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Jurisdictional immunities of States and their property - Information and materials submitted by Governments: Addendum

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JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

Information and materials submitted by Governments

Addendum

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ARGENTINA

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[8 May 1979]

NATIONAL LEGISLATION

The Argentine Constitution

Article 100 - The Supreme Court of Justice and the lower courts of the Nation have jurisdiction over and decide all cases dealing with matters governed by the Constitution and the laws of the Nation, with the exception made in item 11, article 67; and by treaties with foreign nations; of cases within admiralty and maritime jurisdiction; of suits in which the Nation is a party; suits between two or more Provinces; between one Province and the residents of another; between the residents of different provinces; and between one province or its residents against a foreign State or citizen.

Article 101 - In such cases the Supreme Court shall exercise appellate jurisdiction, according to rules and exceptions prescribed by the Congress; but in all matters concerning ambassadors, ministers and foreign consuls, and those in which any Province shall be a party, the Court shall exercise original and exclusive jurisdiction.

Act No. 48 - Jurisdiction and competence of the National Courts.

Publication: Registro Nacional 1863/69, p. 49.

Article 1 - The Supreme Court of National Justice shall try, in the first instance:

...

(3) Cases concerning ambassadors or other foreign diplomats, members of legations, the members of their families, or their domestic staff, in the manner in which a court of justice may proceed in accordance with international law.

(4) Cases dealing with the privileges and immunities of consults and vice-consults in their official capacity.

Act No. 2372 - Approval of the Code of Criminal Procedure for the Federal Courts and Ordinary Courts of the Capital and National Territories

Publication: Registro Nacional 1887/88, p. 772.

Article 21 - The National Supreme Court shall have original jurisdiction in:

Criminal cases concerning ambassadors, ministers or foreign diplomatic agents; members of legations, the members of their families, or their domestic staff, in

/...

the manner and in the cases in which a court of justice may proceed in accordance with international law.

Act No. 21,708 - Amendments to Act No. 17,454 (National Code of Civil and Commercial Procedure) and Decree Law No. 1,285/58.

Publication: Boletín Oficial 28-12-77.

Article 2 - Articles 16 and 24 of Decree Law No. 1,285/58 shall be replaced by the following articles:

...

Article 24 - The Supreme Court of Justice shall have:

1. Original and exclusive jurisdiction in all matters concerning two (2) or more provinces and private persons, between one (1) province and a resident or residents of another province, or foreign citizens or subjects; matters concerning one (1) province and one (1) foreign State; cases concerning ambassadors or other foreign diplomatic ministers, members of legations and the members of their families, in the manner in which a court of justice may proceed in accordance with international law; and cases dealing with the privileges and immunities of foreign consults in their official capacity.

No action shall be taken on a complaint against a foreign State without first seeking from its diplomatic representative, through the Ministry of Foreign Affairs and Worship, the consent of that country to submit to proceedings. However, the executive branch may declare, by means of a duly substantiated decree, with respect to a particular country, that there is no reciprocity for the purposes of this provision. In such cases, the foreign State with respect to which such a declaration has been made shall be subject to Argentine jurisdiction. If the declaration of the executive branch specifies that the absence of reciprocity applies only in certain respects, the foreign country shall be subject to Argentine jurisdiction only in those respects. The executive branch shall declare that reciprocity is established when the foreign country so amends its rules.

For the purposes of the first part of this paragraph, the following shall be deemed to be residents:

(a) Physical persons domiciled in the country for two (2) years or more prior to the lodging of the complaint, regardless of nationality;

(b) Juridical persons under Argentine public law;

(c) All other juridical persons incorporated and domiciled in Argentina;

(d) Firms and associations without juridical personality, if all their members have the status described in subparagraph (a). Cases concerning foreign ambassadors or ministers plenipotentiary are those which directly affect such persons by virtue

of the fact that their rights are under discussion or because their liability is involved, as well as those which similarly affect the members of their families, or the staff of the embassy or legation having diplomatic status.

No action shall be taken on proceedings against the persons referred to in the foregoing paragraph, without first seeking from the ambassador or minister plenipotentiary concerned, the consent of his Government to their submission to proceedings. Cases concerning foreign consuls are those brought in respect of deeds or acts performed in the exercise of their specific functions, provided that their civil or criminal liability is at issue.

INTERNATIONAL CONVENTIONS

International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, signed at Brussels on 10 April 1926, and Additional Protocol

Act No. 15,787 - Accession to the Brussels international conventions on maritime law.

Publication: Boletín Oficial 5-1-61.

Article 1 - The Brussels international conventions of 10 April 1926, concerning the Unification of Certain Rules relating to the Immunity of State-owned Vessels and its Additional Protocol signed at Brussels in 1934, are hereby acceded to.

Vienna Convention on Diplomatic Relations, adopted by the United Nations Conference on Diplomatic Intercourse and Immunities at Vienna on 18 April 1961

Decree Law No. 7672 of 13 September 1963.

Approval of international agreements.

Publication: Boletín Oficial 19-9-63.

Article 5 - The Vienna Convention on Diplomatic Relations, adopted by the United Nations Conference on Diplomatic Intercourse and Immunities at Vienna on 18 April 1961 and signed by the Argentine Republic on that date is hereby approved.

Vienna Convention on Consular Relations (1963)

Act No. 17,081: Approval.

Publication: Boletín Oficial 12-1-67.

Article 1 - The 1963 Vienna Convention on Consular Relations, signed by the Artentine Republic on 24 April 1963, is hereby approved.

Study prepared by the Argentine Ministry of Justice

"The Supreme Court of Justice, which was at first guided by the theory of immunity from jurisdiction, has opted for the conclusions of more recent doctrine" (El Derecho Internacional Público ante la Corte Suprema (International public law in the Supreme Court), by Dr. Isidoro Ruiz Moreno, Ed. Eudeba).

In the action brought by the Minister Plenipotentiary of Chile against Carlos Porta, bankruptcy trustee of Fratelli Lavarello fú Gio Batta, for annulment of the sale of the SS Aguila, the Court stated in its decision that:

> "The contract of sale whose annulment has been applied for, and from which the present case originates, was made and came into being and was intended to be, and in fact was, performed and complied with within the jurisdictional limits of the Argentine Republic. Both these circumstances, together with the fact that only a few days before this action was brought a representative of the firm selling the vessel applied to the national courts for the enforcement of its rights in connexion with this transaction and also applied for and obtained in enforcement of the said contract an order blocking the monies of the Government of Chile which it had deposited in this country, and together also with the circumstance that the plaintiff alleges that there are in Buenos Aires funds arising out of this transaction and he for his part in applying for an order blocking these funds, clearly show that the intrinsic validity of this contract and all matters relating to it should be regulated in accordance with the general laws of the Nation and that the national courts are competent in such matters.

The Court drew attention to the provisions of articles 1209 and 1215 of the Civil Code concerning the law applicable to contracts which are to be performed in the Republic, and it added that: "Since the Government of Chile is acting in this case through its diplomatic representative in Argentina, who has offered and pledged his personal responsibility in the case, the provisions of article 101 of the Constitution and of article 1, paragraph 3, of the Act of 14 September 1863 are applicable". For these reasons the Court declared itself competent and ordered the case to proceed. (Decision No. 47, p. 248).

In its decision in the case of Zubiaurre v. the Government of Bolivia, the Court, without considering the validity of the instrument in question, stated merely that an action opposing a foreign testamentary provision did not come within the original jurisdiction attributed to it by article 101 of the Constitution and article 1 of Act No. 48 (Decision No. 79, p. 124).

The same argument was sustained in the case of the United States Maritime Administration v. Dodero Brothers Ltd. (Decision No. 141, p. 129).

In the case of BAIMA and BESSOLINO v. the Government of Paraguay (Decision No. 123, p. 58), the Court expressed its considerations at greater length and held that a foreign Government cannot be sued in the courts of another country without its consent (Decision No. 123, p. 58).

This question of immunity of States was considered at the time when on account of the Civil War, the Spanish Government decided to appropriate the vessel Cabo Quilates and assign it to the auxiliary naval forces for Government Service. When the vessel put in at Buenos Aires, the ship owners brought an action against the Spanish Government for recovery of the vessel. When the case opened, the Spanish Government, through its Ambassador, announced that it was unwilling to submit to the jurisdiction of the Argentine courts "on a matter of Government property used in the service of the Government". In other words, the Spanish Government expressly declared its refusal to accept the jurisdiction of the Argentine courts. The Court observed that it was a fundamental principle of international public law and constitutional law that there could be no compulsion of a State in such cases. It went on to explain, clearly and concisely, the considerations underlying this principle.

> "The wisdom and foresight of this rule of public law are unquestionable. If the acts of a sovereign State could be examined by the courts of another State and could perhaps contrary to the former's wishes be declared null and void, friendly relations between Governments would undoubtedly be jeopardized and international peace disturbed" (Decision No. 178, p. 173).

From an examination of the decisions of the Court, Dr. Ruiz Moreno, in his aforementioned work, draws the following conclusions:

1. A foreign State may execute deeds governed by the ordinary law;

2. A foreign Government may be sued in an Argentine court, but its prior consent is necessary before the case can continue;

3. A statement by the diplomatic representative is sufficient to determine the nature of the deed or service in question.

AUSTRIA

/Original: German/
/6 July 1979/

... Austria has ratified the European Convention on State Immunity. Furthermore, in reply to the ... request of the International Law Commission the following relevant materials are transmitted herewith for information of the International Law Commission:

National legislation*

Austrian declaration in accordance with article 28, paragraph 2, of the European Convention on State Immunity, Federal Law Gazette (BGBl) No. 432/1976, enclosure A);

Federal Law of 3 May 1974 (BGBl No. 433/1976) concerning the exercise of jurisdiction in accordance with article 21 of the European Convention on State Immunity (enclosure A);

Declaration by the Republic of Austria in accordance with article 21, paragraph 4, of the European Convention on State Immunity (BGBl No. 173/1977), (enclosure B);

Decisions of Austrian Tribunals

Supreme Court (Oberster Gerichtshof): decision of 10 May 1950, 1 Ob 167/49 and 1 Ob 171/50, in: SZ 23/143, Spruchrepertorium No. 28 neu, (enclosure C);

Decision of 10 February 1961, 2 Ob 243/60 in: Juristische Blaetter, Jahrgang 84, Heft 1/2, page 43 ff (enclosure D);

Decision of 14 February 1963, 5 Ob 343/62 in: SZ 36/26 (enclosure E).

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* Translated by the Secretariat from German into the official languages of the United Nations. /Foot-notes marked by asterisks in the present document are supplied by the Secretariat. Those marked by numbers or letters were in the original texts./

Austrian declaration in accordance with article 28, paragraph 2, of the European Convention on State Immunity

"The Republic of Austria declares according to article 28, paragraph 2, of the European Convention on State Immunity that its constituent States Burgenland, Carinthia, Lower Austria, Upper Austria, Salzburg, Styria, Tyrol, Vorarlberg and Vienna may invoke the provisions of the European Convention on State Immunity applicable to Contracting States, and have the same obligations."

The instrument of ratification, signed by the Federal President and countersigned by the Vice-Chancellor, was deposited on 10 July 1974; in accordance with article 36, paragraph 2, the Convention entered into force between Austria, Belgium and Cyprus on 11 June 1976. The entry into force of the Additional Protocol is to be announced separately.

...

Federal Act of 3 May 1974 on the exercise of jurisdiction in accordance with article 21 of the European Convention on State Immunity

The National Council has decided that:

1. (1) The Vienna Regional Civil Court (Landesgericht für Zivilrechtssachen Wien) shall be solely competent to determine whether the Republic of Austria shall give effect, in accordance with article 20 of the European Convention on State Immunity, to any judgement given by a court of another Contracting State. The same shall apply as regards giving effect to a settlement in accordance with article 22 of the Convention. Jurisdiction shall be exercised through chambers (Senate) without regard to the value of the object of dispute.

(2) The determination shall be made on the basis of a legal action brought in accordance with the provisions of the Code of Civil Procedure and subject to the special conditions laid down in article 21, paragraph 3, of the Convention.

(3) The action to obtain a determination may be brought either by the Party which directly derives rights from the foreign judgement (settlement) or by the Republic of Austria itself.

2. This Federal Act shall enter into force on the date on which the European Convention on State Immunity becomes applicable to Austria.

3. The Federal Minister of Justice shall be responsible for the execution of this Federal Act.

...

Declaration by the Republic of Austria in accordance with article 21, paragraph 4, of the European Convention on State Immunity (BGBl No. 432/1976)

"In compliance with paragraph 4 of article 21 of the European Convention on State immunity, the Republic of Austria declares that it designates the Vienna Regional Civil Court (Landengericht für Zivilrechtssachen Wien) as solely competent to determine whether the Republic of Austria shall give effect, in accordance with article 20 of the above-mentioned Convention, to any judgement given by a court of another Contracting State."

Receipt of the declaration, which was signed by the Federal President and countersigned by the Federal Chancellor, was acknowledged by the Secretary-General of the Council of Europe in a written communication dated 23 February 1977.

...

Repertory of precedents. No. 28

1. Under international law, foreign States are exempt from the jurisdiction of the Austrian courts only in so far as relates to acts performed by them in the exercise of their sovereign powers.

2. Similarly, under municipal law, foreign States are subject to Austrian jurisdiction in all contentious matters arising out of legal relations within the sphere of private law.

3. 1/ No recognition of the expropriation of German trade mark rights through war measures taken by Czechoslovakia. 1/

Judgement of 10 May 1950, 1 Ob 167/49 and 1 Ob 171/50

I. Court: Commercial Court, Vienna; II. Court: Higher Regional Court, Vienna

The lower court regarded it as an established fact that the father of Emil H., the plaintiff, had held the general agency in Austria for the firm of Georg D. in Hamburg since 1899 and that in 1938 this general agency had passed to the plaintiff. The products bearing the controversial trade marks of the firm of Georg D. had been continuously manufactured in Austria by the father of the plaintiff and subequently by his son since 1919, during which period they received the ingredients for these manufactured articles from the firm in Hamburg. The merchandise was sold in packaging which had been approved by the firm of Georg D., Hamburg. The perfumes and cosmetics marketed by the firm of Georg D., Hamburg, together with their respective trade marks were entered in the Vienna Register of Trade Marks and registered with the International Office in Berne in the name of the firm D.,

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1/ Rule of law No. 3 was not included in the repertory of precedents, since it does not relate to any question which has not been repeatedly decided in a uniform manner in the practice of the Supreme Court.

Hamburg. The plaintiff and his father had manufactured, in particular, Dr. D.'s Birkenwasser with the trade mark "Colibri", D's Haarwasser, Dr. D's Birkenbrillantin (Schüttelbrillantin) and "Malattine" skin cream, the trade marks of which were registered in the above-mentioned manner in the name of D., Hamburg.

In 1910, a branch office of the Hamburg firm was established in Bodenbach, Bohemia, under the name of "Georg D., Bodenbach". As German property, this business was expropriated and nationalized in 1945, and it has since been operated by the Czechoslovak State under the name "Jiří D., národní správa, Podmokly". It is undisputed that, on the instructions of the firm of Georg D., Hamburg, the above-mentioned trade marks were also registered in the name of the firm of "Georg D., Bodenbach" in the Vienna Register of Trade Marks.

On 31 May 1948, the Austrian Patent Office officially certified that the trade marks of the firm Jiří D., národní správa in Podmokly, Czechoslovakia, which had been registered with the International Office in Berne on 29 December 1947 under No. 133,940 (trade mark "Colibri"), No. 133,941 (trade mark "Malattine"), No. 133,942 (trade mark "Dr. D., Barva na vlasy Neril"), No. 133,943 (trade mark "D"), No. 133,944 (trade mark "Nerilin"), No. 133,945 (trade mark "Illusion"), No. 133,946 (pictorial trade mark), No. 133,947 (trade mark "Čistá hláva"), No. 133,948 (trade mark "Colibri"), No. 133,949 (trade mark "D"), No. 133,950 (trade mark "Dr. D."), No. 133,951 (trade mark "Tula-D"), No. 133,952 (trade mark "Dr. D. Březová voda") and No. 133,953 (trade mark "Malatina"), enjoyed protection in Austria under the terms of the Agreement of Madrid for the International Registration of Trademarks, signed on 14 April 1891.

At the end of July 1948, as the authorized agent and representative of the firm Jiří D., národní správa, Podmokly, Dr. Walter M. circulated a letter bearing the stamp Dr. M. in which, on the instructions of the firm Georg D., Bodenbach, he make it known that the name "D" and the trade mark "Colibri" had been registered in the Vienna Register of Trade Marks in the name of the firm Georg D. in Bodenbach since 1913 and 1918 respectively, had also been registered to that firm with the International Office in Berne and, consequently, were protected in the territory of the Republic of Austria. The circular letter therefore called for all D. products supplied by Hans H. (the plaintiff) to be withdrawn from commercial circulation and no longer marketed or sold.

Under these circumstances, the plaintiff applied, inter alia (further claims are not the subject of the appeal procedure), for a temporary injunction restraining the respondent from using the trade marks "D", "Colibri", "Dr. D.'s Birkenhaarwasser" and "Malatine" in the territory of the Republic of Austria.

The lower court granted this application on the following ground: as a result of nationalization, the respondent had changed the name of its firm to Jiří D., národní správa, Podmokly, and could therefore do business in Austria only under the newly chosen name. The firm's designation as Georg D., Bodenbach in a letter circulated by its representative at the end of July 1948 and in the exhibition hall of the Vienna Autumn Fair in 1948 was therefore a deliberate misrepresentation which infringed the competitive rights of the plaintiff and fell within the terms of article 9 of the Unfair Competition Act. Consequently, the plaintiff was entitled

to request enforcement of the injunction against the improperly chosen name. The exhibition of merchandise under the improper name and the circular letter referring to merchandise whose trade marks, production, packaging and sale in Austria had been a prerogative of the plaintiff for many years, thus gaining commercial acceptance, and in relation to which the respondent claimed exclusive rights for which he sought respect from a circle of customers, created a set of circumstances falling under the terms of article 2 of the Unfair Competition Act. In Austria those rights were owned by the plaintiff as business representative of the Hamburg firm Georg D. His application for the injunction should therefore be granted.

The Court of Appeal, on the other hand, rejected the application for the temporary injunction on the ground that restraint would only be possible if extracts submitted from the trade mark registers actually indicated that the plaintiff had exclusive usufruct in the territory of the Republic of Austria. However, such extracts had not been submitted to the lower court; moreover, the informants who had given testimony had not affirmed that trade marks had not also been registered in the name of the respondents or the branch office in Bodenbach.

This judgement was appealed by the plaintiff.

In the appeal proceedings, the plaintiff sought an extension until 31 December 1950 of the temporary injunction granted by the judgement of 22 January 1945; the requested extension was approved by the lower court but rejected by the Court of Appeal on the ground that, for the reasons explained above, such a matter could be decided only by the Supreme Court. This judgement was also appealed.

The Supreme Court reinstated the judgement of the lower court.

Statement of grounds

Before dealing with the merits of the appeal, the Supreme Court must decide whether an action can even be brought in this case.

The respondent is the Czechoslovak State; this is so even though that State is engaging in business under a firm name, for the latter is merely a name and by virtue of its use there does not come into existence a new legal entity which is distinguishable from the owner of the firm.

The question whether a foreign State can be sued in domestic courts has not been answered in a uniform manner in Austrian judgements. The older practice of all countries was to exempt foreign States from municipal jurisdiction, the exceptions being at the most actions in rem and voluntary submission to the jurisdiction. This was also the attitude of the Austrian courts until the turn of the century, as exemplified by GlU 2694, 2698, 6549, 6771, 7559, 11709, GlUNF 1804. The first departure from this principle appeared in the judgement of 17 December 1907 (Röll, Eisenbahnrechtliche Entscheidungen, XCI (1907), No. 122). In its statement of grounds, this judgement held that

"The State as entrepreneur is a juridical person within the realm of private law and can therefore, in the same way as other physical or juridical persons,

be sued in the ordinary courts in matters concerning private law wherever the law makes no exception in this respect. This unquestionably applies to the home State, but there is no reason to depart from this principle in the case of a foreign State. This does not constitute an infringement of territorial sovereignty any more than does the act of suing a foreign national in a municipal court whenever the competence of the court can be in any way justified under the rules of jurisdiction."

For the next 20 years, the courts adhered to the principles expressed in this fundamental judgement. Thus, in the judgement of 5 February 1918, GZ 1918, p. 111, the Supreme Court also drew a distinction between

"claims based on a title under private law and claims resulting from an act of State authority. In such a case, a foreign State, as the obligated party under private law, is also subject to domestic jurisdiction whenever a domestic venue is substantiated. There is no explicit legal provision under which suits against a foreign State are removed from domestic jurisdiction; it would be a misinterpretation of the terms of article IX of the Introductory Act on the Jurisdiction Norm for the Court of Appeal to see therein an explicit reference to principles of international law and, consequently, a basis for its own viewpoint. Paragraph 1 of the article contains the important principle that the boundaries of domestic jurisdiction are not determined merely by the provisions of Austrian positive law but can be amplified by international treaties or principles of international law."

At the time, therefore, the Supreme Court actually took the view that there was a principle of international law under which foreign States, as holders of property rights based on a title under civil law, were subject to domestic jurisdiction, and it accordingly appointed a trustee for the defendant for the purpose of conducting proceedings against the Romanian State for the reimbursement of advance payments made to the Romanian Government for the contractual supply of grain.

This legal opinion is repeated in an observation made in the judgement of 27 August 1919 (GZ, 1919, p. 380), although the observation by no means substantiates that judgement. The case involved claims for damages brought by the Austro-Hungarian Bank against the Communist Government in Hungary on the ground of measures taken by the latter which had infringed its bank privilege. As security for these claims, the Bank sought a temporary injunction on bank notes which had been stolen from the Hungarian Legation in Vienna and subsequently recovered by the police. The Supreme Court denied Austrian jurisdiction since "the socialization measures by the Communist Government in Hungary which had motivated the claim were sovereign acts of the Government of a foreign State which in Austria could not be regarded as an obligated party under private law. A temporary injunction in favour of the claim for damages would therefore be incompatible with the rule of international law under which, in principle, no State can bring another State before its courts." The Supreme Court then added: "To be sure, exceptions to this rule must be allowed. Apart from voluntary submission, such an exception is admittedly made in so far as rights to immovable property in this country are concerned. It may further be maintained that Austrian jurisdiction can be invoked

against a foreign State with a view to enforcing - and thus also securing - claims which may be asserted in Austria and in respect of which the foreign State appears to bear liability purely from the standpoint of private law."

A further judgement was rendered on 5 January 1920 (SZ, II/1.). In this case, the Ottoman State was sued for payment for certain building work at the Embassy in Vienna which the Ottoman Ambassador in Vienna had ordered but not paid for. The Supreme Court decided in favour of Austrian jurisdiction on the following grounds:

> "The view that the concept of sovereignty of a State includes the absolute freedom of that State from the jurisdiction of every foreign court is not correct. It is true that in matters concerning the sovereignty of the foreign State, which serves as the basis for the application of the rules of international law, municipal jurisdiction cannot be assumed. Where, on the other hand, the foreign State conducts itself as the holder of ordinary private rights and enters into contracts to be performed within the territory of the other State, it enters the confines of the legal system of that State and cannot therefore remain entirely independent of it; in such cases, the foreign State, too, must be subject to the jurisdiction of the State in whose territory the business enterprise is domiciled. In the case under review, we are concerned with a claim under private law which does not concern the sovereignty of the defendant State in any way. The reference to principles applicable to the extraterritoriality of ambassadors is out of place because the object of extraterritoriality is to exclude everything that might hinder the ambassador in carrying out his mission; this latter consideration is not in question here."

The Supreme Court referred, in addition, to the relevant justification offered for the judgement of the Court of Appeal, which had essentially repeated the grounds for the judgement of 5 February 1918.

In later judgements, the Supreme Court, apparently under the influence of Walker's Internationales Privatrecht, which had appeared in the meantime, abandoned this practice and returned to earlier case law. Henceforth, it again required express submission to Austrian jurisdiction. In the case which formed the basis of the judgement of 20 January 1926 (ZBl, 1926, No. 134), the Czechoslovak State Railways had ordered machines from a firm in Vienna. The offer contained a clause to the effect that the courts of the supplier's domicile were to exercise jurisdiction. The Supreme Court denied the competence of the Austrian court whose jurisdiction had been invoked, holding that the agreement between the parties did not clearly provide for the right of the Austrian courts to exercise jurisdiction and compulsory powers. Such a clear provision was regarded as all the more necessary in view of the fact that the submission of a foreign State to municipal jurisdiction implies a waiver of extraterritoriality and that, for this reason, such a waiver which runs counter to the essential nature of a sovereign State can only be inferred from such acts of that State as clearly show an intention to waive.

The judgement of 11 September 1928 (SZ, X/177) does not answer the question of whether a foreign State can ever be subject to domestic jurisdiction irrespective of whether it became involved in litigation in exercise of its national sovereign

rights or as a party to a private law transaction. In all cases, however - with the exception of those involving jurisdiction over immovable property - the judgement demanded explicit submission, since State sovereignty, which was indivisible, would otherwise be infringed. It therefore denied the admissibility of a suit against the Czechoslovak State for damages incurred through an accident in the Legation building.

> "The foreign State's ownership of this building renders that State subject to Austrian jurisdiction only in so far as the lawsuit relates to the immovable property itself or to binding agreements concluded in relation thereto. Such claims for damages - in which it cannot be said, as in the other cases mentioned, that the foreign State has entered the confines of the domestic legal system and thus submitted thereto in advance - cannot be subject to domestic jurisdiction."

In the judgement of 4 July 1930 (Rspr, 1930, No. 481), the admissibility of appointing a priority trustee to press claims against the Hungarian State was rejected on the ground that the Hungarian State had declared that it would not submit to Austrian jurisdiction in the matter. A similar position was taken by the judgement of 9 September 1930 (Rspr, 1930, No. 444), which also referred to the Austro-Hungarian Execution Treaty (RGBl, No. 299/1914).

This judgement is not incompatible with the judgement of 22 May 1928 (Rspr, 1928, No. 381) concerning the appointment of a priority trustee against the Bulgarian National Bank, since, although all the latter's shares were owned by the Bulgarian State, the Bank constituted a special juridical person and the case related to the dismissal of an exceptional appeal under article 16 of the Act on Non-Contentious Proceedings in which the Supreme Court stated that the question of whether a foreign State could be subject to domestic jurisdiction in matters of private law was controversial from the standpoint of legal doctrine.

In the judgement of 22 January 1935 (AnwZtg, 1935, p. 426), the Supreme Court, referring to SZ, X/177, to the unpublished judgement 1 Ob 885/29 and to judgement Rspr, 1930, No. 444, endorsed the view of the lower court that special submission to domestic jurisdiction was required.

The only judgement rendered since 1945 shares this view. This judgement (of 17 September 1947; 1 Ob 621/47, JBl, 1947, p. 491) dismissed a claim for damages against the German State Railways under the State Liability Act on the ground that there was no jurisdiction. The German State Railways were said to be the property of the German Reich, and municipal courts were not entitled to assume jurisdiction over foreign States. This was said to be acknowledged in doctrine and practice. The judgement did not make reference to the decisions previously referred to which expressed the opposite view. Summing up, therefore, it cannot be said that there is as yet any uniformity of case law in so far as concerns the extent to which foreign States are subject to Austrian jurisdiction. In view of the fact that we are here concerned with a question of international law, we must examine the practice of the courts of civilized countries and find out whether from that practice we can deduce a uniform view; this is the only way to ascertain whether there still exists a principle of international law to the effect that foreign States, even in so far

as concerns claims belonging to the realm of private law, cannot be sued in domestic courts. The first court to enunciate the principle that in matters belonging purely to the realm of private law foreign States cannot claim immunity was the - at the time still independent - Court of Cassation of Naples in a judgement of 27 March 1886 (Giurisprudenza Italiana, 1886, I, 1, 228). A few months later, the Court of Cassation of Florence (in a judgement of 16 July 1886; Giurisprudenza Italiana, 1886, I, 1, 486) followed this decision. The Court of Cassation of Rome did likewise on 1 July and 12 October 1893 (Giurisprudenza Italiana, 1893, I, 1, 1213). The case was concerned with the following facts: On 17 May 1866, the Austrian Government made an agreement with a certain firm by the name of Fisola by which the latter undertook to build fortifications along the Venetian border. When Venetia had ceased to be part of Austria, the Austrian State refused to pay for the work. The Court of Cassation of Rome decided in favour of municipal jurisdiction, mainly on the ground that a distinction had to be made between a case in which a Government acted in its capacity of ente politico and one in which it acted in its capacity of ente civile. In the former case, its acts could not be subject to adjudication by foreign courts, while in the latter case the Government acted in the capacity of a legal personality of private law and was subject to the rules of private law and therefore also to municipal jurisdiction. The case under consideration involved an agreement between the Austrian Government and Fisola which was purely within the realm of private law. In the judgement of 25 May 1896 (Giurisprudenza Italiana, 1896, I, 1, 664), the - at the time still independent - Court of Cassation of Florence took the same view. The Italian courts have since adhered to this legal view (in recent times, the plenary judgements of 12 June 1925 (Corte di Cassazione, 1925, No. 1456) and 11 February/13 March 1926 (Corte, 1926, No. 1661); further, the judgement of 3 August 1935 (Giurisprudenza Italiana, 1935, I, 1, 109), etc.).

In 1903, in the case of Société Anonyme des Chemins de Fer Liégeois-Luxemburgeois v. The Netherlands (judgement of 11 June 1903; Clunet, 1904, 417), the Belgian Court of Cassation followed this practice. The plaintiff company had agreed with the Netherlands Railway Administration to enlarge a station building which was being used by both parties, and it claimed from the Netherlands a sum of money payable by the latter which the plaintiff company had advanced. The Court of Cassation rejected the plea to the jurisdiction on the ground that "the immunity of foreign States from municipal jurisdiction can be invoked only where their sovereignty is affected thereby; this is the case only in so far as concerns acts relating to the political life of a State. Where, on the other hand, the State, in taking account of the needs of the community, does not confine itself to its political role but, on the contrary, acquires and possesses property, concludes agreements, constitutes itself creditor and debtor and even engages in commerce, it does not set in motion executive power but merely does what private individuals can do; in such a case, it acts like a private individual. If, as such, it becomes involved in a conflict of interests by virtue of the fact that the State has either concluded an agreement on an equal footing with another party or incurred liability for an act that has nothing to do with the political order, a dispute arises in connexion with a civil matter which is subject exclusively to the jurisdiction of the courts. In such a case, foreign States, in the same way as private individuals and other foreigners, are subject to the Belgian courts. It is inconceivable that the foreign State would waive its

sovereignty by submitting to the jurisdiction of foreign courts in connexion with the adjudication of agreements which it has freely concluded while it preserves its sovereignty intact if, in a claim or counter-claim involving immovable property, it is subject to foreign jurisdiction as acknowledged by doctrine and virtually unanimous practice." The Court of Cassation adds that in all these cases the competence of the municipal courts derives not from the consent of the defendant State but from the nature of the act and the capacity in which the State has intervened.

The recent practice of the Swiss courts has moved in the same direction. The judgement of the Federal Court of 13 March 1918 (BG, E44, I, 54) affirmed, on the application of the holder of an issue of an Austrian Government loan, a distraint order against the Austrian Ministry of Finance; broadly speaking, the reasons given were as follows:

> "The principle of extraterritoriality and of the exemption of a foreign State from the jurisdiction of the municipal courts cannot by any means be recognized as generally and unconditionally applicable. It is quite true that there is a widely acknowledged doctrine which infers from the sovereignty and mutual independence of States as recognized by international law that a State is immune from foreign jurisdiction not only in relation to acts in the exercise of its sovereign power (jure imperii) but also, generally speaking, in so far as concerns its capacity as a party to private legal relations (jure gestionis). This practice is followed more particularly by German, Austrian,"

- the judgement of 17 December 1907 obviously escaped the notice of the Federal Court, and the judgement of 5 February 1918 was first published in the second issue of the Allgemeine Österreichische Gerichtszeitung of 30 March 1918, which appeared subsequent to the Swiss judgement of 13 March 1918 -

> "French, British and American courts. It must, however, be contrasted, since 1886 and 1903 respectively, with the practice of the Italian and Belgian courts according to which a foreign State can in general be sued in the municipal courts, like a private individual, when acting in the capacity of a party to private legal relations (cf. van Praag, Jurisdiction et droit international public, p. 406 et seq., and the grounds stated for the judgement of the Brussels Court of Cassation, which was fundamental for Belgium, in Neumeyer's Zeitschrift für Internationales Privat- und öffentliches Recht, XVI (1906), p. 243 et seq.). Likewise, the prevailing opinions in their countries are opposed, for example, in France by André Weiss, Droit international privé, V, pp. 96-115, and in Germany by Friedrich Stein, Zivilprozessorduung, 10th ed., p. 16 - now Jonas-Pohle, 16th ed., V. A3 preceding article 1. Moreover, this opinion itself admits exceptions in cases such as those in which the foreign State explicitly or implicitly acknowledges domestic jurisdiction (cf. v. Bar, Theorie und Praxis des internationalen Privatrechtes, II, p. 660 et seq.; A. Weiss, op. cit., p. 109). Accordingly, the draft prepared by the Institut de droit international at its meeting in Hamburg in 1891 also made allowance for international regulation of the competence of courts with regard to foreign States and heads of State (art. II, para. 1 (5): 'actions based on contracts

concluded by the foreign State in the territory if their full execution in that territory may be required under the terms of an explicit clause or in accordance with the nature of the action itself' (Annuaire de l'Institut, XI, p. 437; A. Weiss, op. cit., p. 115, foot-note). Having regard to the legal position as here set out, the competence of the Swiss courts must be unreservedly recognized in the present case. The legal relationship between the Austrian State and the bondholders which results from the issue of the Treasury bonds concerned falls within the realm of private law. The State directly issued these bonds in Switzerland and expressly undertook also to redeem the bonds concerned ('stamped in Switzerland') - to which those submitted by the defendant at the appeal hearing belonged - in Swiss currency in Switzerland. With regard to such bonds, provision has in fact been made for the entire business to be transacted in Switzerland and, hence, for optional Swiss or Austrian jurisdiction in proceedings against the State, including relevant security measures such as distraint orders."

These principles were repeated in the Federal Court judgement of 28 March 1930 in the case of the Hellenic Republic v. Zurich Higher Court (BG, E 56, I, 247 et seq.). A number of bondholders had obtained a distraint order against the Hellenic Republic as assignee of a bonded debt of the Société de Chemin de Fer Ottoman Salonique-Monastir. The Federal Court acknowledged the admissibility of the legal proceedings but revoked the distraint on the ground of lack of local competence.

The reasons stated included the following:

"The judgement in the Dreyfuss case (BG, E 44, I, 54) holding that the exemption of foreign States from domestic jurisdiction is generally acknowledged in contested claims arising out of an act performed by a foreign State in exercise of its sovereign power (jure imperii), but that, on the other hand, this unanimity in no way extends to cases involving private legal relations entered into by a foreign State, has even today lost none of its validity. Since then, it is not merely the Belgian and Italian courts which have adhered to their above-mentioned practice - in Italy alone in the years 1924-1926 in four judgements, two of them by the Court of Cassation, the highest court in the Kingdom (cf. the quotations in Spruth, Gerichtsbarkeit über fremde Staaten, pp. 47, 42, and, again in Italy, Sioxto-Pintór in J.W., 1926, 2407). In a judgement of 5 January 1920, the Austrian Supreme Court also took the same stand, and, in two further judgements which unquestionably involved sovereign acts of foreign Governments, it at least referred to this distinction (Spruth, op. cit., p. 33, with quotations). Even in France, where, as in Germany, England and the United States, the courts have until now been strictest in upholding the principle of absolute exemption except in specific, narrowly defined cases, the prevalent practice has begun to waver, although, since it is for the most part only judgements of lower courts that are involved, it cannot be said that the previously held view has been abandoned (Spruth, op. cit., pp. 41 and 42, 44-46; Secretain in the Journal des Tribunaux, 1925, p. 258 et seq., especially 262-264; see also the judgement of 10 December 1921 of the German National Court (RGZ, 103, 274 et seq.), which obviously sought to leave open the possibility of a later

change in court attitudes). The development of judicial practice has been paralleled by that of the literature on international law, in which the number of writers holding the view of the Belgian and Italian courts is also manifestly increasing (see the evidence in Spruth, op. cit., pp. 21-69; de Visscher in the Revue de droit international et de législation comparée, 1922, p. 300 et seq.; Siotto-Pintór, op. cit.) .... However, the Swiss Federal Court places a fundamental restriction (p. 249 et seq.) on the admissibility of suits against foreign States in respect of so-called acta gestionis. Even Italian practice, which goes further in recognizing domestic jurisdiction over foreign States, does not find it sufficient that the contentious claim should derive from a legal relationship belonging to the realm of private law (justified by the foreign State jure gestionis rather than jure imperii). All of the above-mentioned recent judgements, in which the Italian courts took domestic jurisdiction for granted, referred rather to circumstances which went beyond that requirement and involved legal relations which had been established or entered into or were intended to be maintained by the foreign State in Italy, so that, by virtue of its origin and substance, the legal relationship giving rise to the proceedings was connected to Italy in such a manner as to make it appear subject to the latter's legal system.

"It was therefore a question of situations in which the foreign State either possessed in Italian territory a business establishment from whose operation the claim derived or had developed a commercial activity in that territory through the conclusion of agreements to be executed therein. What we are concerned with is not so much an implicit voluntary submission of the foreign State to domestic jurisdiction in the case in question as the fact that a State can act in the territory of another State only under the latter's legal system and is therefore, through such acts, subject to that system by necessity and not merely by virtue of an implicit expression of will to be inferred from its conduct. Indeed, most writers have had only situations of that kind in mind when they declared themselves in favour of the possibility of jurisdiction (and enforcement) in respect of foreign States in cases involving claims under private law. As can be seen from the context, all the statements in Siotto-Pintór, op. cit., referred only to such cases. The other disputes cited by the defendants in appeal proceedings in Pillet-Niboyet, Manuel de droit international privé, p. 671, were also confined to the forum rei sitae in actions in rem concerning property of a foreign State situated in France, to the forum hereditatis and to cases in which the foreign State 'concludes contracts in France'. Although a corresponding restriction cannot, at least with any degree of certainty, be inferred from Belgian judicial practice, this is not conclusive, since the Belgian courts admit the possibility of proceedings against a foreign State in Belgium only for the judicial determination of a claim but not for enforcement. The Federal Court, too, went no further in its earlier Dreyfuss judgement. It did, to be sure, find that there was no recognized rule of international law which also delcared a foreign State exempt from domestic jurisdiction in jure gestionis cases belonging to the realm of private law. Yet, it did not uphold for that reason only the distraint order which had been obtained against the Austrian State at that time. The decisive consideration was rather, that the matter involved a debt obligation established by Austria through the offer of the

contentious loan to Swiss subscribers in Swiss territory, in respect of which, moreover, liquidation in Switzerland, including fulfilment of the debtor's repayment commitments, had been expressly stipulated in the terms and conditions of the loan, so that, although domestic jurisdiction had not actually been agreed upon, it did appear to be established in accordance with the forum contractus."

Proceeding to the case in hand, the Federal Court then goes on to state that the debt obligation from which the contentious claims giving rise to a distraint order derive can be regarded as pertaining to Swiss territory only if the claims were therein substantiated, established or intended to be executed by the debtor, or, at least, if the debtor had performed acts through which he had established a place of performance in Switzerland. However, none of these circumstances applied. In particular, as further stated by the Federal Court, no place of payment in Switzerland had been established. The Court of Appeal therefore revoked the distraint.

The distinction that has been drawn between acta jure imperii and acta jure gestionis by the Italian, Belgian and Swiss courts and by the above-quoted Austrian judgements also applies to the jurisdiction of the Mixed Tribunals in Egypt. In its judgement of 24 November 1920 (Clunet, 1921, 271) concerning a case against the British Crown arising out of a collision at sea, the Mixed Court of Appeal in Alexandria stated that acts done in exercise of the sovereignty of a foreign State were not subject to the jurisdiction of a municipal court but that the position was entirely different where an act, e.g., a quasi-delict as in the case under review, had been done by the employees of a foreign State in its private interest and without any connexion whatever with its political activity. To concede immunity from jurisdiction in such a case would be a denial of justice (négation de la justice) because it would deprive of the protection of the law those individuals whose interests are in conflict with the private interests of the State concerned. The Court of Appeal referred to precedents, and in particular to a judgement of 9 May 1921 which is not available to the Supreme Court, and added that the lack of jurisdiction of the court of one State over another State is only relative, it being generally acknowledged that a foreign Government can proceed in the courts of another State as plaintiff against those persons who are subject to the jurisdiction of that State and that it is bound to submit to a suit before a court of that State in matters concerning immovable property situated there. The Court of Appeal argued from this that lack of jurisdiction cannot be pleaded by a foreign State where the latter has acted purely as an ordinary private individual.

Similarly, in a judgement rendered by the Mixed Tribunal in Cairo on 14 February 1927 (Harvard Research 616), the competence of the court in a rent action concerning a furnished villa leased by a Government was affirmed on the ground that the matter did not involve an act of sovereign authority (acte de puissance public) but rather a private-law agreement in respect of which the Government was subject to the jurisdiction of the foreign courts.

In a judgement rendered by the Mixed Court of Appeal in 1930 (Harvard Research 616) concerning the claims of the agent for the Turkish Tobacco Monopoly, who had allegedly been dismissed without good cause, this judicial practice was summarized as follows:

"Since, however, the Mixed Tribunals (like the Italian and Belgian courts) are consistent in affirming that immunity relates only to sovereign acts and not to administrative acts in which the foreign State conducts itself in accordance with the principles of private law (9 May 1912, Bull., 24, 330; 24 November 1920, Bull., 30, 25; Tribunal of Alexandria, Gaz., XVI, 123, No. 125; Tribunal of Cairo, 14 February 1927, Gaz., XVII, 101, No. 151) ...".

Among the States which in principle recognize immunity from jurisdiction even where acta gestionis of private law are concerned are Germany (RGZ, 62, 165; 103, 274), England (in particular a judgement given in 1880), the United States (in particular a judgement given in 1812 - see the digest of the judicial practice of the United States in Revue générale de droit international public, 1936, p. 603 et seq.), Czechoslovakia (Slg. OG. 343, 2162), Poland (judgement of the Supreme Court of Warsaw of 2 March 1926, Annuario di diritto comparato, II/III, p. 768), Portugal (judgement delivered in 1923 and referred to by Irizarry y Puente in Revue générale de droit international public, 1934, p. 545) and France (in particular a judgement of 24 January 1849, DP, 49, 1, 9). The French courts, however, have deviated from this practice in so far as concerns a foreign State regularly engaged in commerce in France. In proceedings instituted against the Trade Mission of the USSR, the Paris Court of Appeal, in its judgement of 19 November 1926 (Revue de droit international privé, 1927, 251), laid down for the first time the principle that the Mission could be sued in respect of commercial transactions entered into in France. In the course of proceedings before the Court of Cassation, the plaintiff obtained an opinion from the General Secretary of the Ministry of Foreign Affairs in which the Secretariat stated that negotiations were then in progress with the Soviet Union with regard to this question. The Secretariat added: "Nevertheless, my department has for the time being, accepted the view that this organization (the Soviet Trade Mission) must be treated in the same manner as foreign merchants resident in France and that it is not entitled to any privilege on the pretext that it is an emanation of the Soviet State" (reprinted in Stoupnitzky, Statut international de l'URSS, Paris, 1936, p. 283, note 1). The Court of Cassation affirmed this decision on 19 February 1929 (Clunet, 1929, 1042) on the ground that the commercial activities of the Trade Mission extended to all matters and that these manifestations could only be regarded as commercial matters (actes de commerce) which were wholly alien to the principle of the sovereignty of States (similarly the judgement of the French Court of Cassation of 15 December 1936; Revue critique de droit international, 1937, 710).

French judicial practice must therefore, albeit only in cases involving transactions by the trade monopoly administration of a foreign State, be classed together with the practice of States which no longer recognize the immunity of States in all matters of private law, although in other respects, it adheres to the classic doctrine of immunity (e.g. judgement of the Court of Cassation of 23 January 1933; Clunet, 1934, 96).

In a case reported in Harvard Research 622, the Greek courts similarly affirmed Greek jurisdiction over the Soviet Union for default in the delivery of livestock on the following grounds:

"If the USSR undertakes to act as a vendor of goods, it thus assumes the character of an entrepreneur, engages in an ordinary transaction of civil commerce and enters into an agreement under internal law. Its relations can then be examined under the jurisdiction of the Greek courts since the plaintiff invoking the jurisdiction with a view to the settlement of this question is a Greek national. It must also be noted that the USSR, in concluding the agreement, has voluntarily submitted to Greek jurisdiction."

The Ilfov Commercial Court (name of the Bucharest commercial court) also took this view in its judgement of 18 October 1920 (Revue de droit international privé, 1924, 581) in proceedings brought against the Polish Tobacco Monopoly Administration. With regard to its requirements and obligations, the Court held, every State must be viewed under two different aspects:

"(a) the State undertakes public acts, acts of sovereignty, of administration, jure imperii in consequence of its political requirements; (b) the State undertakes civil acts, so-called actes de gestion; it buys, sells, undertakes all kinds of jure privato transactions as a result of the considerable expansion of the functions and requirements of the modern State. By virtue of this activity, the State cannot be distinguished from a private individual. The criterion for distinguishing between these acts lies in their nature and not in the purpose for which they are performed."

Similarly, in 1917 the Supreme Court of Brazil (as reported by Irizarry y Puente, "Fundamental principles of public international law" in Revue générale de droit international public, 1934, p. 547) that when a State, in managing its property, concludes agreements, it thus assumes the rights and obligations relating to contractual commitments under civil law and therefore cannot claim immunity. Likewise the Supreme Court of Chile in 1921 (as reported by Irizarry y Puente, op. cit., p. 548) in a judgement given against Bolivia. It is admittedly unclear from the only extract of a judgement available to the Supreme Court whether the said judgement does not refer to a case of jurisdiction over immovable property. If it does, Chile would have to be excluded from the list of States in which the so-called theory of differentiation has gained acceptance.

Domestic jurisdiction was also affirmed by the Tsarist courts in Imperial Russia (judgement of 30 September 1909, reported by Büchler in Zeitschrift für Ostrecht, 1927, p. 291) in cases where a foreign State acquired property or undertook actions of a private character in Russian territory.

The so-called Codex Bustamente also makes a distinction: in principle, immunity is the rule when the State acts as a State and by virtue of its political character (art. 334); on the other hand, the jurisdiction of the courts over foreign States is recognized when the latter act as individuals or private persons (art. 335).

This survey shows that today it can no longer be said that judicial practice generally recognizes the principle of exemption of foreign States in so far as concerns claims of a private character, because the majority of courts of different civilized countries deny the immunity of a foreign State in such cases, and more

particularly because exceptions are made even in those countries which today still adhere to the traditional principle that no State is entitled to exercise jurisdiction over another State; by way of example we may refer to a judgement of the Supreme Court of Tennessee (see Harvard Research 584) which in 1923 assumed jurisdiction over land owned by the State of Georgia which that State had acquired for the purpose of building a railway. Thus, American courts, too, admit of exceptions to the classic doctrine of immunity at least in those cases which concern the exercise of jurisdiction over immovables (in the case under review, the question arose whether railway land owned by a foreign State could be expropriated for the purpose of widening a road).

The resolution adopted by the Imperial Economic Conference of the British Empire in 1923 is proof that this movement has also made headway elsewhere in the Anglo-Saxon countries; the resolution stated expressly that a Dominion engaged in trade in another Dominion is not, for that reason, entitled to claim freedom from taxation (Harvard Research, 608: "shall not in its character as such be treated as entitled to any sovereign immunity from taxation either directly or through the claims of superiority to the jurisdiction of municipal courts").

A similar recommendation is contained in the report of the World Economic Conference held at Geneva in 1927 (Harvard Research, 607).

International treaties, too, have on several occasions recognized the principle that acta jure gestionis are not exempt from jurisdiction. Thus, article 233 of the Treaty of St. Germain (and similarly the other treaties concluded near Paris) provides that the Austrian Government, if it engages in international trade, shall not therefore in relation to such trade be or be regarded as being entitled to claim rights, privileges and immunities of sovereignty.

The meaning of this clause is controversial. Some regard it as a privilegium odiosum of the Central Powers, others as the manifestation of a new international law. We need not consider which of these two views is correct. However, as the former Central Powers accepted an obligation through the Treaty, not only in relation to former enemy Powers but quite generally to invoke the jurisdiction of foreign courts in commercial matters, we are, in any event, entitled to say that such submission of sovereign States in matters of private law is regarded as being perfectly admissible in international law.

Other treaties, too, contain similar provisions which are not limited in their application to particular States, as e.g. article 30 of the Paris Air Navigation Convention of 13 October 1919 and article 2 of the Warsaw Air Transport Convention of 12 October 1929.

Similarly, the various draft agreements of international asscciations contain proposals pointing in the same direction. The relevant proposal of the Institut de Droit International of 1891 was referred to in the above-mentioned judgement of the Swiss Federal Court (vol. 56, I, 247).

The thirty-fourth Conference of the International Law Association in Vienna in 1926 again discussed the question, without adopting any definitive resolution.

The same applies to the subcommittee of the League of Nations which confined itself to publishing a report on the status causae on 11 October 1926.

On the other hand, a detailed draft with reasoned arguments was prepared by the Harvard Law School in 1932; its article 11 contains the following provision:

> "A State may be made a respondent in a proceeding in a court of another State, when in the territory of such other State it engages in an industrial, commercial, financial or other business enterprise in which private persons may there engage, or does an act there in connection with such an enterprise wherever conducted, and the proceeding is based upon the conduct of such enterprise or upon such act.
>
> "The foregoing provision shall not be construed to allow a State to be made a respondent in a proceeding relating to its public debt."

The authors of the draft refer in particular to the jurisprudence of Italy, Belgium and the Egyptian Mixed Tribunals and state that even if the distinction between acta jure gestionis and acta jure imperii has not been generally recognized, it is time to lay down such a distinction in an international codification (Harvard Research, 606). It is also worth mentioning that the introduction (p. 473) refers to a remark made by Chief Justice Marshall, the author of the judgement given in 1812 which is still a leading decision in the United States, who said in that judgement that a head of State who descends into the marketplace must be treated like any private trader.

The various proposals of international associations show that the classic doctrine of unlimited immunity no longer corresponds to the view expressed in legal practice.

Neither does the literature on the subject present a uniform picture. The Supreme Court must now consider legal doctrine briefly because the communis opinio doctorum is also regarded as a source of international law.

Austrian legal doctrine is divided. Classic doctrine is upheld only by Walker, Internationales Privatrecht, 5th ed., p. 175, and Pollak, Zivilprozessrecht, 2nd ed., p. 251; all other authors, while not always concurring on specific points, deny that, in contentious matters falling purely within the sphere of private law, recognition is to be accorded to a principle of international law under which a State may under no circumstances - with the possible exception of actions in rem and cases of express submission - be sued in municipal courts; this position was already taken by Jettel, Handbuch des internationalen Privat - und Strafrechtes (1893), p. 145; Strisower, Österreichisches Staatswörterbuch, 2nd ed., see "Extraterritoriality", I, 916; Verdross, Völkerrecht, p. 200; Sperl, Lehrbuch, p. 32 et seq.; Wolff, Zivilprozessrecht, 2nd ed.; Verdross (merely as the author of a report) in Klang, Kommentar, 2nd ed. (1949), I, p. 208. Hold-Ferneck, Lehrbuch des Völkerrechts, I, p. 171, goes further than anyone else; he does not recognize a rule of international law at all and regards States as exempt from the jurisdiction of other States only where special - domestic (?) - provisions so state.

In other countries, too, no uniform view of the matter has developed among authors, as can be seen from the relevant compilations prepared by Spruth, Gerichtsbarkeit über fremde Staaten (Frankfurt, 1929), Edwin Gmür, Gerichtsbarkeit über fremde Staaten (Zurich, 1948), p. 140 et seq., and Riezler, Internationales Prozessrecht (Berlin 1949), p. 395 et seq.

Even in the Anglo-Saxon countries, where the courts have virtually without exception adhered to the classic immunity doctrine until now, the view is increasingly being taken in the literature that a distinction should be made between acta juris imperii and acta juris gestionis, e.g. Watkins, The State as Party Litigant, p. 189 et seq. (Baltimore, 1927); George Granville Chillmore in Recueil des Cours de la Haye, VII, 417 and 480; Irizarry y Puente in Revue générale de droit international public, 1934, 548. Starke's An Introduction to International Law (London, 1947), the most recent handbook of international law in English, also regards the question as definitely open.

In conclusion, mention may be made of two noted contemporary Swiss authorities on international law who hold that the opposite viewpoint reflects the law as it now prevails, namely, Guggenheim, Lehrbuch des Völkerrechtes, I, p. 174 et seq., who upholds the classic immunity doctrine, and Schnitzer, Internationales Privatrecht, 2nd ed., II, p. 368 et seq.; also reflecting this view is the recent work by Riezler, Internationales Prozessrecht (1949), p. 400.

Accordingly, there clearly is no communis opinio doctorum.

The Supreme Court therefore reaches the conclusion that it can no longer be said that under recognized international law so-called acta gestionis are exempt from municipal jurisdiction. This subjection of the acta gestionis to the jurisdiction of States has its basis in the development of the commercial activity of States. The classic doctrine of immunity arose at a time when all the commercial activities of States in foreign countries were connected with their political activities, either by the purchase of commodities for their diplomatic representatives abroad or by the purchase of war matériel for war purposes. Therefore there was no justification for any distinction between private transactions and acts of sovereignty. Today the position is entirely different; States engage in commercial activities and, as the present case shows, enter into competition with their own nationals and with foreigners. Accordingly, the classic doctrine of immunity has lost its meaning and, ratione cessante, can no longer be recognized as a rule of international law.

However, if a restriction under international law can no longer be recognized in the case of acta gestionis, then only the rules of municipal law apply, since, under article IX of the Introductory Act on the Jurisdiction Norm, these rules give way only where the rules of international law supersede municipal law.

The question of which persons enjoy extraterritoriality in this country is not dealt with at all in article IX of the Introductory Act, since this provision only refers to the principles of international law (para. 2). Article IX states only that even subjects of law who are in general exempt from Austrian jurisdiction may in any event be sued in this country in actions in rem and cases involving

voluntary submission. Hence, if a principle of international law regarding the exemption of foreign States in matters of private law is found not to exist, a foreign State must, under what is then the only applicable law, be placed on the same footing as any other foreigner, since domestic Austrian law also contains no restrictions that go beyond international law.

It also cannot be validly argued against this view that international law is thus superseded by domestic law because the latter determines which acts are to be regarded as acts of sovereignty and which are not. This is faulty legal thinking, since, where an act is regarded as an act of sovereignty under recognized international law, it must be so regarded by our courts. The courts may, however, go beyond this and, in accordance with domestic law also exclude from jurisdiction those acts which are regarded only in this country as constituting acts of sovereignty. Nevertheless, this comity vis-à-vis other States can never constitute a violation of international law any more than such a violation is deemed to have occurred where a State - as is still done today by the Anglo-Saxon countries - excludes all acts of foreign States from its jurisdiction. So long as there is no universally applicable world law, it will not be possible to bring about complete uniformity in the legal practice of all States. However, international law does not require that; it is sufficient if the limits fixed by international law are universally observed.

For these reasons, the Supreme Court concludes that in the present case domestic jurisdiction must be found to obtain.

The Court must therefore now deal with the merits of the case.

The plaintiff's capacity to sue must be regarded as having been validated, since the lower courts have concurred in finding that it has been satisfactorily shown that the plaintiff is the general representative and licensee of the firm of Georg D. and that he has for years made use of the trademarks registered in the name of the Hamburg firm. However, the predominant practice of the Supreme Court (judgement of 22 December 1926, Rspr., 1929, No. 79; 16 May 1935, SZ, XVII/87; an opposing view taken only in the judgement of 3 July 1929, GRUR, 34, 1213) has the effect of going beyond the text of the law and, in addition, granting the licensee a right to sue under article 9 of the Unfair Competition Act. The Supreme Court does not feel that there is any reason for it to alter this position, since it is in large measure a response to practical needs. Furthermore, the appellant's right to institute his action cannot be denied on the ground that the trademark rights whose protection is sought are held by a German national. The institution of proceedings by the Austrian licensee of a German firm could only be regarded as intended for purposes of evasion and therefore as inadmissible if, under Austrian law, German owners of trade mark rights held by them prior to 1945, the plaintiff's right to appeal cannot be denied on these grounds, either.

The court of first instance explicitly stated that there was no dispute concerning the fact that the same trade marks which were registered in the name of the firm of Georg D. in Hamburg were also registered in the Vienna Register of Trade Marks in the name of the firm of Georg D. in Bodenbach.

The judgement in the present contentious proceedings therefore depends on whether the Austrian trade marks registered in the name of the Boderbach branch of the Hamburg firm became vested in the enterprise which was nationalized in Czechoslovakia, since the respondent's right to make use of the disputed marks would then be regarded as having been validated and it could therefore not be said to have been demonstrated that he was improperly offering for sale and distributing in Austria goods which were protected by the marks; the situation would be different if the transfer of the right had not been validated, since the use of the marks in Austria would then infringe the older trade mark rights of the Hamburg firm and its licensee. It will be shown below that international registration of the nationalized marks does not alter that fact.

The first prerequisite for recognition of a transfer of the Austrian marks to the enterprise nationalized in Czechoslovakia is that the nationalization was valid under Czechoslovak law. The question of validity must be answered in the affirmative.

The legal basis of the so-called nationalization is the Decree of 25 October 1945 by the President of the Czechoslovak Republic (Sammlung der Gesetze und Verordnungen, No. 108, Decree concerning the Confiscation of Enemy Property), part I, article 1, line 2, of which provided for confiscation, for the benefit of the State and without payment of compensation, of the property of individuals of German nationality (osob fysických narodností německé). This must be held to include not only the property of so-called Sudeten Germans but also that of other Germans, on the ground that Czechoslovakia was at war with Germany and is therefore entitled to confiscate the property of German nationals for so-called purposes of reparation.

From the standpoint of internal Czechoslovak law, therefore, there can be no doubt that the confiscation of the branch office at Bodenbach of the German firm of Georg Dralle is valid in law. Whether or not this confiscation can also be regarded as permissible under international law is immaterial in so far as concerns its internal validity. In international law the question is controversial (see Starke, Introduction, p. 267). For example, Verdross (Völkerrecht, p. 304) states that belligerent Powers are not entitled to liquidate enemy property situated in their territory. Georgio Balladore Pallieri, La guerra (1935, p. 369) and the authorities there referred to take the opposite view; in the latter sense also the judgement of 8 December 1947 of the Supreme Court of the United States in Silesian-American Corporation v. Clark (68 Sup. Ct. 179). The /Austrian/ Supreme Court would, at this stage of the proceedings, be called upon to consider this problem only if it reached the conclusion that war measures permissible under international law are also to be regarded as valid by non-belligerent States in their own territories. This, however, as appears from the prevailing practice and doctrine of international law, is not the case.

Thus, the Tribunal of Monaco, in a judgement of 24 May 1917 (Clunet, 1917, 1508), held that the plea of a debtor that a law enacted in his home State and prohibiting the making of payments to nationals of an enemy State was unavailing, the prohibition not being binding outside the territory of the home State; similarly a judgement of one of the Netherlands courts of appeal (Clunet, 1917, 236);

contra: a judgement of first instance of the District Court of Rotterdam which allowed the prohibition to be treated as force majeure (see Sclère, "Condition des biens ennemis", in Répertoire de droit international, IV, p. 465).

Of particular importance is the judgement of 3 August 1915 of the Court of Chancery of New Jersey (Revue, 1918, 122), which denied all extraterritorial validity to war measures on the ground that, if such validity were accorded, neutral courts would become the auxiliary agents of belligerent Powers in their conduct of the war. On the other hand, a judgement of the District Court of New York (given in May 1915: Clunet, 1915, 930) refused to order an Austrian woman to make payment to an English firm; the Court relied on the principle of neutrality and stated that, if neutral courts were to act otherwise, they would, where payments had been prohibited by the laws of both States, support the creditor, which, in practice, would be tantamount to applying only those war measures which had been enacted for the benefit of defendants.

The Swiss courts have repeatedly had occasion to deal with the effect of war measures enacted by foreign States. The judgement of 17 December 1914 of the Federal Court (BGE 40/I, 486; Revue, 1917, 351) refused to consider them on grounds similar to those given by the Court of New Jersey, stating that it could not be the duty of the Federal Court to ensure the operation of an extraordinary war measure taken by a foreign State; similarly, a judgement of 17 April 1916 (BGE II, 813; Revue, 1917, 348) said that the judge of a neutral State could not be expected to apply foreign enactments which were designed to combat an enemy State in the economic or other fields. The judgement of 19 April 1918 (BGE 44 II, 170) repeated that the Federal Court had always adhered to the principle that the war measures of belligerent Powers could not be recognized by the Swiss courts.

The Swiss courts also adhered to this view in the Second World War. Thus, the Court of Appeal of Zurich, in a judgement of 11 November 1942 (Schweizerische Juristenzeitung, XXXIX, 367), did not recognize the appointment of a commissioner who was to administer the business of a firm established at Danzig, and the judgement of 15 January 1940 (Schweizerische Juristenzeitung, XXXIX, 302) refused to recognize the applicability of a German ordinance concerning the treatment of enemy property in Switzerland.

In a judgement of 25 September 1944 (reported by Seidl-Hohenveldern, Österreichische Juristenzeitung, 1949, 535, note 28), the Swedish Supreme Court refused to recognize the confiscation by the British Custodian of Enemy Property of a British company 99 per cent of whose shares were in the hands of German shareholders; it ordered the assets standing to the credit of the company in Sweden to be paid to the German shareholders.

The same view has been adopted, without exception, by all writers; see in particular Niboyet, "De l'effet en pays neutre des mesures de guerre" (Revue, 1920, 248 et seq.), and "Droits acquis", No. 62 (Répertoire de droit international, V, p. 716); also Dietrich-Schindler, "Do confiscatory laws have extraterritorial effect?" (Schweizerisches Jahrbuch für Internationales Recht, 1946, p. 68 et seq.), who quotes other Swiss writers, and in particular a book by Sauser-Hall, Les Traités de paix et les droits privés des neutres (not available to the Supreme Court) which follows the same doctrine.

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This Court also adopts this view, which is reflected in the doctrine and practice of a number of States and is not contradicted by any precedents, i.e. the view that war measures have no extraterritorial effect and therefore cannot be recognized in a non-belligerent State even if they are permissible under international law. In view of the fact that Austria never took part in the war and merely had to suffer the belligerency of third States in a passive capacity, the confiscation of German property in Czechoslovakia also can have no effect in so far as concerns property situated in Austria and forming part of the assets of the branch office.

Neither the Potsdam Agreement of 2 August 1945 nor the Paris Agreement of 21 December 1945 affects the legal position as here stated. The Potsdam Agreement confines itself to distributing to the principal Powers, in a broad manner, the reparations to be paid; it does not contain any provision from which there can be inferred a duty incumbent upon the countries occupied by the Allies to accord to the confiscatory measures enacted in the territories of the individual Allied States any extraterritorial effect beyond that accorded by the generally accepted rule of international law.

The Paris Agreement is, generally speaking, based on the principle that only German assets situated in the territories of the Allied Powers are to be liquidated (article 6A); it does not, therefore, claim any extraterritorial validity. On the other hand, article 6C provides that German property situated in third countries is to be included in such liquidation by virtue of special agreements to be concluded with those countries. The Paris Agreement is therefore to be accorded extraterritorial validity only to the extent that those States in whose territories such assets are situated have undertaken to accord such validity by means of international agreements, as did Switzerland in the Washington Financial Agreement of 25 May 1946 (Schweizer Jahrbuch, IV, 148).

Accordingly, Austria, with which no agreement has so far been concluded and which, although forcibly occupied by the German Reich, has not acceded to the Paris Agreement or to the special London Agreement of 27 July 1946 concerning the Treatment of German Patents, has not undertaken to liquidate German assets. Article 6C is therefore not applicable in Austria. Thus, the measures enacted in individual Allied States with regard to the liquidation of assets cannot be said to have any extraterritorial effect in Austria.

Considerations having to do specifically with the law of trade marks lead to the same conclusion.

The question of whether a trade mark registered domestically in the name of a foreign enterprise is to be treated as identical with the marks of the home State, i.e. whether the principle of the uniformity of trade marks is to be recognized in Austria, is governed by national Austrian law. It is not a question of general international law but of private international law. Austrian conflict law therefore resolves the issue of how trade mark law is to be applied to a foreign enterprise.

The applicability of Austrian law is also not affected by the fact that both Austria and Czechoslovakia are members of the Paris Union (the Hague revision applies as between the two countries), since every State gives its own interpretation to the Convention inasmuch as the efforts to create an international trade mark jurisdiction have thus far proved unsuccessful.

Even though, under article 6 of the Paris Convention (Hague revision), a foreign mark is in principle to be admitted for deposit domestically only if it is registered in the home State, this affords only minimal protection. No Union State is prevented from going further and protecting foreign marks even if they have not been registered in the home State. This is the case in Austria under the Trade Mark Protection Act (BGBl, No. 206/47) if reciprocity is guaranteed pursuant to article 32, paragraph 4, of the Act. It therefore cannot be said that the principle of "accessoriness" has been fully applied under Austrian law, since Austria also recognizes foreign marks which are not protected in the home State or, at all events, are not protected there as registered marks. In the case of marks which are not protected in the home State, the principle of the territoriality of the enterprise naturally does not apply. Thus, in accordance with the view rejected by the Supreme Court, it would be concluded that a distinction must be made between accessory and non-accessory marks. In the case of an accessory mark, the territoriality principle would apply and its fate would depend entirely on that of the home State mark; all war measures and political measures in the home State would - provided that domestic law and order were not affected - have to be recognized in this country with no possibility of review, whereas, in the case of marks not registered in the home State, war measures and the like in that State could not be taken into consideration.

However, contrary to a view that is widely held in the literature, it cannot be granted in the case of accessory foreign marks that, because of the accessory nature of the origin and duration of the trade mark right, they are to be regarded as located abroad rather than in the home State and therefore, in accordance with the territoriality principle, are "tied to the enterprise" and thus subject to the foreign war measures. The fact of "accessoriness" does not necessarily mean that, under conflict law, these marks fall under the law of the State in which the primary right is vested. A mortgage is also an accessory right with which the secured claim lapses, and yet its fate is determined by the location of the mortgage rather than that of the principal right. The same view is still predominant today in surety law despite the tendency to regard the law of the secured principal claim as the applicable law.

In addition, a number of breaches have been made in the telle quelle principle in the case of accessory foreign marks, too. The Paris Union Convention itself, in article 6, paragraph 2, cites a considerable number of questions which are not to be governed by the law of the country of origin, in particular, for example, the distinctiveness of the mark. The transfer obligation laid down in article 9, paragraph 2, of the Trade Mark Protection Act is also binding on a foreign trade mark proprietor irrespective of whether such an obligation exists under his domestic law, etc.

For all these reasons, the Supreme Court rejects the principle of the uniformity of trade mark rights and of their localization in the country of origin. Transfer measures in the home State which are not recognized domestically, such as war measures and the like, therefore cannot have the effect, in relation to marks owned by the enterprise, of causing the enforced transfer of the home State mark to be regarded as valid domestically in relation to a foreign mark.

The same view has been taken in international judicial practice.

An Act of 2 August 1872 introduced a match monopoly in France, and match factories were expropriated. The concessionaire of the monopoly, the Compagnie générale des alumettes, sought a finding that the foreign marks of the expropriated factories had also been transferred to it. The French Court of Cassation, in a judgement of 8 November 1880 (Revue, 1907, 434), refused to make such a finding on the ground that the expropriation of a domestic enterprise did not affect the latter's commercial personality and therefore could have no effect on trade mark rights existing abroad.

Any extraterritorial effect of confiscations in relation to trade mark rights was also denied in the judgements rendered during the early 1900s in many different countries in the matter of the "Chartreuse" mark. Pursuant to an Act of 1 July 1901, the Carthusian Order in France was dissolved and its property confiscated; the property in question included the cloister "La Grande Chartreuse", where the monks manufactured a liquer with the brand name "Chartreuse". The purchaser of the manufacturing facilities and the liquidator of the cloister property thereupon became involved in a series of lawsuits with the trustee for the Carthusians, in whose name the marks were registered. In almost all the countries concerned, the lawsuits ended in judgements favourable to the Carthusians, since the confiscation of the Order's property by the French State was not deemed to have any extraterritorial effect. Reference may be made to the explanations of grounds (which do, to be sure, differ in points of detail) offered by, among others, the Swiss Federal Court in the judgement of 13 February 1906 of its Penal Chamber (Clunet, 1907, 213), the Brazilian Federal Court in its judgement of 10 May 1907 (Clunet, 1907, 1171), the Netherlands Court of Cassation in its judgement of 5 March 1908 (Revue, 1908, 843), the German National Court in its judgement of 29 May 1908 (RGZ, 69, 1), the House of Lords in its judgement of 18 March 1910 (Revue, 1910, 914) and the Brussels Court of Appeals in its judgement of 20 May 1910 (Revue, 1911, 732). Most recently, a similar view was taken in the Knäckebrot judgement of 19 July 1948 of the Hamburg Higher Land Court (Montatsschrift für deutsches Recht, 1948, 283), which held that the expropriation of trade mark rights had no effect outside the Occupation Zone. The extensive literature dealing with the Chartreuse judgements has also for the most part given expression to this view, e.g. A. Weiss (Revue, 1907, 425); Kohler, "Chartreuse and the French Government" (Archiv für bürgerliches Recht, 18, 207, and Revue, 1907, 440), and Pillet, "The Carthusian trade mark and the claims of the liquidator in foreign courts" (Revue, 1907, 525). Most recently, Benkard "The separation of industrial patent and trade mark rights" (Deutsche Rechtszeitschrift, 1949, 320) comments on the Knäckebrot judgement (calling attention to the latest German literature in note 2). Opposing views are found only in the expert opinions rendered in favour of the liquidator of the Chartreuse enterprises by Lyon-Caen (Revue, 1907, 435) and Millerand (Revue, 1907, 444) and in Nussbaum, Deutsches internationales Privatrecht, 208, note 1. That the confiscation of trade

mark rights has no extraterritorial effect has thus remained an unchallenged principle in judicial practice in the period since the Chartreuse trials; for example, the judgement of 24 October 1921 of the German-French Mixed Arbitral Tribunal (Recueil des décisions des TAM, I, p. 503) observes: "The Carthusians had their property expropriated without compensation and pursuant to an internal police-power law whose effects foreign States have not seen fit to recognize ...".

This universally recognized practice is also not contradicted by the above-mentioned judgement of the German-French Mixed Arbitral Tribunal in the Mumm case, which stated that the purchaser of the property of the German firm, G. H. Mumm and Company which had been liquidated in France had also acquired all Mumm trade marks outside France and Germany; the judgement specifically held that, pursuant to the annex to article 297 of the Versailles Peace Treaty, trade marks were also included in the German property subject to liquidation since it was the purport of the Treaty that the trade marks of liquidated firms, wherever situated, should also be subject to liquidation:

> "Having regard to the fact that this notion is clearly contrary to the ideas underlying both the sequestration measures taken during the war by the Allied and Associated Powers and the contractual provisions of the Treaty of Versailles which gave approval to these measures and supplemented them by authorizing the liquidation of the sequestrated German property for the benefit of the said Powers, that the aim in view was (annex to article 197, sections 3 and 4) to seize German property wherever it was situated and to hold it as security for the payments levied against Germany, that this aim would be only partly achieved if trade marks registered by a German firm established in France could not be sequestrated and liquidated either in France, because they were situated abroad, or in foreign countries, because they were inseparable from the business assets, of which only France could dispose, that that would result in the disappearance, for the benefit of no one, of things of economic value which it was essential to use in the manner provided for in the Treaty ...";

a similar view is taken by the judgement of 31 January 1925 of the German-French Mixed Arbitral Tribunal (Recueil, V, 144) in the matter of the "Parfums d'Orsay" trade marks.

The Mixed Arbitral Tribunal also recognized, in keeping with the practice which had prevailed since the Chartreuse judgements, that the foreign marks were situated abroad, but it concluded in the light of the aim pursued in the Versailles Treaty that the foreign marks were also included in the liquidation since trade marks go with the enterprise in question - this legal principle was at that time still universally accepted - and any other interpretation would therefore mean that the foreign marks were no longer of value to anyone. Thus, the theory of the uniformity of domestic and foreign marks was not upheld in the Mumm judgement, either.

Accordingly, if the Supreme Court rejects the uniformity theory and finds that the liquidation undertaken in Czechoslovakia has no effect in relation to the Austrian marks, its ruling is consistent with the currently prevailing doctrine

and practice of all civilized nations with regard to the extraterritorial effect of the confiscation of trade mark rights.

The only question remaining to be dealt with is therefore whether the fact that the nationalized enterprise in Czechoslovakia has permitted international registration of the Dralle marks must prompt this Court to render a different judgement. Since Czechoslovakia has until now not acceded to the London revision of the Agreement of Madrid, the Hague revision is applicable here, too.

International registration of a trade mark does not provide the basis for a uniform international right to the mark but merely causes the foreign mark to be treated in all contracting States as if it had also been registered domestically. Since Austria rejects the concept of a uniform mark in relation to foreign marks, this also applies to internationally registered foreign marks. The only difference vis-à-vis an ordinary foreign mark pursuant to article 6 of the Paris Union and article 32 of the Trade Mark Protection Act is that the priority accorded to the predecessor in title to a foreign mark registered domestically before the registration of the international mark is also accorded to the successor in title even if the transfer has not been effected in the domestic register of trade marks (art. 4 of the Agreement of Madrid; judgement of 14 April 1937 of the Antwerp Commercial Court (Ing. Conseil, 281/7)). Nevertheless, marks applied for in the name of the nationalized enterprises cannot claim the priority accorded to the marks previously applied for in the name of the Codenbach branch office since, as stated above, Austria does not recognize the transfer of the marks because of the fact that it is based on a war measure. Accordingly, the international application for the marks by the nationalized enterprise is entitled only to the priority accorded to the 1947 application.

Since the nationalized marks are thus of later date than the rights of the plaintiff or his licenser, which have been exercised in Austria for decades, the set of circumstances envisaged by article 9 of the Unfair Competition Act may be deemed to exist. The Appeals Court thus acted incorrectly in refusing to issue the temporary injunction applied for. Accordingly, the appellant should have been granted relief and the judgements of the court of first instance reinstated.

The order concerning costs is based on article 393 of the Execution Code.

The First Chamber has ordered the inclusion of the following rules of law in the repertory of precedents under No. 28:

1. Under international law, foreign States are exempt from the jurisdiction of the Austrian courts only in so far as relates to acts performed by them in the exercise of their sovereign powers;

2. Similarly, under municipal law, foreign States are subject to Austrian jurisdiction in all contentious matters arising out of legal relations within the sphere of private law.

Art. IX of the Introductory Act on the Jurisdiction Norm; article 42 of the Jurisdiction Norm; article 477(1), 6, of the Code of Civil Procedure: No exemption of foreign States for acta jure gestionis. - In determining whether an act should be regarded as performed in a private or in a sovereign capacity, the act itself, rather than its purpose, is decisive. - The maintenance and operation of motor vehicles and their use on the public roads by a foreign State are to be regarded as acts performed by that State in its private capacity. - A foreign State is also liable in the municipal courts for damage arising out of a traffic accident if such damage is caused during an official journey (collection of mail for an Embassy unit).

Judgement of the Supreme Court of 10 February 1961 (2 Ob 243 60)

The plaintiff maintained that on 2 December 1956 he had parked his motor car in a lawful manner in front of his residence in Vienna 11. At 7 a.m., a motor car belonging to the United States Embassy in Vienna, namely a Volkswagen bearing official CD identification, struck the rear of the parked vehicle with such impact that the latter was completely wrecked. The vehicle belonging to the defendant (the United States) was driven by a highly inebriated chauffeur in civilian dress. It was alleged that, on instructions from the air attaché, mail was to be collected from the airport in the vehicle in question. The very next day, the plaintiff submitted his claim for damages to the United States Embassy. The responsible official allegedly acknowledged that damage of S 34,550 had been incurred and promised payment by 2 January 1957. Subsequently, however, the Embassy declared itself willing to pay only S 26,000 and, finally, only S 17,414.72. The damage had not yet been made good, and diplomatic representations had been to no avail. The plaintiff therefore sued the defendant for payment of damages amounting to S 34,550.

The Court of First Instance dismissed the claim on grounds of lack of jurisdiction. It contended that, under both international and municipal law, foreign States were exempt from Austrian jurisdiction in respect of sovereign acts. Collection of mail for the Embassy was said to constitute such an act since it involved an official journey rather than a journey of a private or an administrative nature by an agent of the defendant.

The Court of Appeal granted the plaintiff's appeal and instructed the Court of First Instance to initiate legal proceedings. It took the view that a claim could be brought against the defendant as owner of the vehicle which had caused the damage since the relations between the plaintiff and the defendant belonged to the realm of private law.

The appeal by the defendant was dismissed.

The defendant contested the view of the Court of Appeal that the claim was admissible since it did not involve an act of sovereign authority but rather a private act through which damage had been caused to the plaintiff. The defendant contended that the fact that the damage had been caused by one of its vehicles was irrelevant. All means used by a State in exercise of its sovereign rights

constituted sovereign acts on the part of the State. This applied to the vehicle pool and to the weapons of the army, etc. The purchase, but not the use, of weapons was regarded as an act pertaining to the realm of private law. The criterion was not the question of the ownership and possession of the vehicle but the act which constituted the subject matter of the claim. However, this act belonged to the realm of sovereign rights. The collection of mail for the air attaché had nothing to do with the activity of the State in its private capacity.

This view cannot be upheld.

The Supreme Court, under Precedent No. 28 (new), SZ, XXIII, 143, dealt with the question of whether, and subject to what conditions, a foreign State may be sued in an Austrian court. In the judgement in question, the Court reviewed all relevant Austrian and foreign practice and doctrine.

The judgement has been published, and it is therefore sufficient to repeat only the most important of the fundamental considerations which have led the Court to lay down the following rules of law: (1) Under international law, foreign States are exempt from the jurisdiction of the Austrian courts only in so far as relates to acts performed by them in the exercise of their sovereign powers. (2) Similarly, under municipal law, foreign States are subject to Austrian jurisdiction in all contentious matters arising out of legal relations within the sphere of private law.

We must proceed on the basis of article IX of the Introductory Act on the Jurisdiction Norm. The material submitted (Committee report and explanation of the Government bill) when this provision was introduced in Parliament shows that, when reference was made to rules of international law, the intention was not to restrict but to extend the jurisdiction of the Austrian courts. A correct interpretation of article IX requires that rules of Austrian law must yield only to the extent that rules of international law supersede Austrian municipal law (Precedent No. 28 (new)).

Taking into account this interpretation, the Suprement Court, in the judgement referred to, had to consider, first of all, the question of whether there is a recognized rule of international law which confers on foreign States exemption from the jurisdiction of municipal courts in respect of legal relations belonging to the realm of private law (acta jure gestionis). The Court came to the conclusion that in judicial practice the principle of exemption of foreign States from jurisdiction is not generally recognized in so far as concerns claims of a private nature, because in such cases the majority of courts in various civilized countries (Egypt, Belgium, Italy, Switzerland and Austria) deny the immunity of foreign States and because even the courts of those countries which still adhere to the traditional rule that no State is entitled to exercise jurisdiction over another (Czechoslovakia, Germany, Great Britain, France, Poland, Portugal and the United States) make exceptions to this rule).

The Supreme Court has also considered the views of writers on this question because the communis opinio doctorum must also be regarded as a source of international law. The Court reached the conclusion that among writers there is

no uniform opinion one way or the other. In so far as concerns the judicial practice of individual countries and the different views expressed by writers, we can, in order to avoid repetition, refer to what has been said in the judgement referred to above.

In its earlier judgement, the Court reached the conclusion that in respect of acta jure gestionis a limitation under international law can no longer be recognized.

Basing ourselves on this premise, all we have to do in this case is to examine the question of whether the plaintiff bases his claim on an act performed by the foreign defendant State in its private or in its sovereign capacity. The lower courts arrived at different conclusions. Whereas the Court of First Instance regarded as decisive the purpose of the journey, viz. the collection of mail for the Embassy of the defendant, the Court of Appeal took the view that the defendant State was being sued as the operator of the vehicle and as a road user.

In its appeal, the defendant contends that the means whereby a State exercises its sovereign rights are irrelevant because all means at its disposal belong to the sphere of private law and that the decisive factor is the act performed by the State with the aid of those means. It is contended that in this case the motorcar was the means whereby the sovereign act (the collection of mail for the Embassy) was carried out and that the case must be judged in accordance with this act.

This Court is unable to accept this contention. The distinction between private and sovereign acts is easily understood if one considers the following: Eminent writers, such as Schnitzer (Internationales Privatrecht, p. 833 et seq.), point out that an act must be deemed to be a private act where the State acts through its agencies in the same way as a private individual can act. An act must be deemed to be a sovereign act where the State, on the basis of its sovereignty, performs an act of legislation or administration (makes a binding decision). Sovereign acts are those in respect of which equality between the parties is lacking and where the place of equality is taken by subordination of one party to the other. Spruth (Gerichtsbarkeit über fremde staaten) defines this distinction as follows: "To act as a sovereign State means to act in the performance of sovereign rights. To enter into private transactions means to put oneself on a basis of equality with private individuals." Dahm (Völkerrecht, p. 229) expresses the same idea when he says that there are cases in which a State descends from its elevated position and makes its appearance in legal capacities and in spheres in which private individuals move.

Thus, we must always look at the act itself which is performed by State organs and not at its motive or purpose. We must always investigate the act of the State from which the claim is derived. Whether an act is of a private or sovereign nature must always be deduced from the nature of the legal transaction, viz. the inherent nature of the action taken or of the legal relationship which arises. In a note of 23 April 1928 to the former League of Nations, Switzerland used the following words

> The solution ... would be to take as a criterion not the ultimate purpose of the act but its inherent nature. In order for the nature of the act to be such as will afford its complete jurisdictional immunity, the act must be one which could not be performed by a private individual." (cited in the appendix to Spruth's Gerichtsbarkeit über fremde staaten p.93)

Some examples may serve to illustrate this proposition. The purchase of land by a foreign State from a private individual is, even in the opinion of the defendant, a private act. If, as a result of such a purchase, the acquired rights of a third party were to be infringed, the latter, even in the opinion of the defendant, would be entitled to institute an action for the enforcement of his claim against the foreign State in a domestic court. If the purpose of the purchase were to be regarded as decisive, then such an action could not be brought against the foreign State if the land was intended to be used for the establishment of a military base. If a foreign State instructs a local builder to build a house on land owned by the foreign State, there can be no doubt, even in the view expressed by the defendant during the appeal, that a building contract of this kind is a private contract in respect of which the foreign State can be sued in the local courts. If the purpose were to be regarded as decisive and the building were intended for use as the Embassy of the foreign State, then no action could be brought in the local courts. Many instances could be cited to show that the plea of immunity from jurisdiction is frequently only a pretext to evade contractual obligations. On the other hand, it may be assumed that States intent on meeting their obligations will make payment without furthter ado once the factual and legal position has been established.

These examples show the soundness of the view that, in determining whether an action may be brought, it is the act from which the claim is derived that is decisive and not the purpose of the act.

There is no justification for the objection that the Public Liability Act is concerned with violations of the law which are only indirectly connected with the exercise of sovereign authority. The Public Liability Act provides for the liability of public authorities according to the provisions of civil law, and a public authority after the initiation of proceedings in accordance with article 8 of the Act, can be sued in the ordinary courts (article 9). Where reciprocity is guaranteed, even foreign nationals can institute proceedings for damages (article 7).

If we apply the basic principles here outlined to the case before us, we must conclude that the act from which the plaintiff derives his claim for damages against the defendant is not the collection of mail but the operation of a motorcar by the defendant and the latter's action as a road user. By operating a motorcar and using the public roads, the defendant moves in spheres in which private individuals also move. In these spheres, the parties face one another on a basis of equality, and there can be no question here of any supremacy and subordination. It follows that in so far as liability for damage is concerned, the foreign State must be treated like a private individual. The damage alleged by the plaintiff could not, under these circumstances, have been caused by the collection of mail from the airport but only by the operation of the motorcar and

the use of public roads by the defendant. The plaintiff thus derives his claim from a private legal relationship. The development of traffic on public roads and the dangers to every road user from such traffic compel us to accept this view. To deny the liability of a foreign State arising from the operation of motor vehicles on the public roads would lead to intolerable results and hardships for private citizens. This is best illustrated by the present case, assuming always that the plaintiff's allegations are true, which will emerge when the case is heard on the merits. Spruth (op. cit., p. 77) has made certain observations which are opposite in the present case. There is no doubt that the foreign State, in the event of a collision involving a motor vehicle owned by it, would be entitled to bring an action for damages against a private individual in the local courts and in accordance with local law. The foreign State is thus given rights to invoke the jurisdiction of the courts of another State, and it could do so as it pleases and for its own benefit. Not so the private individual. The latter would have no rights whatever against the foreign State if, depending on the purpose of the journey, the operation of motor vehicles and the use of public roads by foreign States were to be regarded as a sovereign act. It would be argued that the claims, however well-founded, of a private individual in respect of damage caused by a collision could not be pursued against the foreign State by a separate action (cf. Parliamentary bill, explanatory note on the Introductory Act on the Jurisdiction Norm, Materialien I, p. 614) or a counterclaim. A State would thus have to deny to its citizens rights which it granted to a foreign State.

Finally, the Court must express its views on some of the arguments put forward against limitation of the exemption of foreign States from jurisdiction. It is said that it is one of the fundamental rights of a State not to allow another State to subject it to its authority and that such subordination creates a risk of political complications and prevents the foreign State from performing the tasks which by international usage it is entitled to perform in the territories of other States. Moreover, the "fear of execution" has caused many writers to deny all jurisdiction over foreign States (Spruth, op. cit., p. 94). The unlimited recognitition of such a "fundamental right" in respect of acta jure gestionis would constitute an infringement of the sovereignty of the State of the forum. The risk of political complications is far greater if disputes of a private nature are fought out at the diplomatic level before the facts and the legal position have been clarified. Experience shows that the objective judgement of an independent court is more likely to be accepted than a political decision. The foreign State is not in the least hindered in the performance of its tasks if - like all other road users - it is brought before a court to have its liability for an accident determined in accordance with the provisions of civil law. In so far as concerns the lack of means to execute a judgement, we need only point out that such means exist under international law within the framework of municipal law. There can be no violation of foreign sovereighty because the binding force of a judgement operates only within the territory of the forum State and the judgement operates only within the territory of the forum State and the judgement can be enforced only within that territory (Spruth, op. cit., p. 97).

For all these reasons, the court is of the opinion that the operation of a motor vehicle by a foreign State and the use of public roads by the latter belong to the sphere of the private activities of that State even if, as has been

contended, such operation and use have occurred in the performance of official functions and that accordingly the foreign State can be sued for damages in a local court. A traffic accident creates private legal relations between the foreign State and the private individual involved on a basis of equal rights between them. In international judicial practice, likewise, liability arising out of a private contract is treated on the same basis as liability for a tort, which has nothing to do with the political order (see the judgement of the Belgian Court of Cassation of 1903 referred to in Precedent No. 28 above).

The Court is therefore of the opinion that this action has been properly brought in the Austrian courts.

The Court did not consider it necessary to consult the Federal Ministry of Justice as provided in article IX (3) of the Introductory Act on the Jurisdiction Norm because no doubt exists as to the extraterritoriality as such of the defendant. This question was capable of being determined on the basis of the record before the Court, (see SZ, XXIII/143; Wahle, JBI, 1960, p. 35, regarding article IX of the Introductory Act on the Jurisdiction Norm). The Agreement concluded on 22 October 1940 between the then Government of Germany and the then Government of Romania concerning resettlement of the ethnic German population of southern Bukovina and the Dobrudja does not give rise in Austria to an actionable obligation to pay compensation.

Judgement of 14 February 1963 (5 Ob 343/62)

I. Court: Regional Civil Court, Vienna;

II. Court: Higher Regional Court, Vienna

The plaintiff states that he was one of 556 persons resettled from Bessarabia, Bukovina and the Dobrudja who took up residence in Austria and subsequently became Austrian nationals. He maintains, in his action against the Federal Republic of Germany, that the latter has paid compensation under the Equalization of Burdens Act of 14 August 1952 (BGBl, I, p. 446) to resettled persons who had become German nationals but has refused compensation to those of other nationalities. The Federal Ministry of Justice, he notes, has stated that Austria refuses to pay compensation, that the resettled persons have to press their claims against the defendant and that it would be advisable to clarify the legal situation by conducting a trial which would set the pattern for subsequent proceedings. The plaintiff states that, a Romanian national at the time, he voluntarily took part in the resettlement pursuant to the Agreement of 22 October 1940 between the then Government of Germany and the then Royal Government of Romania concerning resettlement to the German Reich of the ethnic German population of southern Bukovina and the Dobrudja. He had left behind in Romania a farm with livestock and equipment valued at an estimated RM 50,800 and had not received an equivalent payment even though the payment had been due on 26 November 1940 and was subject to interest and the German Reich had taken over in 1941 from the Kingdom of Romania, under the State Treaty, property valued at RM 132,530,160.90 which had belonged to the resettled persons. The plaintiff calls upon the defendant to pay

him the sum of S 50,800 together with 4 per cent interest accrued since 26 November 1940 and bases his claim on a private agreement with the German Reich, to which he entrusted his property through the German Liquidation Office at the German Embassy in Bucharest and which had been bound under the German-Romanian Agreement to make restitution to him in Austria for his property through the German Resettlement Trust Company, Ltd. with headquarters in Berlin; he also cites unjust enrichment as a basis for his claim. The plaintiff contends that the Vienna Regional Civil Court is competent to deal with this property matter because the defendant is owner of a building at Metternichgasse 3, Vienna III.

The Court of First Instance handed down a default judgement in favour of the plaintiff, and the judgement was appealed by the defendant.

The court of appeal declared the default judgement and the proceedings previous thereto, including the service of papers in respect of the action, to be null and void and dismissed the action on the ground of lack of domestic jurisdiction. It found that the appeal had been filed within the prescribed time-limits and that the contested default judgement was null and void because the service procedure had been illegal under article 477 (4) of the Code of Civil Procedure. In addition, the lower court should have taken note ex officio of the lack of domestic jurisdiction, which had been apparent at every stage of the proceedings. The defendant was being sued on the basis of a State treaty, i.e. on the basis of a set of circumstances which came within the sphere of public law and, indeed, of international law.

The Supreme Court dismisses the plaintiff's appeal.

Statement of grounds

The court of appeal, in dealing with the question of whether domestic jurisdiction could be invoked for the claim, could take the matter up only in connexion with a valid appeal which had been filed within the prescribed time-limits. If it had acted on a late appeal, it would have violated proper legal procedure, thus invalidating the proceedings and the judgement and compelling the Supreme Court to take cognizance of the matter ex officio (art. 411 (2) of the Code of Civil Procedure, SZ, XXX, 48). This Court concurs in the view of the court of appeal that the appeal was filed within the prescribed time-limits. By a note verbale of 27 February 1962, the German Embassy returned the default judgement of 22 January 1962 together with the uncompleted service form to the Federal Ministry of Foreign Affairs, stating that the Federal Republic of Germany was refusing service of the judgement pursuant to article 4 of the Hague Convention of 1 March 1954 relating to Civil Procedure. Under this provision, service may be refused only if the State in whose territory it is to be effected deems it likely to prejudice its sovereignty or security. Even though in the present instance the defendant may at the same time be the State applied to for legal assistance, it is nevertheless not the case that the defendant refused to accept service, which would have made it necessary to proceed in accordance with article 109 of the Code of Civil Procedure, but rather that the foreign State applied to refused to provide legal assistance. This refusal is a sovereign right of the foreign State

against whose exercise remedy may, under the second paragraph of article 1 of the Convention, be sought only through diplomatic channels. Accordingly, the default judgement was not even served on the defendant, and the period prescribed for the filing of an appeal therefore could not begin to run. Hence, the defendant's appeal cannot be said to have been filed too late. It has been consistently held by the courts that a party wishing to contest a judgement is not required to wait until service is effected and the period prescribed for legal remedy has begun to run but may do so as soon as a link has been established between the court and its judgement, e.g. through delivery of the judgement to the court registry (SZ, XXI, 2, etc.). The appeal was therefore correctly considered to have been filed within the prescribed time-limits.

The further questions of whether the court of first instance was competent to deal with this property matter and whether there had been default must yield to the question of whether domestic jurisdiction can be invoked, for the lack of such jurisdiction precludes the domestic courts from conducting any proceedings whatsoever and must be taken cognizance of ex officio without regard to the stage reached in the proceedings. Accordingly, the arguments offered in the plaintiff's appeal cannot invalidate the findings of the court which heard the defendant's appeal. In applying article IX of the Introductory Act on the Jurisdiction Norm, the Supreme Court has, since the inclusion in its repertory of the new precedent No. 28 (SZ XXIII, 143: see also JBl, 1962, p. 43), adopted the theory of relative immunity. In accordance with this theory, a foreign State is entitled to immunity only in respect of its sovereign acts, which may not be judged by municipal authorities, and a State is subject to municipal jurisdiction only in respect of its acts within the sphere of private law, provided that a point of reference exists in private international law. Immunity is granted in respect of acta jure imperii and is denied in respect of all acta jure gestionis. In specific cases, the court's judgement depends on whether the claim derives from an act which the foreign State performed in exercise of its sovereign rights or derives from legal relations or circumstances within the sphere of private law on the basis of which the foreign State had the same rights or obligations as a private individual. The grounds for liability under private law cited by the plaintiff cannot be upheld, since the asserted liability derives from a State treaty which, even if one were to be guided by judgement SZ, XXXIII, 15, does not contain any specific statement of obligation to pay compensation. The property left behind by the resettled persons was, in accordance with this treaty, taken over by the German Liquidation Office, which had been set up as an agency of the German Government and had acted as such and whose organs enjoyed extraterritorial rights. The property was turned over to the Royal Romanian Government, creating a debt to the German Reich on the part of the Romanian State whose payment was governed by the Convention. The obligation of the German Reich under the above-mentioned State treaty to pay the resettled persons the equivalent of the property left behind in Romania is not based on a collective agreement under private law or on individual agreements between the German Reich and the resettled persons but is an obligation under public law resulting from a political measure taken by the German Reich. The fulfilment of this obligation is, like all legal questions relating to war damage, a matter for legislation. The question of compensation can be settled with universal binding effect only by a law or, in the case of resettled persons of different nationality, by an agreement between States. Both courses were adopted by

the defendant, i.e. through the Equalization of Burdens Act of 31 December 1952 and through the Financial and Equalization Treaty of 27 November 1961 (BGBl, No. 283/1962), under article 8 (1) of which the defendant is obligated to ensure that expellees and resettled persons of Austrian nationality are also granted benefits pursuant to the Equalization of Burdens Act under certain conditions. It has also been held in German judicial practice (BGHZ, 22 286) that compensation claims by resettled persons fall within the sphere of public law and cannot be represented as being claims under private law. It therefore follows from the principle of relative immunity that the claim is not subject to domestic jurisdiction. The action was properly dismissed on this ground.

BARBADOS

/Original: English/
/16 July 1979/

The Government of Barbados wishes to inform that Barbados at present has no legislation dealing specifically with the subject of jurisdictional immunities of States and their property, nor have there been any relevant decisions of national tribunals. The current position in Barbados is that foreign States enjoy immunity from the jurisdiction of our courts under customary international law. This immunity is restricted to governmental or administrative activities, as distinct from commercial ventures. Barbados follows this distinction as developed in the courts of the United Kingdom, prior to the passage by the United Kingdom of its State Immunity Act, and other common law jurisdictions.

The Government of Barbados further wishes to state that to date there has been no relevant diplomatic or official correspondence on the matter. The Barbados Government is, however, at the moment in the process of considering such legislation and in addition is spearheading efforts for a Caribbean Convention on State Immunity. The Government of Barbados would therefore be very interested in seeing the International Law Commission develop a convention on this topic.

CHILE

/Original: Spanish/
/5 June 1979/

(A) Legislation

The principle governing the normative practice of the Chilean State is based on broad and unrestricted recognition of the jurisdictional immunity of foreign States. Its legislative bodies emphasize the general precepts of international law on the subject.

a.1. The Government of Chile, in its capacity as a Member of the United Nations, has already recognized and respects the first principle set out in Article 2 of the Charter, paragraph 1 of which provides that: "The Organization is based on the principle of the sovereign equality of all its Members".

The same Article provides that the United Nations are not authorized "to intervene in matters which are essentially within the domestic jurisdiction of any state", and that the Members are not required "to submit such matters to settlement under the present Charter".

2.2 The Chilean State also observes the principles set out in the Charter of the Organization of American States, among which are the following: Article 3. "(b) International order consists essentially of respect for the personality, sovereignty, and independence of States, and the faithful fulfillment of obligations derived from treaties and other sources of international law".

In Article 9, the same Charter adds that: "States are juridically equal, enjoy equal rights and equal capacity to exercise these rights, and have equal duties ...".

a.3 A third instrument that may be mentioned is the Code of Private International Law, also known as the Bustamente Code, which was signed at Havana on 20 February 1928, ratified on 14 June 1933, promulgated as a Law of the Republic by Decree No. 374 of the Ministry of Foreign Affairs on 10 April 1934, and published in the Diario Oficial on 25 April 1934.

Book IV, which relates to International Law of Procedure, provides, in article 314, that "The law of each contracting State determines the competence of courts, as well as their organization, the forms of procedure and of execution of judgements, and the appeals from their decisions".

In article 333, the same Code provides that "The judges and courts of each contracting State shall be incompetent to take cognizance of civil or commercial cases to which the other contracting States or their heads are defendant parties, if the action is a personal one, except in cases of express submission or of counterclaims".

With respect to real actions which may be exercised, article 334 of the Code in question lays down that: "In the same case and with the same exception, they shall be incompetent when real actions are exercised, if the contracting State or its head has acted on the case as such and in its public character, when the provisions of the last paragraph of Article 318 shall be applied". Article 318 provides, in this respect, that: "The submission in real or mixed actions involving real property shall not be possible if the law where the property is situated forbids it".

Article 335, on the other hand, stipulates that: "If the foreign contracting State or its head has acted as an individual or private person, the judge or courts shall be competent to take cognizance of the cases where real or mixed actions are brought, if such competence belongs to them in respect to foreign individuals in conformity with this Code".

Finally, article 336 of the Code states that: "The rule of the preceding articles shall be applicable to universal causes (juicios universales, e.g., distribution of a bankrupt's or decedent's effects), whatever the character in which the contracting foreign State or its head intervenes in them".

a.4. Another legislative instrument to which Chilean courts are subject in regard to the immunity from jurisdiction of foreign States is the Vienna Convention on Diplomatic Relations signed on 18 April 1961, which was promulgated as a law of the Republic by Supreme Decree No. 666 of 9 November 1967 and published in the Diario Oficial of 4 March 1968.

In article 22, the aforementioned Convention provides that:

"1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

"2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

"3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution".

a.5. Recently, the Government of Chile provided, in article 9 of Decree Law No. 2,349 of 13 October 1978, published in Diario Oficial of 28 October 1978, that "any foreign State and its organs, institutions and enterprises may apply in Chile for immunity from jurisdiction or execution, as the case may be, on the same terms, to the same extent and with the same exceptions as its own legislation grants to the State of Chile or to its organs, institutions and enterprises".

(B) Judicial decisions

On the occasions on which the Chilean courts have pronounced on the subject, their decisions have established a uniform doctrine on broad and unrestricted recognition of the jurisdictional immunity of foreign States.

b.1. In 1968 a claim was presented against the Embassy of the Socialist Federal Republic of Yugoslavia for payment for certain services.

In its judgement of 30 May 1968, the Sixth Labour Court of Santiago declared that it lacked jurisdiction to take cognizance of the action since "it is a principle of our law that foreign embassies enjoy the privilege of immunity from jurisdiction", a principle "which must be fully applied in labour actions, no matter what social reasons may militate in favour of the rights of employees and against the aforementioned privilege of immunity from jurisdiction".

The Santiago Labour Court, on appeal, upheld the decision on the ground that "since the defendant is protected by the privilege of extraterritoriality, the principles of international law referred to by the judge in his finding must be applied".

The Supreme Court of Justice ruled that there was no case for a petition in error against the Labour Court's decision, on the ground that "if it is not established that the State represented by the defendant embassy has ratified the Vienna Convention or that the plaintiff, when rendering his services, benefited from one of the cases of waiver of immunity provided for in that Convention, the labour courts cannot act, by reason of the privilege of extraterritoriality enjoyed by diplomatic missions in our country" (judgement of 22 October 1968).

b.2. The Supreme Court of Justice, by a decision of 3 September 1969, annulled the judgement given by the Pedro Aguirre Cerda District Labour Court in the action brought by Mr. Marchant against "the Government of Nationalist China, represented in Chile by the Ambassador of that Republic, Mr. Ti Tsun Li". On that occasion, the Supreme Court stated that "it is a universally recognized principle of

international law that neither sovereign nations nor their Governments are subject to the jurisdiction of the courts of other countries. "There are," it added, "other extrajudicial means of claiming from those nations and their Governments performance of the obligations incumbent on them".

b.3. Following the doctrine upheld in the aforementioned rulings, the Supreme Court of Justice, by a decision of 10 December 1969, set aside the preventive injunctions obtained by an unofficial agent of the Gulf Oil Company from the Second Antofagasta superior departmental court, in the case of Gulf Oil Co. versus the Bolivian Government, on the ground that "it is unquestionable that the Chilean courts lack jurisdiction and competence to issue preventive injunctions or orders prohibiting the conclusion of deeds and contracts, or to take other kinds of measures relating to goods, machinery and any other type of cargo sent to Bolivia from abroad through Chilean territory".

b.4 More recently, the Supreme Court of Justice, by a decision of 2 June 1975, and acting on the initiative of the Government, annulled the final judgement of 16 January 1979, rendered by the Judge of the Fifth Santiago superior departmental court in the case of A. Senerman versus Republic of Cuba, on the ground that "foremost among the fundamental rights of States is that of their equality and from this equality derives the need to consider each State exempt from the jurisdiction of any other State. It is by reason of this characteristic, erected into a principle of international law, that in regulating the jurisdictional activity of different States the limit imposed on this activity, in regard to the subjects, is that which determines that a sovereign State must not be subject to the jurisdictional power of the courts of another State".

To sum up, all the legal provisions indicated and the judicial decisions referred to guarantee, at the domestic level in Chile, respect for the immunity of foreign States from jurisdiction.

COLOMBIA

/Original: Spanish/
/12 July 1979/

As for the immunity of the State itself, in custom and doctrine international law grants the foreign State, its organs and its property, immunity from the jurisdiction of national courts. "The reciprocal independence, equality, and dignity of sovereign States rendered every State duty-bound to refrain from exercising in personam or in rem jurisdiction for the purpose of enforcing local laws against a foreign State or its property" ("Manual of Public International Law" by Max Sørensen, New York, 1968, p. 424).

I am attaching a photocopy of note O/J 767/86 of 24 August 1964, addressed to the then Ambassador of Colombia in Bonn, in which I make some comments on the topic ...

At the national level the Republic of Colombia has some provisions on the subject:

- Decree No. 3135 of 1956 (photocopy attached)*
- Article 336, paragraph 1, of the Code of Civil Procedure
- Article 693 of the Code of Civil Procedure
- Article 694 of the Code of Civil Procedure
- Article 133 of the Penal Code
- Article 134 of the Penal Code
- Article 323 of the Code of Criminal Procedure.

Information on decisions by national courts has been requested of the Supreme Court of Justice and will be sent as soon as possible.**

Jurisdiction of German Courts in respect of foreign States

Bogota, 24 August 1964

Sir,

I am pleased to acknowledge receipt of your note No. 206/45 of 3 July 1964, in which you refer to the problem created by the decision of 30 April 1963 of the Constitutional Court of the Federal Republic of Germany and to the various meetings and expressions of opinion to which this decision has given rise within the diplomatic corps accredited to Bonn.

As you indicate, the decision establishes the principle that proceedings may be instituted against foreign States in German courts in respect of acts other than sovereign acts or acts by the public authorities, although it recognizes that this principle does not affect the prerogatives and immunities accorded to diplomatic missions accredited to Germany.

That is the essence of the decision, as set out in the statement appearing on page 42 of the French translation transmitted by you and in the light of the outline contained in the two paragraphs on page 43.

The Ambassador of Colombia
Bonn, Germany

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* Decree is related to the "Diplomatic prerogatives".

** By the time of publication, no information on the decisions was provided to the United Nations.

I have read the decision in question with close attention and great interest, since it relates to one of the most interesting topics in contemporary public international law. It must be said that the precedents, doctrine and international practice on which it is based enjoy wide acceptance among legal scholars. It must also be borne in mind that no one today disputes the fact that a change has taken place along these lines in the international community.

1. Having begun with an international society of a relational character based solely on the existence of States as the only subjects of international law and as the voluntary authors of international law, we have gone on to today's international society, which is institutional in character and based on assumptions which, although still the traditional ones of the past, have been broadened and modified as a result of the recognition of other subjects of international law, particularly international organizations endowed with powers and functions which imply an abdication of traditional State sovereignty in the strict sense of the term.

2. State sovereignty is not absolute but limited - limited, first of all, by the very conditions of existence of the international community and, in addition, by the existence of international organizations and entities of a supra-State or supranational character which exceed the strict limits of absolute State sovereignty in the traditional sense. In short, international law is no longer merely a body of law which performs co-ordinating functions as between its subjects but is also, and above all, a body of superimposed law which entails a limitation of State sovereignty.

Operating on this assumption, which we accept, the decision in question explores exhaustively the most varied sources of legal doctrine, precedent and inter-State practice in this regard and emphasizes the following basic distinction:

(a) Sovereign acts exercised by the State through its public authorities (jure imperii). In respect of such acts, immunity from domestic jurisdiction exists and is recognized without any difficulty whatsoever both in international law and in the German decision;

(b) Acts other than those mentioned above, i.e. acts which the State performs not as a sovereign entity but when it is operating on the same level as an individual, a private person. These are what are known as administrative acts (jure gestionis); the question which arises is whether or not they are subject to the domestic jurisdiction of the State in which they are performed. The German decision answers this question in the affirmative.

The decision duly indicates the basis for this affirmative answer. However - and I regard this as of paramount importance - it does not explain its reasoning but confines itself to a simple statement when it says: "In the present case, no importance should be attached to the special problem of the immunity of diplomatic missions. The exercise of German jurisdiction does not imply a violation of diplomatic prerogatives and immunities." (p. 42 of the decision)

This is precisely the key point, for the practical result of the German decision is nothing less than interference with and disregard of the diplomatic

sphere of the agent of the defendant State, since it is he, as duly accredited representative of that State, who would be notified of the legal action and of everything that occurred in the proceeding in which he was called upon to appear, give evidence and act on behalf of his Government, the international personification of the State in question.

Otherwise, it is impossible to see how the legal proceeding could take place or how the summoning, appearance and representation of the foreign State against which proceedings were instituted in a German court could proceed. It should also be borne in mind that the execution of the German decision would have to be effected through some sort of formal request delivered to the competent judicial authorities of the other State.

In that event, which is the general rule in all countries, the national authorities of the foreign State against which proceedings had been instituted and a decision rendered would ultimately be the ones responsible for giving effect to the decision in question. In the case of Colombia, the decision would be enforced only subject to the set of requirements provided for in articles 555-561 of the Judicial Code concerning the execution of decisions of foreign courts.

One of these requirements calls for the foreign decision "not to affect national jurisdiction or be otherwise contrary to public order or morality" (art. 557.2 of the Code). It may be assumed that an affected country would be able to put forward numerous arguments in support of the thesis that such a foreign decision rendered against its State violated national jurisdiction and one of the basic principles of its domestic legal order, namely the principle that it is domestic judges who are competent to render such decisions.

Thus, in the absence of a public treaty directing compliance and of the application of legislative reciprocity or de facto reciprocity, the result would be non-compliance with the German decision in the foreign State against which it had been rendered. One does not have to be a clairvoyant to foresee the difficulties that this would introduce in the normal development of relations of every kind between the two States in question, nor would it be rash to suppose that the German State and its courts would be tempted to try to enforce their decision which had failed of compliance by taking retaliatory measures directed precisely against the diplomatic and consular mission of the country against which the decision had been rendered.

In the light of these concerns, one wonders how the German State will arrange matters in practice so as not to violate the diplomatic prerogatives and immunities of the accredited diplomatic corps, since otherwise its decision will not be enforced and the new legal principle will then remain just that - a mere principle of German domestic law having no international application.

The German decision argues that a distinction must be made between the immunity of States as a general problem and the immunity of diplomatic missions as a special problem. It concludes that, in the case in point, no importance should be attached to the latter problem since the exercise of German jurisdiction does not imply any violation of diplomatic prerogatives and immunities. The decision

adds that the criterion to be applied in distinguishing between sovereign State acts, which are exempt from jurisdiction or immune, and private State acts, which are not immune and are subject to German jurisdiction, must be sought in accordance with German domestic law.

In order to anticipate any criticism in this regard, since the delimination of justiciable and non-justiciable State acts and, hence, the definition of the scope of the immunities of foreign States remain within the exclusive competence of the German national authorities, the decision explains that "the establishment by the national legislator of improper domestic jurisdiction would be at variance with the basic principle of good faith recognized under international law" (p. 40, third para., in fine).

However, this is a broad theoretical statement which, in my opinion, does not negate the practical problem to which I have already drawn attention. Moreover, it is not possible to accept without further examination the statement that in this case the special problem of the immunity of diplomatic missions is of no importance, for it seems to me that that is precisely what is at issue and is rightly causing concern to the diplomatic corps accredited to Bonn.

I therefore find very reasonable the opposing view put forward by the Federal Minister of Justice on behalf of the Federal Government when he does indeed attach importance to this problem and explains how diplomatic missions can be disturbed and hindered in the performance of their normal activities and functions as a result of legal proceedings instituted against a foreign State in the German courts.

The German Minister states as follows: "(c) Over and above the fundamental principle of the immunity of States, the special problem of the immunity of diplomatic missions is also of importance in the present case. Diplomatic missions must not be interfered with in the performance of their tasks. The admissibility of actions for payment of the kind we are dealing with here could be particularly troublesome to a diplomatic mission in the performance of its functions if such actions became numerous or, indeed, if the diplomatic mission was compelled, in connexion with the litigation, to disclose facts relating to its internal operations or to permit inspections to be conducted within the mission building." (p. 4, in fine)

These are the brief observations suggested to me by the decision of the Constitutional Court of the Federal Republc of Germany, Second Chamber, composed of eight (8) judges, which decision has the force of law according to an explanation provided by the Department of Protocol of the German Government. They will serve to guide your actions when the matter is brought up again, either at meetings of the accredited diplomatic corps or with the authorities and Government of that country.

May I say in conclusion that, in connexion with this legal discussion, both the Secretary-General of the Foreign Ministry and the undersigned reviewed earlier presentations on the subject and, in so doing, refreshed our recollection of the wise teachings along similar lines imparted to many generations of Colombians

by the distinguished professor and specialist in international law, Dr. Hermann Meyer-Lindenberg, at present Assistant Director of the Legal Division of the Federal Ministry of Foreign Affairs, with whom you might wish to discuss the contents of this note.

Accept, Sir, the assurances of my highest consideration.

Humberto Ruiz Varela
Acting Legal Counsel

CZECHOSLOVAKIA

/Original: English/
/20 July 1979/

The Permanent Mission of the Czechoslovak Socialist Republic would like to point out in this connexion that section 47* of the enclosed Act constitutes the basic provision of the Czechoslovak law in the sphere of an exclusion of foreign States and their property from the jurisdiction of Czechoslovak civil courts and notarial offices. It clearly follows from this provision that the Czechoslovak law is based in this respect on the theory of absolute immunity.

This theory represents a legal concept according to which a foreign State (and its property as well), being a sovereign territorial and political entity,

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* Section 47 provides:

Section 47

Exclusion from the jurisdiction of Czechoslovak courts and notarial offices

(1) Foreign States and persons who under international treaties or other rules of international law or special Czechoslovak legal regulations enjoy immunity in the Czechoslovak Socialist Republic shall not be subject to the jurisdiction of Czechoslovak courts and notarial offices.

(2) The provision of paragraph 1 shall also apply to the service of documents, summoning of the aforesaid persons as witnesses, execution of decisions or other procedural acts.

(3) However, Czechoslovak courts and notarial offices shall have jurisdiction, if:

(a) the subject of the proceedings is real property of the States and persons listed in paragraph 1, which is located in the Czechoslovak Socialist Republic, or their rights relating to such real property belonging to other persons, as well as their rights arising from their tenancy of such real property, unless the subject of the proceedings is the payment of rent,

(b) the subject of the proceedings is an inheritance in which the persons listed in paragraph 1 appear outside their official duties,

(c) the subject of the proceedings concerns the pursuit of a profession or commercial activity which the persons listed in paragraph 1 carry out outside their official duties,

(d) the foreign State or the persons listed in paragraph 1 voluntarily submit to their jurisdiction.

(4) Service in the cases listed in paragraph 3 shall be done through the Ministry of Foreign Affairs. If service cannot thus be realized, the court shall appoint a trustee for accepting documents or, if necessary, for protecting the absentee's rights.

cannot be submitted to jurisdiction of another State unless it expressly agrees to it. The theory of absolute immunity is the only possible and logic consequence of one of the cornerstones of contemporary international law - the principle of sovereign equality of States.

The application of this principle in international relations is based on the assumption that the will of a State will always be duly and fully respected. This principle does not, however, exclude the possibility that a State under certain circumstances can find it desirable or otherwise appropriate to submit a certain case to the jurisdiction of another State. This case being the consequence of that State's own decision is the only example when a State may establish its jurisdiction in respect to another State. Where there is no expressly declared readiness on the part of one State to submit certain cases to the jurisdiction of another State (be it by an oral agreement or by an international treaty), any attempts to establish the jurisdiction unilaterally (by internal law, by decisions of the courts or otherwise) must be considered to be contrary to international law.

There is no rule in contemporary international law identifying possible exceptions from the immunity of States for certain areas of their activities (e.g., economy, finance, trade, etc.).

With reference to section 47, paragraph 2, subparagraph (a) of the enclosed Act the Permanent Mission underlines that this provision can in no way be viewed as forming an exception from the basic principle set forth in section 47, paragraph 1. This rule, quite on the contrary, confirms the respect for the principle of the sovereign equality of States since its sole aim is to ensure the indisputable and self-evident link that exists between a territorial State and an object forming a content of real property or rights relating to real property in the State concerned.

Summing up, the Permanent Mission would like to note that since the concept of absolute immunity is shared by a considerable number of members of the international community, the correctness and purposefulness of the attitude that the International Law Commission, or to be more exact, its appropriate Working Group, has adopted in this respect at its thirtieth session last year, must necessarily be questioned. The Permanent Mission has in mind particularly the following part of the above-mentioned Working Group's report:

> "A working distinction may eventually have to be drawn between activities of States performed in the exercise of sovereign authority which are covered by immunities, and other activities in which States, like individuals, are engaged in an increasing manner and often in direct competition with private sectors. ... In other words only acta iure imperii or acts of sovereign authority as distinct from acta iure gestionis or jure negotii are covered by State immunities". (United Nations document, A/33/10, p. 388, para. 29).

This approach to the topic in question cannot lead to any positive results, since it cannot be met in the affirmative by at least a significant part of the international community.

FINLAND

/Original: English/
/11 June 1979/

According to the Act on the Confiscation and Prohibition to Dispose of the Property of a Foreign State with Which Finland Maintains Friendly Relations passed on 27 May 1921, such property may not be confiscated or frozen as collateral for claims. The Act has in general been interpreted to mean that the final implementation, too, of any such measures against another State is prohibited, and that a foreign State is not answerable before the courts of another State. This interpretation is supported by the Vienna Convention on Diplomatic Relations of 18 April 1961. Nevertheless, such immunity is generally considered to apply to cases of acta iuris imperii only, and not to cases of acta iuris gestionis. These questions have usually not constituted legal cases in practice because they have been settled by the diplomatic channel.

GERMAN DEMOCRATIC REPUBLIC

/Original: English/
/7 April 1981/

The German Democratic Republic takes the liberty to set forth its basic position on /jurisdictional immunities of States and their property/. Relevant excerpts from domestic laws and regulations are annexed to these comments.

1. As a matter of principle the German Democratic Republic holds the view that the general immunity of a State from the jurisdiction of another State cogently ensues from the international law principle of the sovereign equality of States and that equal immunity of all States corresponds to the sovereign equality of States.

2. The German Democratic Republic considers the immunity of a State from the jurisdiction of another State a State's right to which it is basically entitled with regard to all activities it legally undertakes within another State's area of sovereignty, a right which exists vis-à-vis all measures taken by that other State in the practical exercise of its governmental power. A State's immunity does not, however, restrict the validity of the substantive law of another State within its area of sovereignty.

3. It is for each State itself to decide whether to waive, generally or in individual cases, the exercise of the right to immunity in respect of certain activities it undertakes within the area of sovereignty of another State and in what legal form (by accession to corresponding multilateral or bilateral agreements or by unilateral (domestic) legal acts) it chooses to do so. Any decision by a court or other bodies of another State on this issue would subordinate it and its sovereignty to the sovereignty of that other State and thus violate the principle of sovereign equality.

4. This applies to the German Democratic Republic as a socialist country particularly where its exercise of economic activities is concerned since socialist countries in their activities cannot make a distinction between so-called "sovereign" and "non-sovereign" acts (acta juris imperii and acta juris gestionis). A State's economic role cannot be separated from its other activities since the socialist State, which is both the political organization of the people and the collective owner of people's property, in all its activities observes the unity of politics and economics. Therefore, the German Democratic Republic does not accept the theory of functional immunity.

5. State property in the German Democratic Republic is nationally-owned property of society as a whole. It is the mainstay of socialist relations of production and the economic foundation of the socialist social system. In respect of nationally-owned property the principle of inviolability applies. This principle is embodied in chapters 1 and 2 of the Constitution of the German Democratic Republic. Article 20 of the Civil Code of the German Democratic Republic of 19 June 1975 also contains explicit provisions in this regard. As a matter of principle nationally-owned property is utilized and managed by nationally-owned enterprises and government institutions. They are allocated separate and clearly defined parts of nationally-owned property. In the discharge of the functions and powers assigned to them they are authorized to possess, use and control, on the basis of the laws and regulations, the nationally-owned property entrusted to them by the socialist State.

6. As a matter of principle the German Democratic Republic regards its State property as immune. There are, however, cases where claims to immunity are waived altogether or in part. In the German Democratic Republic's practice this is done by way of explicit provisions to this effect in international agreements. Waiver of immunities may also take the form of agreement to proceedings before a foreign court. However, recognition of foreign court decisions in the German Democratic Republic is subject to certain conditions. Under the Code of Civil Law Procedure of the German Democratic Republic of 19 June 1975, a decision by a German Democratic Republic court is required on the recognition and execution of a foreign court judgement or arbitration award. Besides, legally valid decisions are recognized and executed only on the basis of the principle of reciprocity. Furthermore, the Code of Civil Law Procedure stipulates on what grounds recognition is denied to foreign court judgements and arbitration awards. For instance, such judgements and awards must not have serious procedural shortcomings or contravene the ordre public of the German Democratic Republic.

Civil Code of the German Democratic Republic
of 19 June 1975

"Article 20

"Protection of the Socialist Property

"(1) Socialist property is inviolable. It enjoys the special protection of the socialist State.

"(2) It is the duty of all citizens and enterprises to protect the socialist property.

"(3) The acquisition of or transition from the sector of socialist property to personal property of objects which are the basis of the economic activities of the enterprises is inadmissible. Nationally-owned property may neither be mortgaged, attached nor charged. Exceptions must be regulated by law."

Law on Judicial Procedure in Civil, Family and Labour Matters - Civil Procedure Code - of 19 June 1975

"Article 193

"Recognition of Decisions

"(1) Final decisions of courts of other States are recognized in the German Democratic Republic under the condition of reciprocity.

"(2) Recognition is excluded if

"1. the provisions on the exclusive jurisdiction of the courts of the German Democratic Republic have not been observed;

"2. the jurisdiction of the court of another State has been established in contradiction to an agreement, valid under the law of the German Democratic Republic, conferring jurisdiction to a court or an arbitration;

"3. the losing party has not been heard by the court because of lacking service or other breaches of procedural rules;

"4. a final decision by a court of the German Democratic Republic exists on the same claim between the same parties;

"5. the decision contradicts the basic principles of the political and legal system of the German Democratic Republic or might impair its sovereignty, security or other material interests.

"(3) If the claim is litispendant between the same parties before the courts of the German Democratic Republic, a decision on recognition cannot be taken before the conclusion of the litigation."

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"Declaration of Enforceability

"Article 195

"(1) Enforcement of court decisions of other States in civil, family and labour matters takes place if they have been declared to be enforceable.

"(2) The declaration of enforceability is issued on the creditor's motion.

"(3) For the decision on the motion that county court is competent in the circuit of which the debtor has his domicile, abode or seat. Otherwise that county court is competent in the circuit of which the debtor owns assets.

"(4) The district court is competent to issue the declaration of enforceability of decisions which are to be recognized and implemented in the German Democratic Republic on the basis of international binding agreements.

"Article 196

"(1) The motion for a declaration of enforceability has to comprise a copy of the decision to be enforced and its certified translation into German. The copy must contain a notice that the decision cannot be contested by way of an ordinary legal remedy.

"(2) Within the proceedings on the motion the only issue is to ensure that the conditions of article 193 are fulfilled.

"(3) A hearing can be dispensed with if neither the creditor nor the debtor apply for it. The motion shall be served on the debtor together with the invitation to comment. At the same time he shall be notified that a hearing may be dispensed with unless he expressly asks for it.

"(4) The decision on the motion is taken in the form of an order.

"Article 197

"Decisions on costs and orders determining costs which have been issued on the basis of a decision to be recognized according to article 193, may be declared enforceable even if they have been issued outside the verdict. To proceedings on the motion for a declaration of enforceability apply articles 195 and 196.

"Article 198

"(1) Arbitration awards issued in other States and decisions on costs and on the determination of costs related to them, which have become final and enforceable in the other State, shall be treated, for the purpose of recognition and enforceability, like court decisions of other States.

"(2) The provisions on the enforceability of domestic arbitration awards shall be applied analogously. The setting aside of the arbitration award is replaced by the statement that the award is denied enforcement in the German Democratic Republic."

NORWAY

[Original: English]
[26 July 1979]

Norway has not enacted national legislation or decisions of national tribunals that relates to jurisdictional immunities of States and their property with the exception of a law dated 17 March 1939,* containing certain regulations for foreign official ships. Under this law immunity is only granted when a ship is used for purposes such as, for example, fishery supervision. If a ship owned by a foreign Government is in fact an ordinary merchant ship immunity is not granted.

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* § 1. The fact that a vessel is owned or used by a foreign Government, or that a vessel's cargo belongs to a foreign Government, shall not - with the exemption of the uses mentioned in §§ 2 and 3 - prevent proceedings being taken in this realm for claims arising out of the use of the vessel or the transport of the cargo - or the enforcement of such a claim in this realm or interim orders against the vessel or the cargo.

§ 2. Proceedings to collect claims as mentioned in § 1 may not be instituted in this realm when they relate to:

(1) Men of war and other vessels which a foreign Government own or use when at the time the claim arose they were used exclusively for government purposes of a public nature.

(2) Cargo which belongs to a foreign Government and is carried by a vessel as mentioned under 1.

(3) Cargo which belongs to a foreign Government, and is carried in a merchantman for government purposes of a public nature, unless the claim relates to salvage, general average or agreements regarding the cargo.

§ 3. Enforcements and interim orders relating to claims as mentioned in § 1 may not be executed within this realm when relating to:

(1) Men of war and other vessels which are owned by or used by a foreign Government or chartered by them exclusively on time or for a voyage, when the vessel is used exclusively for government purposes of a public nature.

(2) Cargo which belongs to a foreign Government and is carried in vessels as mentioned under 1 or by merchantmen for government purposes of a public nature.

In conjunction with an agreement with a foreign Government, the King may decide that this procedure shall also apply to other vessels which are owned by or used by a foreign Government, and to other cargo which belongs to the foreign Government, when in time of war this Government so demands.

§ 4. By agreement with a foreign Government it may be decided that a certificate from the diplomatic representative of the foreign Government shall be considered proof for treating vessels and cargo under the stipulations of § 3, first paragraph, 1 and 2, when a requisition is made for the amulment of enforcements or interim orders.

§ 5. This law will come into force on the day determined by the King.

The Royal Ministry of Foreign Affairs, Compilation of Norwegian Laws, Etc., 1814-1953.

PHILIPPINES

[Original: English]
[29 June 1979]

Decisions of the Philippine Supreme Court

(No. L-1648. August 17, 1949)

PEDRO SYQUIA, GONZALO SYQUIA, AND LEOPOLDO SYQUIA, petitioners, vs. NATIVIDAD ALMEDA LOPEZ, Judge of Municipal Court of Manila, CONRADO V. SANCHEZ, Judge of Court of First Instance of Manila, GEORGE F. MOORE ET AL., respondents.

1. COURTS; JURISDICTION; CLAIM OF TITLE AND POSSESSION OF PROPERTY BY PRIVATE CITIZEN; AGAINST OFFICERS AND AGENTS OF THE GOVERNMENT. - A private citizen claiming title and right of possession of a certain property may, to recover possession of said property, sue as individuals, officers and agents of the Government who are said to be illegally withholding the same from him, though in doing so, said officers and agents claim that they are acting for the Government, and the courts may entertain such a suit although the Government itself is not included as a party-defendant.

2. ID.; ID.; ID.; IF JUDGMENT WILL INVOLVE FINANCIAL LIABILITY OF GOVERNMENT, SUIT CANNOT PROSPER OR BE ENTERTAINED EXCEPT WITH GOVERNMENT'S CONSENT. - But where the judgment in the suit by the private citizen against the officers and agents of the government would result not only in the recovery of possession of property in favor of said citizen but also in a charge against or financial liability to the Government, then the suit should be regarded as one against the Government itself, and, consequently, it cannot prosper or be entertained by courts except with the consent of said government.

3. ID.; ID.; SUIT BY CITIZEN AGAINST FOREIGN GOVERNMENT WITHOUT LATTER'S CONSENT; COURTS LACK OF JURISDICTION. - This is not only a case of a citizen filing a suit against his own Government without the latter's consent but it is of citizen filing an action against a foreign government without said government's consent, which renders more obvious the lack of jurisdiction of the courts of his country.

ORIGINAL ACTION in the Supreme Court. Mandamus.

The facts are stated in the opinion of the court.

Gibbs, Gibbs, Chuidian and Quasha for petitioners.
J. A. Wolfson for respondent.

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MONTEMAYOR, J.:

For the purposes of this decision, the following facts gathered from and based on the pleadings, may be stated. The plaintiffs named Pedro, Gonzalo, and Leopoldo, all surnamed Syquia, are the undivided joint owners of three apartment buildings situated in the City of Manila known as the North Syquia Apartments, South Syquia Apartments and Michel Apartments located at 1131 M. H. del Pilar, 1151 M. H. del Pilar and 1188 A. Mabini Streets, respectively.

About the middle of the year 1945, said plaintiffs executed three lease contracts, one for each of the three apartments, in favor of the United States of America at a monthly rental of ₱1,775 for the North Syquia Apartments, ₱1,890 for the South Syquia Apartments and ₱3,335 for the Michel Apartments. The term or period for the three leases was to be "for the duration of the war and six months thereafter, unless sooner terminated by the United States of America." The apartment buildings were used for billeting and quartering officers of the U. S. armed forces stationed in the Manila area.

In March, 1947, when these court proceedings were commenced, George F. Moore was the Commanding General, United States Army, Philippine Ryukus Command, Manila, and as Commanding General of the U. S. Army in the Manila Theatre, was said to control the occupancy of the said apartment houses and had authority in the name of the United States Government to assign officers of the U. S. Army to said apartments or to order said officers to vacate the same. Erland A. Tillman was the Chief, Real Estate Division, Office of the District Engineers, U. S. Army, Manila, who, under the command of defendant Moore was in direct charge and control of the lease and occupancy of said three apartment buildings. Defendant Moore and Tillman themselves did not occupy any part of the premises in question.

Under the theory that said leases terminated six months after September 2, 1945, when Japan surrendered, plaintiffs sometime in March, 1946, approached the predecessors in office of defendants Moore and Tillman and requested the return of the apartment buildings to them, but they were advised that the U. S. Army wanted to continue occupying the premises. On May 11, 1946, said plaintiffs requested the predecessors in office of Moore and Tillman to renegotiate said leases, execute lease contracts for a period of three years and to pay a reasonable rent 1 higher than those payable under the old contracts. The predecessor in office of Moore in a letter dated June 6, 1946, refused to execute new leases but advised that "it is contemplated that the United States Army will vacate subject properties prior to 1 February 1947." Not being in conformity with the continuance of the old leases because of the alleged comparatively low rentals being paid thereunder, plaintiffs formally requested Tillman to cancel said three leases and to release the apartment buildings on June 28, 1946. Tillman refused to comply with the request. Because of the alleged representation and assurance that the U. S. Government would vacate the premises before February 1, 1947, the plaintiffs took no further steps to secure possession of the buildings and accepted the monthly rentals tendered by the predecessors in office of Moore and Tillman on the basis of a month to month lease subject to cancellation upon thirty days notice. Because of the failure to comply with the alleged representation and assurance that the three apartment

buildings will be vacated prior to February 1, 1947. Plaintiffs on February 17, 1947, served formal notice upon defendants Moore and Tillman and 64 other army officers or members of the United States Armed Forces who were then occupying apartments in said three buildings, demanding (a) cancellation of said leases; (b) increase in rentals to ₱300 per month per apartment effective thirty days from notice; (c) execution of new leases for the three or any one or two of the said apartment buildings for a definite term, otherwise, (d) release of said apartment buildings within thirty days of said notice in the event of the failure to comply with the foregoing demands. The thirty-day period having expired without any of the defendants having complied with plaintiffs' demands, the plaintiffs commenced the present action in the Municipal Court of Manila in the form of an action for unlawful detainer (desahucio) against Moore and Tillman and the 64 persons occupying apartments in the three buildings for the purpose of having them vacate the apartments, each occupant to pay ₱300 a month for his particular apartment from January 1, 1947 until each of said particular defendant had vacated said apartment; to permit plaintiffs access to said apartment buildings for the purpose of appraising the damages sustained as the result of the occupancy by defendants; that defendants be ordered to pay plaintiffs whatever damages may have been actually caused on said property; and that in the event said occupants are unable to pay said ₱300 a month and/or the damages sustained by said property, the defendants Moore and Tillman jointly and severally be made to pay said monthly rentals of ₱300 per month per apartment from January 1, 1947 to March 19, 1947, inclusive, and/or the damages sustained by said apartments, and that defendants Moore and Tillman be permanently enjoined against ordering any additional parties in the future from entering and occupying said premises.

Acting upon a motion to dismiss filed through the Special Assistant of the Judge Advocate, Philippine Ryukus Command on the ground that the court had no jurisdiction over the defendants and over the subject matter of the action, because the real party in interest was the U. S. Government and not the individual defendants named in the complaint, and that the complaint did not state a cause of action, the municipal court of Manila in an order dated April 29, 1947, found that the war between the United States of America and her allies on one side and Germany and Japan on the other, had not yet terminated and, consequently, the period or term of the three leases had not yet expired; that under the well settled rule of International Law, a foreign government like the United States Government cannot be sued in the courts of another state without its consent; that it was clear from the allegations of the complaint that although the United States of America has not been named therein as defendant, it is nevertheless the real defendant in this case, as the parties named as defendants are officers of the United States Army and were occupying the buildings in question as such and pursuant to orders received from that Government. The municipal court dismissed the action with costs against the plaintiffs with the suggestion or opinion that a citizen of the Philippines, who feels aggrieved by the acts of the Government of a foreign country has the right to demand that the Philippine Government study his claim and if found meritorious, take such diplomatic steps as may be necessary for the vindication of the rights of that citizen, and that the matter included or involved in the action should be a proper subject matter of representations between the Governments of the United States of America and the Philippines. Not being satisfied with the order, plaintiffs appealed to the Court of First Instance of Manila, where the motion to dismiss was renewed.

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The Court of First Instance of Manila in an order dated July 12, 1947, affirmed the order of the municipal court dismissing plaintiffs' complaint. It conceded that under the doctrine laid down in the case of U. S. vs. Lee, 106 U. S., 196 and affirmed in the case of Tindal vs. Wesley, 167 U. S., 204, ordinarily, courts have jurisdiction over cases where private parties sue to recover possession of property being held by officers or agents acting in the name of the U. S. Government even though no suit can be brought against the Government itself, but inasmuch as the plaintiffs in the present case are bringing this action against officers and agents of the U. S. Government not only to recover the possession of the three apartment houses supposedly being held illegally by them in the name of their government, but also to collect back rents, not only at the rate agreed upon in the lease contracts entered into by the United States of America but in excess of said rate, to say nothing of the damages claimed, as a result of which, a judgment in these proceedings may become a charge against the U. S. Treasury, then under the rule laid down in the case of Land vs. Dollar, 91 Law. ed., 1209, the present suit must be regarded as one against the United States Government itself, which cannot be sued without its consent, specially by citizens of another country.

The plaintiffs as petitioners have brought this case before us on a petition for a writ of mandamus seeking to order the Municipal Court of Manila to take jurisdiction over the case. On October 30, 1947, counsel for respondents Almeda Lopez, Sanchez, Moore and Tillman filed a motion to dismiss on several grounds. The case was orally argued on November 26, 1947. On March 4, 1948, petitioners filed a petition which, among other things, informed this Court that the North Syquia Apartments, the South Syquia Apartments and Michel Apartments would be vacated by their occupants on February 29, March 31, and May 31, 1948, respectively. As a matter of fact, said apartments were actually vacated on the dates already mentioned and were received by the plaintiffs-owners.

On the basis of this petition and because of the return of the three apartment houses to the owners, counsel for respondents Almeda Lopez, Sanchez, Moore and Tillman filed a petition to dismiss the present case on the ground that it is moot. Counsel for the petitioners answering the motion, claimed that the plaintiffs and petitioners accepted possession of the three apartment houses, reserving all of their rights against respondents including the right to collect rents and damages; that they have not been paid rents since January 1, 1947; that respondents admitted that there is a total of ₱109,895 in rentals due and owing to petitioners; that should this case be now dismissed, the petitioners will be unable to enforce collection; that the question of law involved in this case may again come up before the courts when conflicts arise between Filipino civilian property owners and the U. S. Army authorities concerning contracts entered into in the Philippines between said Filipinos and the U. S. Government. Consequently, this Court, according to the petitioners, far from dismissing the case, should decide it, particularly the question of jurisdiction.

On June 18, 1949, through a "petition to amend complaint" counsel for the petitioners informed this court that petitioners had already received from the U. S. Army Forces in the Western Pacific the sum of ₱109,895 as rentals for the three apartments, but with the reservation that said acceptance should not be

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construed as jeopardizing the rights of the petitioners in the case now pending in the courts of the Philippines or their rights against the U. S. Government with respect to the three apartment houses. In view of this last petition, counsel for respondents alleging that both respondents Moore and Tillman had long left the Islands for other Army assignments, and now that both the possession of the three apartments in question as well as the rentals for their occupation have already been received by the petitioners renew their motion for dismissal on the ground that this case has now become moot.

The main purpose of the original action in the municipal court was to recover the possession of the three apartment houses in question. The recovery of rentals as submitted by the very counsel for the petitioners was merely incidental to the main action. Because the prime purpose of the action had been achieved, namely, the recovery of the possession of the premises, apart from the fact that the rentals amounting to ₱109,895 had been paid to the petitioners and accepted by them though under reservations, this Court may now well dismiss the present proceedings on the ground that the questions involved therein have become academic and moot. Counsel for the petitioners however, insists that a decision be rendered on the merits, particularly on the question of jurisdiction of the municipal court over the original action, not only for the satisfaction of the parties involved but also to serve as a guide in future cases involving cases of similar nature such as contracts of lease entered into between the Government of the United States of America on one side and Filipino citizens on the other regarding properties of the latter. We accept the suggestion of petitioners and shall proceed to discuss the facts and law involved and rule upon them.

We shall concede as correctly did the Court of First Instance, that following the doctrine laid down in the cases of U. S. vs. Lee and U. S. vs. Tindal, supra, a private citizen claiming title and right of possession of a certain property may, to recover possession of said property, sue as individuals, officers and agents of the Government who are said to be illegally withholding the same from him, though in doing so, said officers and agents claim that they are acting for the Government, and the courts may entertain such a suit although the Government itself is not included as a party-defendant. Of course, the Government is not bound or concluded by the decision. The philosophy of this ruling is that unless the courts are permitted to take cognizance and to assume jurisdiction over such a case, a private citizen would be helpless and without redress and protection of his rights which may have been invaded by the officers of the government professing to act in its name. In such a case the officials or agents asserting rightful possession must prove and justify their claim before the courts, when it is made to appear in the suit against them that the title and right of possession is in the private citizen. However, and this is important, where the judgment in such a case would result not only in the recovery of possession of the property in favor of said citizen but also in a charge against or financial liability to the Government, then the suit should be regarded as one against the government itself, and, consequently, it cannot prosper or be validly entertained by the courts except with the consent of said Government. (See case of Land vs. Dollar, 91 Law. ed., 1209)

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From a careful study of this case, considering the facts involved therein as well as those of public knowledge of which we take judicial cognizance, we are convinced that the real party in interest as defendant in the original case is the United States of America. The lessee in each of the three lease agreements was the United States of America and the lease agreements themselves were executed in her name by her officials acting as her agents. The consideration or rentals was always paid by the U. S. Government. The original action in the municipal court was brought on the basis of these three lease contracts and it is obvious in the opinion of this court that any back rentals or increased rentals will have to be paid by the U. S. Government not only because, as already stated, the contracts of lease were entered into by such Government but also because the premises were used by officers of her armed forces during the war and immediately after the termination of hostilities.

We cannot see how the defendants and respondents Moore and Tillman could be held individually responsible for the payment of rentals or damages in relation to the occupancy of the apartment houses in question. Both of these army officials had no intervention whatsoever in the execution of the lease agreements nor in the initial occupancy of the premises both of which were effected through the intervention of and at the instance of their predecessors in office. The original request made by the petitioners for the return of the apartment buildings after the supposed termination of the leases, was made to, and denied not by Moore and Tillman but by their predecessors in office. The notice and decision that the U. S. Army wanted and in fact continued to occupy the premises was made not by Moore and Tillman but by their predecessors in office. The refusal to renegotiate the leases as requested by the petitioners was made not by Moore but by his predecessors in office according to the very complaint filed in the municipal court. The assurance that the U. S. Army will vacate the premises prior to February 29, 1947, was also made by the predecessors in office of Moore.

As to the defendant Tillman, according to the complaint he was Chief, Real Estate Division, Office of the District Engineer, U. S. Army, and was in direct charge and control of the leases and occupancy of the apartment buildings, but he was under the command of defendant Moore, his superior officer. We cannot see how said defendant Tillman in assigning new officers to occupy apartments in the three buildings, in obedience to order or direction from his superior, defendant Moore, could be held personally liable for the payment of rentals or increase thereof, or damages said to have been suffered by the plaintiffs.

With respect to defendant General Moore, when he assumed his command in Manila, these lease agreements had already been negotiated and executed and were in actual operation. The three apartment buildings were occupied by army officers assigned thereto by his predecessors in office. All that he must have done was to assign or billet incoming army officers to apartments as they were vacated by outgoing officers due to changes in station. He found these apartment buildings occupied by his government and devoted to the use and occupancy of army officers stationed in Manila under his command, and he had reason to believe that he could continue holding and using the premises theretofore assigned for that purpose and under contracts previously entered into by his government, as long as and until orders to the contrary were received by him.

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It is even to be presumed that when demand was made by the plaintiffs for the payment of increased rentals or for vacating the three apartment buildings, defendant Moore, not a lawyer by profession but a soldier, must have consulted and sought the advice of his legal department, and that his action in declining to pay the increased rentals or to eject all his army officers from the three buildings must have been in pursuance to the advice and counsel of his legal division. At least, he was not in a position to pay increased rentals above those set and stipulated in the lease agreements, without the approval of his government, unless he personally assumed financial responsibility therefor. Under these circumstances, neither do we believe nor find that defendant Moore can be held personally liable for the payment of back or increased rentals and alleged damages.

As to the army officers who actually occupied the apartments involved, there is less reason for holding them personally liable for rentals and supposed damages as sought by the plaintiffs. It must be remembered that these army officers when coming to their station in Manila were not given the choice of their dwellings. They were merely assigned quarters in the apartment buildings in question. Said assignments or billets may well be regarded as orders, and all that those officers did was to obey them, and accordingly, occupied the rooms assigned to them. Under such circumstances, can it be supposed or conceived that such army officers would first inquire whether the rental being paid by their government for the rooms or apartments assigned to them by order of their superior officer was fair and reasonable or not, and whether the period of lease between their government and the owners of the premises had expired, and whether their occupancy of their rooms or apartments was legal or illegal? And if they dismissed these seemingly idle speculations, assuming that they ever entered their minds, and continued to live in their apartments unless and until orders to the contrary were received by them, could they later be held personally liable for any back rentals which their government may have failed to pay to the owners of the buildings, or for any damages to the premises incident to all leases of property, specially in the absence of proof that such damages to property had been caused by them and not by the previous occupants, also army officers who are not now parties defendant to this suit? Incidentally it may be stated that both defendants Moore and Tillman have long left these Islands to assume other commands or assignments and in all probability none of their 64 co-defendants is still within this jurisdiction.

On the basis of the foregoing considerations we are of the belief and we hold that the real party defendant in interest is the Government of the United States of America; that any judgment for back or increased rentals or damages will have to be paid not by defendants Moore and Tillman and their 64 co-defendants but by the said U. S. Government. On the basis of the ruling in the case of Land vs. Dollar already cited, and on what we have already stated, the present action must be considered as one against the U. S. Government. It is clear that the courts of the Philippines including the Municipal Court of Manila have no jurisdiction over the present case for unlawful detainer. The question of lack of jurisdiction was raised and interposed at the very beginning of the action. The U. S. Government has not given its consent to the filing of this suit which is essentially against her though not in name. Moreover, this is not only a case of a citizen filing a suit against his own Government without

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the latter's consent but it is of citizen filing an action against a foreign government without said government's consent, which renders more obvious the lack of jurisdiction of the courts of his country. The principles of law behind this rule are so elementary and of such general acceptance that we deem it unnecessary to cite authorities in support thereof.

In conclusion we find that the Municipal Court of Manila committed no error in dismissing the case for lack of jurisdiction and that the Court of First Instance acted correctly in affirming the municipal court's order of dismissal. Case dismissed, without pronouncements as to costs.

Moran, C.J., Parás, Feria, Bengzon, Tuason, and Reyes, JJ., concur.

PERFECTO, J., dissenting:

The petition must be granted. This is the conclusion we have arrived at long ago, soon after this case had been submitted for our decision We regret that, to avoid further delay in the promulgation of the decision in this case, we are constrained to limit ourselves to a synthesis of the reasons for our stand. So that this opinion may be released immediately, we are making it as short as possible. To said effect we have to waive the opportunity of elaborating on our arguments.

We are of the opinion that both the municipal court and the Court of First Instance of Manila erred in dismissing petitioners' complaint and the majority of the Supreme Court have given their exequatur to such grievous error.

There is no question that the Municipal Court of Manila had and has complete jurisdiction to take cognizance of and decide the case initiated by petitioners. That jurisdiction is the same whether the true defendants are those specifically mentioned in the complaint or the Government of the United States.

The contention that the Government of the United States of America is the real party defendant does not appear to be supported either by the pleadings or by the text of the contract of lease in question. If said government is the real party defendant and had intended to impugn the jurisdiction of the Municipal Court of Manila, it must have done so through its diplomatic representative in the Philippines, i. e., the American Ambassador. It does not appear that the American Ambassador had intervened in the case in any way and we believe no one appearing in the case has the legal personality to represent said government.

In the hypothesis that the Government of the United States of America is the lessee in the contract in question and, therefore, should be considered as the real party defendant in the ejectment case, that simple fact does not deprive our courts of justice of their jurisdiction to try any legal litigation relating to said contract of lease. The very fact that the government of the United States of America had entered into a private contract with private citizens of the Philippines and the deed executed in our country concerns real property located in Manila, places said government, for purposes of the jurisdiction of our courts, on the same legal level of the lessors.

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Although, generally, foreign governments are beyond the jurisdiction of domestic courts of justice, such rule is inapplicable to cases in which the foreign government enters into private contracts with the citizens of the court's jurisdiction. A contrary view would simply run against all principles of decency and violative of all tenets of morals.

Moral principles and principles of justice are as valid and applicable as well with regard to private individuals as with regard to governments either domestic or foreign. Once a foreign government enters into a private contract with the private citizens of another country, such foreign government cannot shield its non-performance or contravention of the terms of the contract under the cloak of non-jurisdiction. To place such foreign government beyond the jurisdiction of the domestic courts is to give approval to the execution of unilateral contracts, graphically described in Spanish as "contratos leoninos". because one party gets the lion's share to the detriment of the other. To give validity to such contract is to sanctify bad faith, deceit, fraud. We prefer to adhere to the thesis that all parties in a private contract, including governments and the most powerful of them, are amenable to law, and that such contracts are enforceable through the help of the courts of justice with jurisdiction to take cognizance of any violation of such contracts if the same had been entered into only by private individuals.

To advance the proposition that the Government of the United States of America, soon after liberating the Philippines from the invading Japanese forces, had entered with the petitioners into the lease contract in question with the knowledge that petitioners could not bring an action in our courts of justice to enforce the terms of said contract is to hurl against said government the blackes indictment. Under such situation, all the vociferous avowals of adherence to the principles of justice, liberty, democracy, of said Government would appear as sham. We cannot believe that the Government of the United States of America can in honest conscience support the stand of respondents in this case. We cannot believe that said government is so callous as not to understand the meaning of the shame entailed in the legal stand of non-jurisdiction intended to place said government beyond the reach of our courts of justice.

Judgment affirmed; case dismissed.

(No. L-3981. July 30, 1951)

PHILIPPINE ALIEN PROPERTY ADMINISTRATION, petitioner, vs. HON. OSCAR CASTELO, Judge of the Court of First Instance of Manila. PEDRO C. HERNAEZ and ASUNCION DE LA RAMA VDA. DE ALUNAN, in her own behalf and as Administratrix of the Estate of her deceased husband Rafael R. Alunan, respondents.

PLEADING AND PRACTICE; PARTIES; U. S. GOVERNMENT CANNOT BE SUED WITHOUT ITS CONSENT. - A suit against the Alien Property Custodian and the Attorney General of the United States involving vested property under the Trading with the Enemy Act, as amended, is in substance a suit against the United States. On the same principle it may be said that a suit against the Philippine Alien Property Administration involving vested properties located in the

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Philippines is a suit against the United States and as a corollary, in order that an action may be prosecuted and maintained against the Philippine Alien Property Administration respecting properties located in the Philippines, congressional consent must first be shown to have been given by the United States to such suit and that the terms of such consent were complied with. Failure to make such showing will inevitably result in the dismissal of the case. (Syquia vs. Gen. Moore et al., 47 Off. Gaz., No. 2., p. 665; Marble Construction Corp., vs. War Damage Commission, 47 Off. Gaz., No. 5, p. 2309; Marquez Lim vs. Nelson et al., 48 Off. Gaz., No. 1, p. 83.)

ORIGINAL ACTION in the Supreme Court. Certiorari with Preliminary Injunction.

The facts are stated in the opinion of the Court.

William R. Allen, Juan T. Santos, Ric. Rodriguez Baluyot and Lino M. Patajo for petitioner.

Honorio Poblador Jr. and Eduardo P. Arboleda for respondents.

BAUTISTA ANGELO, J.:

This is a petition for certiorari with preliminary injunction. The injunction was granted in a resolution issued on July 31, 1950.

Petitioner is an agency of the United States of America created by Executive Order No. 9818 with authority to vest enemy owned properties in the Philippines. On July 7, 1949, respondents Pedro C. Hernaez and Asuncion de la Rama Vda. de Alunan, in her own behalf and as administratrix of the estate of her deceased husband Rafael R. Alunan, filed a complaint in the Court of First Instance of Manila against petitioner wherein it was alleged that Pedro C. Hernaez and the late Rafael R. Alunan were the owners of eight (8) parcels of land with the improvements thereon situated in the city of Manila, which were vested by the petitioner on April 22, 1947, in the United States of America and that, because of petitioner's refusal to release them to the respondents, the latter have suffered damages amounting to ₱5,000 a month. Respondents prayed that petitioner be ordered to vacate the properties in question and to restore them to the respondents and to pay damages at the rate of ₱5,000 a month from April 22, 1947, until the petitioner vacates the premises, together with the costs of action.

On July 20, 1949, petitioner answered the complaint admitting that it has vested the lots and improvements mentioned in the complaint as required by law for the reason that respondents had sold them to Hakodate Dock Co., Ltd., which was the registered owner thereof since March 3, 1943, and setting up two counterclaims, to wit, one for the return to petitioner of the sum of ₱36,789.68 which respondents had collected from the United States of America as rentals for the occupation of said property without being the owners thereof, and the other for the sum of ₱123,049.94 as reimbursement for the expenses incurred by petitioner in demolishing, repairing and improving the buildings erected on

said lots in the event that the case is decided in favor of respondents. Petitioner likewise alleged as affirmative defense that the court of origin had no jurisdiction to entertain respondents' claim for ₱5,000 a month as damages because there was no statutory permission or consent granted to said respondents to sue petitioner with respect to said damages.

Leave having been granted by the court of origin to the Republic of the Philippines and to Dr. Nicanor Jacinto to intervene in the case, the former on August 11, 1949, filed an answer siding with the petitioner in resisting the claim of the respondents, and the latter on October 31, 1949, filed a complaint in intervention alleging that on November 6, 1939, Pedro C. Hernaez and Rafael R. Alunan mortgaged the properties in question to said intervenor to secure the payment of a loan of ₱160,000, which amount was on February 3, 1943, paid under duress to him by Hakodate Dock Co., Ltd., and for which he signed a release of said mortgage, and praying that, irrespective of the ownership of said properties, the mortgage be declared in force and subsisting. Both petitioner and respondents answered the complaint in intervention alleging that the sum of ₱160,000 mentioned therein had been paid by Hakodate Dock Co., Ltd., to Dr. Jacinto voluntarily and that the mortgage has been properly cancelled and released.

On May 8, 1950, the lower court rendered decision in favor of the plaintiffs, the dispositive part of which is as follows:

> "Plaintiffs Pedro C. Hernaez and Asuncion de la Rama Vda. de Alunan, in her own behalf and as judicial administratrix of the estate of the deceased Rafael R. Alunan, are the legal owners of the property under litigation and the defendant is hereby ordered to return the same to plaintiffs;
>
> "Defendant Philippine Alien Property Administration is hereby ordered to pay to plaintiffs the sum of ₱3,375 a month from May, 1947 until the possession of the property in litigation is restored to plaintiffs;
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> "The mortgage on the property aforesaid in favor of Nicanor Jacinto is declared cancelled and the claim of the said intervenor is hereby dismissed;
>
> "The claim of the intervenor Republic of the Philippines is ordered dismissed;
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> "Defendant's counterclaim is dismissed.
>
> "Costs against defendant."

Copy of the decision was received by petitioner on May 11, 1950, and before the expiration of the period to appeal, or on May 25, 1950, the plaintiffs, now respondents, filed a motion asking that, notwithstanding the appeal interposed by petitioner, an order of execution be issued as regards that part of the judgment which orders the petitioner to pay the respondents the sum of ₱3,375 a month from May, 1947 until the possession of the property in litigation is

restored to them. Petitioner objected to this motion, but, on June 22, 1950, the court granted the motion stating, among other things, that counsel for petitioner did not deny that petitioner may cease to exist before the final termination of this case in the appellate court, and that petitioner "submitted itself voluntarily to the jurisdiction of this court by filing its answer to the complaint and appearing at the trial without questioning the jurisdiction of the court." Petitioner filed a motion for reconsideration, and the same having been denied, it instituted the present proceedings imputing abuse of discretion to his Honor, the respondent Judge.

The basic issue involved in this case is whether the respondent Judge in the exercise of his discretion and before the expiration of the period to appeal may issue a writ of execution upon the special reason that the party against which the judgment was rendered will cease to exist before the final termination of the case in the appellate court.

The law under which the respondent Judge issued the disputed writ of execution is section 2, Rule 39 of the Rules of Court, which provides:

> "SEC. 2. **Execution** discretionary. - Before the expiration of the time to appeal, execution may issue, in the discretion of the court, on motion of the prevailing party with notice to the adverse party, upon good reasons to be stated in a special order. If a record on appeal is filed thereafter, the special order shall be included therein. Execution issued before the expiration of the time to appeal may be stayed upon the approval by the court of a sufficient supersedeas bond filed by the appellant, conditioned for the performance of the judgment or order appealed from in case it be affirmed wholly or in part."

As may be seen, before the expiration of the time to appeal, execution may issue, in the discretion of the court, on motion of the prevailing party and with notice to the adverse party, upon good reasons to be stated in the order. The rule allows the issuance of a writ of execution pending appeal provided that there exist good reasons justifying it. What constitutes a good reason, the rule leaves it to the discretion of the court. In this particular instance, the respondent Judge considered as good reason the fact that the petitioner, Philippine Alien Property Administration, may cease to exist or to function in the Philippines before the final termination of the case in the appellate court, and so he found it necessary to issue the writ to enable the respondents to collect from petitioner the rents which according to the decision they are entitled to should the same be affirmed by the appellate court. Now, we ask, is this reason valid and tenable within the meaning of the rule?

Apparently the reason advanced by the Court of origin in issuing the writ of execution as regards the payment of damages is justifiable, considering that its purpose is to enable the respondents to collect from petitioner the rents to which they are entitled in case the decision is affirmed by the appellate court, which matter is solely addressed to the discretion of the court. However, we find the action taken legally untenable considering certain fundamental principles

which cannot be disregarded, one of which is the immunity of the United States Government from suit unless it gives its express consent thereto. If the order is entertained as we are urged, its ultimate effect would be to allow the United States Government to be sued without its consent, because its main purpose is to enforce that part of the judgment regarding damages which is disputed because of the alleged lack of jurisdiction of the court to entertain it. It is true that this question is involved in the case on the merits, which is now pending appeal, but the same cannot be brushed aside in this proceedings because of the inescapable fact that on that fundamental issue hinges the determination of this incident. In other words, it is imperative to determine if the issuance of the writ of execution is proper even if the respondent Judge finds good reason justifying such action considering the fact that the party against which the writ is to be enforced is an agency of the government of the United States.

It is well settled that a suit against the Alien Property Custodian and the Attorney General of the United States involving vested property under the Trading with the Enemy Act, as amended, is in substance a suit against the United States. On the same principle it may be said that a suit against the Philippine Alien Property Administration involving vested properties located in the Philippines is a suit against the United States. And as a corollary, we may say that in order that respondents may prosecute and maintain an action against the Philippine Alien Property Administration respecting properties located in the Philippines, they must first show that congressional consent has been given by the United States to such suit and that they have complied with the terms and conditions of such consent. Failure to make such showing will inevitably result in the dismissal of the case. (Syquia vs. Gen. Moore et al., 84 Phil., 312; Marvel Building Corp. vs. War Damage Commission, 85 Phil., 27; Marquez Lim vs. Nelson et al., 87 Phil., 328).

Petitioner admits consent to sue the United States in proper cases through the Philippine Alien Property Administration in the courts of justice in the Philippines has been granted. Such consent is found in section 3 of the Philippine Property Act of 1946. And we presume that the action that has given rise to this incident was instituted under the provisions of said section 3, and it is one of those authorized under the Trading with the Enemy Act, as amended, (section 9(a)), which refers to actions instituted by the persons who are neither enemies nor allies of enemies for the purpose of establishing their right, title or interest in vested properties, and of recovering their ownership and possession.

But it should be noted that the relief granted to a person to claim enemy property which has been vested by the Philippine Alien Property Administration is only limited to those expressly provided for in the Trading with the Enemy Act, as amended, which does not include a suit for damages for the use of the property vested by the Philippine Alien Property Administration. Paragraph 4 of section 7(c) of said Act is very expressive on this point. This is also apparent from an examination of the provisions of section 9(a) of said Act. Nowhere under said section 9(a), nor under any other provisions of the Trading with the Enemy Act can we find any authorization to sue the United States Government to recover damages such as the case under consideration. This is a

different cause of action to which congressional consent has not been given by the law.

One case which illustrates the difference we have just pointed out and which bears a striking similarity to the one under consideration is Von Brunning vs. Sutherland, 29 F. (2d), 631, the facts of which as found by the court are:

"It appears from the allegations of the plaintiff's bill of complaint that plaintiff was a natural-born citizen of the United States, who prior to April 6, 1917, intermarried with on Adolph von Brunning, a German subject, and thereby acquired and has since retained German citizenship. In the year 1917, and at all times subsequent thereto, plaintiff was the owner of a life estate in a certain house and lot at 1758 N Street N.W., Washington, D.C., and in July 1918, the Alien Property Custodian, having determined that plaintiff was an alien enemy under the Trading with the Enemy Act, seized the premises, and retained the custody thereof for a period of 28 months: whereupon, in November, 1920, the Custodian returned the property to plaintiff under the amendment to the Trading with the Enemy Act, approved June 5, 1920 (chapter 241, 41, Stat., 977), and again amended (Chapter 285, 42 Stat. 1511).

"It is charged by plaintiff that, during the occupation of the premises by the Custodian, the house after having been altered for such purposes, was used for departmental offices, or as a bureau by the Custodian, and that thereby the property was damaged to the extent approximately of $6,000, and was unrepaired when it was returned to plaintiff; also that the rental value of the property during this period was not less than $500 per month, whereas the Custodian fixed the same at $100 per month, and upon the return of the property paid plaintiff $900, and no more, although the property was occupied by the custodian for the period of 28 months; and that no part of the damages aforesaid, nor of the balance due upon rent, has since been paid by the Custodian. The plaintiff prayed that the court should ascertain and fix the amount due her for the use of the buildings by the Custodian, and fix the damages sustained by the property as aforesaid, and enter a decree against the Custodian and the Treasurer of the United States therefor.

"The bill of complaint was met by a motion of defendants praying that it be dismissed on the ground that it sought to recover upon an obligation alleged to be owing to the plaintiff by the United States, and that the United States had not consented that it or any of its officers might be sued in such case, and also the plaintiff had not stated facts sufficient to entitle her to equitable relief by decree of the lower court under the Trading with the Enemy Act, as amended or otherwise. The lower court sustained this motion, and dismissed the bill." (pp. 631-632).

Upon the foregoing facts, the Court of Appeals of the District of Columbia made the following findings:

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"We think this ruling correct. Section 9(a) of the Trading with the Enemy Act as amended provides, among other things, that any person, not an enemy or ally of enemy claiming any interest, right or title in any property which may have been seized by the Alien Property Custodian and held by him under the act, may institute a suit in equity in the Supreme Court of the District of Columbia, to establish the interest, right, or title so claimed, and, if so established, the court shall order the conveyance or transfer to the claimant of the property so held by the Custodian, or the interest therein to which the court shall determine the claimant to be entitled. This is the only suit authorized by section 9 of the act, and the sole remedy afforded by it is the return of the seized property in proper case to the claimant.

"* * * The relief sought by her is a judgment for debt and damages for the use of her property and injury to it while it was in the custody of the Custodian. This is an essentially different cause of action, and is not authorized by the act.

"Such a suit is in effect a suit against the United States, and cannot be sustained without permission first given by the United States * * *" (p. 632).

Considering the striking similarity between the present case the Von Brunning case, and it appearing that the latter case was considered a cause of action different from the claim for the return of the same properties and for that reason it was dismissed because it was not authorized by the Trading with the Enemy Act, a fortiori, the claim for damages in the present case should be regarded in the same light and should be likewise disregarded as having been presented without the previous consent of the United States Government. We see, therefore, no valid reason to justify the view taken by the respondent Judge.

We do not find merit in the claim that petitioner has waived its objection to the jurisdiction of the court simply because it failed to file a motion to dismiss impugning the court's jurisdiction over its person, or because it failed to object to the presentation of the evidence presented by respondents to substantiate their claim for damages. In the first place, petitioner could not have properly filed a motion to dismiss as contended because the government of the United States has expressly consented to be sued for the recovery of the property in question by virtue of the express authorization given to it by the Trading with the Enemy Act, so that the only thing petitioner could do was to object to the court's jurisdiction with respect to the claim for damages, which is exactly what it did when it challenged the jurisdiction of the court with regard to said claim for damages. And, in the second place, petitioner could not have properly waived such objection, even if it wanted to, in view of the principle that only the Congress of the United States may waive the immunity from suits given to the United States Government. On this matter, it has been held that neither the President of the United States, nor petitioner, nor any of their subordinate officers can give the required consent to be sued, and so neither can waive nor withdraw such consent. This is the sole function of Congress. (Carr. vs. U.S. 98 U.S. 433; Minnesota vs. U.S. 305 U.S. 386; U.S. vs. Shaw, 309 U.S. 501).

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Another aspect that should be considered is the effect of the writ of execution on the property against which it is to be enforced. If the purpose is to enforce it against the moneys or properties vested by the petitioner, then it cannot be legally done, for under section 9 (f) of the Trading with the Enemy Act, such property is exempt from attachment, garnishment, execution or from any lien whatsoever. The only exception to this privilege refers to properties acquired during the First World War (sect. 30) or to those intended to be returned to non-residents if action is taken before the intention to return is revoked, section 32 (f), and the reason behind such coercive measure is evidently to give American creditors an opportunity to attach them before they are taken out of the jurisdiction of the court. The present case does not come within the exception. This is another reason why the writ of execution cannot be maintained.

Wherefore, the order of the court of origin dated June 22, 1950, as well as its order of July 20, 1950, denying petitioner's motion for reconsideration, are hereby set aside and rendered without effect, without pronouncement as to costs.

The preliminary injunction issued is hereby declared final.

Parás, C. J., Feria, Pablo, Bengzon, Padilla, Tuason, Montemayor and Jugo, J. J., concur.

Writ granted, orders set aside.

(No. L-4263. March 12, 1953)

AMADO B. PARREÑO, plaintiff and appellant, vs. HON. JAMES P. MCGRANERY, Attorney General of the United States, defendant and appellee.

1. INTERNATIONAL LAW; SUITS AGAINST FOREIGN STATE NOT ALLOWED. It is a widely accepted principle of international law, which is made a part of the law of the land (art. II, sect. 3, of the Constitution) that a foreign State may not be brought to suit before the courts of another State or its own courts without its consent. This principle was expressly recognized by the courts of the Philippines in various cases, among which were Syquia vs. Lopez, et al. (84 Phil., 312); Marvel Building Corps. vs. Philippine War Damage Commission (85 Phil., 27); Marquez Lim vs. Nelson et al. (8" Phil., 328).

2. ID.; ID.; RULE EXTENDS TO CASES ALREADY COMMENCED.-U.S. Public Law No. 671 approved on August 8, 1946, which came to be known as section 34 of the Trading with the Enemy Act, provides that "suits for the satisfaction of debt claims shall not be instituted, prosecuted or further maintained except in conformity with this section". The new enactment superseded or amended section 9 (a) of the Trading with the Enemy Act, so that no claims in any court other than the District Court for the District of Columbia against the Custodian may thereafter be allowed. Section 34 has been construed to extend even to suits already validly commenced under section 9 (a).. (See Cabell vs. Clark, 162 F, 2d, 163.)

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APPEAL from the order of the Court of First Instance of Negros Occidental. Enriquez, J.

The facts are stated in the opinion of the Court.

Parreño, Parreño, Carreon and Arroyo for appellant.

Juan T. Santos and Lino M. Patajo for appellee.

TUASON, J.:

This is an appeal from an order of Honorable Eduardo D. Enriquez, Judge of the Court of First Instance of Negros Occidental, dismissing the complaint on the grounds that the court had no jurisdiction of the person of the defendant and of the subject-matter of the action.

The suit was brought by Amado B. Parreño against the Philippine Alien Property Administrator, later substituted by the Attorney General of the United States, to collect the sum of P13,063 out of the proceeds of real and personal properties of Kokichi Ishiwata, a Japanese national, which had been vested in and transferred to the defendant. The amount was alleged to be due for legal services rendered by the plaintiff to Ishiwata before the outbreak of the recent world war. In the complaint the plaintiff asked for, and Honorable Jose Teodoro, Sr., Judge of another branch of the same court, issued a writ of attachment, which was levied on one of the vested lots and its improvements.

It is a widely accepted principle of international law, which is made a part of the law of the land (art. 11, sect. 3, of the Constitution), that a foreign State may not be brought to suit before the courts of another State or its own courts without its consent. This principle was expressly recognized by the courts of the Philippines in various cases, among which were Syquia vs. Lopez, et al., G. R. No. L 1618; Marvel Building Corp. vs. Philippine War Damage Commission, G. R. No. L 1822; Marquez Lim vs. Nelson, et al., G. R. No. L 2112.

Plaintiff and appellant, however, in his sole assignment of error contends that "this action is not a suit against the United States" pointing out that "the decisive test is whether or not the claim of the plaintiff should it be granted or awarded will constitute a charge against or financial liability to the Treasury of the United States Government", and that by his allegations the relief sought is not to be satisfied from that source.

That a suit against the Attorney General of the United States to establish a claim under the Trading with the Enemy Act of October 6, 1917, falls within the rule of government immunity to suit is not open to question. (Banco Mexicano vs. Deutsche Bank, 263 U. S. 591, 603; Henkels vs. Sutherland, 271 U. S. 298; Becker Steel Co. vs. Cummings, 296 U. S. 74, 78; Cummings vs. Deutsche Bank, 300 U. S. 115, 118; Von Bruning vs. Sutherland, 29 F. /2d/ 631). In Banco Mexicano vs. Deutsche Bank, supra, the Court said:

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"... we agreed with the Court of Appeals that this suit is in effect a suit against the United States of America and all of its conditions must obtain." And in Cummings vs. Deutsche Bank, supra: "* * * The title acquired by the United States was absolute and unaffected by definitions of duties or limitations upon the power of the Custodian or the Treasurer of the United States. ... To the extent that the argument rests upon the assumption that the United States did not acquire obsolute title, it is fallacious and need not be noticed."

This principle was expressly followed in this jurisdiction in the case of Miguel Socco Reyes vs. Philippine Alien Property Administrator* et al., G.R. No. L-2879, where it was said: "* * * The Philippine Alien Property Administrator was not a debtor of Teizo Mori, because the latter had been divested of any title or interest in the properties formerly owned by him and registered in his name after Vesting Order No. P-7 had been executed, and because the said properties after Vesting Order No. P-7 had been executed, and after they had been sold, the proceeds realized from the sale thereof, belonged to the Government of the United States of America."

As an alternative proposition appellant calls attention to Section 3 of United States Public Law No. 485, otherwise known as Philippine Property Act of 1946, which provides in effect that any suit authorized under section 9(a) of the Trading With the Enemy Act, like the present suit, may be brought in the courts of the Philippines if the action arises with respect to property located in the Philippines at the time of the vesting. But by United States Public Law No. 671 approved on August 8, 1946, which came to be known as Section 34 of the Trading With the Enemy Act, there was enacted a procedure for the equitable payment by the Custodian of debt claims and for review by the District Court for the District of Columbia of any disallowance by the said Custodian. Providing that "suits for the satisfaction of debt claims shall not be instituted, prosecuted or further maintained except in conformity with this section," the new enactment superseded or amended section 9(a) of the Trading with the Enemy Act, so that no claims in any court other than the District Court for the District of Columbia against the Custodian may thereafter be allowed. Section 34 has been construed to extend even to suits already validly commenced under section 9(a). See Cabell vs. Clark, 162 F. /2d/ 153.

It is asserted that Section 34 "could not in any way repeal or abrogate the provisions of the Property Act of 1946 vesting jurisdiction on Courts of First Instance to try and hear cases against an officer of the Property Alien Administration, after the granting of its (Philippine) independence on July 4, 1946."

As a general proposition, the right of the government to withdraw its consent to be sued can not seriously be challenged. In the particular case at bar, there was the circumstance that the continuation of the Trading With the Enemy Act in the Philippines after July 1, 1946, was agreed upon by the United States and the

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* 81.Phil.312. 85.Phil.27. 87.Phil.328. 86.Phil.181.

Philippine Governments, and Section 34 was implicitly if not expressly accepted by the latter. At the time there remained a large amount of Japanese property in the Philippines which had not been vested or liquidated and which, according to the desire of both Governments, was to be transferred to the Philippine Government after settlement of all claims against it and its former owners and in line with international obligations; and it was believed and agreed that the only Government which could vest such property and should have jurisdiction in this field was that of the United States. See Joint Statement of President Roxas and Ambassador McNutt printed in House (U.S.) Report No. 2296; Press Release August 22, 1946, Statement by United States Ambassador Paul V. McNutt; Philippine Property Act of 1946; Proclamation of (Philippine) Independence; Statement of President Roxas contained in Senate (U.S.) Report No. 1578; Joint Statement of President Roxas and United States Commissioner Paul V. McNutt quoted in House (U.S.) Report No. 2296 and Senate (U.S.) Report No. 1578.

As to the amendment of the Trading With the Enemy Act, the change was calculated to accomplish no more than an improvement of the procedure in the settlement and liquidation of debt claims mainly in the interest of the claimants themselves. Whereas under section 9(a) payment was allowed under the principle of "first come, first served", Section 34 has set up an orderly scheme of priorities and equitable distribution of the assets among the creditors. Senate Report No. 1839 and House Report No. 2398, both of the 79th United States Congress, 2nd Session, explained: "/Subsections 34(e) and (f)/ provide that the United States District Court for the District of Columbia shall be the forum for review. Since the procedure calls for a marshaling of claims and since, on review, the court may have to give consideration to the entire account, it would cause a serious breakdown in administrative and judicial proceedings if debt claim determinations were reviewed by the several district courts throughout the country. It is believed that the matter must be centralized and no injustice should result."

The order dismissing the complaint is therefore affirmed with costs against the plaintiff and appellant.

(No. L-6118. April 26, 1954)

LARRY J. JOHNSON, plaintiff and appellee, vs. MAJ. GEN. HOWARD M. TURNER ET AL., defendants and appellants.

ACTIONS AGAINST THE UNITED STATES GOVERNMENT; JURISDICTION OF COURT TO TRY THE SAME; EFFECT OF LACK OF CONSENT TO BE SUED. - Where the claim and the judgment sought will be a charge against and a financial liability to the United States Government because the defendants had undoubtedly acted in their official capacities as agents of said Government, the action is really a suit against the Government of the United States, and because said Government has not given its consent thereto, the courts, particularly the trial court, have no jurisdiction to entertain the same.

APPEAL from a judgment of the Court of First Instance of Manila. Jose, J.

The facts are stated in the opinion of the Court.

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Sixto F. Santiago for appellants.

Quintia F. Pidel for appellee.

MONTEMAYOR, J.:

This is an appeal by the defendants from a decision of the Court of First Instance of Manila ordering them or their successors or representatives to return to plaintiff or his authorized representative the confiscated Military Payment Certificates (Scrip Money) in the reconverted or new series, amounting to $3,713. For purposes of the present appeal the pertinent facts not disputed are as follows:

> Plaintiff Larry J. Johnson, an American citizen, was formerly employed by the U. S. Army at Okinawa up to August 5, 1950, when he resigned, supposedly in violation of his employment contract. In the same month he returned to the Philippines as an American citizen, bringing with him Military Payment Certificates (Scrip Money) in the amount of $3,713 which sum he claims to have earned while at Okinawa. About five months later, that is, on January 15, 1951, he went to the U. S. Military Port of Manila and while there tried to convert said scrip money into U. S. dollars, allegedly for the purpose of sending it to the United States. Defendant Capt. Wilford H. Hudson Jr., Provost Marshal of the Military Port of Manila in the performance of his military duties and claiming that said act of Johnson in keeping scrip money and in trying to convert it into dollars was a violation of military circulars, rules and regulations, confiscated said scrip money, gave a receipt therefor and later delivered the scrip money to the military authorities. Johnson made a formal claim for the return of his scrip money and upon failure of the military authorities to favourably act upon his claim, on July 3, 1951, he commenced the present action in the Court of First Instance of Manila against Major General Howard M. Turner as Commanding General, Philippine Command (Air Force) and 13th Air Force with office at Clark Field; Major Norvald B. Thompson as Finance Officer, Provost Marshal, 13th Air Force with office at Clark Field; and Captain Wilford H. Hudson Jr., as Provost Marshal attached to the Manila Military Port Area, to recover the said amount of $3,713 "at the reconverted or new series and to the same full worth and value". It may be stated in this connexion that shortly after the confiscation of the scrip money in Manila on January 15, 1951, an order was issued by the U. S. Military authorities for the conversion of all scrip money then outstanding into a new series, thereby rendering valueless and of no use the old series of which the scrip confiscated from Johnson formed a part, and that was the reason why the prayer contained in Johnson's complaint is for the return not of the very same scrip money (old series) confiscated, but of the sum "at the reconverted or new series and to the same full worth and value".

The defendants through counsel moved for the dismissal of the complaint on the ground of lack of jurisdiction over their persons and over the subject-matter for the reason that they were being sued as defendants in their respective official capacities as officers of the U. S. Air Force and the action was based on their official actuations, and that the U. S. Government had not given its consent to be sued. The motion for dismissal was denied and the case was heard, after which, the

trial court found and held that it had jurisdiction because the claim was for the return of plaintiff's scrip money and not for the recovery of a sum of money as damages arising from any civil liability of the defendants; and that the confiscatory act of the defendants is contrary to the provisions of the Philippine Constitution prohibiting deprivation of one's property without due process of law.

Pursuant to rules and regulations as well as the practice in U. S. military establishments in Okinawa and the Philippines, military payment certificates popularly known as "scrip money" is issued to military and authorized personnel for use exclusively within said military establishments and as a sole medium of exchange in lieu of U. S. dollars, the issuance of said scrip money being restricted to those authorized to purchase tax free merchandise at the tax-free agencies of the U. S. Government within its military installations. It is said to be intended as a control measure and to assure that the economy of the Republic of the Philippines will be duly protected.

The confiscation of Johnson's scrip money is allegedly based on Circular No. 19, Part I, par. 7 (a) of the GHQ, Far East Command, APO 500, dated March 15, 1949, the pertinent provisions of which read thus:

> "7. Disposition of Military Payment Certificates. a. Personnel authorized to hold and use military payment certificates prior to departing on leave, temporary duty, or permanent change of status from a military payment certificate area to areas where military payment certificates are not in authorized use will dispose of their military payment certificates holding prior to departure. Similarly authorized personnel who lose their authorized status are required at the time of such loss to dispose of their military payment or certificate holdings."

It is the claim of the defendants that Johnson should have disposed of or converted his scrip money into dollars upon his resignation as employee of the U. S. Government when he lost his authorized status, and prior to his departure from Okinawa, and that his possession of said scrip money in the Philippines, particularly in the Manila Military Port Area was illegal, hence the confiscation.

Believing that the main and most important question involved in the appeal is that of jurisdiction, we shall confine our considerations to the same. In the case of Syquia vs. Lopez, et al., 47 Off. Gaz., 665, where an action was brought against U. S. Army officers not only for the recovery of possession of certain apartments occupied by military personnel under a contract of lease, but also to collect back rents and rents at increased rates including damages, we held:

> "We shall concede as correctly did the Court of First Instance that following the doctrine laid down in the cases of U. S. vs. Lee and U. S. vs. Tindal, supra, a private citizen claiming title and right of possession of a certain property may, to recover possession of said property, sue as individuals, officers, and agents of the Government who are said to be illegally withholding the same from him, tho in doing so, said officers and

agents claim that they are acting for the Government and the court may entertain such a suit although the government itself is not bound or concluded by the decision. The philosophy of this ruling is that unless the courts are permitted to take cognizance and to assume jurisdiction over such a case, a private citizen would be helpless and without redress and protection of his rights which may have been invaded by the officers of the Government professing to act in its name. In such a case the officials or agents asserting rightful possession must prove and justify their claims before the courts, where it is made to appear in the suit against them that the title and right of possession is in the private citizen. However, and this is important, where the judgement in such a case would result not only in the recovery of possession of the property in favour of said citizen but also a charge against or financial liability to the Government, then the suit should be regarded as one against the government itself, and consequently, it cannot prosper or be validly entertained by the courts except with the consent of said Government."

In the present case, if the action were merely for the return of the scrip money confiscated from plaintiff Johnson, it might yet be said that the action was for the recovery of property illegally withheld by officers and agents of a government professing to have acted as its agents. However, as already stated the present action is for the recovery not of the very scrip money confiscated but for the amount of said scrip in the new series of military payment certificates, and this was the relief granted by the lower court. Furthermore, if the relief is to be of any benefit to plaintiff and since has already lost his authorized status to possess and use said scrip money, he will have to be given the equivalent of said scrip money in dollars. It is, therefore, evident that the claim and the judgement will be a charge against and a financial liability to the U. S. Government because the defendants had undoubtedly acted in their official capacities as agents of said Government, to say nothing of the fact that said defendants had long left the Philippines possibly for other assignments; that was the reason the decision appealed from directs the return of the scrip money by the defendants or their successors. Consequently, the present suit should be regarded as an action against the United States Government.

It is not disputed that the U. S. Government has not given its consent to be sued. Therefore, the suit cannot be entertained by the trial court for lack of jurisdiction.

Another point may be mentioned, though incidentally, namely, that before the decision was rendered by the lower court the plaintiff filed his claim for the same amount of $3,713 with the Claims Division, General Accounting Office, Washington, D.C. However, the record fails to show the action taken, if any, on said claim.

In conclusion, we find and hold that the present action because of its nature is really a suit against the Government of the United States, and because said Government has not given its consent thereto, the courts, particularly the trial court have no jurisdiction to entertain the same. Because of this, we deem it

unnecessary to discuss and rule upon the propriety and legality of the confiscation made by the defendants, particularly Capt. Wilford H. Hudson, of the scrip money from the plaintiff, and whether or not the latter's filing of his claim with the U. S. Government through its Claims Division, constitutes an abandonment of his claim or suit with the Philippine court.

In view of the foregoing, the decision appealed from is hereby reversed and the complain is dismissed. No pronouncement as to costs.

Parás, C. J., Pablo, Bengzon, Reyes, Jugo, Bautista Angelo, Labrador, and Concepcion, JJ., concur.

Judgment reversed.

(No. L-24294. May 3, 1974) 1/

DONALD BAER, Commander U. S. Naval Base, Subic Bay, Olongapo, Zambales, petitioner, vs. HON. TITO V. TIZON, as Presiding Judge of the Court of First Instance of Bataan, and EDGARDO GENER, respondents.

Political law; State immunity from suit; A foreign government acting through its naval commanding officer is immune from suit relative to the performance of an important public function of any government, the defense and security of its naval base in the Philippines granted under a treaty. - The invocation of the doctrine of immunity from suit of a foreign state without its consent is appropriate. More specifically, insofar as alien armed forces is concerned, the starting point in Raquiza v. Bradford, a 1945 decision. x x x The solidity of the stand of petitioner is therefore evident. What was sought by private respondent and what was granted by respondent Judge amounted to an interference with the performance of the duties of petitioner in the base area in accordance with the powers possessed by him under the Philippine-American Military Bases Agreement. This point was made clear in these words: "Assuming, for purposes of argument, that the Philippine Government, through the Bureau of Forestry, possesses the 'authority to issue a Timber License to cut logs' inside a military base, the Bases Agreement subjects the exercise of rights under a timber license issued by the Philippine Government to the exercise by the United States of its rights, powers and authority of control within the bases; and the findings of the Mutual Defense Board, an agency of both the Philippine and United States Governments, that 'continued logging operation by Mr. Gener within the boundaries of the U. S. Naval Base would not be consistent with the security and operations of the Base,' is conclusive upon the respondent Judge. * * * The doctrine of state immunity is not limited to cases which would result in a pecuniary charge against the sovereign or would require the doing of an affirmative act by it. Prevention of a sovereign from doing an affirmative act pertaining directly and immediately to the most important public function of any government - the defense of the state - is equally as untenable as requiring it to

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1/ SECOND DIVISION.

do an affirmative act." That such an appraisal is not opposed to the interpretation of the relevant treaty provision by our Government is made clear in the aforesaid manifestation and memorandum as amicus curiae, wherein it joined petitioner for the grant of the remedy prayed for.

Same; Same; A naval commander may, however, be sued in his personal capacity. - There should be no misinterpretation of the scope of the decision reached by this Court. Petitioner, as the Commander of the United States Naval Base in Olongapo, does not possess diplomatic immunity. He may therefore be proceed against in his personal capacity, or when the action taken by him cannot be imputed to the government which he represents.

Courts; Jurisdiction; Preliminary injunction; Trial court has no authority to grant a writ of preliminary injunction against U.S. naval authorities in the Philippines in favor of a timber licensee whose license already expired. - The infirmity of the actuation of the respondent Judge becomes even more glaring when it is considered that private respondent had ceased to have any right of entering within the base area. This is made clear in the petition in these words: "In 1962, respondent Gener was issued by the Bureau of Forestry an ordinary timber license to cut logs in Barrio Mabayo, Morong, Bataan. The license was renewed on July 10, 1963. In 1963, he commenced logging operation inside the United States Naval Base, Subic Bay, but in November, 1963 he was apprehended and stopped by the Base authorities from logging inside the Base. The renewal of his license expired on July 30, 1964, and to date his license has not been renewed by the Bureau of Forestry. * * * In July 1964, the Mutual Defense Board, a joint Philippines-United States agency established pursuant to an exchange of diplomatic notes between the Secretary of Foreign Affairs and the United States Ambassador to provide 'direct liaison and consultation between appropriate Philippine and United States authorities on military matters of mutual concern,' advised the Secretary of Foreign Affairs in writing that 'The enclosed map shows that the area in which Mr. Gener was logging definitely falls within the boundaries of the base. This map also depicts certain contiguous and overlapping areas whose functional usage would be interfered with by the logging operations.'" Nowhere in the answer of respondents, nor in their memorandum, was this point met. It remained unrefuted.

ORIGINAL ACTION in the Supreme Court. Certiorari with preliminary injunction.

The facts are stated in the opinion of the Court.

Sycip, Salazar, Luna Manalo and Feliciano for petitioner.

A. E. Dacanay for private respondent.

Solicitor Camilo D. Quiason as amicus curiae.

FERNANDO, J.:

There is nothing novel about the question raised in this certiorari proceeding against the then Judge Tito V. Tizon, filed by petitioner Donald Baer, then Commander of the United States Naval Base, Subic Bay, Olongapo, Zambales, seeking

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to nullify the orders of respondent Judge denying his motion to dismiss a complaint filed against him by the private respondent, Edgardo Gener, on the ground of sovereign immunity of a foreign power, his contention being that it was in effect a suit against the United States, which had not given its consent. The answer given is supplied by a number of cases coming from this Tribunal starting from a 1945 decision, Raquiza v. Bradford 1/ to Johnson v. Turner, 2/ promulgated in 1954. The doctrine of immunity from suit is of undoubted applicability in this jurisdiction. It cannot be otherwise, for under the 1935 Constitution, as now, it is expressly made clear that the Philippines "adopts the generally accepted principles of international law as part of the law of the Nation." 3/ As will subsequently be shown, there was a failure on the part of the lower court to accord deference and respect to such a basic doctrine, a failure compounded by its refusal to take note of the absence of any legal right on the part of petitioner. Hence, certiorari is the proper remedy.

The facts are not in dispute. On November 17, 1964, respondent Edgardo Gener, as plaintiff, filed a complaint for injunction with the Court of First Instance of Bataan against petitioner, Donald Baer, Commander of the United States Naval BAse in Olongapo. It was docketed as Civil Case No. 2984 of the Court of First Instance of Bataan. He alleged that he was engaged in the business of logging in an area situated in Barrio Mabayo, Municipality of Morong, Bataan and that the American Naval Base authorities stopped his logging operations. He prayed for a writ of preliminary injunction restraining petitioner from interfering with his logging operations. A restraining order was issued by respondent Judge on November 23, 1964. 4/ Counsel for petitioner, upon instructions of the American Ambassador to the Philippines, entered their appearance for the purpose of contesting the jurisdiction of respondent Judge on the ground that the suit was one against a foreign sovereign without its consent. 5/ Then, on December 12, 1964, petitioner filed a motion to dismiss, wherein such ground was reiterated. It was therein pointed out that he is the chief or head of an agency or instrumentality of the United States of America, with the subject matter of the action being official acts done by him for and in behalf of the United States of America. It was added

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1/ 75 Phil. 50.

2/ 94 Phil. 307. The other cases from Raquiza v. Bradford follow: Tubb and Tedrow v. Griess, 78 Phil. 249 (1947); Miquiabas v. Commanding General, 80 Phil. 262 (1948); Dizon v. Phil. Ryukus Command, 81 Phil. 286 (1948); Syquia v. Almeda Lopez, 84 Phil. 312 (1949); Marvel Building Corp. v. Philippine War Damage Commission, 85 Phil. 27 (1949); Marquez Lim v. Nelson, 87 Phil. 328 (1950); Philippine Alien Property Administration v. Castelo, 89 Phil. 568 (1951); Parreño v. McGranery, 92 Phil. 791 (1953).

3/ According to Article II, Sec. 3 of the 1935 Constitution: "The Philippines renounces war an an instrument of national policy, and adopts the generally accepted principles of international law as part of the law of the Nation." The same provision is found in the present Constitution, Article II Sec. 3, reading thus: "The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land, and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations."

4/ Petition, par. 2(a) and (b).

5/ Ibid., par. 2(d).

that in directing the cessation of logging operations by respondent Gener within the Naval Base, petitioner was entirely within the scope of his authority and official duty, the maintenance of the security of the Naval Base and of the installations therein being the first concern and most important duty of the Commander of the Base. 6/ There was, on December 14, 1964, an opposition and reply to petitioner's motion to dismiss by respondent Gener, relying on the principle that "a private citizen claiming title and right of possession of certain property may, to recover possession of said property, sue as individuals, officers and agents of the Government, who are said to be illegally withholding the same from him, though in doing so, said officers and agents claim that they are acting for the Government." That was his basis for sustaining the jurisdiction of respondent Judge. 7/ Petitioner, thereafter, on January 12, 1965, made a written offer of documentary evidence, including certified copies of telegrams of the Forestry Director to Forestry personnel in Balanga, Bataan dated January 8, and January 11, 1965, directing immediate investigation of illegal timber cutting in Bataan and calling attention to the fact that the records of the office show no new renewal of timber license or temporary extension permits. 8/ The above notwithstanding, respondent Judge, on January 12, 1965, issued an order granting respondent Gener's application for the issuance of a writ of preliminary injunction and denying petitioner's motion to dismiss the opposition to the application for a writ of preliminary injunction. 9/

A motion for reconsideration having proved futile, this petition for certiorari was filed with this Court. The prayer was for the nullification and setting aside of the writ of preliminary injunction issued by respondent Judge in the aforesaid Civil Case No. 2984 of the Court of First Instance of Bataan. A resolution of March 17, 1965 was issued by this Court requiring respondents to file an answer and upon petitioner's posting a bond of P5,000.00 enjoining them from enforcing such writ of preliminary injunction. The answer was duly forthcoming. It sought to meet the judicial question raised by the legal proposition that a private citizen claiming title and right of possession of a certain property may, to recover the same, sue as individuals officers and agents of the government alleged to be illegally withholding such property even if there is an assertion on their part that they are acting for the government. Support for such a view is found in the American Supreme Court decisions of United States v. Lee 10/ and Land v. Dollar. 11/ Thus the issue is squarely joined as to whether or not the doctrine of immunity from suit without consent is applicable. Thereafter, extensive memoranda were filed both by petitioner and respondents. In addition, there was a manifestation and memorandum of the Republic of the Philippines as amicus curiae where, after a citation of American Supreme Court decisions going

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6/ Ibid., par. 2(e).

7/ Ibid., par. 2(f).

8/ Ibid., par. 2(i).

9/ Ibid., par. 2(j).

10/ 106 US 196 (1882).

11/ 330 US 731 (1947).

back to Schooner Exchange v. M'faddon, 12/ an 1812 decision, to United States v. Belmont, 13/ decided in 1937, the plea was made that the petition for certiorari be granted.

A careful study of the crucial issue posed in this dispute yields the conclusion, as already announced, that petitioner should prevail.

1. The invocation of the doctrine of immunity from suit of a foreign state without its consent is appropriate. More specifically, insofar as alien armed forces is concerned, the starting point is Raquiza v. Bradford, a 1945 decision. 14/ In dismissing a habeas corpus petition for the release of petitioners confined by American army authorities, Justice Hilado, speaking for the Court, cited from Coleman v. Tennessee, 15/ there it was explicitly declared: "It is well settled that a foreign army, permitted to march through a friendly country or to be stationed in it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place." 16/ Two years later, in Tubb and Tedrow v. Griess, 17/ this Court relied on the ruling in Raquiza v. Bradford and cited in support thereof excerpts from the works of the following authoritative writers: Vattel, Wheaton, Hall, Lawrence, Oppenhein, Westlake, Hyde, and McNair and Lauterpacht. 18/ Accuracy demands the clarification that after the conclusion of the Philippine-American Military Bases Agreement, the treaty provisions should control on such matter, the assumption being that there was a manifestation of the submission to jurisdiction on the part of the foreign power whenever appropriate. 19/ More to the point is Syquia v. Almeda Lopez, 20 where plaintiffs as lessors sued the Commanding General of the United States Army in the Philippines, seeking the restoration to them of the apartment buildings they owned leased to United States armed forces stationed in the Manila area. A motion to dismiss on the ground of non-suitability was filed and upheld by respondent Judge. The matter was taken to this Court in a mandamus proceeding. It failed. It was the ruling that respondent Judge acted correctly considering that the "action must be considered as one against the U.S. Government". 21/ The opinion of Justice Montemayor continued: "It is clear that the courts of the Philippines including the Municipal Court of Manila have no jurisdiction over the present case for unlawful detainer. The question of

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12/ 7 Cranch 116.

13/ 301 US 324.

14/ 75 Phil. 50.

15/ 97 US 509 (1879).

16/ 75 Phil. 50, 60.

17/ 78 Phil. 249 (1947).

18/ Ibid., 252-254.

19/ Cf. People v. Acierto, 92 Phil. 534 (1953) and People v. Gozo, L-36409, Oct. 26, 1973, 53 SCRA 476.

20/ 84 Phil. 312 (1949).

21/ Ibid., 323.

lack of jurisdiction was raised and interposed at the very beginning of the action. The U.S. Government has not given its consent to the filing of this suit which is essentially against her, though not in name. Moreover, this is not only a case of citizen filing a suit against his own Government without the latter's consent but it is of a citizen filing an action against a foreign government without said government's consent, which renders more obvious the lack of jurisdiction of the courts of his country. The principles of law behind this rule are so elementary and of such general acceptance that we deem it unnecessary to cite authorities in support thereof." 22/ Then came Marvel Building Corporation v. Philippine War Damage Commission, 23/ where respondent, a United States agency established to compensate damages suffered by the Philippines during World War II was held as falling within the above doctrine as the suit against it "would eventually be a charge against or financial liability of the United States Government because * * *, the Commission has no funds of its own for the purpose of paying money judgments". 24/ The Syquia ruling was again explicitly relied upon in Marquez Lim v. Nelson, 25/ involving a complaint for the recovery of a motor launch, plus damages, the special defense interposed being "that the vessel belonged to the United States Government, that the defendants merely acted as agents of said Government, and that the United States Government is therefore the real party in interest". 26/ So it was in Philippine Alien Property Administration v. Castelo, 27/ where it was held that a suit against the Alien Property Custodian and the Attorney General of the United States involving vested property under the Trading with the Enemy Act is in substance a suit against the United States. To the same effect is Parreño v. McGranery, 28/ as the following excerpt from the opinion of Justice Tuason clearly shows: "It is a widely accepted principle of international law, which is made a part of the law of the land (Article II, Section 3 of the Constitution), that a foreign state may not be brought to suit before the courts of another state or its own courts without its consent." 29/ Finally, there is Johnson v. Turner, 30/ an appeal by the defendant, then Commanding General, Philippine Command (Air Force, with office at Clark Field) from a decision ordering the return to plaintiff of the confiscated military payment certificates known as scrip money. In reversing the lower court decision, this Tribunal, through Justice Montemayor, relied on Syquia v. Almeda Lopez, 31/ explaining why it could not be sustained.

22/ Ibid.

23/ 85 Phil. 27 (1949).

24/ Ibid., 32.

25/ 87 Phil. 328 (1950).

26/ Ibid., 329.

27/ 89 Phil. 568 (1951).

28/ 92 Phil. 791 (1953).

29/ Ibid., 792. The excerpt continues with a reference to the Syquia, Marvel Building Corporation, and Marquez Lim decisions.

30/ 94 Phil. 807 (1954).

31/ 84 Phil. 312 (1949).

The solidity of the stand of petitioner is therefore evident. What was sought by private respondent and what was granted by respondent Judge amounted to an interference with the performance of the duties of petitioner in the base area in accordance with the powers possessed by him under the Philippine-American Military Bases Agreement. This point was made clear in these words: "Assuming, for purposes of argument, that the Philippine Government, through the Bureau of Forestry, possesses the 'authority to issue a Timber License to cut logs inside a military base, the Bases Agreement subjects the exercise of rights under a timber license issued by the Philippine Government to the exercise by the United States of its rights, power and authority of control within the bases; and the findings of the Mutual Defense Board, an agency of both the Philippine and United States Governments, that 'continued logging operation by Mr. Gener within the boundaries of the U.S. Naval Base would not be consistent with the security and operation of the Base,' is conclusive upon the respondent Judge. * * * The doctrine of state immunity is not limited to cases which would result in a pecuniary charge against the sovereign or would require the doing of an affirmative act by it. Prevention of a sovereign from doing an affirmative act pertaining directly and immediately to the most important public function of any government - the defense of the state - is equally as untenable as requiring it to do an affirmative act." 32/ That such an appraisal is not opposed to the interpretation of the relevant treaty provision by our government is made clear in the aforesaid manifestation and memorandum as amicus curiae, wherein it joined petitioner for the grant of the remedy prayed for.

2. There should be no misinterpretation of the scope of the decision reached by this Court. Petitioner, as the Commander of the United States Naval Base in Olongapo, does not possess diplomatic immunity. He may therefore be proceeded against in his personal capacity, or when the action taken by him cannot be imputed to the government which he represents. Thus, after the Military Bases Agreement, in Miquiabas v. Commanding General 33/ and Dizon v. The Commanding General of the Philippine-Ryukus Command, 34/ both of them being habeas corpus petitions, there was no question as to the submission to jurisdiction of the respondents. As a matter of fact, in Miquiabas v. Commanding General, 35/ the immediate release of the petitioner was ordered, it being apparent that the general court martial appointed by respondent Commanding General was without jurisdiction to try petitioner. Thereafter, in the cited cases of Syquia, Marquez Lim, and Johnson, the parties proceeded against were American army commanding officers stationed in the Philippines. The insuperable obstacle to the jurisdiction of respondent Judge is that a foreign sovereign without its consent is haled into court in connection with acts performed by it pursuant to treaty provisions and thus impressed with a governmental character.

32/ Petition, paragraph 2(2).

33/ 80 Phil. 262 (1948).

34/ 81 Phil. 286 (1948).

35/ 80 Phil. 262 (1948).

3. The infirmity of the actuation of respondent Judge becomes even more glaring when it is considered that private respondent had ceased to have any right of entering within the base area. This is made clear in the petition in these words: "In 1962, respondent Gener was issued by the Bureau of Forestry an ordinary timber license to cut logs in Barrio Mabayo, Moring, Bataan. The license was renewed on July 10, 1963. In 1963, he commenced logging operation inside the United States Naval Base, Subic Bay, but in November 1963 he was apprehended and stopped by the Base authorities from logging inside the Base. The renewal of his license expired on July 30, 1964, and to date his license has not been renewed by the Bureau of Forestry. * * * In July 1964, the Mutual Defense Board, a joint Philippines-United States agency established pursuant to an exchange of diplomatic notes between the Secretary of Foreign Affairs and the United States Ambassador to provide 'direct liaison and consultation between appropriate Philippine and United States authorities on military matters of mutual concern,' advised the Secretary of Foreign Affairs in writing that: 'The enclosed map shows that the area in which Mr. Gener was logging definitely falls within the boundaries of the base. This map also depicts certain contiguous and overlapping areas whose functional usage would be interfered with by the logging operations.'" 36/ Nowhere in the answer of respondents, nor in their memorandum, was this point met. It remained unrefuted.

WHEREFORE, the writ of certiorari prayed for is granted, nullifying and setting aside the writ of preliminary injunction issued by respondent Judge in Civil Case No. 2984 of the Court of First Instance of Bataan. The injunction issued by this Court on March 18, 1965 enjoining the enforcement of the aforesaid writ of preliminary injunction of respondent Judge is hereby made permanent. Costs against private respondent Edgardo Gener.

Zaldivar, Antonio, Fernandez and Aquino, JJ., concur.

Barredo, J., did not take part.

Certiorari granted, writ of preliminary injunction nullified and set aside.

36/ Petition, paragraph 3.

POLAND

/Original: English/
/17 July 1979/

State's immunity derives from its sovereignty. It is based upon the sovereign equality of States and their respective independence. For, in accordance with the principle par in parem non habet imperium, no sovereign nor independent State, as subject of international law, is subordinate to the laws of another State. State's immunity is of a very broad character, since the State does not fall under the legislation nor the jurisdiction or the authority of any other State, and as a subject of international law is but amenable to rules of that law. Each State, moreover, is obliged to respect the sovereignty of another State, as the principle of sovereign equality of States is universally binding. Stemming as they do from that latter principle a sovereign State and its institutions are not amenable to foreign national courts.

Under the principle of equality, no State has the right to adjudge in cases involving any other sovereign State, as they are all equal in the face of law. Thus, the jurisdictional immunity is a principle of international relations and an institution of international law.

Although the Polish Civil Code does not refer expressis verbis to the jurisdictional immunity with regard to a foreign State, Polish courts do recognize the validity of the immunity by rejecting summons brought against such a State, on the ground of absence of relevant national jurisdiction.

In its ruling of 14 December 1948 /C 635/48 - Państwo i Prawo 1949, No. 4, p. 119/, Poland's Supreme Court stated the following: "The question of jurisdiction by Polish courts over other States cannot be based on provisions of articles 4 and 5 of the Code of Civil Procedure of 1932; a foreign State cannot be considered an alien in the meaning of article 4 of the Code of Civil Procedure nor of the provisions of article 6 of the Code which applies to diplomatic representatives of such a State. The legal basis of a court immunity would be different for such a State as well as different for the court immunity of diplomatic representatives. In deciding upon the questions of court immunities with regard to foreign States, one should base directly on the generally recognized principles accepted in international jurisprudence, outstanding among which is that of reciprocity among States. The principle consists in one State rejecting or granting court immunity to another State to the very same extent as the latter would grant or reject the immunity of the former.

The ruling of the Supreme Court of 26 March 1958 /2 CR 1"2/56: Orzecznictwo Sądów Polskich, 1959, No. 6/60/ stipulates that due to customary international practice, whereby bringing summons against one State in the national courts of another State is inadmissible, Polish courts, in principle, are not competent to deal with cases against foreign States.

It is neither admissible to deem a foreign State to be subjected to the jurisdiction of Polish courts by way of the so-called facta concludentia /such a

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position has been taken in the above quoted ruling of the supreme Court of 14 December 1948/ like the common implications of purchasing real estate in Poland by such a State. A foreign State may renounce its immunity from Polish court jurisdiction, such a renunciation, however, must be unambiguous, drawn in writing, in the form of a statement of the Government concerned, addressed to the Government of Poland.

Jurisdictional immunity involves also the property of a foreign State. It is based upon executional immunity and the immunity against protective distraint. Accordingly, executionary measures may be employed against property belonging to another State only if the State concerned recognizes in a given case the competence of another State's courts. Executionary proceedings against another State's property, located on Poland's territory, would call for a separate and clear-cut renunciation of executional immunity.
