot be presumed to extend to the exercise of the power to execute or enforce judgement against the State, having consented to the exercise of jurisdiction by appearing before the court without raising a plea of jurisdictional immunity.

immunity could result in the actual exercise of jurisdiction by the court.<sup>113</sup>

57. In point of fact, the expression of consent, either in writing or by conduct, which is the subject of draft article 8 entails practically the same results as voluntary submission to the jurisdiction in draft article 9. The line of distinction between consent and voluntary submission is necessarily a very fine one, and, as such, is not readily discernible, nor indeed clearly appreciable. Voluntary submission could be viewed as a more affirmative method of expressing consent by conduct, since volition is likely to be regarded as a clearer and more explicit expression of assent, or an unhesitating and unequivocal manifestation of willingness and readiness on the part of a free-willing sovereign state to submit to all the consequences of adjudication by the court of another State, up to but not including measures of execution.

### C. Text of article 8

58. Article 8 on consent of State might contain the following provision:

#### *Article 8: Consent of State*

**1. A State shall not exercise jurisdiction against another State without the consent of that other State in accordance with the provisions of the present articles.**

**2. Jurisdiction may be exercised against a State which consents to its exercise.**

**3. A State may give consent to the exercise of jurisdiction by the court of another State under paragraph 2:**

**(a) in writing, expressly for a specific case after a dispute has arisen, or**

**(b) in advance, by an express provision in a treaty or an international agreement or in a written contract in respect of one or more types of cases, or**

**(c) by the State itself, through its authorized representative appearing before the Court in a proceeding to contest a claim on the merit without raising a plea of State immunity.**

<sup>113</sup> There could be no real consent without full knowledge of the right to raise an objection on the ground of State immunity (*Baccus S.R.L. v. Servicio Nacional del Trigo* (1956) (see footnote 87 above)), but see also Earl Jowitt in *Juan Ysmael & Co. v. Government of the Republic of Indonesia* (1954) (see footnote 103 above), where he said *obiter* that a claimant Government:

“... must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective. The court must be satisfied that conflicting rights have to be decided in relation to the foreign government’s claim.” (*Op. cit.*, p. 99.)

Cf. the *Hong Kong Aircraft* case (see footnote 102 above), in which Sir Leslie Gibson of the Supreme Court of Hong Kong did not consider mere claim of ownership to be sufficient (*International Law Reports, 1950* (London), vol. 17, case No. 45, p. 173). Contrast Justice Scrutton in *The “Jupiter”* No. 1 (1924) (United Kingdom, *The Law Reports, Probate Division, 1924*, p. 236), and Lord Radcliffe in the *Gold bars* case, *United States of America and Republic of France v. Dollfus Mieg et Cie and Bank of England* (1952) (*Annual Digest . . . 1949* (London), vol. 16, case No. 36, pp. 176–177).

### ARTICLE 9 (Voluntary submission)

#### A. The concept of voluntary submission

59. The notion of voluntary submission is essentially not dissimilar from an expression of consent to the exercise of jurisdiction by a court of another State. The only slight difference between voluntary submission in this draft article 9 and consent of a State in draft article 8 lies in the emphasis on the initiative taken by the State, which has of its own accord opted or elected to submit to the jurisdiction of another State. The capacity of a State to initiate proceedings in a court of another State is subject to the rules of competence and procedures prevailing in the State of the forum.<sup>114</sup> If a State expressly chooses a forum, the choice is tantamount to voluntary submission. If a State becomes a plaintiff or intervenes in a proceeding before a court of that other State, it has taken a step even slightly beyond mere consent to be sued or to be brought to trial before the court of that other State. The net result of voluntary submission under this article and the expression of consent under article 8 is identical. The State is considered as being impleaded in either event, whether it has itself freely and voluntarily submitted to the jurisdiction, or merely consented to the exercise of such jurisdiction by a court of another State, as in article 8. Once jurisdiction becomes exercisable without the need to compel the State to submit to it, that State cannot be heard afterwards to object to the exercise of such jurisdiction for lack of consent, for the simple reason that it has either expressly consented to it or has willingly submitted to it.

60. In other words, a State is deemed to have failed to raise a plea of State immunity once the proceedings have reached a stage in which it has become clear that the State has in fact consented or voluntarily submitted to the jurisdiction. At this point, that State can no longer withdraw from the proceedings by invoking State immunity, or by insisting on fulfilment of the obligation on the part of the State of the forum to decline jurisdiction as required by article 7.

61. Voluntary submission is therefore an act which is clearly expressive of the willingness of a State to have the case decided, or the question determined, or the dispute settled, by a court of another State. There are several ways in which this willingness or volition of State could be expressed or demonstrated. How to manifest or communicate this volition is for each State to decide in any given situation. Nevertheless, the question whether such expression of volition could be said to be manifest must ultimately be determined by the judicial authority in accordance with its own established practice or its own rules of procedure, having regard to the circumstances of each case.

<sup>114</sup> It is possible to envisage some disabilities or lack of capacity to sue for technical procedural reasons, such as the case of an “enemy State” in time of war before some jurisdictions.

### 1. INSTITUTING OR INTERVENING IN A LEGAL PROCEEDING

62. One clearly visible method of voluntary submission consists in the act of bringing an action or instituting a legal proceeding before a court of another State. By becoming a plaintiff before the judicial authority of another State, the claimant State, seeking judicial relief or other remedies, manifestly submits to the jurisdiction of the forum. There can be no doubt that when a State initiates a litigation before a court of another State, it has irrevocably submitted to the jurisdiction of that other State to the extent that it can no longer be heard to complain against the exercise of the jurisdiction it has itself initially invoked.<sup>115</sup>

63. The same result follows in the event a State intervenes in a proceeding before a court of another State, unless the intervention is exclusively or simultaneously accompanied by a plea of State immunity or purposely to object to the exercise of jurisdiction on the ground of its sovereign immunity.<sup>116</sup> Similarly, a State which participates in an interpleader's proceeding voluntarily submits to the jurisdiction of that court. Any positive action by way of participation in a proceeding by a State on its own initiative and not under any compulsion is inconsistent with a subsequent contention that the volunteering State is being impleaded. However, participation for the limited purpose of objecting to the continuation of the proceedings will not be viewed as voluntary submission.<sup>117</sup>

### 2. ENTERING AN APPEARANCE ON A VOLUNTARY BASIS

64. A State may be said to have voluntarily submitted to the jurisdiction of a court of another State without being itself a plaintiff or claimant or intervening in proceedings before that court. For instance, a State may volunteer its appearance or freely enter an appearance, not in answer to any claim or any writ of summons, but of its own free will as *amicus curiae* or otherwise, in the interest of justice to

<sup>115</sup> For example, the European Convention on State Immunity (see footnote 79 above), which provides, in article 1, para. 1, that:

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

See Council of Europe, *Explanatory Reports on the European Convention on State Immunity* (Strasbourg, 1972).

<sup>116</sup> Thus, according to article 1, para. 3, of the European Convention on State Immunity:

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

See also draft article 10 below, para. 81.

<sup>117</sup> See, for example, art. 13 of the European Convention on State Immunity:

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

See also *Dollfus Mieg et Cie* (1950) (1952) (see footnote 89 above).

make a point or to assert an independent claim in connection with proceedings before a court of another State. Unless the assertion is one concerning jurisdictional immunity in regard to the proceedings in progress, entering an appearance on a voluntary basis before a court of another State constitutes another example of voluntary submission to the jurisdiction, after which no plea of State immunity could be successfully raised.

65. By way of contrast, it follows that failure on the part of a State to enter an appearance in a legal proceeding is not to be construed as passive submission to the jurisdiction. Alternatively, a claim of interest by a State in a property under litigation is not inconsistent with its assertion of jurisdictional immunity.<sup>118</sup> A State cannot be compelled to come before a court of another State to assert an interest in a property against which an action *in rem* is in progress, if that State does not choose to submit to the jurisdiction of the court entertaining the proceedings.

### 3. OTHER INDICATIONS OF INTENTION TO SUBMIT TO THE JURISDICTION

66. Voluntary submission to the jurisdiction is a positive act performed by a State which clearly indicates its intention in this regard. A State may undertake to submit to the jurisdiction of a court of another State in a treaty or an international agreement, and such undertaking could be done in such a way as to be binding on it under the law of treaties.<sup>119</sup> There is nothing to prevent a State from concluding a contract in writing with an individual, containing a term specifying an agreed choice of law governing the contract as well as a mutually selected method of settlement of dispute arising out of the transaction. A State could freely choose not only the substantive law but also a court of law other than its own to have a question decided. Such a chosen court may operate as a *forum prorogatum* in private international law.<sup>120</sup> However, the final determination on competence or decision to exercise jurisdiction will, in the ultimate analysis, depend on the local rules of procedure, or the *lex fori* itself, which could set a standard or requirements more exacting than mere indications of willingness or clear intention or binding undertaking to submit to the jurisdiction. The competent forum may insist on actual

<sup>118</sup> For example, in *The "Jupiter"* No. 1 (1924) (see footnote 113 above), Judge Hill held that a writ *in rem* against a vessel in the possession of the Soviet Government must be set aside in as much as the process against the ship compelled all persons claiming interests therein to assert their claims before the court, and inasmuch as the USSR claimed ownership in her and did not submit to the jurisdiction. Contrast *The "Jupiter"* No. 2 (1925), where the same ship was then in the hands of an Italian company and the Soviet Government did not claim an interest in her. (United Kingdom, *The Law Reports, Probate Division, 1925*, p. 69.)

<sup>119</sup> See, for example, the practice cited in footnote 143 below.

<sup>120</sup> See, for example, art. 2, para. (b) of the European Convention on State Immunity: "by an express term contained in a contract in writing."

voluntary submission, and nothing short of submission could entail exercise of jurisdiction.<sup>121</sup>

### B. The effect of voluntary submission

67. The fact that a State voluntarily submits to the jurisdiction of a court of another State by any of the recognized means or methods of voluntary submission entails the consequence of disentitlement of that State from pleading jurisdictional immunity. Thus, if a State has intervened or taken a step in the proceedings before a court of another State, it must be deemed to have submitted to the jurisdiction of that court, unless it can justify the assertion that such intervention or such a step was only for the purpose of claiming immunity or asserting an interest in property in circumstances such that the State would have been entitled to immunity had the proceedings been brought against it.<sup>122</sup>

68. The practical consequence of voluntary submission, insofar as it is recognized by a competent court exercising jurisdiction, extends to all stages of appeal but not to measures of execution, nor to any counterclaim unless it arises out of the same legal relationship or facts as the claim.<sup>123</sup> Propositions of law relating to the effect of counterclaim will be considered in draft article 10 (see paras. 72–80 below). Suffice it to state that for the purposes of article 9, voluntary submission by instituting proceedings, or by intervention or by taking a step in proceedings, or by otherwise indicating a clear intention to submit to the jurisdiction, will entail legal consequences of amenability in respect to those proceedings only, and not to other proceedings or independent counterclaims.<sup>124</sup>

69. As has been seen in the case of expression of consent by a State to the exercise of jurisdiction by a court of another State, voluntary submission by a State to the jurisdiction of a similar court only enables the juridical authority to overlook or forego consideration of possible questions of jurisdictional immunity. It does not serve to compel the court of another State to decline jurisdiction or

to refrain from the exercise of its otherwise competent jurisdiction; it merely renders exercisable an otherwise existing jurisdiction in spite of the fact that a foreign State is involved. The exercise of jurisdiction by the competent court in the event of voluntary submission is merely permissive or discretionary, and not mandatory or compulsory for the court. Indeed, the court may have to follow other rules of competence or procedure which prohibit the exercise of jurisdiction regardless of voluntary submission, notwithstanding the fact that the foreign State itself has instituted the proceedings or effectively intervened or taken a step in the proceedings already initiated or pending before the court. Each court is ultimately master of its own procedure regarding particularly the extent of its own jurisdiction and the justiciability of each cause of action.

70. The practice of States has not given much indication as to the direction in which the court is likely to react in the event of voluntary submission by a State, which is indubitably binding on that State, but not necessarily on the courts of another State. A court may dismiss an action on countless grounds, including non-justiciability and lack of competence or jurisdiction for reasons other than the application of State immunity. It may do so on grounds of its own public policy or may prefer to decline jurisdiction owing to the existence of a more convenient forum. For these reasons, the provisions of article 9 on voluntary submission should be formulated with extreme care and must be delicately balanced.

### C. Text of article 9

71. The following wording is suggested for article 9:

#### *Article 9. Voluntary submission*

1. Jurisdiction may be exercised against a State which has voluntarily submitted to the jurisdiction of a court of another State:

(a) by itself instituting or intervening in proceedings before that court; or

(b) by appearing before that court of its own volition or taking a step in connection with proceedings before that court without raising a claim of State immunity; or

(c) by otherwise expressly indicating its volition to submit to the jurisdiction and to have the outcome of a dispute or question determined by that court.

2. The mere fact that a State fails to appear in proceedings before a court of another State shall not be construed as voluntary submission.

3. Appearance or intervention by or on behalf of a State in proceedings before a court of another State with a contention of lack of jurisdiction on the ground of State immunity, or an assertion of an interest in a property in question shall not constitute voluntary submission for the purpose of paragraph 1.

#### ARTICLE 10 (Counter-claims)

72. A treatment of general principles of State immunity would of necessity be incomplete without reference to another aspect of consent of State in a somewhat different

<sup>121</sup> For example, the United Kingdom State Immunity Act 1978, which provides, in sect. 2, paras. (1) and (2):

“(1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of courts of the United Kingdom.

“(2) . . . but a provision in any agreement that it is to be governed by the law of the United Kingdom is not to be regarded as submission.” (*Op. cit.*, pp. 715–716.)

<sup>122</sup> See, for example, subsections 4(a) and (b) of section 2 of the United Kingdom State Immunity Act 1978. Subsection 5 does not regard as voluntary submission any step taken by a State on proceedings before a court of another State “in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained and immunity is claimed as soon as reasonably practicable.” (*Op. cit.*, p. 716.) Delay in raising a plea or defence of jurisdictional immunity may create an impression in favour of submission.

<sup>123</sup> See, for example, article 1, subpara. 1(a) of the European Convention on State Immunity.

<sup>124</sup> Voluntary submission to the jurisdiction of a court of another State is limited to the proceedings in respect of which a State has made voluntary submission, and not to other cases before that court, much less to all other cases in general before the judicial authority of that other State.

connection. As has been seen in draft articles 8 and 9, there are many ways in which a State may signify its consent or voluntarily submit to the jurisdiction of a court of another State, with differing implications and to a varying degree or extent of subjection to the jurisdiction of the State of the forum. A State may institute proceedings in a court of another State. The question may arise as to the extent to which such initiative could entail subjection or amenability of that State to the jurisdiction of courts of another State in respect of counter-claims against the plaintiff State. Conversely, a State against which a legal proceeding has been instituted in a court of another State may decide to counter-claim against the party that initiated the proceedings. In both connections, a State is to some extent amenable to the competent jurisdiction of the forum, since in either case there is clear evidence of consent to submit to the jurisdiction. The consequence of the expression of such consent or manifestation of such volition to submit to the jurisdiction may vary in the degree and extent of its amenability or the effectiveness of its subjection to the competent jurisdiction of the authority concerned. In each case, whether a State brings a counter-claim or a counter-claim is brought against a State in a court of another State, an important question arises as to the extent and scope of effectiveness of such a counter-claim by or against a State.

#### A. Counter-claims against a State

73. A situation closely following voluntary submission by a State to the jurisdiction of a court of another State by instituting proceedings before that court is produced by the possibility open to the defendant or an interested party to bring a counter-claim against the State. It has been noted that by bringing an action, the State is amenable to the jurisdiction of the court of another State in respect of that course of action. The State has submitted to the jurisdiction fully in regard to its claim (see para. 67 above). It should be further observed in the present context that such submission entails not only as respects the principal claim but also with respect to counter-claims arising out of the same legal relationship or the same facts as the claim.<sup>125</sup>

74. The legal consequences of voluntary submission are indeed far-reaching. A State which voluntarily submits to the jurisdiction of a court of another State by instituting proceedings or intervening in proceedings before that court submits to all the consequential outcome of the exercise of jurisdiction, all stages of the proceedings, including decision of first instance, appellate and final adjudication, as well as the incidence of costs, which lies within the exclusive discretion of the deciding authority. While submission to jurisdiction stops short of subjection to execution of judgement, which is a separate stage requiring separate consent of the State, it may cover wider ground than the original claim. It can extrude beyond the principal claim, and in some measure also covers counter-claims against the State.

75. Once a State sets in motion the machinery of justice of another State, unforeseen consequences may follow. Cross-actions might be brought against the State by the defendant, seeking to set off the principal claim either by an independent counter-claim or by counter-claiming in respect of the same subject-matter. Seeing that a foreign State has submitted to the local jurisdiction, other creditors may feel inclined to join in as additional parties to the proceedings. Care should be taken to delineate the extent of the consequences of voluntary submission by a State to the jurisdiction of a court of another State. Such voluntary submission has a limited scope, and entails consequences primarily with respect to the proceedings instituted by the State or in which the State has intervened. The State making such submission does not submit to the jurisdiction generally, for all matters and for all times. One effect of submission which is perhaps not contemplated by the State is its liability or amenability to the jurisdiction of the judicial authority of another State in respect of counter-claims arising out of the same transaction or occurrence that is the subject-matter of the principle claim,<sup>126</sup> or of the same legal relationship or facts as the principal claim.<sup>127</sup>

76. Independent counter-claims arising out of different transactions or occurrence not forming part of the subject-matter of the claim, or arising out of a distinct legal relationship or separate facts as the principal claim may only be maintained against the State if they fall within the scope of one of the admissible exceptions to the rule of State immunity. In other words, separate and independent counter-claims or cross-actions could be brought against the foreign State only when such separate proceedings would have been available and actionable under other parts of the present articles, regardless of consent or voluntary submission, or the fact that the State has instituted or intervened in proceedings before that court.<sup>128</sup>

77. Even in respect of counter-claims arising out of the same transaction or occurrence on which the claim is based, jurisdiction is only exercisable to the extent that the counter-claims do not exceed the amount of the principal claim or do not seek relief differing in kind. In such event, the court has the choice of proceeding with consideration

<sup>126</sup> See, for example, the United States Foreign Sovereign Immunities Act of 1976 (see footnote 86 above), section 1607 (Counterclaims): "(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state."

<sup>127</sup> See, for example, section 2, para. 6, of the United Kingdom State Immunity Act 1978. See also *Strousberg v. Republic of Costa Rica* (1881) *Law Times Reports* (London), vol. 44, p. 199, where the defendant was allowed to assert any claim he had by way of cross-action or counter-claim to the original action in order that justice may be done. But such counter-claims and cross-suits can only be brought in respect of the same transactions and can only operate as set-offs.

<sup>128</sup> Common law jurisdictions tend to limit the scope and extent of counter-claims against foreign States, while in some civil law jurisdictions, independent counter-claims have been allowed to operate as offensive remedies. In some cases, affirmative relief has been granted. See, for example, *Etat de Pérou v. Krelinger* (1857) (*Pasicrisie belge*, 1857 (Brussels), part 2, p. 348); *Letort v. Gouvernement Ottoman* (1914) (*Revue juridique internationale de la locomotion aérienne*, 1914 (Paris), p. 142);

<sup>125</sup> See footnote 123 above.

of the counter-claim to the extent of the amount of relief sought in the principle claim, without any further relief differing in kind. Counter-claims beyond the extent thus described may be permissible but will be reduced in scope and extent to the same amount and kind of relief as the original claim and as such would operate merely as set-offs rather than offensive counter-claims.<sup>129</sup>

### B. Counter-claims by a State

78. The exercise of jurisdiction is also possible in regard to counter-claims by a State. A State may make voluntary submission by introducing or making counter-claims before the court of another State. By itself bringing a cross-action, a cross-suit or a counter-claim before the judicial authority of another State, the State submits to the jurisdiction of that other State. Such cross-actions may be entertained irrespective of their scope or the extent of the relief sought or the nature of the remedy requested. If they do not arise out of the same transaction as the original claim, then the State only submits to the jurisdiction in respect of the independent counter-claims or the separate proceedings instituted by the State. As they are separate and unconnected proceedings, voluntary submission to one does not necessarily imply submission to the other.

79. It should be observed, however, that in respect of the original claim or the principal claim against the State which has arisen out of the same transactions or occurrence on which the counter-claims are based, voluntary submission by the State counter-claiming must of necessity extend to the principal claim, covering fully the original action as well. Unlike counter-claims against foreign States, which in the practice of many jurisdictions are limited in the scope and extent allowable,<sup>130</sup> counter-claims by the State can, but need not, operate only as set-offs. The State could seek an affirmative relief by bringing a counter-claim or a cross-suit, the proceedings in respect of which it has thereby submitted to the jurisdiction of the tried court. The only difference appears to be that the relief sought in the original claim may exceed that envisaged in the counter-claim by the State, both in amount and in kind. Submission to jurisdiction by the State making a counter-claim entails a further-reaching effect than voluntary submission by the State instituting original proceedings or making principal claims before that same court.<sup>131</sup>

80. This discrepancy in favour of the position of a State as a plaintiff before the courts of another State in respect of counter-claims against it, as opposed to the position of the same State as a dependant bringing counter-claims before these courts, is somewhat startling. It may entail an unintended consequence—that of encouraging States to seek relief by instituting proceedings or intervening in

proceedings before the courts of other States, rather than await the fate of having proceedings instituted against themselves before deciding to make offensive counter-claims, with fuller and more damaging effect than defensive counter-claims against the States, which could at best operate as set-offs. This anomaly could be rectified by equalizing the effect of counter-claims against and by the State. On the other hand, there may still be valid reasons for inducing the State to take the initiative of voluntary submission.

### C. Text of article 10

81. Article 10 may be thus worded:

#### *Article 10. Counter-claims*

**1. In any legal proceedings instituted by a State, or in which a State intervenes, in a court of another State, jurisdiction may be exercised against the State in respect of any counter-claim:**

**(a) for which in accordance with the provisions of the present articles jurisdiction could be exercised had separate proceedings been instituted before that court; or**

**(b) arising out of the same legal relationship or facts as the principal claim; and**

**(c) to the extent that the counter-claim does not seek relief exceeding in amount or differing in kind from that sought by the State in the principal claim.**

**2. Any counter-claim beyond the extent referred to in paragraph 1(c) shall operate as a set-off only.**

**3. Notwithstanding voluntary submission by a State under article 9, jurisdiction may not be exercised against it in respect of any counter-claim exceeding in amount or differing in kind from the relief sought by the State in the principal claim.**

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

#### ARTICLE 11 (Waiver)

##### A. The notion of waiver and its consequences

82. Another known method of expressing consent of a State to the exercise of jurisdiction by a court of another State is renunciation of jurisdictional immunity by the State. Renunciation or waiver of immunity may be considered as a form of voluntary submission. It is recognized as such in the practice of States. Waiver is often treated in several legislations under the same heading as voluntary submission.<sup>132</sup> The internal laws of some

<sup>129</sup> See, for example, art. 1, para. 2 of the European Convention on State Immunity; sect. 1607 (c) of the United States Foreign Sovereign Immunities Act of 1976; and sect. 2, para. 6, of the United Kingdom State Immunity Act 1978.

<sup>130</sup> See the practice of States referred to above in footnote 128.

<sup>131</sup> See, for example, art. 1, para. 3 of the European Convention on State Immunity.

<sup>132</sup> See, for example, the United Kingdom State Immunity Act 1978, sect. 2, on submission to jurisdiction as an exception from immunity. See also the reply of Yugoslavia (August 1980) to question 2 of the questionnaire addressed to Governments:

“Since court action was initiated by a foreign State, the respective foreign State thereby *waived*\* the jurisdictional immunity by bringing

(Continued on next page.)

countries contain specific provisions on waiver of State immunity, in the same sense and with the same meaning and effect as voluntary submission.<sup>133</sup>

83. Waiver is therefore another formal way of expressing consent to the jurisdiction to be exercised by the judicial authority of another State. As a juridical concept, "waiver" presupposes the existence of a right to be waived. Thus, jurisdictional immunity may be waived by a State only in the event in which that State is immune or is entitled to immunity from the jurisdiction of the courts of another State. It is not inconceivable, as in practice it has been so considered, that waiver as an effective method of voluntary submission is treated as an exception to the rule of State immunity.<sup>134</sup>

84. It is not inaccurate to state that in effect waiver entails the same consequences as voluntary submission to jurisdiction. As a notional concept, however, it reflects a different aspect of the sovereign authority of a State. As has been seen in early judicial reasonings, the notions of sovereignty, dignity, reciprocity, consent and waiver have been mentioned in this connection.<sup>135</sup> State immunity itself is sometimes said to be the direct consequence of consent or implied waiver of the sovereign right of a State to exercise jurisdiction over foreign diplomats and visiting forces. Conversely, State immunity as an aspect of sovereign right of every State can also be waived by the authority of that State.

85. As waiver of jurisdictional immunity has been notionally known practically interchangeably with voluntary submission with comparable constitute elements, the consequences of an effective waiver are broadly similar to those of voluntary submission. An effective waiver or renunciation by a State enables the courts of another State to exercise its competent judicial authority over the State which has waived its jurisdictional immunity. Once effectively waived, State immunity cannot be claimed. Waiver entails the effect of renouncing or denouncing the use or exercise of a right, which in this case is State immunity. Therefore, an effective or validly executed waiver will preclude that State which has renounced its

own right from claiming or relying on that right or raising a successful plea of jurisdictional immunity. A State which has explicitly or by clear implication waived its jurisdictional immunity from the courts of another State cannot be heard to say or argue that it is immune from their jurisdiction. It is stopped from denying the consequences of its own conduct and remains amenable to all stages of the exercise of judicial jurisdiction, up to but not including execution.

## B. Methods of waiving State immunity

### 1. EXPRESS WAIVER *in facie curiae*

86. To be effective, a waiver has to conform to the ground rules of the State of the forum. In the practice of most States, an express waiver in the face of the court when a dispute has arisen will be considered sufficient to waive State immunity. In some countries,<sup>136</sup> only such express waiver performed *in facie curiae* when jurisdiction of the court is being invoked, and nothing short of that, will satisfy the test of an effective renunciation.<sup>137</sup>

87. The judicial practice of States is not uniform on the requirements of an express waiver. While some common law jurisdictions regard an express waiver as inoperative unless it takes place before the court when there is *in esse* a proceeding against the State,<sup>138</sup> other jurisdictions look to the intent rather than the form or the timing of such expression of consent.<sup>139</sup>

### 2. EXPRESS UNDERTAKING TO WAIVE IMMUNITY

88. Jurisprudence is far from settled in State practice regarding an undertaking to waive immunity. Strict requirement has been known, which does not consider to be effective waiver of prior assent in an arbitration clause<sup>140</sup> or an agreement in a contract to submit to jurisdiction.<sup>141</sup> A clearer trend appears to be emerging,

(Footnote 132 continued.)

action in the court on a specific matter." (United Nations, *Materials on Jurisdictional Immunities* . . . (op. cit.), p. 641.)

<sup>133</sup> See, for example, the United States Foreign Sovereign Immunities Act of 1976, sect. 1605 of which provides:

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

"(1) in which the foreign State *has waived its immunity\** either explicitly or by implication . . .";

<sup>134</sup> For example, sect. 1605, cited in the preceding footnote, appears to treat waiver as a general exception to sovereign immunities.

<sup>135</sup> See, for example, Chief Justice Marshall in *The Schooner "Exchange" v. McFaddon and others* (1812) (see footnote 81 above):

" . . . every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation." (Op. cit., p. 137.)

See also Lord Justice Brett in *The "Parlement belge"* (1880) (United Kingdom, *The Law Reports, Probate Division*, vol. V (1880), p. 197):

" . . . each and every [sovereign State] declines to exercise by means of its courts any of its territorial jurisdiction over . . . any sovereign or ambassador of any other State . . . though such sovereign, ambassador . . . be within its territory, and therefore, but for the common agreement, subject to its jurisdiction." (*Ibid.*, pp. 214–215.)

<sup>136</sup> See, for example, *Mighell v. Sultan of Johore* (1894) (see footnote 71 above). According to Lord Esher, "it is only when the time comes that the Court is asked to exercise jurisdiction over him [the sovereign] that he can elect whether he will submit to the jurisdiction". (op. cit., p. 159.)

<sup>137</sup> See, for example, the House of Lords in *Duff Development Company Ltd. v. Government of Kelantan and another* (1924) (see footnote 67 above, *in fine*).

<sup>138</sup> See, for example, Judge Philip of the Supreme Court of Queensland (Australia), in *United States of America v. Republic of China* (1950) (see above, footnote 66), where it was held that an agreement to submit to the jurisdiction in the instrument of hypothecation was ineffective.

<sup>139</sup> See, for example, art. 2 of the European Convention on State Immunity:

"A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it has undertaken to submit to the jurisdiction of that court either:

"(a) by an international agreement;

"(b) by an express term contained in a contract in writing; or

"(c) by an express consent given after dispute between the parties has arisen."

<sup>140</sup> See, for example, *Duff Development Company Ltd v. Government of Kelantan and another* (1924) (see footnote 67 above, *in fine*).

<sup>141</sup> See, for example, *Kahan v. Pakistan Federation* (1951) (see footnote 68 above, *in fine*).

however, in the legislative practice of States, of regarding the express undertaking by a State to submit to the jurisdiction of the courts of another State as a valid and operative waiver of jurisdictional immunity.<sup>142</sup> The current trend appears to favour a less rigid requirement. An express waiver is not ineffective even if it was prematurely concluded in an agreement before any dispute arose and prior to any question of jurisdiction being considered by any court. An undertaking by a State to submit to jurisdiction or to waive immunity is today considered to be binding on the State, or to constitute an effective waiver of immunity, whether it is made in a treaty or an international agreement,<sup>143</sup> or even in an ordinary contract in writing.<sup>144</sup>

89. In principle, an undertaking by a State to submit to the jurisdiction of the courts of another State, or to a forum of their mutual choice previously selected, is binding on the State in the system in which appropriately it is being considered. If the undertaking is given in a treaty or an international agreement governed by international law, then the parties to the treaty could invoke that obligation of the State to submit to jurisdiction. In actual practice, however, the question of jurisdiction is considered primarily by municipal courts, and the decision on the effectiveness of waiver or an undertaking to submit has initially to be taken by the trial court, whether or not the undertaking to submit is contained in a treaty provision or as a term of a written contract.

### 3. WAIVER BY CONDUCT OR IMPLICATION

90. As in previous articles, there is no clear evidence in support of any theory of implied waiver as an exception *per se* to State immunity. Waiver of immunity could nonetheless be effected by implication or by conduct, such as actual submission to jurisdiction by a State by instituting or intervening in proceedings without raising a

<sup>142</sup> See, for example, the United Kingdom State Immunity Act 1978, which provides in sect. 2, para. (2) that "A State may submit . . . by a prior written agreement . . ."; and the United States Foreign Sovereign Immunities Act of 1976, which provides in sect. 1605 that immunity could be waived "either explicitly or by implication."

<sup>143</sup> See, for example, treaties of commerce, navigation and trade between the USSR and the following countries: Romania (Moscow, 20 February 1947) (United Nations, *Treaty Series*, vol. 226, p. 94), arts. 5 and 6; Hungary (Moscow, 15 July 1947) (*ibid.*, vol. 216, p. 266), art. 5; Czechoslovakia (Moscow, 11 December 1947) (*ibid.*, vol. 217, p. 54), art. 4; Bulgaria (Moscow, 1 April 1948) (*ibid.*, p. 116), art. 4; German Democratic Republic (Berlin, 27 September 1957) (*ibid.*, vol. 292, p. 92), art. 4; Mongolia (Moscow, 17 December 1947) (*ibid.*, vol. 687, p. 250), art. 4; Albania (Moscow, 15 February 1958) (*ibid.*, vol. 313, p. 276), art. 4; Democratic Republic of Viet Nam (Hanoi, 12 March 1958) (*ibid.*, vol. 356, p. 164), art. 4; Democratic People's Republic of Korea (Moscow, 22 June 1960) (*ibid.*, vol. 399, p. 22), art. 4.

See also the practice of the Netherlands, in United Nations, *Materials on Jurisdictional Immunities* . . . (*op. cit.*), pp. 587-589.

<sup>144</sup> The prevailing practice is in favour of freedom of contract or treaty-making. The extent of the binding force of each contract and international agreement is a matter that requires further crystallization in State practice. There are conflicting trends in both directions.

plea of jurisdictional immunity or by counter-claiming in proceedings against the State itself.

91. The crucial question relates to the problem of identifying the authority which could be considered properly authorized to effect a waiver on behalf of the State. Who can waive State immunity is a subject that requires very close attention. Generally, the highest governmental authority could waive immunity. The authority that could submit the State to the jurisdiction of another State could by its conduct waive immunity by entering an appearance before the court through its authorized representatives after the dispute has arisen. Similarly, the State organ or authority vested with the treaty-making power or the capacity and authority to conclude a written contract binding on the State could effectively agree or undertake by way of waiver of immunity to submit to the jurisdiction of a court of another State.<sup>145</sup>

### C. Text of article 11

92. Article 11 could read as follows:

#### *Article 11. Waiver*

1. Jurisdictional immunity may be waived by a State at any time before commencement or during any stage of the proceedings before a court of another State.

2. Waiver may be effected by a State or its authorized representative,

(a) expressly *in facie curiae*, or

(b) by an express undertaking to submit to the jurisdiction of a court of that other State as contained in a treaty or an international agreement or a contract in writing, or in any specific case after a dispute between the parties has arisen.

3. A State cannot claim immunity from the jurisdiction of a 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 to immunity can be based until after it has taken such a step, in which event it can claim immunity based on those facts if it does so at the earliest possible moment.

4. A foreign State is not deemed to have waived immunity if it appears before a court of another State in order specifically to assert immunity or its rights to property.

<sup>145</sup> See, for example, the United Kingdom State Immunity Act 1978, sect. 2, para. 7:

"The head of a State's diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to submit on behalf of the State in respect of any proceedings; and any person who has entered into a contract on behalf of and with the authority of a State shall be deemed to have authority to submit on its behalf in respect of proceedings arising out of the contract."