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

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JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

[Agenda item 3]

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

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Introductory note

1. The sixth report on jurisdictional immunities of States and their property is a continuation of the five successive reports¹ already submitted to the International Law Commission. The introductory note in the fifth report on this topic² is still applicable as a practical guide to the present

report, which will cover the remaining exceptions to State immunity in part III. As an introduction to the substantive parts of the present report, which will bring the Commission closer to the conclusion of its study and preparation of

¹ The five previous reports were: (a) preliminary report, *Yearbook* . . . 1979, vol. II (Part One), p. 227, document A/CN.4/323; (b) second report, *Yearbook* . . . 1980, vol. II (Part One), p. 199, document A/CN.4/331 and Add.1; (c) third report, *Yearbook* . . . 1981, vol. II (Part One), p. 12, docu-

ment A/CN.4/340 and Add.1; (d) fourth report, *Yearbook* . . . 1982, vol. II (Part One), p. 199, document A/CN.4/357; (e) fifth report, *Yearbook* . . . 1983, vol. II (Part One), p. 25, document A/CN.4/363 and Add.1.

² Document A/CN.4/363 and Add.1 (see footnote 1 (e) above), paras. 1-27.

draft articles on the topic, section A below gives the updated status of the draft articles so far submitted, some of which have been considered and provisionally adopted, and indeed further adjusted and revised, while others are still under active examination by the Drafting Committee, and yet others have been set aside for the time being for consideration after the submission of the rest of the draft articles.

A. Status of the draft articles already submitted

2. To date, 15 draft articles have been submitted to the Commission in the five reports already considered. Of these 15 draft articles, the first five are contained in part I, "Introduction", the second five in part II, "General principles", and the third five in part III, "Exceptions to State immunity".

1. PART I. INTRODUCTION

3. In part I (Introduction), *article 1* (Scope of the present articles) as provisionally adopted in 1980³ has been revised and readjusted so as to confine the scope of the draft articles more explicitly to "the immunity of one State and its property from the jurisdiction of the courts of another State".⁴

4. *Article 2* (Use of terms), as submitted in the second report of the Special Rapporteur for temporary guidance, has been partially considered in at least two separate connections.⁵ First, following the revision of draft article 1, limiting the scope of the draft articles, a definition of the term "court" was introduced in paragraph 1 (a) of article 2.⁶ Secondly, paragraph 1 (f), defining "trading or commercial activity",⁷ has been withdrawn and replaced by the new paragraph 1 (g), defining "commercial contract".⁸

³ "Article 1. Scope of the present articles

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

See *Yearbook . . . 1980*, vol. II (Part Two), p. 141.

⁴ "Article 1. Scope of the present articles

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

See *Yearbook . . . 1982*, vol. II (Part Two), p. 99; for the commentary, *ibid.*, pp. 99-100.

⁵ For the original text of article 2, *ibid.*, pp. 95-96, footnote 224.

⁶ "Article 2. Use of terms

"1. For the purposes of the present articles:

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

"..."

Ibid., p. 100; for the commentary, *ibid.*

⁷ See footnote 5 above.

⁸ "Article 2. Use of terms

"1. For the purposes of the present articles:

"..."

"(g) 'commercial contract' means:

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

"(ii) any contract for a loan or other transaction of a financial nature,

5. Other terms defined in article 2, paragraph 1,⁹ have not been fully considered. The definitions of "immunity" and "jurisdictional immunities" in former subparagraphs (a) and (b) are perhaps self-evident and no longer needed. The definitions of "territorial State" and "foreign State" in subparagraphs (c) and (d) have been withdrawn and the technique adopted of referring instead to *one State* in relation to *another State*. The definition of "State property" in subparagraph (e), and paragraph 2 of the article, remain to be considered. New terms may yet be included as consideration of further draft articles progresses.

6. *Article 3* (Interpretative provisions) has been partially considered in connection with the exception of "commercial contracts" as contained in article 12 and defined in article 2, paragraph 1 (g), already provisionally adopted. The Commission also provisionally adopted paragraph 2 of article 3, recognizing the use of the "nature test" as well as the "purpose test" for determining the commercial or non-commercial character of a contract or transaction.¹⁰

7. Paragraph 1, giving an illustration of the various elements which constitute a State for the purpose of immunity and the types of power covered by the expression "jurisdiction" of another State, remains to be considered.¹¹

8. *Article 4* (Jurisdictional immunities not within the scope of the present articles) has been briefly discussed in connection with draft article 15 (Ownership, possession and use of property), especially its paragraph 3. This article, as well as *article 5* (Non-retroactivity of the present articles), is still to be considered more fully after the Commission has considered the rest of the draft articles.¹²

2. PART II. GENERAL PRINCIPLES

9. Part II (General principles) is all but complete except for the basic article, *article 6* (State immunity), which, despite its previous provisional adoption,¹³ remains to be re-examined with a view to possible reformulation so as to

including any obligation of guarantee in respect of any such loan or of indemnity in respect of any such transaction;

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

"..."

See *Yearbook . . . 1983*, vol. II (Part Two), p. 34; for the commentary, *ibid.*, pp. 34-35.

⁹ See footnote 5 above.

¹⁰ "Article 3. Interpretative provisions

"..."

"2. In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made primarily to the nature of the contract, but the purpose of the contract should also be taken into account if, in the practice of that State, that purpose is relevant to determining the non-commercial character of the contract."

See *Yearbook . . . 1983*, vol. II (Part Two), p. 35; for the commentary, *ibid.*, pp. 35-36.

¹¹ For the text of article 3, see *Yearbook . . . 1982*, vol. II (Part Two), p. 96, footnote 225.

¹² For the texts of articles 4 and 5, *ibid.*, footnotes 226 and 227.

¹³ "Article 6. State immunity

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

give greater satisfaction to the various points of view expressed. The study and analysis leading to the formulation of draft article 6 have not been seriously challenged, but its wording requires further improvement and readjustment. There is sufficient general agreement that immunity is a fundamental principle of international law supported by the general practice of States. Only its fullest extent has yet to be more precisely defined. A State is immune from the jurisdiction of the courts of another State. The rest of the draft articles will further clarify, qualify or modify the scope and extent of the application of this principle. Final revision of article 6 will therefore have to await consideration of the remaining draft articles, so as to allow a more generally accepted restatement of the basic principle to materialize.¹⁴ In the mean time, it may be convenient to reaffirm the existence of a basic general principle of State immunity in article 6 as further elaborated and qualified by other general principles in part II of the draft articles, to the extent of and subject to the exceptions and limitations contained in part III. As is gradually becoming increasingly apparent, in each of the particular areas designated as exceptional, the extent of State immunity is being delineated. In each of these areas, immunity exists to varying degrees and extent, beyond which no immunity need be recognized or accorded.

10. Except for article 6 (State immunity), the remaining four articles of part II (General principles) have been provisionally adopted without too much opposition. *Article 7* (Modalities for giving effect to State immunity)¹⁵ was accepted by consensus subject to final approval of article 6, since it contains an express reference to State immunity under article 6. But article 7 covers wider ground than modalities for fulfilment of the obligation to give effect to State immunity. It also sets out the circumstances when a State is said to be impleaded, whether directly or indirectly, and the different situations or occasions in which a proceeding not instituted against a State as such is still regarded as being against a State. Inherent in the provisions of article 7 is the differentiation between the higher and lower echelons of bodies forming part of the State or under its administration or control, and the requirement for acts to be performed in the exercise of governmental or sovereign authority for State immunity to be extended to cover agencies and instrumentalities of more remote connection with the central organ or machinery of government. Similarly, representatives of a State are immune only in respect of acts performed in their representative capacities and not otherwise, except for diplomatic agents who are entitled to immunity *ratione personae* in addition to their immunity *ratione materiae*, both of which belong to the sending State in the ultimate analysis and which can be waived only by the sending State.

¹² Effect shall be given to State immunity in accordance with the provisions of the present articles."

See *Yearbook . . . 1980*, vol. II (Part Two), p. 142; for the commentary, *ibid.*, pp. 142 *et seq.*

¹⁴ See *Yearbook . . . 1982*, vol. II (Part Two), p. 100, footnote 239. Several alternative formulations have been proposed, such as:

"A State is immune from the jurisdiction of the courts of another State except as provided in the present articles"; or "... except as provided in articles 12 to 20"; or "... to the extent and subject to the limitations provided in the present articles".

¹⁵ *Ibid.*; for the commentary, *ibid.*, pp. 100 *et seq.*

11. *Article 8* (Express consent to the exercise of jurisdiction),¹⁶ *article 9* (Effect of participation in a proceeding before a court)¹⁷ and *article 10* (Counter-claims)¹⁸ deal with the various aspects of consent to the exercise of jurisdiction, expressly given as in article 8, or by conduct such as participation in a legal proceeding, as in article 9, or the effect of counter-claims by or against a State, as in article 10. Articles 8 and 9 were provisionally adopted in 1982 and article 10 in 1983, thus completing the provisions on general principles dealing with consent as an important element in the establishment or application of State immunity.

12. Articles 6 to 10 constitute the general principles of State immunity and are placed in part II, entitled "General principles". Should the title be changed to "General provisions", a corresponding change will be needed for part III, which could read "Extent of State immunity in specified areas" instead of "Exceptions to State immunity".

3. PART III. EXCEPTIONS TO STATE IMMUNITY

13. Part III (Exceptions to State immunity) begins with *article 11* (Scope of the present part)¹⁹ which, as revised by the Special Rapporteur²⁰ after a preliminary exchange of views in the Commission, is intended to serve as a link between parts II and III of the draft articles. It would also serve to introduce the necessary or implied condition of reciprocity permissible in the granting or refusal of State immunity in a given case in a specified area of activities or conduct of a State. It is also designed to confirm the exceptional nature of subsequent articles providing for a limited application of State immunity. Part III in its entirety and in each of its specific provisions from article 12 to article 20 deals with actual limitations of State immunity.

14. Four exceptions have so far been proposed by the Special Rapporteur in articles 12 to 15, of which two have been provisionally adopted by the Commission together with their respective commentaries, namely *article 12* (Commercial contracts)²¹ together with its ancillary pro-

¹⁶ *Ibid.*, p. 107; for the commentary, *ibid.*, pp. 107 *et seq.*

¹⁷ *Ibid.*, p. 109; for the commentary, *ibid.*, pp. 109 *et seq.*

¹⁸ See *Yearbook . . . 1983*, vol. II (Part Two), p. 22; for the commentary, *ibid.*, pp. 22 *et seq.*

¹⁹ The text originally submitted by the Special Rapporteur read as follows:

"*Article 11. Scope of the present part*

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

See *Yearbook . . . 1982*, vol. II (Part Two), p. 95, footnote 220.

²⁰ "*Article 11. Scope of the present part*

"The application of the exceptions provided in part III of the present articles may be subject to a condition of reciprocity or any other condition as mutually agreed between the States concerned."

Ibid., p. 99, footnote 237.

²¹ "*Article 12. Commercial contracts*

"1. If a State enters into a commercial contract with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial contract fall within the jurisdiction of a court of another State, the State is considered to have consented to the exercise of that jurisdiction in a

visions²² and *article 15* (Ownership, possession and use of property).²³ The adoption of article 12, which had presented the greatest difficulties, constituted an important breakthrough in the efforts to secure a more generally acceptable solution to the main and central problem of State immunity. Article 15 had not given rise to much comment or opposition, although the reasons for accepting it could be based on diverse grounds, centring on the unique applicability and monopoly of the *lex situs* and therefore the supremacy of the *forum rei sitae*, at least in so far as immovables are concerned. Reasoning in private international law finds stout support in public international law doctrine of the supreme authority of the territorial sovereign. The principle of territoriality overrides all other considerations, including that of sovereign immunity, which is personal to the State claiming entitlement to immunity.

15. Two other exceptions were proposed by the Special Rapporteur in his fifth report, namely *article 13* (Contracts of employment)²⁴ and *article 14* (Personal injuries and

(Footnote 21 continued)

proceeding arising out of that commercial contract, and accordingly cannot invoke immunity from jurisdiction in that proceeding.

"2. Paragraph 1 does not apply:

"(a) in the case of a commercial contract concluded between States or on a Government-to-Government basis;

"(b) if the parties to the commercial contract have otherwise expressly agreed."

See *Yearbook* . . . 1983, vol. II (Part Two), p. 25; for the commentary, *ibid.*, pp. 25 *et seq.*

²² Article 2, paragraph 1 (g), and article 3, paragraph 2 (see footnotes 8 and 10 above).

²³ "*Article 15. Ownership, possession and use of property*

"1. The immunity of a State cannot be invoked to prevent a court of another State which is otherwise competent from exercising its jurisdiction in a proceeding which relates to the determination of:

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

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

"(c) any right or interest of the State in the administration of property forming part of the estate of a deceased person or of a person of unsound mind or of a bankrupt; or

"(d) any right or interest of the State in the administration of property of a company in the event of its dissolution or winding up; or

"(e) any right or interest of the State in the administration of trust property or property otherwise held on a fiduciary basis.

"2. A court of another State shall not be prevented from exercising jurisdiction in any proceeding brought before it against a person other than a State, notwithstanding the fact that the proceeding relates to, or is designed to deprive the State of, property:

"(a) which is in the possession or control of the State; or

"(b) in which the State claims a right or interest,

if the State itself could not have invoked immunity had the proceeding been instituted against it, or if the right or interest claimed by the State is neither admitted nor supported by *prima facie* evidence.

"3. The preceding paragraphs are without prejudice to the immunities of States in respect of their property from attachment and execution, or the inviolability of the premises of a diplomatic or special or other official mission or of consular premises, or the jurisdictional immunity enjoyed by a diplomatic agent in respect of private immovable property held on behalf of the sending State for the purposes of the mission."

See *Yearbook* . . . 1983, vol. II (Part Two), p. 36; for the commentary, *ibid.*, pp. 36 *et seq.*

²⁴ The text originally submitted by the Special Rapporteur read as follows:

damage to property).²⁵ There was a lack of enthusiasm for these two exceptions since they found no support in the general practice of States. Nevertheless, a trend seems to have emerged in recent legislation and treaty practice projecting such limitations for future progressive development. After the first round of discussion in the Commission, the Special Rapporteur submitted a revised draft of these two articles to the Drafting Committee.

16. The application of the exception concerning contracts of employment as provided in the revised article 13²⁶ seems narrowly confined to the small number of cases in which the employer State, of its own free will, decides to place locally recruited non-national employees under the

"*Article 13. Contracts of employment*

"1. Unless otherwise agreed, a State is not immune from the jurisdiction of the courts of another State in respect of proceedings relating to a 'contract of employment' of a national or resident of that other State for work to be performed there.

"2. Paragraph 1 does not apply if:

"(a) the proceedings relate to failure to employ an individual or dismissal of an employee;

"(b) the employee is a national of the employing State at the time the proceedings are brought;

"(c) the employee was neither a national nor a resident of the State of the forum at the time of employment; or

"(d) the employee has otherwise agreed in writing, unless, in accordance with the law of the State of the forum, the courts of that State have exclusive jurisdiction by reason of the subject-matter."

Ibid., p. 18, footnote 54.

²⁵ The text originally submitted by the Special Rapporteur read as follows:

"*Article 14. Personal injuries and damage to property*

"Unless otherwise agreed, a State is not immune from the jurisdiction of the courts of another State in respect of proceedings relating to injury to the person or death or damage to or loss of tangible property, if the act or omission which caused the injury or damage in the State of the forum occurred in that territory, and the author of the injury or damage was present therein at the time of its occurrence."

Ibid., p. 19, footnote 55.

²⁶ The revised text of article 13 submitted by the Special Rapporteur read as follows:

"*Article 13. Contracts of employment*

"1. Unless otherwise mutually agreed between the States concerned, a State which employs an individual for services to be performed, in whole or in part, in the territory of another State, and has effectively placed the employee under the social security system of that other State, is considered to have consented to the exercise of jurisdiction by a court of that other State in a proceeding relating to the contract of employment.

"2. Paragraph 1 does not apply if:

"(a) the individual has been appointed under the administrative law of the employer State, and is performing functions in the exercise of governmental authority;

"(b) the proceeding relates to non-appointment or dismissal of an individual seeking employment or re-employment;

"(c) the individual is a national of the employer State at the time the proceeding is instituted;

"(d) the individual was neither a national nor a habitual resident of the State of the forum at the time when the contract of employment was concluded, unless otherwise agreed in writing between the parties to the contract of employment;

"(e) the individual has otherwise agreed in writing, and the court of the State of the forum does not retain exclusive jurisdiction by reason of the subject-matter of the proceeding or the subordinate rank of the employee performing services of a solely domestic or non-governmental nature."

Ibid., p. 20, footnote 58.

social security system of the host State in preference to its own. This may constitute a clear indication of intention to consent to the exercise of local jurisdiction and the applicability of local labour law in regard to that particular contract of employment. This exception does not concern either appointment or non-appointment of an employee, or dismissal, or non-renewal of the contract of employment. It may concern breaches of the terms of the contract of employment to which local labour law and regulations of local labour relations apply. Thus a large volume of State immunity is preserved in the field of contracts of employment.

17. The revised text of article 14 (Personal injuries and damage to property)²⁷ is very limited in the scope of its application so as to cover only recovery of pecuniary compensation for insurable risks of accidents resulting from inland transport of passengers and goods by rail, road, waterways or air, and the liability of the occupier of premises for risks which are also insurable. It is designed not to deprive individuals of otherwise available relief without in any way inconveniencing the foreign Government. It does not concern transboundary torts or letter-bomb cases. But the insurance companies involved would no longer be able to hide behind the cloak of sovereign immunity, and this may serve in a way to encourage government agencies operating in another State to take out insurance policies where such are not required or already compulsory. Both articles 13 and 14 remain with the Drafting Committee and will be considered at the thirty-sixth session.

18. Following the above account of the work so far accomplished and the draft articles still to be reconsidered and revised or readjusted before provisional adoption, it may now be convenient to proceed with a presentation of other possible exceptions or particular areas in which the extent of State immunity deserves the closest scrutiny and the most meticulous consideration.

B. Debate in the Sixth Committee at the thirty-eighth session of the General Assembly

19. At the thirty-eighth session of the General Assembly, about 80 representatives took part in the debate on the report of the Commission on the work of its thirty-fifth

²⁷ The revised text of article 14 submitted by the Special Rapporteur read as follows:

Article 14. Personal injuries and damage to property

"1. Unless otherwise mutually agreed between the States concerned, a State which, through one of its organs, or agencies or instrumentalities acting in the exercise of governmental authority, maintains an office, agency or establishment in another State or occupies premises therein, or engages therein in the transport of passengers and cargoes either by air or by rail or road, or by waterways, is considered to have consented to the exercise of jurisdiction by a court of that other State in a proceeding relating to compensation for death or injury to the person or loss of or damage to tangible property, if the act or omission which caused the injury or damage in the State of the forum occurred in that territory, and the person responsible for or contributing to the injury or damage was present therein at the time of its occurrence.

"2. Paragraph 1 is without prejudice to the rights and duties of individuals in one State *vis-à-vis* another State which are specifically regulated by treaties, or other bilateral agreements, or regional arrangements, or international conventions specifying or limiting the extent of liabilities or compensation."

Ibid., footnote 59.

session. No fewer than two thirds spoke on chapter III of the report, on jurisdictional immunities of States and their property, touching on one or several aspects of the topic.²⁸ The fact that consideration of the topic in progress enlivened the debate in the Sixth Committee is in itself an encouraging sign, confirming the general belief that the topic is of practical importance and the need and relative urgency for it to be completed in the near future. The Special Rapporteur believes it may be useful at this point to give his overall impressions of the debate on the topic and to provide further clarifications where lingering doubts and hesitations subsist.

I. IRRELEVANCE OF CONTINUING DIFFERENCES IN IDEOLOGY

20. Ideological differences with regard to the personality of the State or the capacity and functions of the State continue to exist. There is no likelihood that such a controversy could be resolved one way or the other. It became apparent from the debate that, according to one school of thought, a sovereign State cannot have two different personalities. A State cannot act otherwise than as a sovereign entity. All functions undertaken by the State are governmental and official. A State does not act nor can it perform an act in a like manner as an individual. This theory is not only prevalent among socialist States but also adhered to in some non-socialist countries.²⁹ On the other hand, this distinction has been recognized from the very beginning of State immunity in the judicial practice of several countries, notably Italy, Belgium and Egypt. The ideological differences in this connection cut across the distinctions between socialist law and non-socialist law, civil law and common law, Islamic law and non-Islamic law, or other similar classifications of legal systems. It would appear to serve no useful purpose for the Special Rapporteur or the Commission to endeavour to resolve these differences. On the contrary, in its study the Commission has so far tried to avoid taking any side in the confrontation between such unavoidable differences. Possible solutions proposed by the Special Rapporteur therefore do not rely on any such distinctions.

21. While the Commission has been able to reach the conclusion, tentatively as it may seem, that State immunity is a general principle, and that its limitations are exceptions to the general principle, which is of course composed of several elements and qualifications as elaborated in articles 6 to 10, the proposed exceptions have not been based on any such differences which could give rise to objections from one quarter or another. Thus all the criticisms and objections raised in the Sixth Committee against the application of any such distinctions, whether between *acta jure imperii* and *acta jure gestionis*, to which considerable lip-service continues to be paid in a growing quantity of judicial decisions, or between public acts and private

²⁸ See *Official Records of the General Assembly, Thirty-eighth Session, Sixth Committee*, 36th to 50th, 54th and 70th meetings. See also the statement introducing the report and the concluding observations by the Chairman of the Commission, *ibid.*, 34th meeting, paras. 12-20, and 54th meeting, para. 52.

²⁹ See, for example, the statement by Miss Frascini, the representative of Uruguay, *ibid.*, 45th meeting, para. 45.

acts, or between official and governmental capacity or personality and unofficial and non-governmental capacity or personality, or between the various functions undertaken by a Government or State organ, do not apply to the draft articles proposed and provisionally adopted by the Commission.

22. The criticism levelled against the lack of justification or practical difficulties in the application of the functional criterion or any such distinctions need not therefore retain the attention of the Commission, which proceeds on the assumption that such differences in ideology persist and endeavours to find solutions regardless of such differences. None of the solutions proposed will therefore be based on any of the distinctions or criteria which have been the subject of penetrating, and at times justified criticism.

2. EMERGENCE OF SUBTLE DIFFERENCES IN PRACTICE AND PROCEDURE

23. The expression "jurisdictional immunities" to many and in several legal systems tends to presuppose the existence of jurisdiction, i.e. invocable or exercisable jurisdiction, depending on the point of view from which the initiation of a legal proceeding is considered; the plaintiff may invoke jurisdiction while the court may exercise it. Generally speaking, it seems logical enough that the question of immunity from jurisdiction does not and cannot arise unless and until it is clear that such jurisdiction, from which the defendant could claim to be immune, does exist. Following this conceptual or theoretical approach, the scope or limit of jurisdiction is not at issue in any examination or investigation of the question of State immunity. In practice, however, the disconnection between jurisdiction and jurisdictional immunity is not so clear-cut. When jurisdiction of a court is challenged, it could be challenged on the ground of jurisdictional immunity, because it impleads the foreign sovereign directly or indirectly, or on any other ground, such as the "act of State" doctrine, or lack of jurisdiction under the laws of the organization of the court *ratione materiae* because the subject-matter of the dispute lies outside the scope of its jurisdiction or beyond its limits, or *ratione personae* because the person involved is exempt from the jurisdiction or for lack of capacity to sue and be sued of either one of the party-litigants. Nor is the court bound to decide upon the question of immunity before determining the extent of its jurisdiction in any case or vice versa.

24. Procedural discrepancies have compounded the difficulties of approaching the issue. In most systems, jurisdictional immunity need not be raised by the party. Although it can be raised at any stage of the trial, it can also be considered by the court *proprio motu* or *d'office*. In other systems, it is a question of *ordre public* and the court is bound to consider its own competence in any event. In general, other branches of the Government, such as the State Department, the *Procureur de la République* or the *Avvocato dello Stato* could raise the question with the court by making a suggestion of immunity or intervening as *amicus curiae*. In some systems, "jurisdictional immunity" is so inextricably linked and intimately confused with invocability or exercisability of jurisdiction that there is no tangible, subtle distinction left in effect between *immunité de juridiction* and *incompétence d'attribution*, especially in

civil-law countries where the court has little discretion, upon proof of its *compétence en la matière*, to decline or refuse to exercise jurisdiction. It has no choice but to sit and decide the case. When the court declares itself *incompétent*, the effect is the same as dismissal of a case for lack of jurisdiction or on the ground of jurisdictional immunity.

25. This subtle distinction has to be maintained in order to appreciate the necessity for the pre-existence of jurisdiction in many classes of case before proceeding to decide on the question of immunity. Without this distinction, it would make no difference whether the defendant was entitled to State immunity or not, or whether in fact as well as in law the court had no jurisdiction in the first place, regardless of the personality or the personal attributes of the defendant. Reference to the existing jurisdiction or the permissible scope of exercisable jurisdiction is determined by the internal law of the State of the forum. The law on this point may be found in some cases in the constitution of the State or in the judiciary act or in the law of the organization of the courts of justice. Whatever it may be called, it determines the scope and extent of jurisdiction in any given case, and whenever there is a foreign element in the proceeding, the law determining the invocability or exercisability or appropriateness of jurisdiction of a court is known as the applicable rules of private international law or conflict of laws, whether or not there is a question of conflict of laws or of concurrence of jurisdictions.

26. It is a fortunate coincidence that many representatives³⁰ have pointed out that, in the present study of jurisdictional immunities of States and their property, the Commission is neither required nor called upon to examine, co-ordinate or harmonize the question of extent or scope of jurisdiction of the courts of any State, nor to regulate internationally or by way of uniform rules the applicable rules of private international law or conflict of laws of every State. One has to start from the proposition that jurisdiction exists or that there is jurisdiction which is valid and recognized generally. Of course, disputes between States as to the propriety of the exercise of concurrent jurisdictions or priority of jurisdiction belong to other fields of private and public international law. They do exist and always continue to exist in relation to this topic as well as countless other topics involving the exercise of jurisdiction whenever there is a foreign element in the dispute. It is not the purpose of the present study to resolve all questions covered under a much larger heading of national jurisdiction or extent of judicial jurisdiction of a national court. One point should be made clear beyond dispute, however, whatever the views regarding the distinction between *immunité de juridiction* and *incompétence d'attribution*: whenever the court decides to exercise its jurisdiction and to consider the merits of the case, it has also decided that it is competent and has jurisdiction in accordance with its applicable rules of private international law governing the question of jurisdiction in such matters. In so doing, the court has also decided that the defence of jurisdictional immunity raised by one of the parties was not available to take the case out of its jurisdiction. Thus doubts could only

³⁰ See, for example, the statements by Sir Ian Sinclair, the representative of the United Kingdom, *ibid.*, 39th meeting, para. 93, and by Mr. De Stoop, the representative of Australia, *ibid.*, 50th meeting, para. 49.

exist when the court declines to exercise jurisdiction, since the issue of extent or scope of jurisdiction may have been confused or merged with the question of jurisdictional immunity. When jurisdiction is assumed and exercised, both questions have been clearly determined, namely the existence of jurisdiction and the non-applicability of State immunity.

3. DIMINISHING CRITICISM AND GROWING ACCEPTANCE OF THE NECESSITY FOR INTERNATIONAL CONTROL OF STATE IMMUNITY

27. One encouraging element resulting from increasing appreciation of the problems confronting the Commission is the decrease in opposition to and decline in criticism of its work, with regard both to the areas of investigation and to the seriousness of the objections. It must be insisted several times that the source materials before the Commission constitute the sum total or quasi-sum total of existing State practice and that the selection of cases presented under each rubric is not at random, nor discriminatory, before this fact is understood and accepted. It also took time and effort to point out that practically every legal system has followed a path that is not always uniform, regardless of the doctrine of precedent or *stare decisis*, and that the seeming distortions are not the Special Rapporteur's own doing but inherent in the practice of States itself. It has become at times impossible to untwist or unbend the course of legal developments so as to stretch it into a straight line. Like a river, whose natural course is dictated by geological conditions and the volume and frequency of rainfall, so the judicial practice of States on this topic is conditioned by several factors of common sense, logic and even expediency.

28. Clearly, some of the misgivings will remain, owing to the complexity of the subject-matter under investigation and existing differences in the various legal systems, differences not only in ideology, but also in approach, methodology and outcome. Such differences either appear reconcilable or could be put aside in order to allow a more orderly international regulation to operate; but lack of in-depth appreciation may continue. Care should be taken lest lack of practice in a given State be misconstrued as existence of practice favouring absolute immunity, when in actual fact there has been no decision upholding any State immunity anywhere. In the same way that it cannot be said that a particular legal system has adopted a restrictive practice, nor can the opposite be inferred simply from the absence of practice to the contrary. It has become increasingly more apparent that the question of jurisdictional immunities of States deserves international attention and cannot be left to the judicial decisions of municipal courts alone, nor exclusively to national legislation.³¹ The codification and progressive development of international law on the topic by an international institution will alone be likely to provide an adequate and satisfactory answer to most of the questions involved.

³¹ Several representatives in the Sixth Committee indicated that no legislation was contemplated in their countries. At the informal meeting of legal advisers of the Asian-African Legal Consultative Committee held in New York from 23 to 25 November 1983, it was agreed to await further developments in the work of the Commission before considering new initiatives.

29. This growing realization is imperative if chaos is ever to be replaced by order. State immunity as a principle is to be upheld, but several specified areas should be investigated to determine the precise extent of immunity, its applicability and the conditions or limitations qualifying its application. These specified areas may be viewed as exceptional spheres where State immunity may not operate or apply to its maximum capacity, but is otherwise limited by more impelling reasons of practical necessity or sheer common sense or good faith. Reciprocity is another consideration that has its valid application and mounting persuasive force. If States are at the same time, though not in the same case, giver and recipient of immunity, reciprocity is inevitable, though not necessarily controllable.

4. COMMENTS ON THE DRAFT ARTICLES

30. A large number of speakers in the Sixth Committee took time to comment in a highly constructive and very encouraging way on the draft articles provisionally adopted or recently submitted. The Special Rapporteur could not help being inspired by many of the commentators, who are without exception well-wishers.

31. *Article 10* (Counter-claims) received positive endorsement in principle. No one spoke against the substance or principles contained in its provisions. Some merely suggested possible drafting improvements, which will be re-examined during second reading. This is not insignificant in view of the vastly different rules of procedure that exist in various legal systems. The Drafting Committee is to be congratulated for its agility in meeting most of the points encountered in the formulation of the three paragraphs to cover different situations in the prevailing systems in various parts of the world.

32. *Article 11* (Scope of the present part) is designed to introduce the notion of "reciprocity" as an element which will ensure flexibility in the application of the exceptions proposed in part III of the draft articles. It has been observed quite correctly that reciprocity will serve to reduce the scope of application of State immunity rather than expand it. It will not reduce the exceptions, although in actual practice there appear to be diametrically opposite schools of thought. One is found in the practice of India³² and concerns more the executive than the judiciary, since the rule seems to favour general immunity except where, by virtue of reciprocity, the principle of State immunity has no application in the other country concerned. Another school followed by Italy would allow State immunity only if, by way of reciprocity, it can be clearly proven that the Italian State would likewise be accorded jurisdictional immunity. This doctrine of reciprocity applies especially with regard to immunity of State property from attachment and execution. Proof has to be furnished of existing legislation of the other State or else confirmed in writing by the Ministry of Foreign Affairs through normal diplomatic channels.³³ Thus property of a foreign State is not auto-

³² See, for example, the statement made at the thirty-fourth session of the Commission by Mr. Jagota (*Yearbook* . . . 1982, vol. I, pp. 189-190, 1729th meeting, paras. 6-12). Mr. Rao expressed a similar view at the informal meeting of legal advisers of the Asian-African Legal Consultative Committee in New York on 25 November 1983 (unpublished).

³³ See, for example, decree law No. 1621 of 30 August 1925 on the

matically accorded immunity from attachment or execution, unless, by virtue of reciprocity, it can be established that, under existing legislation of that country, property of the Italian State is accorded immunity from attachment and execution. Whichever way the doctrine of reciprocity is to be applied, it would only operate to limit rather than expand the scope of State immunity.

33. It has also dawned on the Special Rapporteur, listening to the various comments made in the course of the debate in the Sixth Committee during the thirty-eighth session of the General Assembly, that the nature of the exceptions in part III could also be clarified in the provision of article 11. For instance, it has been stated all along that the principle of State immunity is relative in the sense that consent is decisive. Thus, even if the cases under consideration were to fall squarely within one of the exceptions provided for in the draft articles, nothing could prevent the court of a State from granting immunity. In any event, the court may also follow the lead of the executive in any given case for any reason that it considers to be imperative. Even convenience could be operative as a reason for the court declining to exercise its otherwise competent jurisdiction on the ground that it is a *forum non conveniens*, or that other forums are more convenient and therefore more appropriate.

34. *Article 12* (Commercial contracts) has attracted the most comment, together with the related provisions of article 2, paragraph 1 (g), and article 3, paragraph 2. The majority of speakers seemed to think that it had struck a satisfactory balance. There were those who would like to see a more restrictive formulation, and also those who would consider these provisions superfluous. Admittedly, the problems did not arise in regard to socialist countries, but no strong objection was raised against allowing the world community, including the non-socialist countries, to endeavour to resolve this difficult and complex question among themselves. Yet others expressed the view that the Commission was on the right track, but hoped that further improvement could be introduced to maintain an even better equilibrium between the interests of various groups of States, the rich and the poor, developed and developing, socialist and non-socialist, and other opposite types of interest. To be more precise, criticism was levelled from some quarters regarding the use of the expression "applicable rules of private international law"—so much used in the context of conflict of laws—which refers to an internal legal system with a foreign element, concerning the scope and extent of existing competence or jurisdiction of a court of law rather than State immunity. The interests of developing countries would be better served if the exception of commercial contracts were further linked to a significant territorial or other substantial connection or contact with the forum State, especially if it were further reinforced or secured by the establishment of a local office or agency operating within the territory of the forum State, whence the dispute resulting from a commercial contract has emerged. The second reading of this draft could produce a still more satisfying improvement. As it is, the draft represents a breakthrough and offers a possible way out of the labyrinth in which the law finds itself.

(Footnote 33 continued.)
property of foreign States in Italy, *Rivista di diritto internazionale* (Rome), 18th year (1926), p. 159, "Atti esecutivi sopra beni di Stati esteri nel Regno".

35. *Article 13* (Contracts of employment) has also been the subject of favourable as well as less kindly expressed views. The revised version was definitely preferred but opinions still varied from one extreme to another. The Drafting Committee will have to meet another challenge here.

36. *Article 14* (Personal injuries and damage to property) has come up against some strong opposition, unless it is confined to pecuniary compensation and coverage for insurable risks. Opinions were also divided. The interests of foreign States and the safety and welfare of local inhabitants are at stake, though not necessarily in direct conflict, since the insurance company comes into the picture as the middleman who claims the best of both worlds. The Drafting Committee will also face considerable difficulties in this connection, though, it is hoped, by no means insurmountable ones.

37. *Article 15* (Ownership, possession and use of property) has attracted little comment. It was on the whole considered satisfactory, except for the saving clause concerning diplomatic and consular premises in paragraph 3, which could be made clearer. Ultimately, it might be necessary to spell out in part IV of the draft articles, in no uncertain terms, the immunity of State property from attachment and execution. Such immunity, as the representative of France pointed out,³⁴ could not be identified with the inviolability and protection provided in the two Vienna Conventions of 1961 and 1963.³⁵ Perhaps the gap will have to be filled, and part IV rather than article 15 appears to offer an appropriate place.

C. Continuing progress in legal developments

38. Since the previous report, submitted in 1983, legal developments have occurred in abundance and in rapid succession, so that any observation made on the practice of a State today may no longer be valid tomorrow. Before proceeding to confirm or make any necessary alterations to the projected structure of the rest of the present study, it may be necessary to glance quickly at the legal developments that have occurred since the preparation of the fifth report.

1. SHARP INCREASE IN RESTRICTIVE PRACTICE

39. Whatever the outcry or denial of emerging trends, there appears to be an unmistakable upsurge in legal developments which clearly indicates a strong tendency in favour of further restrictions of State immunity in every imaginable field, most important of all in the allowance of actual attachment and execution of State property where it really hurts—affecting not only the sovereign dignity of the State, but more practically the means by which meaningful diplomatic intercourse or interchange of good offices and international transactions are engaged.

³⁴ See the statement by Mr. Guillaume, the representative of France (*Official Records of the General Assembly, Thirty-eighth Session, Sixth Committee, 41st meeting, para. 29*).

³⁵ 1961 Vienna Convention on Diplomatic Relations (United Nations, *Treaty Series*, vol. 500, p. 95), and 1963 Vienna Convention on Consular Relations (*ibid.*, vol. 596, p. 261).

40. Recent practice in the United States of America has been noted for the liberal interpretation that its courts have been prepared to give to the wording of the *Foreign Sovereign Immunities Act of 1976*,³⁶ so as to disallow State immunity where the commercial transaction, wherever concluded and performed, could cause direct effect in the United States, or entail financial consequences therein, or bring tangible benefits or advantages such as repatriation of profits to the home base in the State of the forum. In actual practice, however, United States courts could be said to have imposed self-restraint in certain decisions holding the injury to have occurred outside the territory of the forum State³⁷ or that the commercial transaction in question had no bearing or adverse effect in the United States.³⁸ In any event, the Act in question was designed to establish a well-recognized exception to jurisdictional immunities customarily accorded to foreign Governments, and not in any way whatsoever to expand or enlarge existing territorial or national jurisdiction of United States courts, nor to create new special jurisdiction where none had existed before.³⁹

41. In that particular connection, it is not United States practice that has gone furthest in favour of the exercise of jurisdiction in regard to commercial activity, rather the most recent case-law of the United Kingdom, where the House of Lords admitted the assumption of sister-ship jurisdiction upon the physical presence of a sister ship.⁴⁰

42. Yet in terms of doctrinal confirmation of the nature test for a commercial transaction, notwithstanding the public or sovereign purpose of the contract from the point of view of the State, the Constitutional Court of the Federal

Republic of Germany must now be regarded as a champion in upholding jurisdiction by application of the nature test to the exclusion of all other tests and proceeding thereby to allow attachment and also the eventual possible execution of the assets of the property of a foreign sovereign State (in one case, the National Iranian Oil Company),⁴¹ German case-law was careful to disallow such a drastic measure against the bank account of a foreign State for the operation of an embassy (a case concerning the Philippine Embassy),⁴² although other bank accounts not connected with the operation of the embassy might not be so leniently treated.

43. In this connection, United States courts may be leading the field in holding that the burden lies on the foreign embassy concerned to furnish proof that the bank account to be attached was for the purpose of operating the embassy and in ruling that a mixed account is liable to attachment and therefore unprotected by State immunity.⁴³

44. This sharp twist in the recent practice of countries holding a restrictive view of immunity is far more alarming than the theoretical absence of jurisdictional immunity, followed by a judicial pronouncement or even condemnation without any prospect of satisfaction or execution of the judgment. What appears in the fifth report of the Special Rapporteur regarding Italian practice in the field of contracts of employment⁴⁴ must now be disavowed. In cases judged since the preparation of that report (1983), bank accounts of embassies were attached for payment of social security and other emoluments under contracts of employment.⁴⁵

2. ABSENCE OF JUDICIAL PRACTICE UPHOLDING ABSOLUTE IMMUNITY

45. As much as the Special Rapporteur is willing to recognize and accept as authoritative and persuasive any current judicial decisions supporting the doctrine of absolute immunity, none has been found in the period since the preparation of the fifth report. A memorandum submitted by a member of the Commission⁴⁶ has proved of the greatest value as evidence of existing adherence to an absolute view of State immunity. Clearly, the absolute doctrine as propounded in the memorandum and supported by some members of the Commission is entitled to the greatest weight as an authoritative statement of the law in a given

³⁶ *United States Code, 1976 Edition*, vol. 8, title 28, chap. 97; reproduced in United Nations, *Materials on Jurisdictional Immunities of States and their Property* (Sales No. E/F.81.V.10), pp. 55 *et seq.*

For United States case-law, see, for example, *Texas Trading and Milling Corp. v. Federal Republic of Nigeria and Central Bank of Nigeria* (1981) (*Federal Reporter, 2nd Series*, vol. 647 (1981), p. 300; see also United Nations, *Materials on Jurisdictional Immunities* . . . , p. 527); *Harris Corporation v. National Iranian Radio and Television* (1982) (*Federal Reporter, 2nd Series*, vol. 691 (1983), p. 1344). Cf. a similar trend which has emerged in the case-law of France: see, for example, *Corporación del Cobre v. Braden Copper Corporation et Société Le Groupement d'importation des métaux* (1972) (*Revue générale de droit international public* (Paris), vol. 77 (1973), p. 1240).

³⁷ See, for example, *Sedco, Inc. (Petróleos Mexicanos)* (1982) (*Federal Supplement*, vol. 543 (1982), p. 561). Pemex, as an instrumentality of the Mexican Government, was held to be immune from jurisdiction, and the blow-out concerned was held to be non-commercial and also within the discretionary activity protected by the *Foreign Sovereign Immunities Act of 1976*.

³⁸ See, for example, *Maritime International Nominees Establishment v. Republic of Guinea* (1982) (*Federal Reporter, 2nd Series*, vol. 693 (1983), p. 1094). The court declined jurisdiction for lack of a substantial link between the commercial activity and the United States.

³⁹ See, for example, *Warner v. Territory of Hawaii* (1953) (*ibid.*, vol. 206 (1953), p. 851). See also American Law Institute, *Restatement of the Foreign Relations Law of the United States (Revised), Tentative Draft No. 2* (27 March 1981) (Philadelphia, Pa.), pp. 171-221, Part IV: Jurisdiction and Judgments, chap. 2, especially p. 178: "The law . . . does not establish causes of action or create or destroy legal obligations . . ." The Act refers to any civil action against a foreign State as defined in the Act and which is not entitled to immunity under the provisions of the Act or under any applicable international agreement.

⁴⁰ See, in particular, *The "I Congreso del Partido"* (1981) (*The All England Law Reports, 1981*, vol. 2, p. 1064). Two sister ships of the *I Congreso del Partido*, namely the *Marble Islands* and the *Playa Larga*, were at the origin of the action.

⁴¹ See the decision of 12 April 1983 by the Federal Constitutional Court concerning the complaint of unconstitutionality submitted by the National Iranian Oil Company (*Entscheidungen des Bundesverfassungsgerichts* (Tübingen), vol. 64 (1984), p. 1).

⁴² See the decision of the Federal Constitutional Court of 13 December 1977 in *X v. Republic of the Philippines* (United Nations, *Materials on Jurisdictional Immunities* . . . , p. 297).

⁴³ See, for example, *Birch Shipping Corp. v. Embassy of Tanzania* (1980) (*Federal Supplement*, vol. 507 (1981), p. 311).

⁴⁴ Document A/CN.4/363 and Add.1 (see footnote 1 (e) above), para. 48.

⁴⁵ The Ceremoniale Diplomatico della Repubblica has intervened on two occasions in actions, one involving the Embassy of Algeria and the other the Embassy of the Islamic Republic of Iran, for payment of social security and other emoluments. See *Appunto* (Rome), 10 June 1983.

⁴⁶ *Yearbook* . . . 1983, vol. II (Part One), p. 53, document A/CN.4/371.

State, whether socialist or non-socialist. It has certainly afforded a sound foundation for the Commission in its continuing search for a better balanced approach to this difficult conceptual problem.

46. It is high time an absolute view was cited so as to present firm opposition to the restrictive trends that appear to be asserting themselves. The question is how to slow down, arrest or even reverse the trends so as to maintain what jurisdictional immunities there might still be for States and their property. The trends would not be suspended simply by enunciation of an opposing doctrine or by mere declaration of an absolute principle. Even if such a gesture were to be followed up by national legislation, it would only allow immunity one-sidedly to foreign States, and only by a process of reciprocal treatment would jurisdiction in turn be upheld and exercised. Just as it is correct to predicate that most of the developing countries have not adopted the practice of restrictive immunity, it is equally accurate to state that none of the socialist countries has adopted a restrictive view of State immunity. But to state any such proposition, however emphatically, is still far from providing concrete evidence of a judicial decision allowing immunity in cases where it would have been denied in countries practising restricted immunity. Regrettably, nothing short of an affirmative judicial decision could be viewed as establishing the acceptance of absolute immunity in the judicial practice of States. It would be difficult, if not impossible, for the Special Rapporteur to invent or concoct such a decision in a vacuum.

47. Judicial decisions that have gone a long way to approaching an absolute rule of State immunity are to be found in the practice of British and American courts, dating back to *The "Pesaro"* (1926)⁴⁷ and *The "Porto Alexandre"* (1920),⁴⁸ which must now be considered to have long been overruled and discarded. As has been seen, the judicial practice of the States that had upheld absolute immunity has now radically changed. As far as the research of the Codification Division reveals, there are no such judicial decisions in the practice of other States.

⁴⁷ See *Berizzi Brothers Co. v. SS "Pesaro"* (1926) (*United States Reports*, vol. 271 (1927), p. 562).

⁴⁸ United Kingdom, *The Law Reports, Probate Division, 1920*, p. 30. See also *The "Parlement belge"* (1880) (*ibid.*, vol. V (1880), p. 197) and *The "Cristina"* (1938) (*The Law Reports, House of Lords, Judicial Committee of the Privy Council, 1938*, p. 485).

3. CONTINUING PURSUIT OF THE CURRENT PROGRAMME

48. In the circumstances, the more appealing alternative would appear to be to accelerate the pace of work in pursuit of the current programme. This would at least provide an assured way of containing the restrictive trends. By examining the particular areas where exceptions are believed to have been recognized, and by circumscribing and delimiting the scope of the application of such exceptions in the specified areas, taking into account all the theoretical differences identified and the various points of view noted, and bearing in mind the differences in legal, political and economic systems prevailing in various States, an approach may be found which could yield salutary results.

49. In the pages that follow, it is therefore proposed to examine draft articles in the following specified areas of part III.

Article 16. Patents, trade marks and other intellectual properties;

Article 17. Fiscal liabilities and customs duties;

Article 18. Shareholdings and membership of bodies corporate;

Article 19. Ships employed in commercial service;

Article 20. Arbitration.

50. It should be recalled at this point that the selection of the above specified areas has not been without precedent. Rather, precisely because such areas have been considered exceptional in a number of instruments, multilateral conventions,⁴⁹ regional or bilateral treaties, or legislative enactments,⁵⁰ the present study cannot afford to overlook whatever authoritative source materials or practice may exist in order to prepare the groundwork upon which to erect a solid edifice of legal propositions.

⁴⁹ See, for example, the 1972 European Convention on State Immunity and its Additional Protocol (Council of Europe, European Treaty Series (Strasbourg), No. 74 (1972)) and the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (Brussels, 10 April 1926) and Additional Protocol (Brussels, 24 May 1934) (League of Nations, *Treaty Series*, vol. CLXXVI, pp. 199 and 215; reproduced in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 173 *et seq.*).

⁵⁰ See, for example, the United States *Foreign Sovereign Immunities Act of 1976* (see footnote 36 above); the United Kingdom *State Immunity Act 1978* (see footnote 58 below); Pakistan's *State Immunity Ordinance, 1981* (see footnote 62 below); and Singapore's *State Immunity Act, 1979* (see footnote 61 below).

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

PART III. EXCEPTIONS TO STATE IMMUNITY (*continued*)

ARTICLE 16 (Patents, trade marks and other intellectual properties)

A. General considerations

1. SCOPE OF "PATENTS, TRADE MARKS AND OTHER INTELLECTUAL PROPERTIES"

51. The object of article 16 is to examine the extent of State immunity in another specified area, that involving

"patents, trade marks and other intellectual properties". Under the general heading of article 16 are grouped three categories of intellectual and industrial property. The first group is designated as "patents" and includes industrial designs and inventions for industrial or manufacturing purposes. The second group, entitled "trade marks", covers the use of trade names, service marks or other similar rights pertaining to merchandise on sale in the markets or for general or limited distribution for commercial pur-

poses. The third group comprises the remaining types of industrial or intellectual property, such as copyright, translation rights, reproduction rights, literary works, artistic objects, musical compositions, lyrics, video tapes, discs, and audio and audio-visual tapes.

52. Industrial or intellectual properties under the heading of article 16 are therefore rights protected by States, nationally as well as internationally. The protection provided by States within their respective territorial jurisdictions varies according to the organized system of registration of such rights, for which protection is guaranteed by internal law and enforced by appropriate machinery. The system for deposit, examination, investigation and eventual registration is administered in each State in accordance with its prevailing legislation and customs. It is not unusual that, in industrially or economically developed countries, the protection provided is more effective and infringement is discouraged or severely punished, while in less developed or developing countries, such a system may either be non-existent or be at a very embryonic stage, since expert knowledge is required before registration of any invention, patent or industrial design. Copyrights of literary works, artistic objects and musical compositions, reproduction, translation or performance of which must be authorized in advance, often against fees or royalties, are more widely known the world over, for they are also associated with cultural heritage and works of art protected by recognition of an author's rights, regardless of the commercial or non-commercial nature of the reproduction, performance, publication or distribution.

2. PROTECTION AS A BASIS FOR JURISDICTION

53. Legal protection offered by the State of the forum provides a strong foundation and a valid legal basis for the assumption and exercise of jurisdiction. Protection is generally consequential upon registration or even upon application for registration or upon deposit of such an application. It may also exist otherwise in certain systems where, even prior to actual acceptance for registration, some measure of protection is conceivable. Protection depends on the existence and sanctity of the national legislation and the effectiveness of the system in operation in a particular society. Thus not only is the appropriate legislation applicable, but also there has to be an effective system of registration in force to afford a sound legal basis for jurisdiction.

54. It follows that effectiveness is only practicable within the territorial confines of the State concerned. Thus the system in operation could be invoked for protection in cases of infringement of intellectual properties or violation of the rights protected only in so far as infringements or violations occurring within the territory of the State of the forum are concerned. In the case of infringements or violations outside such territorial limits, other remedies or a different kind of protection available in another State under the jurisdiction of another authority would have to be invoked.

55. It could also be stated that the basis for jurisdiction is the existence of a substantial territorial connection or important contact with the State of the forum. Without the occurrence of violations or infringements within its terri-

tory, there would be no justification for the exercise of jurisdiction. This is so because the legislative protection given is available only territorially, the State not being in a position to extend its protective arms beyond the limits of its own national territory.

3. CLOSENESS TO TRADE AND USE OF PROPERTY

56. It is clear that the area specified under article 16 bears the closest relationship to "commercial contracts" under article 12 and "ownership, possession and use of property" under article 15. In the latter two articles, the two exceptions appear to have been fairly widely accepted in the practice of States. Article 16 could be considered as an extension of the exception of trading transactions recognized under article 12, the difference being that, in article 16, the purpose of the protection is to prevent "unfair competition" in trade and to regulate the imposition of trade restrictions such as anti-trust legislation. The protection of patents, trade marks and other intellectual properties is designed to ensure greater fairness in commercial practices. The result of this protection could be felt internally as well as in international trade, as the origin of the goods may be in one State and their distribution might infringe rights in another State. While the measure of protection is territorially limited, its beneficial consequences could be transboundary, if not world-wide, regardless of the place of origin, production or manufacture of the goods; the place of infringement could be at the receiving end, in the country of either wholesalers or retail traders. Even under modern theories regarding rules of conflict of laws for unfair competition or restraint on trade, the law of the country where the infringement occurs is a decisive factor and this could be the proper forum to exercise jurisdiction.

57. By analogy with article 15, copyrights and other intellectual property rights constitute a collection of proprietary rights or rights to use or reproduce which could be designated as properties under the classification of "incorporeal hereditaments", i.e. intangible rights, or rights without a corpus. Recognition and protection of such industrial designs or other intellectual properties is a matter for the law of the place where the particular right is registered. In other words, the *lex situs* of such intangible properties is the law of the place of their registration. Thus the applicable law, as well as the invocable or exercisable jurisdiction, seem to cross at the same convenient point so as to make the court of the State where protection is offered for the registration of such rights as well as of the place of their infringement the only competent forum, and as such a *forum conveniens* under the applicable rules of private international law.

4. CONSENT AS AN ALTERNATIVE BASIS FOR THE EXERCISE OF JURISDICTION

58. If a State seeks the protection of another State for the registration of a patent, invention or industrial design, it has clearly consented to the exercise of jurisdiction by the territorial authority from which it is seeking protection within the territory of another State. This would seem equally true when a State seeks to claim or contest a claim

to such rights, or is otherwise involved in a dispute concerning infringements of such rights or properties. Of course, if the State does not contest the rights but admits the violations or infringements, it would be difficult in the same breath to invoke its sovereign immunity for an activity which is not only commercial and non-governmental, but also involves unfair competition and trade practices. It would seem logical for consent to be presumed or implicit in the event of infringements, just as in the event of contestation. In the latter event, the foreign State would be claiming the protection of the State of the forum and, as such, would be another claimant of the rights at issue or in dispute.

59. Such a line of reasoning is attractive, whether the search for protection by another State is evidence of consent if this is regarded as a right to use an incorporeal property, or if it is considered to be a waiver or abandonment of immunity when a State competes in trade in the territory of another State, especially in the field of unfair competition of trade practices, beyond entering an ordinary commercial contract. Whatever the rationale behind the suggestion of non-immunity in this specified area, whether on the grounds of implied consent by analogy with article 12 or article 15, or whether it is likened to commercial contracts under article 12 or to the use of property under article 15, common sense appears to dictate absence of objection to this restriction on State immunity. The practice of States may bear witness to this preliminary finding.

B. The practice of States

1. GENERAL OBSERVATIONS

60. It should be observed, before exploring the practice of States in this specified area, that legal developments in the field of patents, trade marks and other intellectual properties are matters of comparatively recent occurrence. Trade names and trade marks may have been the earliest of intellectual properties to have been given national and international protection. Patents of inventions and industrial designs were relatively unknown in the developing world, and it is not until very recently that attention has been drawn in developing countries to the need to provide incentives for initiatives of invention and ingenuity, even in more primitive societies. Thus State practice has not been too rich in this area where another State is a party to litigation before a national authority. Earlier case-law of developed countries has very few instances of such disputes. Judicial and governmental practice of States can only be found in the contemporary period.

61. Another explanation may be found in the fact that States did not normally engage in trade themselves until very recently, and now that they do, they have not indulged in unfair competition, save in very rare, exceptional instances. With the assistance of a theory of consent by conduct or by necessary implication, a State very often finds itself appearing as claimant or indeed plaintiff before the courts of another State, thus avoiding the invocation of State immunity. Again with the aid of such a doctrine, acceptance of this exception to State immunity does not need to be based on too much practice.

62. The present inquiry is limited to the protection of patents, trade marks and other intellectual properties at the national level; beyond that there exists another layer of protection, at the international level, which might be inter-State or intergovernmental relations or protection offered by an international system or organization, such as WIPO, or by a series of international conventions, such as the Paris Copyright Convention.⁵¹ The present study is conducted at the national, as opposed to the international level. Thus, when a State seeks the authority, judicial or administrative, of another State to protect its rights against infringements, it may be an initial step in the process of exhaustion of local remedies.

63. In actual practice, a State may succeed to the rights and obligations of private firms or trading or manufacturing companies, by way of nationalization or otherwise, and also become answerable for the infringements of patents by the corporations it has nationalized or acquired. This is not an uncommon phenomenon in this day and age, when developing countries and socialist as well as capitalist States have also deemed it expedient to nationalize an industry or enterprise or the production and management of natural resources such as oil, gas, electricity, water and other sources of energy. Banking and other financial institutions are no exceptions to the wave of nationalization to remedy or improve national economies.

2. JUDICIAL PRACTICE

64. Judicial decisions directly in point are not so plentiful for reasons that are apparent from the foregoing general observations. The case-law regarding patents, trade marks and other intellectual properties is regarded as a specialized field for practitioners. Only specialists in any one of the three groups are well versed in the jurisprudence in a particular branch of the industry or artistry protected. Thus cases involving foreign States or Governments or their agencies and instrumentalities are rare. Nevertheless, the few leading cases that are available are instructive and so noteworthy that they deserve the most attentive consideration.

65. The leading case in this particular area is indisputably the decision of the Supreme Court of Austria in *Dralle v. Republic of Czechoslovakia* (1950).⁵² This decision ranks as one of the *causes célèbres* in the historical development of the case-law of Austria and is well known throughout the world for the thoroughness with which the court examined not only Austrian case-law, but also the judicial practice and jurisprudence of as many important countries as are known in the annals of legal science. Not only European cases, but also Latin-American and Asian cases were cited and examined by the court. In this case, the respondent was the Czechoslovak State, engaging in business under the name of a firm. The dispute related to the use of trade

⁵¹ Universal Copyright Convention, revised at Paris on 24 July 1971 (United Nations, *Treaty Series*, vol. 943, p. 178).

⁵² *Österreichische Juristen Zeitung* (Vienna), vol. 5 (1950), p. 341, case No. 356; *International Law Reports, 1950* (London), vol. 17 (1956), p. 155, case No. 41; *Journal du droit international* (Clunet) (Paris), vol. 77 (1950), p. 749. The text of the decision of the Austrian Supreme Court is reproduced (in English) in United Nations, *Materials on Jurisdictional Immunities*..., pp. 183 *et seq.*

marks which applied to goods made by the German parent company, sold in Austria and registered in the name of the Czechoslovak subsidiary nationalized by the Czechoslovak State. The German parent company sought an injunction to prevent the Czechoslovak Government from using the trade marks. The extraterritorial effect of the confiscation of trade mark rights was denied in relation to the Austrian marks. It was also held that, since Austria rejected the concept of a uniform trade mark in relation to foreign marks, this also applied to internationally registered foreign marks. Since the nationalized marks were subsequent to the rights of the plaintiff or his licensor, the injunction could be granted. It was held that:

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.⁵³

Referring to the facts of the case, the court observed that:

... 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.⁵⁴

66. Whatever may be the criteria used to distinguish between *acta jure gestionis* not covered by State immunity and *acta jure imperii* entitled to immunity, the Supreme Court of Austria was as convincing as it was convinced in its historical approach and judicial reasoning that the business activity conducted in Austria was not protected by State immunity and that the question relating to the use of trade marks by foreign firms registered in Austria was determined by Austrian domestic law under Austrian jurisdiction. No immunity was recognized in respect of questions relating to the foreign trade mark rights in dispute. The Czechoslovak Government could be said to be as much a claimant of the foreign mark rights as the party seeking relief from the court.

67. Another less well-known case is the decision of 30 June 1977 by the Land High Court (Oberlandesgericht) of Frankfurt in the Federal Republic of Germany concerning the Spanish Government Tourist Bureau.⁵⁵ The dispute related to the unauthorized performance of copyrighted film scores and compensation for the infringement of copyrights. The claim for damages was statute-barred but was made on the additional ground of unjust enrichment. The performances were held not to constitute a permissible public use under the Literary Copyright Act. It was also held that film scores retained their separate legal existence even if they were composed for a particular film, because as a rule they could also be utilized for their own sake.⁵⁶ Infringement of copyrighted film scores by showings of such films served, at least indirectly, the "gainful purposes" of the Spanish State.⁵⁷ The court had no diffi-

culty in holding that the Spanish State carrying on business under private law within the Federal Republic of Germany was subject to its jurisdiction. The activities of Spanish Government tourist bureaux were held to be of a private-law nature and thereby not entitled to immunity, nor were violations of copyrights exempt from local jurisdiction even if performances and showings were made by government bureaux of official agencies of a foreign State.

68. In the absence of more recent decisions to the contrary or recognizing State immunity in relation to infringements of rights to the use of patents, trade marks or other intellectual properties, the leading cases cited, especially the Austrian decision containing references to the practice of States, must be viewed as clear indications of an irreversible trend in support of restriction in this particular area, as is in fact being confirmed by other forms of State practice.

3. GOVERNMENTAL PRACTICE

69. It will be seen whether the trend in governmental practice is pointing in the same direction or in the opposite one.

(a) National legislation

70. It is not without interest to note that the United Kingdom, whose case-law has traditionally been associated with the most unqualified practice of sovereign immunity, included the following provision as section 7 of its *State Immunity Act 1978*:⁵⁸

Exceptions from immunity

...

7. A State is not immune as respects proceedings relating to:

(a) any patent, trade mark, design or plant breeders' rights belonging to the State and registered or protected in the United Kingdom or for which the State has applied in the United Kingdom;

(b) an alleged infringement by the State in the United Kingdom of any patent, trade mark, design, plant breeders' rights or copyright; or

(c) the right to use a trade or business name in the United Kingdom.

71. This provision has no direct counterpart in the *Foreign Sovereign Immunities Act of 1976* of the United States,⁵⁹ in which the commercial activity covered in subsection (a) (2) of section 1605⁶⁰ may in fact be said to have overshadowed, if not substantially overlapped, the use of copyrights and other similar rights. There has been no clear decision to reject or support this proposition. On the other hand, the British Act is reproduced in substance in section 9 of Singapore's *State Immunity Act, 1979*,⁶¹ and

⁵⁸ United Kingdom, *The Public General Acts, 1978*, part I, chap. 33, p. 715; text reproduced in United Nations, *Materials on Jurisdictional Immunities*..., pp. 41 *et seq.*

⁵⁹ See footnote 36 above.

⁶⁰ Cf. section 5 of Canada's 1982 "Act to provide for State immunity in Canadian courts" (*The Canada Gazette, Part III* (Ottawa), vol. 6, No. 15 (22 June 1982), p. 2949, chap. 95).

⁶¹ Text reproduced in United Nations, *Materials on Jurisdictional Immunities*..., pp. 28 *et seq.*

⁵³ United Nations, *Materials*..., p. 202.

⁵⁴ *Ibid.*, p. 195.

⁵⁵ *X v. Spanish Government Tourist Bureau, ibid.*, pp. 294 *et seq.*

⁵⁶ *Ibid.*, p. 297.

⁵⁷ *Ibid.*, p. 294.

almost verbatim in section 8 of Pakistan's *State Immunity Ordinance, 1981*.⁶² Other Governments studying the possibility of adopting national legislation on this topic also contemplate inclusion of a similar provision covering this exception in this particular area.⁶³

72. The adoption of a restrictive provision in the national legislation of a few countries, however important, may not be indicative, let alone conclusive, of an emerging trend, but the application of such legislation may produce a widening restrictive effect in view of the practice of many Governments, notably those of India and Italy. The imposition of a commensurate countermeasure in such circumstances is expressly envisaged in the third paragraph of article 61 of the Fundamentals of Civil Procedure of the USSR and the Union Republics.⁶⁴

(b) *International or regional conventions*

(i) *1972 European Convention on State Immunity*

73. The 1972 European Convention on State Immunity⁶⁵ came into force in 1976 between Austria, Belgium and Cyprus. It has since been ratified by the United Kingdom and Portugal. The Netherlands is also contemplating ratification, while the Federal Republic of Germany and Italy are probably already putting the provisions into practice, stretching them to their logical extremes. It is no longer true that the European Convention is accepted only by Western European countries or members of the European Economic Community. Austria is certainly following a distinctly different policy, while Cyprus has been regarded as Asian in the United Nations. The Convention provides:

Article 8

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate:

(a) to a patent, industrial design, trade mark, service mark or other similar right which, in the State of the forum, has been applied for, registered or deposited or is otherwise protected, and in respect of which the State is the applicant or owner;

(b) to an alleged infringement by it, in the territory of the State of the

⁶² *The Gazette of Pakistan* (Islamabad), 11 March 1981 (text reproduced in United Nations, *Materials...*, pp. 20 *et seq.*). Cf. section 8 of South Africa's *Foreign States Immunities Act, 1981* (*ibid.*, pp. 34 *et seq.*).

⁶³ See, for example, the draft Australian legislation of 1984 on the immunities of foreign States, *Foreign States Immunities Bill 1984*, sections 10-20 (reproduced in *International Legal Materials* (Washington, D.C.), vol. XXIII, No. 6 (November 1984), pp. 1398 *et seq.*). Malaysia is also conducting a study.

⁶⁴ That provision reads:

"Article 61. *Suits against foreign States. Diplomatic immunity.*

"...

"Where a foreign State does not accord to the Soviet State, its representatives or its property the same judicial immunity which, in accordance with the present article, is accorded to foreign States, their representatives or their property in the USSR, the Council of Ministers of the USSR or other authorized organ may impose retaliatory measures in respect of that State, its representatives or that property of that State."

Text reproduced (in English) in United Nations, *Materials on Jurisdictional Immunities...*, p. 40.

⁶⁵ See footnote 49 above.

forum, of such a right belonging to a third person and protected in that State;

(c) to an alleged infringement by it, in the territory of the State of the forum, of copyright belonging to a third person and protected in that State;

(d) to the right to use a trade name in the State of the forum.

74. This international convention, although not universal in its application or participation, cannot be brushed aside as insignificant in view of the importance which industrially advanced countries attach to the protection of intellectual property; the principle of reciprocity seems to militate in favour of its widening acceptance in practice.

(ii) *Inter-American Draft Convention on Jurisdictional Immunity of States*

75. While the Inter-American Draft Convention on Jurisdictional Immunity of States as prepared by the Inter-American Juridical Committee⁶⁶ is still in its initial stages and far from being a final text, the problem relating to patents, trade marks and other intellectual properties may be considered overlapped by the wider exception of trade or commercial activities in the first paragraph of its article 5.⁶⁷ The second paragraph states that trade or commercial activities of a State are construed to mean the performance of a particular transaction or commercial or trading act pursuant to its ordinary trade operations.

4. INTERNATIONAL OPINION

76. In the absence of clear *communis opinio doctorum*, as noted by the Supreme Court of Austria in the celebrated *Dralle* case concerning foreign trade marks (see paragraph 65 above), the way is clear for progress to be made along the lines of the majority view or of an existing trend, if any. Since the question is of relatively recent origin, the opinions of publicists have not been so clear-cut or decisive, although it could not be denied that contemporary views are by and large inclined towards a more restrictive practice of jurisdictional immunity in this particular area as well.

77. Thus, for example, the Committee on State Immunity of the International Law Association, in September 1982, recommended a set of draft articles for a convention on State immunity,⁶⁸ article III of which contained the following provision:

Article III. Exceptions to immunity from adjudication

A foreign State shall not be immune from the jurisdiction of the forum State to adjudicate in the following instances *inter alia*:

⁶⁶ Draft approved on 21 January 1983 in Rio de Janeiro (OEA/Ser. G-CP/doc.1352/83, of 30 March 1983). See also *International Legal Materials* (Washington, D.C.), vol. XXII, No. 2 (March 1983), p. 292.

⁶⁷

"Article 5

"States shall not invoke immunity against claims relative to trade or commercial activities undertaken in the State of the forum.

"..."

⁶⁸ The draft convention was adopted by ILA at its Sixtieth Conference (Montreal, 29 August-4 September 1982). See ILA, *Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), pp. 5-10, resolution No. 6: "State Immunity".

...

E. Where the cause of action relates to:

1. Intellectual or industrial property rights (patent, industrial design, trade mark, copyright, or other similar rights) belonging to the foreign State in the forum State or for which the foreign State has applied in the forum State; or
2. A claim for infringement by the foreign State of any patent, industrial design, trade mark, copyright or other similar right; or
3. The right to use a trade or business name in the forum State.

5. A CLEAR TREND

78. If any question, dispute or difference relating to the rights or interests of a State in a patent, trade mark or other intellectual property registered, applied for or otherwise protected by another State is subject to the applicable law and jurisdiction of the court of that other State, it is not too far-fetched to assume that the State owning or applying for registration of such rights would have in fact accepted the protection of another State and hence consented to the exercise of jurisdiction by the forum State in all proceedings relating thereto. Half of the battle is over, since in most cases relating to such rights the foreign State is invariably in the position of a claimant. If the State is claiming the rights or is applying for such rights, its consent to the exercise of jurisdiction is presumed to have been given by its own conduct. If, however, the State is alleged to have infringed the rights of a third person and it disputes or contests the allegation, then it is also inevitably a claimant, for otherwise it will not have to be joined as a party to the litigation, except in the event of an injunction being sought against the State for the continuing use of such rights in the State of the forum. Then the State is obliged either to forgo the use of such rights or to contest the claim. In the latter event, the State will in fact be in the position of a joint claimant or co-claimant of the disputed rights.

79. A trend in the practice of States and legal opinion seems to have emerged clearly in support of absence of immunity, or the subjection of the foreign State claiming, contesting or applying for such rights to the jurisdiction of the forum State. There appears to be no other clear trend in a different or opposite direction.

C. Formulation of draft article 16

80. The draft article for this particular area of patents, trade marks and other intellectual properties might accordingly be formulated as follows:

Article 16. Patents, trade marks and other intellectual properties

1. The immunity of a State cannot be invoked to prevent a court of another State which is otherwise competent from exercising its jurisdiction in a proceeding which relates to the determination of:

(a) the right to use a patent, industrial design, trade mark, service mark, plant breeders' right or any other similar right or copyright which has been registered, deposited or applied for or is otherwise protected in another State, and

in respect of which the State is the owner or applicant; or

(b) the right to use a trade name or business name in that other State.

2. A court of another State shall not be prevented from exercising jurisdiction in any proceeding brought before it which relates to:

(a) an alleged infringement by or attributable to a State, in the territory of that other State, of a patent, industrial design, trade mark, service mark, plant breeders' right or any other similar right or copyright belonging to a third person and protected in that other State; or

(b) an alleged infringement by or attributable to a State, in the territory of that other State, of the right to use a trade name or business name belonging to a third person and protected in that other State.

ARTICLE 17 (Fiscal liabilities and customs duties)

A. General considerations

1. SCOPE OF "FISCAL LIABILITIES AND CUSTOMS DUTIES"

81. A State is not normally liable to taxation or customs duties levied by another State, except in cases where it establishes a business—official or commercial—or maintains an office or agency in the territory of another State. The maxim *par in parem imperium non habet* or *jurisdictionem non habet* must be read in the context where there is no overlapping of activities of a State in the territory or under the territorial sovereign authority of another State. It is generally undisputed that the principle of "territoriality" or "territorial sovereignty" is more absolute and is not subject to limitations or qualifications by the national or personal sovereignty, or sovereign authority or personality of another State.

82. It follows as a matter of course that, in most cases of contact, confrontation, clash or conflict, the territorial sovereign exercises supreme authority over and within its territory. An outside sovereign or extraterritorial power must be presumed to have submitted to the sovereign authority of the territorial State and could only exert or exercise such governmental or sovereign authority as had been previously agreed to by the territorial sovereign, which could either waive its sovereign authority or consent to the exercise of a limited governmental power by the visiting extraterritorial authority. Otherwise, it would be tantamount to the recognition of a colonial status or régime, directly against the concept of *jus cogens*.

83. Conceptually, liability in terms of jural relationship is the correlative of power, as opposed to immunity which is the correlative of non-power. Thus to admit the supremacy or superiority of the territorial sovereign is already one big step towards acceptance of liability, once the extraterritorial State projects its image or personality within the territorial sphere of a sovereign authority of another State.

84. The matter has to a large extent been regulated in so far as diplomatic, consular or *ad hoc* missions are concerned. The special régime allowing for special privileges

and exemptions from certain categories of taxation is based on functional necessity and justified by the principle of reciprocity. Beyond reciprocity and functional necessity, exemption from taxation is granted as a matter of generosity or courtesy; it stems from the comity of nations, based on considerations of reciprocal treatment rather than *opinio juris* or legal obligation. Besides, there is nothing to prevent two or more States or a group of States from agreeing to accord tax concessions *inter se* (or even unilaterally) as part of a generalized system of special preferences, whether for internal revenues or levies for import of goods or for other tariff or non-tariff barriers. The rationale behind the authority to tax or to collect levies lies in the supremacy of the territorial sovereign.

85. Article 17 may be entitled "Fiscal liabilities and customs duties" to denote absence of immunity from the jurisdiction to tax or collect revenues. Lack of exemption or of immunity from the territorial jurisdiction to adjudicate upon questions of taxes or tax assessment is the equivalent of liability for taxation and payment of duties. This heading also includes property taxes and rates for the utilities and facilities connected with immovable property.

2. JURISDICTION TO TAX OR COLLECT IMPORT DUTIES

86. The legal basis for the jurisdiction or power of a State to tax any person, including a foreigner or another State, is to be found in the territorial connection of the source of income or the importation or entry of goods into the territory of the territorial State. The power to tax can sometimes be excessive—if it extends beyond the territorial scope or confines it has to be justified on another ground, such as nationality or origin of the revenue, or indeed residence, even if partial or temporary.

87. Jurisdiction in fiscal matters and importation of goods or merchandise normally belongs to the revenue and customs department of the Ministry of Finance or the Treasury. Thus revenue collection and the power to impose levies and customs duties are sanctioned by law but enforced by the officers of the revenue department or customs officers, or indeed through other more decentralized authorities such as cities, counties and municipalities in respect of rates, property taxes or road taxes for vehicles and other means of transport such as motor launches, helicopters and aircraft. In the penultimate analysis, appeal may be made to the Minister of Finance or the Lord Mayor of a city or other high administrative officer, whose decision could be challenged in a court of law in legal proceedings. Thus a State could be implicated or involved in a proceeding before the court of another State for failure to pay taxes or import duties in respect of income earned on behalf of the State in the territory of that other State or for the importation of goods into that other State without an agreement to exempt or to waive the taxes or duties to be collected. On the other hand, a State could, of its own free will, participate in a proceeding in a court of another State relating to the amount or assessment of taxes, revenues or duties, or to the very question of its own liability for taxation by the revenue authority of the State of the forum. In the latter instance, the State may be said to have consented by clear conduct to the exercise of jurisdiction by the court of the forum State.

3. MARGINAL UTILITY OF AN EXPRESS PROVISION

88. A question may be validly asked as to the practical use of a provision excepting "fiscal liabilities and customs duties" from the principle of State immunity. Once the exception of commercial contracts is admitted, the importation of goods in connection with a commercial transaction is clearly not exempt from the jurisdiction of the territorial or forum State. Nor indeed is the State immune from the jurisdiction of a court of another State in respect of taxation for the revenue or income derived from the trading or commercial activities conducted within the territory of that other State. There may perhaps be no great need to include a specific provision expressly dealing with lack of immunity with regard to "fiscal liabilities and customs duties" payable by an extraterritorial State. But for the sake of clarity, and to put an end to lingering doubts, there appears to be some usefulness, or at least a marginal utility, in dissipating unnecessary hesitancy, thereby clearing the path for greater simplicity in the application of otherwise complex rules of State immunity.

89. Furthermore, there seems to be no doubt as to the correctness of the proposition that, where jurisdiction exists for one State to collect revenues or duties from an agency or instrumentality of another State, liabilities to pay such revenues and duties are established, unless the territorial State specifically waives its power to tax for any reason or considerations of its own free will. Proceedings before the court of another State relating to "fiscal liabilities and customs duties" accordingly lie outside the scope of application of State immunity, constituting as they do a substantive exception to the general principles of jurisdictional immunities of States and their property. Conversely, to formulate such an exception provides an opportunity to delimit the scope and extent of its application, and hence an opportunity to reassert and preserve immunity of State property from some kinds of taxation, as long as it is used as diplomatic or consular premises, and the immunity from income taxes accorded to members of diplomatic and consular missions under the Vienna Conventions of 1961 and 1963.⁶⁹

B. The practice of States

1. JUDICIAL PRACTICE

90. Judicial decisions against a foreign State or foreign government agency compelling payment of taxes, dues, charges or rates are rare. This is so not because they have successfully invoked jurisdictional immunity or been held to be exempt from liability to pay such taxes or revenues, but more frequently because there is no point in refusing to pay such taxes. The fact that another State is admitted and permitted to run a business or use a motor vehicle in the territory of the forum State indicates unmistakably its willingness to recognize and respect the local laws or ground rules, including the power of the local authority to tax and the extraterritorial State's liability to pay local taxes in accordance with local regulations. Adjudication is but an

⁶⁹ See footnote 35 above.

ultimate recourse that need not be taken, once a State acknowledges the supremacy of another State over its own territory. Failure to do that may result in a more serious conflict, entailing graver consequences.

91. There are no decided cases in the practice of most countries, including the United Kingdom, France and Australia. A line of cases could be found in the practice of the United States of America between May 1952, the date of the "Tate Letter",⁷⁰ and January 1977, the date of entry into force of the *Foreign Sovereign Immunities Act of 1976*, most of which concerned the possibility of levying property taxes on State property of a foreign Government. Thus, in three parallel actions, *City of New Rochelle v. Republic of Ghana*, *Republic of Indonesia*, and *Republic of Liberia* (1964),⁷¹ immunity of property from foreclosure proceedings to satisfy real estate tax liens was recognized in three parallel State Department notes dated 8 June 1964. The United States Attorney was instructed to appear and file a suggestion of immunity with the court on the ground that the property in question was "being used as the residence of the Permanent Representative of Ghana to the United Nations" and as such "not subject to the jurisdiction of the County Court of the County of Westchester, State of New York". With respect to the request for action to have the claim for taxes on the property in question withdrawn, however, the Ambassador was informed that "in the Department's view such property is not immune from real property taxation under customary international law".⁷²

92. Thus, unless otherwise agreed in a bilateral treaty, headquarters agreement or multilateral convention, property taxes in the United States are payable, although in the above three cases as well as in an earlier case concerning the Kingdom of Afghanistan,⁷³ immunity from suit was recognized in a claim against property levied upon for non-payment of real estate taxes as a measure of enforcement of tax collection. The State Department held a similar view in regard to non-assessment of taxes against foreign government-owned property used for public non-commercial purposes, namely the consulate of the Republic of Argentina in New York. In that case, Argentina was plaintiff in an action to recover taxes assessed against its consulate in New York.⁷⁴ The lower court held that, in the absence of a treaty to the contrary, a foreign State's property was not exempt from taxation and that Argentina was not entitled to recover real estate taxes on consular property. The

Department of Justice as *amicus curiae* on appeal brought to the attention of the Court of Appeals a letter dated 2 September 1965, to the effect that

The Department of State is of the opinion that under *recognized principles of international law and comity** the several States of the United States, as well as their political subdivisions, should not assess taxes against foreign government-owned property used for public non-commercial purposes.⁷⁵

The New York Court of Appeals held that foreign State property devoted to public governmental use is immune under customary international law from local real estate taxes, but that Argentina's claim for a refund was not timely.

93. In another case, in which the United States sought to enjoin a tax foreclosure sale by the City of Glen Cove against a residence of the Permanent Representative of the Soviet Union to the United Nations,⁷⁶ the State Department stated in a letter to the Attorney General that it "accepts as true the diplomatic representations" of the Soviet Government that the property "is used as a residence of its Permanent Representative to the United Nations and his deputies having the rank of Ambassador or Minister...".⁷⁷ It would appear that the liability for taxes depended on the discretion of the Department of State in the first place but the actual decision, beyond the action taken by the taxing authority, would have to come from the court of competence. The law does not appear to be clear. Relativity abounds around the possibility of existing treaty commitments in a particular case, and yet the residual rule, in the absence of a bilateral arrangement, seems to hover between the various authorities within the same Government. A distinction was drawn between liability for taxation and possible immunity from jurisdiction to foreclose a lien on the property used for governmental and non-commercial purposes, which is closer to immunity from execution but subjection to taxation. A later case relating to attempted taxation by local authorities of uranium stored for Japanese utility companies in Oak Ridge, Tennessee, and purchased pursuant to undertakings between the Governments of Japan and the United States did not throw any further light on this mystery. No decision was made by the State Department as the request from the Embassy of Japan was withdrawn on the basis of a settlement.⁷⁸

94. Judicial decisions and the opinions of the executive in the cases referred to above appear inconclusive if not outright inconsistent. On the one hand, there appears to be authority for the proposition that the power to tax and liability for taxation coexist even as regards a foreign State's property, and that the only possible exception is consent or waiver by the territorial State established in the form of treaty provisions. No clear precedent exists for the

⁷⁰ See the fourth report of the Special Rapporteur (see footnote 1 (*d*) above), para. 94.

⁷¹ *New York Supplement, 2d Series*, vol. 255 (1965), p. 178.

⁷² See *Digest of United States Practice in International Law, 1977* (Washington, D.C., 1979), appendix: "Sovereign immunity decisions of the Department of State, May 1972 to January 1977", p. 1050, No. 44. The Department of State construed section 15 of the Headquarters Agreement of 1947 between the United States of America and the United Nations "as not extending immunity from real estate taxes to missions to the United Nations". That position was first stated in a note to the Secretary-General of the United Nations on 23 November 1955 (*ibid.*).

⁷³ *Knocklong Corporation v. Kingdom of Afghanistan* (1957) (*New York Supplement, 2d Series*, vol. 167 (1958), p. 285); see *Digest of United States Practice...*, 1977, *op. cit.*, p. 1034, No. 14.

⁷⁴ *Republic of Argentina v. City of New York* (1967) (*New York Supplement, 2d Series*, vol. 283 (1968), p. 389); judgment affirmed (1968) (*ibid.*, vol. 290 (1968), p. 706); judgment modified (1969) (*ibid.*, vol. 303 (1970), p. 644).

⁷⁵ See the letter from the Department of State's Acting Legal Adviser, Mr. Richard D. Kearney, to the Comptroller of the City of New York, *Digest of United States Practice...*, 1977, *op. cit.*, p. 1053, No. 48.

⁷⁶ *United States v. City of Glen Cove* (1971) (*Federal Supplement*, vol. 322 (1971), p. 149); judgment affirmed (1971) (*Federal Reporter, 2d Series*, vol. 450 (1972), p. 884).

⁷⁷ See *Digest of United States Practice...*, 1977, *op. cit.*, p. 1069, No. 71.

⁷⁸ *Ibid.*, p. 1077, No. 100. See also C. Brower, "Litigation of sovereign immunity before a State administrative body and the Department of State: The Japanese uranium tax case", *American Journal of International Law* (Washington, D.C.), vol. 71 (1977), p. 438.

absolute immunity of diplomatic or consular premises from taxation beyond courtesy or comity, depending on the discretionary power of the territorial State to dispense with the tax assessment. It is relatively certain that foreign State property used for governmental and non-commercial purposes would be exempt from attachment, seizure, foreclosure proceedings and other measures of execution, especially as far as the executive is concerned. Payment of taxes already assessed would not appear to be recoverable.

95. Such practice, unsettled and unsettling as it may seem, is no more precise elsewhere. The only other relevant decision is probably a Canadian case decided in 1958⁷⁹ relating to an attempt by the local authority to collect rates on premises leased on behalf of the United States for the purpose of constructing a radar installation pursuant to a joint defence scheme with the Canadian Government. The Canadian Supreme Court held that the land was immune from rates, although the decision was probably not influenced by the fact that there was an express invitation by Canada to the United States to undertake the work and that the defence, rather than the commercial, character of the project was emphasized.

2. GOVERNMENTAL PRACTICE

96. In a way not uncharacteristic of the Canadian and United States decisions, which are inherently connected with the positions taken by the political branches of the Government, and not altogether separable from the discretionary power of the executive, governmental practice seems to be preponderantly in favour of settlement of this delicate point by bilateral agreements. Thus the Government of Thailand, for example, had concluded agreements, as it is entitled to do in law and as it often does in practice, with friendly Governments or international organizations dispensing with the liability to pay *ad valorem* duties on transfer of title deeds or reducing such fiscal liabilities by a half. Rates can similarly be adjusted and readjusted in accordance with the favourable treatment to be accorded to official premises or property of Governments or international organizations used for official, governmental and non-commercial purposes.

97. Practice therefore varies from complete exemption or absolute immunity, to complete subjection or liability to taxation in full, via intermediate stages of partial subjection to rates and taxes. This is also true of import duties in Thailand, exemption from which may be accorded under bilateral arrangements or headquarters agreements, as fully authorized by the general enabling clause or provision in an act in the Revenue Code, as well as by the royal decree for customs tariff exemptions.

98. This state of flux in international practice would appear to call for a re-examination of the entire question of fiscal liabilities and customs duties. An attempt should therefore be made to restate or reformulate residuary rules in this specified area, while leaving intact the inviolability,

and hence immunity, of State property from all forms of seizure, attachment, foreclosure or execution.

(a) National legislation

99. The United Kingdom *State Immunity Act 1978*⁸⁰ contains a provision on the point at issue. Section 11 of that Act reads:

Exceptions from immunity

...

11. A State is not immune as respects proceedings relating to its liability for:

(a) value added tax, any duty of customs or excise or any agricultural levy; or

(b) rates in respect of premises occupied by it for commercial purposes.

100. A similar provision is contained in section 13 of Singapore's *State Immunity Act, 1979*⁸¹ and in section 12 of Pakistan's *State Immunity Ordinance, 1981*.⁸² The United States and Canadian counterparts do not contain parallel provisions. However, the liability of foreign Governments to pay United States income tax is to be regulated by income tax regulations on "Income of Foreign Governments". The United States Department of the Treasury's "Notice of proposed rule-making"⁸³ provides guidance for taxing foreign sovereigns on their income from commercial activities within the United States. Roughly speaking, income of foreign Governments from investments in the United States in stocks, bonds or other domestic securities, owned by an integral part or controlled entity of a foreign sovereign, or from interest on bank deposits belonging to such an integral part or controlled entity, is exempt from taxation under section 892 of the *Internal Revenue Code*,⁸⁴ whereas amounts derived from commercial activities in the United States are taxable under section 881 or 882. According to the proposed new rules, certain activities are regarded as non-commercial and income derived therefrom is exempt from taxation. Apart from investments and interest on bank accounts or dividends not connected with the conduct of trade or business, performances of exhibitions devoted to the promotion of acts by cultural organizations and mere purchase of goods for the use of the foreign sovereign are not treated as commercial.

(b) International or regional conventions

101. International or regional conventions appear to remain silent on this point. Perhaps silence was preferred, leaving the practice to grow out of the general confusion. Neither the 1972 European Convention on State Immun-

⁸⁰ See footnote 58 above.

⁸¹ See footnote 61 above.

⁸² See footnote 62 above; see also section 12 of South Africa's *Foreign States Immunities Act, 1981* (*ibid.*).

⁸³ *Federal Register*, vol. 43, No. 158 (15 August 1978), pp. 36111 *et seq.*; see also United Nations, *Materials on Jurisdictional Immunities...*, pp. 63 *et seq.*

⁸⁴ *United States Code, 1976 Edition*, vol. 7, title 26, p. 572.

⁷⁹ *Municipality of the City and County of Saint John, Logan and Clayton v. Fraser-Brace Overseas Corporation et al.*; see United Nations, *Materials on Jurisdictional Immunities...*, pp. 232 *et seq.*

ity⁸⁵ nor the 1983 Inter-American Draft Convention on Jurisdictional Immunity of States⁸⁶ contains a comprehensive provision on immunity from taxation either of the State itself, or of its property. The inter-American draft convention merely states:

Article 6

States shall not claim immunity from jurisdiction either:

...

(d) in tax matters regarding activities under paragraph one of article 5, for property located in the forum State;

...

The activities in question include "trade or commercial activities undertaken in the State of the forum".⁸⁷

3. INTERNATIONAL OPINION

102. Legal opinions are perhaps undecided or even indifferent on a number of relevant points, not knowing for certain whether a provision dealing with this specified area should be included in the part on exceptions. If so, the extent or scope of the content of the exception, its qualifications and limitations will also have to be ascertained and formulated with a reasonable measure of precision and confidence. The draft prepared by the Committee on State Immunity of the International Law Association and adopted at Montreal in 1982⁸⁸ makes no pronouncement on this significant but delicate issue. On the positive side, progressive development of international law should include an appropriate provision.

4. A TWILIGHT ZONE

103. This particular area of "fiscal liabilities and customs duties" may constitute a twilight zone in the opinion of writers, at least as to the desirability and necessity of including a specific provision. This somewhat nebulous area could be illuminated by articulating a draft provision to indicate the likelihood of positive rules being adopted on the application or non-application of State immunity in regard to fiscal liability, including income tax, purchase or sales tax, excise duties, *ad valorem* stamp duties, import levies and duties, rates and other taxes on property. The inclusion of such a provision would seem to be warranted.

C. Formulation of draft article 17

104. Article 17 could be formulated as follows:

Article 17. Fiscal liabilities and customs duties

1. Unless otherwise agreed, a State cannot invoke immunity from the jurisdiction of a court of another State in a proceeding relating to its liability for:

⁸⁵ See footnote 49 above.

⁸⁶ See footnote 66 above.

⁸⁷ See footnote 67 above.

⁸⁸ See footnote 68 above.

(a) value added tax, any duty of customs or excise or any agricultural levy; or

(b) *ad valorem* stamp duty or a charge or registration fee for registration or transfer of property in the forum State; or

(c) income tax derived from commercial activities conducted in the forum State; or

(d) rates or taxes on premises occupied by it in the forum State for commercial purposes.

2. Nothing in paragraph 1 shall be interpreted as an exception to the immunity of a State for its diplomatic and consular premises from seizure, attachment or measures of execution, or to allow foreclosure, sequestration or freezing of such premises or of State property otherwise internationally protected.

ARTICLE 18 (Shareholdings and membership of bodies corporate)

A. General considerations

1. SCOPE OF "SHAREHOLDINGS AND MEMBERSHIP OF BODIES CORPORATE"

105. When a State buys share or holds shares in a company constituted under the law and registered by virtue of the company law of another State, or acquires equities or becomes a member in an association or partnership formed, organized or chartered under the legal system of another State, it may be said to have entered into a legal relationship in that other State. Physically, the State need not leave its territory nor cross the boundary of that other State to acquire shares, membership or partnership in any corporation, association or society established in the territory of another State by virtue of its internal law.

106. The fact that a State holds shares or becomes a member of a body corporate organized and operating in another State would seem to indicate its willingness to recognize the validity of the legal relationship it has created or entered into under the legal system of that other State. In so doing, the State is also bound to respect the local laws of the State of incorporation or registration, or of the *siège social* or headquarters, and to abide by the charter of the corporation or unincorporated partnership concerned. The purpose of article 18 is to examine and delimit the scope of "shareholdings and membership of bodies corporate" by a State as an exception to its immunity from the jurisdiction of the State of incorporation or association.

2. APPLICABILITY OF THE LAW OF INCORPORATION AS A SOUND BASIS FOR EXERCISE OF JURISDICTION

107. In all matters relating to the relationship between shareholders *inter se* or between the shareholders and the company or body corporate of any form, the law of the State of incorporation governs the formation, operation and also the dissolution of the entity in question. No other legal relationship could exist outside the purview of the law of the State of incorporation or registration, or of the controlling centre or *siège social* or *central* of the organization or entity. Because of the special nature of the law and the resulting legal relationship, no other systems of law seem to be applicable. Thus the exclusive application of the law of

the State of incorporation makes it difficult or impossible to imagine the applicability of another law or another separate and independent legal system.

108. It does not, however, necessarily follow that the exclusive applicability of a law implies the exclusive competence of the State of incorporation. The existence of rules of conflict of laws and private international law presupposes the possibility of a choice of laws to be made by any competent court or any tribunal with concurrent jurisdiction. But for a highly specialized branch of the law, such as that relating to patents and trade marks (article 16) or company law or law concerning bodies corporate (article 18), the jurisdiction of the State of incorporation and place of head office of the corporate bodies is practically exclusive. No other jurisdiction seems better entitled to exercise the specialized competence or to apply with accuracy and consistency the complex system of company law or association law of another State, which at best would be alien to it.

109. Thus any court foreign to the applicable law is invariably a *forum non conveniens*. Only the court of the State of incorporation or the place of head office could be a *forum conveniens* or an appropriate adjudicatory tribunal.

3. PRESUMPTION OF CONSENT TO THE EXERCISE OF SOLE JURISDICTION BY THE STATE OF INCORPORATION

110. If the only applicable law coincides with the sole jurisdiction of the State of incorporation and customary international law requires other States to respect the applicable local law of the place of incorporation or of the place of business operation, as the case may be, the presumption is almost irrebuttable that any extraterritorial State acquiring shares in a company or membership of a body corporate established under the law of another State must have understood and consented to be bound by the very same law which creates the legal obligations contracted and, failing other available jurisdictions, also agreed to the exercise of jurisdiction by the competent court of that legal system in all matters relating to or arising out of the legal relationship connected with the company or body corporate in question. No other explanation makes any sense.

4. AN ACQUIRED PLACE

111. It is thus becoming increasingly clear that, in this particular area of "shareholdings and membership of bodies corporate", the principle of State immunity does not and cannot truly apply without creating a legal vacuum which can never be filled. This area may be said to have acquired a rightful place in the current stage of legal developments as an inevitable and uncontested exception to the doctrine of State immunity.

B. The practice of States

1. JUDICIAL PRACTICE

112. The absence of judicial decisions directly concerning these matters does not seem to present a source of real

difficulty, not unlike the area of patents, trade marks and other intellectual properties, where very few decisions have been cited and discussed. In this area, as in others, including that of fiscal liabilities and customs duties, in which case-law is scanty if not non-existent (except for the few instances in the United States), the noticeable absence of judicial pronouncements does not alter the facts of legal developments and evolution. Other sources of State practice need to be examined to supplement what appears to be lacking in judicial reaffirmations.

2. GOVERNMENTAL PRACTICE

(a) National legislation

113. It is sufficiently clear, in the absence of judicial decisions to the contrary, that in the practice of the countries which have adopted national legislation limiting or restricting State immunity in this specified area, immunity is denied a foreign State in proceedings relating to its membership of a body corporate, an unincorporated body or a partnership, and in those arising between the State and that body or its members, or between partners. It is interesting to note the requirement that another member (or members) must not be a State (or States). One of the three links or substantial connections, namely the place of incorporation indicating the system of incorporation, charter or constitution; the place of control; or the principal place of business (*siège social*), must be in the State of the forum to substantiate the presumption of consent to the exercise of jurisdiction by such closely connected forum.

114. Thus section 8 of the United Kingdom *State Immunity Act 1978*⁸⁹ provides:

Exceptions from immunity

...

8. (1) A State is not immune as respects proceedings relating to its membership of a body corporate, an unincorporated body or a partnership which:

(a) has members other than States; and

(b) is incorporated or constituted under the law of the United Kingdom or is controlled from or has its principal place of business in the United Kingdom,

being proceedings arising between the State and the body or its other members or, as the case may be, between the State and the other partners.

(2) This section does not apply if provision to the contrary has been made by an agreement in writing between the parties to the dispute or by the constitution or other instrument establishing or regulating the body or partnership in question.

115. Similar provisions are contained in Singapore's *State Immunity Act, 1979*,⁹⁰ Pakistan's *State Immunity Ordinance, 1981*⁹¹ and other legislative texts.⁹² The Canadian Act and that of the United States of America appear to have included this area under the wider exception of commercial activities.⁹³

⁸⁹ See footnote 58 above.

⁹⁰ See footnote 61 above.

⁹¹ See footnote 62 above.

⁹² See, for example, section 9 of South Africa's *Foreign States Immunities Act, 1981* (*ibid.*).

(b) *International or regional conventions*

116. The 1972 European Convention on State Immunity⁹⁴ and the 1983 Inter-American Draft Convention on Jurisdictional Immunity of States⁹⁵ appear to have included this exception under a larger heading of trade or commercial activities conducted or undertaken in the State of the forum.

3. INTERNATIONAL OPINION

117. International opinion is not so prolific in this area of "shareholdings and membership of bodies corporate". The draft convention prepared by the International Law Association's Committee on State Immunity prefers to have this limited area of exception partially or fully covered by the wider notion of "commercial activity".⁹⁶ Even under that larger exception, questions relating to shareholdings and membership of bodies corporate are not always completely or wholly covered. In any event, article 12,⁹⁷ as provisionally adopted by the Commission, refers to "commercial contracts" rather than the entire field of trading or commercial activities. Accordingly, if originally the reason for including article 18 might have been fragile, there now appears to be stronger justification in practice. There are no compelling views of writers on this particular issue.⁹⁸ A flexible attitude is therefore recommended. Jurisdiction of the State of incorporation or of principal place of business or control may be presumed, for without it there may be no court competent to try the subject-matter of the litigation. In the interest of justice, and however narrow the special area designated under this exception may be, a provision would be useful in any effort to codify or progressively develop rules regarding State immunity and the extent of their practical application.

C. Formulation of draft article 18

118. An attempt has thus been made to formulate article 18 to cover the exception of "shareholdings and membership of bodies corporate", keeping intact the freedom of contract of the parties to opt out of the provision, and establishing a firm link between the exercise of jurisdiction and the preponderant, if not obviously exclusive, applicability of the law of the State of the forum, which is the law of the place of incorporation or association, or the law of the principal place of business or of the place of control. The draft article might be formulated as follows:

⁹³ See section 5 of Canada's 1982 Act (see footnote 60 above), and section 1605, subsection (a)(2), of the United States 1976 Act (see footnote 36 above).

⁹⁴ See footnote 49 above.

⁹⁵ See footnote 66 above.

⁹⁶ See article III, section B, of the draft convention (see footnote 68 above).

⁹⁷ See footnote 21 above.

⁹⁸ See, for example, J. Crawford, Rapporteur for the draft Australian legislation on the immunities of foreign States (see footnote 63 above), in Australian Law Reform Commission, "Foreign State Immunity Research Paper No. 4" (Canberra, 1983).

Article 18. Shareholdings and membership of bodies corporate

1. A State cannot invoke immunity from the jurisdiction of a court of another State in a proceeding relating to the determination of its rights and obligations arising from its shareholdings or membership of a body corporate, an unincorporated body or a partnership between the State and the body or its other members or, as the case may be, between the State and the partnership or the other partners, provided that the body or partnership:

(a) has members other than States; and

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

2. Paragraph 1 does not apply if provision to the contrary has been made by an agreement in writing between the parties to the dispute or by the constitution or other instrument establishing or regulating the body or partnership in question.

ARTICLE 19 (Ships employed in commercial service)

A. General considerations

1. SPECIAL STATUS OF SHIPS

119. Ships or seagoing vessels have a special status distinct from other types of State property. In the first place, they are endowed with a nationality. There is always a State which exercises jurisdiction over a ship, wherever the ship may be, and that is the flag-State or the State whose flag the ship flies. Seagoing vessels may also have their places or port of registration separate or distinct from their flag-State. A land-locked State is entitled to have its flag. The place of registration may serve a different legal purpose, whereas the flag that a ship flies at least serves to indicate her nationality, and the nationality of a vessel in turn may serve to decide a number of questions, including allegiance to a sovereign State, involving its protection and the application of the laws of the flag-State, when on the high seas or otherwise, even outside the territorial waters or exclusive economic zones of the flag-State. A ship without a nationality is often regarded, not as a stateless ship, but as a pirate ship, while the flag-State may disown or denounce any of the ships flying its flag, once it is established that such a ship is engaged in acts of piracy on the high seas or is otherwise perpetrating an international crime known as piracy *jure gentium*.

120. Apart from the usual requisite of nationality which necessarily attaches to a seagoing vessels, the ship is also sometimes considered as a piece of floating territory of the flag-State. It is treated for several purposes as if it were an extension of the landed area of the territory of the State whose flag it flies. Although merely a fiction, the extraterritoriality of a seagoing vessel is a concept that carries far-reaching implications in actual practice. All kinds of legal or juristic acts may be performed or celebrated on board a seagoing vessel, including marriage, birth, burial or cremation, and treated as valid under the applicable laws of the flag-State. In short, several types of civil status of natural persons may be consummated on board this float-

ing territory, even on the high seas. The officer who may initiate the act is the captain or commander of the ship. This master or skipper of the ship may exercise extensive power of registration and administration concerning the civil status of persons. The territorial character of a ship even within foreign territorial waters or anchored in a foreign port may be illustrated by the possibility of asylum being given on board the ship and the surrender of a person by and from the ship, in the form of extradition for an extraditable offence in appropriate circumstances.

121. The combination of the two elements, namely nationality and territory, makes the status of a ship unique in more ways than one. In addition to its unique capacities and qualities, a seagoing vessel is often personified, in the sense that it may be likened to a natural or legal person as it is so recognized in several legal systems. Thus, more notably in the Anglo-American and other common-law countries, a ship could be proceeded against by an action *in rem* in admiralty, a distinct legal status incomparable to any other object or any personified subject of law. Such a process *in rem* is basically directed against the ship itself, which could be considered as coming under part IV of the draft, concerning immunities of State property from attachment and execution. No separate treatment would be necessary, if such were to be the case. However, it is now the practice in common-law systems that a process *in rem* against a ship, whether to repair physical damage caused by careless navigation of such a ship or to recover moneys in respect of salvage services, or in pursuit of a maritime lien, followed by seizure or arrest of the same, really has the purpose of compelling the owner to enter an appearance.⁹⁹

122. It has now become the practice even in a process *in rem* in admiralty for the writ to be addressed not only to the ship, but also to all persons interested in it, including the owner, charterer and operator, as well as the owners of the cargoes carried on board the vessel at the time of seizure. Referring to the peculiarities of the procedures of British admiralty, G. G. Phillimore remarked:

... it [the British admiralty] had peculiar procedures: it could proceed *in rem* against property situated within its jurisdiction by issuing a writ specifically against the ship and by seizure, or it could proceed *in personam* against the owner of the ship or the person actually in command.¹⁰⁰

123. This practice has operated to nullify what might otherwise have been a most effective means for a private litigant wishing to obtain redress against the trading ships of a foreign State. If that practice had not existed, he might have issued a writ *in rem* against the ship and secured his redress without disturbing or indeed impleading the foreign sovereign. But since the practice does exist, he can only issue such a writ *in rem* by addressing it not only to the ship, but inevitably also to all persons interested in it and its cargoes. If such persons are foreign sovereigns or States

⁹⁹ See the dictum of Sir Francis Jeune in *The "Dictator"* (1882) (*The Law Reports, Probate Division*, 1892, p. 304), followed by the Court of Appeal in *The "Gemma"* (1899) (*ibid.*, 1899, p. 285, especially p. 292); cf. Lord Justices Bankes and Scrutton in *The "Jupiter" No. 1* (1924) (*ibid.*, 1924, p. 236, at pp. 241-242).

¹⁰⁰ G. G. Phillimore, "Immunité des Etats au point de vue de la juridiction ou de l'exécution forcée", *Recueil des cours de l'Académie de droit international de La Haye*, 1925-III (Paris, Hachette), vol. 8 (1926), p. 461.

or Governments, they will necessarily be impleaded. Thus, because of its personal consequences, the admiralty rule as to a process *in rem* in the common-law countries, on the face of it impersonal, has become unworkable against vessels in which foreign States are interested. Consequently ships, though *prima facie* governed by rules different from those to which common law submits other movables, are in the final analysis subject to such rules, and the courts "will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control".¹⁰¹

2. OWNERSHIP, POSSESSION OR CONTROL

124. If ships, with their special status and peculiarities under the major legal systems, are also essentially property and subject equally to rules applicable to special kinds of movables, then the persons interested in a ship against which a process *in rem* is being directed must include all persons who are owners of the vessel or who have possession or control of it.

125. The concept of ownership is not irrelevant to the question of nationality. Apart from the possibility of a flag of convenience, which may be attributed to a ship for convenience sake and regardless of its true nationality, several legal systems impose certain minimum requirements for a ship to have the nationality of the flag-State or the State of its registration. Thus, in Thailand, to have Thai nationality a ship must be owned by Thai nationals; or, if the owner is a corporate body organized under Thai law, at least 70 per cent of the shares must be owned by Thai nationals.¹⁰² On the other hand, a company could be established in Thailand and registered with Thai nationality but with less than 70 per cent of its shares owned by Thai nationals. However, to own a Thai vessel with the right to fly the Thai flag, the company itself must be at least 70 per cent Thai-owned.¹⁰³ Otherwise, the vessel could not fly the Thai flag on the ground of insufficient ownership by Thai nationals.

126. Similar requirements exist regarding the classification of ships as being State-owned. Ownership of a vessel by a State will have to meet certain minimum requirements to justify the State's claim to own the vessel, substantially or principally if not wholly. Ownership by the foreign State clearly determines the fact that a proceeding impleads a foreign Government even if it is only incidentally against its owners. As has been seen in a different context, the flag implies the possibility of exercise by the flag-State of certain sovereign rights and powers or duties of protection, but not necessarily involving impleading the State whose flag the ship happens to fly, unless the ship actually belongs to the flag-State. The flag flown by a ship does not imply its ownership by the flag-State or by any State, it merely indicates the nationality of the vessel,

¹⁰¹ See the opinion of Lord Atkin in *The "Cristina"* (1938) (*The Law Reports, House of Lords...*, 1938, p. 490).

¹⁰² See section 7 of the Thai Ships Act as amended by section 3 of the Thai Ships Act (Third Act) (B.E. 2521).

¹⁰³ If it is owned by a registered partnership, all the partners must be Thai.

which entails legal consequences that, to some extent and for some purposes, could be less extensive or limited, as the case may be. The extent of ownership of a vessel by a foreign State may determine whether the State is being impleaded or not when a process *in rem* is directed against that ship. Because of the variety of requirements governing the nationality of a ship, the ship may fly a different flag from that of the State owning it, having been registered under a flag of convenience or otherwise.

127. The question of possession or control of a ship is basically relevant to the consideration of State immunities. Possession by the State could be constructive or actual, for instance through the captain, commanding officer, skipper or master of the ship obeying instructions from the State. Control could be more remote, and yet actual, through the same medium of the captain loyal to the owner State and following the instructions of the State or of one of its responsible agencies or instrumentalities. Persons interested in the ship cover a wider group than the owners or co-owners of the ship, including the corporation or its shareholders who are also classed as shipowners, and also owners or assignees of cargoes laden on board the vessel when seized, and charterers, operators or those responsible for the operation and navigation of the ship, be it the master and his crew or others. A State can thus remain in possession or control of a vessel through its captain, commanding officer or master and crew. A charter-party may contain provisions indicating the division of control according to whether it is a bare-boat charter or a charter-party for certain portions or containers or parts of the vessel, with or without the crew or master.

3. CLASSIFICATION OF VESSELS

128. It would seem pertinent to touch briefly upon the classification of vessels, especially for the purpose of immunities. Whatever the criterion—ownership, possession or control—a warship or man-of-war in active service belongs to a category of State-owned or State-operated ships or public vessels which enjoy extensive immunities from jurisdiction, arrest, detention and execution by the court of any other State, apart altogether from the wide-ranging sovereign power that a warship could display even on the high seas and through territorial waters. Vessels of war belong to the armed forces of the State, adding to its military strength and might, and as such lie outside the reach and jurisdiction of the courts of other States. This rule is applicable whether or not the ship is owned by the State. The fact of its service is determinative of its immunity. Its employment or commission as a man-of-war vests upon the vessel the character of a warship independently of its ownership at any particular moment. The ship could be commissioned under a requisition decree, chartered, bought on hire-purchase or made available on loan from another Government or a private party, so long as it is employed or used by the State as a man-of-war for purposes of national defence.

129. In international law, in time of peace or even in the event of an armed conflict, warships or men-of-war have a special status, special privileges, and admittedly cannot be proceeded against, unless they have been decommissioned or condemned as lawful prizes by a prize-court, an insti-

tution which has gone out of fashion.¹⁰⁴ Ordinarily, nowadays, since war is outlawed and the current instances of armed conflicts offer little or no illustration of such a possibility of adjudication of lawful prizes, it would not be unrealistic to regard such customs and traditions of prize as having fallen into desuetude.

130. The nature or character of service or employment of vessels appears therefore to afford a decisive criterion for classifying them. Warships or men-of-war of all types, including battleships, cruisers, destroyers, government yachts, submarines, auxiliary vessels, military transports, hospital ships, supply ships, etc., constitute a class apart, for which immunities from jurisdiction as well as from seizure and execution seem to have been well settled beyond controversy.¹⁰⁵ Other types of ships stand in need of a more precise designation or division for the different purposes for which ships are to be classified. Thus ships have been classified as public vessels or private ships according to the criterion of ownership, i.e. State-owned or privately-owned, or according to their service or use (a) as ships employed or used exclusively on governmental and non-commercial service, including the cargoes carried by such vessels not being subject to seizure, attachment or detention,¹⁰⁶ or (b) as ships owned or operated by a State for commercial and non-governmental purposes, which are assimilated to private vessels.¹⁰⁷

131. Ships have also been classified, for the purposes of the law of the sea, as (a) warships on the high seas, having complete immunity from the jurisdiction of any State other than the flag-State, (b) ships owned or operated by a State and used only on governmental non-commercial service, which are assimilated to warships, and (c) government vessels operated for commercial non-governmental service, which are assimilated as far as possible to private merchant vessels without immunity of any kind.¹⁰⁸ The classification adopted in the 1958 Geneva Conventions on the law of the sea¹⁰⁹ appears to have been confirmed, if not strengthened, by the classification adopted in the 1982 United Nations Convention on the Law of the Sea,¹¹⁰ of which article 236, entitled curiously enough "Sovereign

¹⁰⁴ See, for example, *The "Twee Gebroeders"* (1800) (C. Robinson, *Reports of Cases Argued and Determined in the High Court of Admiralty* (London), vol. III (1802), p. 162); *The "Helen"* (1801) (*ibid.*, p. 224); *The "Porto Alexandre"* (1920) (*The Law Reports, Probate Division, 1920*, p. 30).

¹⁰⁵ See, for example, article 3 of the 1926 Brussels Convention (paragraph 203 below).

¹⁰⁶ See, for example, article I of the 1934 Additional Protocol to the 1926 Brussels Convention (paragraph 206 below).

¹⁰⁷ See, for example, article 1 of the 1926 Brussels Convention (paragraph 201 below).

¹⁰⁸ See, for example, the Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958) (United Nations, *Treaty Series*, vol. 516, p. 205), and the Convention on the High Seas (Geneva, 29 April 1958) (*ibid.*, vol. 450, p. 11).

¹⁰⁹ The General Assembly by its resolution 1105 (XI) of 21 February 1957, convened an international conference of plenipotentiaries to examine the law of the sea. The conference held at Geneva from 24 February to 27 April 1958, prepared and opened for signature four conventions, of which the Convention on the Territorial Sea and the Contiguous Zone and the Convention on the High Seas have direct bearing on the immunities of public ships.

¹¹⁰ See *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

immunity", assimilates the status of vessels or aircraft owned or operated by a State and used, at the time, only on governmental non-commercial service, to that of any warship or naval auxiliary.¹¹¹

4. THE EXTENT OF STATE IMMUNITY

132. The above general considerations serve in some small way to illustrate the relevance and extent of involvement of the question of State immunity in respect of State-owned and State-operated vessels. The basis for immunity from jurisdiction as well as from seizure, attachment and detention appears to lie in the actual operation or employment of the vessels by the State on governmental non-commercial service, thus leaving exposed to the normal exercise of local or territorial jurisdiction by the courts of competence all public vessels or vessels owned or operated by a State and used by it exclusively on non-governmental and commercial service. It is the purpose of the present study to examine the practice of States, both judicial and governmental, in order to ascertain the precise extent of immunity to be recommended or recognized in respect of ships employed by a State exclusively on commercial and non-governmental service. To what degree or extent can it be said that the position of such government-owned or government-operated vessels, used exclusively on commercial non-governmental service, is to be assimilated to that of privately owned or privately operated merchant marine or trading vessels?

133. It is also relevant to examine the possible use of public vessels in the carriage of goods and passengers for governmental and non-commercial services, such as the carriage of mail, the performance of a postal service,¹¹² or the carriage of food supplies by government ships or even warships to relieve a famine-stricken area, or medical supplies for a disease-ridden population. The nature of the service, namely the carriage of goods and passengers on ordinary commercial lines, seems fairly simple and straightforward, but the purpose of the supply or transport of foodstuffs, medicine and manpower may bear no relation to any commercial pursuit or gain, yet such carriage is designed more significantly to ensure the livelihood and welfare of a people, which is a legitimate government function and concern, as distinct from a commercial or trading transaction and as opposed to commercial service or operation. Legal developments traceable in the judicial and governmental practice of States will afford a serviceable guide in the planning and preparation of a draft article on this important aspect of the topic. It will also be seen to what extent the exercise of jurisdiction by a competent court of the local or territorial State will implead a foreign sovereign, and to what extent the foreign sovereign could be said to have consented to the exercise of such jurisdiction as against State-owned or State-operated ships used exclusively on commercial non-governmental service, and the relationship this question may have with the question of immunity of State property in general from attachment and execution.

¹¹¹ Article 236 is contained in section 10 of part XII, entitled "Protection and preservation of the marine environment."

¹¹² See, for example, *The "Parlement belge"* (1880) (*The Law Reports, Probate Division*, vol. V (1880), pp. 219-220).

5. THE BASIS FOR JURISDICTION

134. It is admittedly outside the scope of the present inquiry to examine the legitimacy of claims for the exercise of jurisdiction by the courts of a State in any given set of circumstances. The question of the appropriateness of or justification for the exercise of such jurisdiction is a matter essentially and primarily within the exclusive domain of a sovereign State. Of course, the jurisdiction of a State is not unlimited; there are some clear territorial limitations, and the exercise of extraterritorial jurisdiction is in principle subject to the rules not only of private international law, but also of the law of nations or public international law. However, this question will not be directly examined in the present study, as it is a question that must recur in any event, whenever there is an exercise of jurisdiction by a court of a State beyond the bounds of its national frontiers or territorial confines. It belongs, therefore, to the much larger subject of the scope and content of jurisdiction as an aspect of the sovereign authority of a State.

135. The points at issue, of which there are several in this particular connection, appear singularly inherent in the peculiarities of admiralty rules in the common-law countries, which permit a process *in rem* against a vessel, followed by its seizure, as a foundation for the commencement of an action or a legitimate ground upon which to found and exercise jurisdiction. Thus the physical presence of a ship within a harbour or port, or indeed lying anchored in territorial waters, could provide a firm ground for starting a process *in rem* or an action to seek relief for damages for collision at sea, or salvage services, or a salvor's or repairer's lien on the vessel. But British admiralty rules contain more points of obscurity than readily imaginable. For instance, the foundation of jurisdiction need be neither *real* nor indeed *personal*; it may often be a mere kinship or association. Through a thread of common ownership, for example, the law could fasten liabilities, both *in rem* and *in personam*, it would seem, on an entirely different ship not identified in any way with the ship in dispute which was at fault or the ship for which salvage services had been rendered, except by the relationship of mere sharing of common owners, or the association with the same fleet of ships—the sisterhood, as it is sometimes strangely called, of ships of the same fleet or company. This fiction of sister-ship jurisdiction, strange as it may seem, has afforded practical grounds and provided a convenient basis for the aggrieved party to commence an action or process *in rem* in admiralty against a sister ship in respect of the wrongs or harms done by another sister ship.¹¹³ Without commenting on the pros and cons of the rationale for such sister-ship jurisdiction, suffice it to recognize that, in the legal practice of States, the basis for jurisdiction seems incredibly wide, but nevertheless reasonably practical and flexible.

B. The practice of States

1. GENERAL OBSERVATIONS

136. It should be observed at this point that the practice of States with regard to State immunity in general started in

¹¹³ See, for example, *The "I Congreso del Partido"* (1981) (footnote 173 below).

many countries almost inevitably with the recognition of the immunities of public armed ships. Thus the immunities of States, as a whole and in all subsequent manifestations, were first recognized in connection with men-of-war. The immunities of public warships in foreign ports and territorial or national waters became established as early as 1812 in the celebrated case concerning a libel *in rem* against the schooner *Exchange*, which had been seized by persons acting under a decree issued by Napoleon I and subsequently converted into a public armed ship, then lying in the port of Philadelphia. In the classic case, *The Schooner "Exchange" v. McFaddon and others*,¹¹⁴ Chief Justice Marshall considered public armed ships as constituting a part of the military force of the nation, and accepted as "a principle of public law, that national ships of war, entering the port of a friendly power, open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction".¹¹⁵

137. This classic dictum of Chief Justice Marshall could scarcely be said to have derived from the desire on the part of a colonial Power or a developed country to perpetuate its subjugation of Asian or African peoples or its domination of foreign territories, or indeed to maintain its superiority over newly emerged States. If anything, the exact reverse seems much closer to the truth. Thus Jean Hostie, writing on the case-law of the American Supreme Court for that period¹¹⁶ when the United States was just a newly born State, had this to say about the sensitive awareness of its own national sovereignty and independence:

This same solicitous concern for its independence — quite natural for a young State, especially as it was the first colonial State to become sovereign, ... and quite justifiable, given the external circumstances and the novelty of the constitutional experience — this same concern is reflected in a doctrine that was to have a major role in the case-law of the Supreme Court.¹¹⁷

138. This decision of the United States Supreme Court is therefore remarkable in that it laid down for the first time, in no uncertain terms, the principle of State immunity in general and the immunities of men-of-war in particular.¹¹⁸ It represented a timely recognition of the equality of States at a time when the European Powers were not predisposed to accept such absolute equality for all States, although subsequent practice made it abundantly clear that an alternative, either in the form of legal inequality or super-

riority of the major Powers before the law, would be unacceptable. The principle enunciated by Chief Justice Marshall received judicial endorsement and governmental approbation in subsequent State practice. It was discussed at length in the United Kingdom after 1820,¹¹⁹ until finally confirmed in *The "Constitution"* (1879).¹²⁰ In France, the Foreign Minister made a declaration to the same effect less than a decade later in relation to a case concerning the *Ville de Victoria* and the *Sultan* (1887).¹²¹ In Germany, the same principles were applied in 1891 in a case concerning a Chilean ship, the *Presidente Pinto*, and in 1901 in a case relating to the *Assari Tewfik*, a Turkish vessel.¹²²

139. At that time, international law was still essentially and exclusively of European origin. But the innovation by the American Supreme Court had begun a series of encouraging breakthroughs to update and internationalize the process of international law-making. If States were to be regarded as equally sovereign and none could have nor exercise jurisdiction over the others, the very first case of likely contact, or indeed conflict or overlapping of sovereign authority or jurisdiction, between States could not have actually occurred unless one State moved into the territorial confines of another. Normally no territory of a State could overlap that of another State. But the mobility of seagoing vessels and the fiction of their territoriality provided precisely for this eventuality. It was therefore not surprising that the doctrine of State immunity first came to be recognized and accepted as a proposition of law in cases involving "floating territory" of one State which happened to sail into the territorial or national waters of another State, with the result that the principle of sovereign equality could not permit the exercise of jurisdiction by the territorial sovereign over the floating territory, which formed part of the armed forces of another, equally sovereign State. This was actually how the basic principle of State immunity or sovereign immunities of States in general came to be recognized and settled as a natural outcome of international intercourse and an inevitable principle of international law. The first concrete illustration of its application is to be found in cases of public armed vessels or warships. The likelihood of their movement into the territory of another State was self-apparent, owing to the inherent nature of their mobility across national maritime frontiers.

140. Gradually and progressively, the principle of State immunity which was first applicable to warships was actually applied to the State itself, its organs, agencies and others instrumentalities. Other public ships, not answering the definition of warships, nor used for defence purposes, were later accorded the same jurisdictional immunities, so long only as they were public vessels, or ships owned or operated by a State for public purposes or employed on governmental and official or non-commercial service.

¹¹⁴ W. Cranch, *Reports of Cases Argued and Adjudged in the Supreme Court of the United States* (New York), vol. VII (3rd ed.) (1911), p. 116.

¹¹⁵ *Ibid.*, pp. 143 and 145-146.

¹¹⁶ See also *Glass v. The Sloop "Betsey"* (1794) (A. J. Dallas, *Reports of Cases Ruled and Adjudged in the Several Courts of the United States and of Pennsylvania* (New York), vol. III (2nd ed.) (1912), p. 6); *Church v. Hubbard* (1804) (Cranch, *op. cit.*, vol. II (3rd ed.) (1911), p. 187); *The "Antelope"* (1825) (H. Wheaton, *Reports of Cases Argued and Adjudged in the Supreme Court of the United States* (New York), vol. X (4th ed.) (1911), pp. 66 and 122).

¹¹⁷ J. Hostie, "Contribution de la Cour suprême des Etats-Unis au développement du droit des gens", *Recueil des cours...*, 1939-III (Paris, Sirey), vol. 69 (1939), pp. 282-283.

¹¹⁸ The decision of Chief Justice Marshall in *The Schooner "Exchange"* was cited by the English Admiralty Court in *The "Prins Frederik"* (1820) (J. Dodson, *Reports of Cases Argued and Determined in the High Court of Admiralty* (London), vol. II (1815-1822) (1828), p. 451).

¹¹⁹ *The "Prins Frederik"* (1820) (see footnote 118 above). It was admitted by the parties that the *Prins Frederik* was a public ship of war, *armé en flûte*, owned by the King of the Netherlands and employed in the carriage of spices and other goods.

¹²⁰ *The Law Reports, Probate Division*, vol. IV (1879), p. 39.

¹²¹ See G. Gidel, *Le droit international public de la mer* (Paris, Sirey), vol. II (1932), p. 303.

¹²² See C. Baldoni, "Les navires de guerre dans les eaux territoriales étrangères", *Recueil des cours...*, 1938-III (Paris, Sirey), vol. 65 (1938), pp. 247 *et seq.*

Thus it came about that the immunities originally granted to States in respect of their public armed vessels were subsequently extended, notably in Anglo-American case-law, to all kinds of public ships which, at the outset, were not employed on commercial service but were later used for the carriage of cargoes as freight earners or in the carrying trade. Since the First World War, it has become common practice among modern coastal States to keep a merchant fleet or create and maintain a merchant marine in order better to promote the national economy and external or overseas trade in the severely competitive international markets of the world. In view of these ever-increasing maritime commercial activities of States, it has become more and more questionable whether the tendency to extend immunities in a sweeping manner could be justified on any logical or juridical grounds, if such an extension finds no firm support in the overall practice of States in general.

141. It is in the light of this question that the closest attention should be paid to contemporary State practice regarding the matter under consideration. It is not without interest to note that the practice of States has been neither logically consistent nor progressively harmonious. In fact, the attitude of one and the same State is often different as a claimant of immunity for its own merchant fleet, when it demands complete and unquestioning concession of State immunity in any circumstances, from when it displays more judicious deliberation and restraint in the recognition and granting of like immunities for foreign public vessels operated and employed by a State or one of its agencies exclusively on commercial and non-governmental service. It will be seen whether there is room for consistency or harmony, if not uniformity, in the general practice of States, taking into account the different political and economic structures and ideologies prevailing in various legal and social systems and the intermittent interplay of the concept and practice of reciprocity.

2. JUDICIAL PRACTICE

(a) *A brief historical sketch of relevant practice*

142. As has been noted in the general observations above, the immunities of States in respect of their public armed vessels were the first to have received judicial recognition, as early as 1812,¹²³ followed by recognition and endorsement in the practice of States. At that time, States were still employing their ships mainly for the purposes of defence. Even the protection of overseas trade with their colonial territories had an imperial ring sufficient to conjure up the official function of national defence or protection of the ships flying their flags. Such protection was considered necessary in international or foreign waters infested by countless fleets of pirate ships hunting for prey and bounty. Ships owned and operated by States originally had this basic function of policing the sea-ways or patrolling the sea lanes to ensure the safety of maritime transport or the safe conduct and undisturbed freedom of navigation for national ships.

¹²³ See *The Schooner "Exchange" v. McFaddon and others* (1812) (footnote 114 above).

143. Later on, States found it necessary and convenient to employ public ships not only to suppress piracy on the high seas, or outwardly to protect vessels flying their flags in peacetime as well as to engage in time of war in the arrest and seizure of foreign neutral or enemy ships as lawful prizes, but more practically in the performance of other public duties not necessarily connected with national defence, such as postal services,¹²⁴ or to serve as government pleasure yachts,¹²⁵ or as patrol boats to suppress illegal traffic or trade.¹²⁶ Immunities of public armed ships were gradually extended to all such vessels employed on public or governmental service. However, the First World War had necessitated the new practice. In order to ensure the supply of vital goods for areas affected by enemy blockade, Governments had to engage directly in the carriage and transport of such supplies as food, medicines, oil and other necessities for the sustenance of human life. The end of the First World War left States with seagoing vessels, freighters and tankers on hand, either publicly owned or privately owned but requisitioned, or seized from enemy fleets, to fulfil the wartime needs of the nation. Once engaged in the maritime trade and keenly aware of the need for such services, it was difficult for maritime nations to disengage themselves at the close of hostilities and to return to normalcy as if the war had never happened. The question to be asked in connection with the judicial practice of States is whether, and to what extent, vessels owned or operated by States exclusively on commercial and non-governmental service would be accorded immunities from the jurisdiction of the courts of another State.

144. The practice of various legal systems in the past appears to reveal a substantial reluctance to give full recognition to the need for such unqualified immunities. The qualification of immunities appears to have been centred on the nature of the service or the exclusive use of the vessel by a State for trading purposes, that is to say on commercial and non-governmental service. It is both crucial and useful to examine the judicial practice of States having the most favourable inclination towards an unqualified doctrine of State immunity. It should be borne in mind that, in some countries, such as in socialist legal systems, where government practice clearly favours an absolute rule of sovereign immunity for ships owned by the State itself regardless of their employment or the nature of their service, there has nevertheless been no judicial practice supporting the converse situation, where foreign States could be given recognition or accorded appropriate immunities for their vessels, however employed or regardless of the nature of their service. As no other judicial system could be said to have gone as far as the British and United States systems, it is only appropriate that the present investigation of judicial practice should begin with the so-called Anglo-American practice.

(i) *United Kingdom*

145. The case-law of the United Kingdom is probably the richest in the field of State immunities in respect of public

¹²⁴ For example, in *The "Parlement belge"* (1880) (see footnote 112 above), immunity was recognized for a mail packet.

¹²⁵ See, for example, *The "Newbattle"* (1885) (*The Law Reports, Probate Division*, vol. X (1885), p. 33).

vessels. It has indisputably shown the greatest propensity towards absolute or unqualified immunity in regard to State-owned or State-operated vessels. But this propensity belongs now to a remote past which is not likely to recur. As has been noted (paragraph 121 above), a process *in rem* against a ship, followed by arrest or detention, is considered to implead the owner. However, a process *in rem*, not followed by arrest or detention, could proceed against a vessel not owned by a foreign State but requisitioned by it. An historical survey of English case-law regarding immunities of foreign public vessels reveals an interesting phenomenon of uncertainty and changing positions in the practice of the courts.

146. English case-law began with a period of uncertainty from 1800 to 1873. Early nineteenth-century cases were concerned with prize law.¹²⁷ The "*Prins Frederik*" (1820)¹²⁸ was probably the first case involving a public ship of war, *armé en flûte*, owned by the King of the Netherlands; but the dispute was finally settled out of court by arbitration. Reported cases before 1873 had little or no bearing on public vessels employed in trade, since States had not generally employed their ships in the carriage of merchandise for freight. Cases like *The "Marquis of Huntley"* (1835),¹²⁹ *The "Athol"* (1842)¹³⁰ and *The "Thomas A. Scott"* (1864)¹³¹ were either concerned with ships of war or related to questions of municipal rather than international law.

147. The second period was from 1873 to 1880, that is to say between *The "Charkieh"* (1873)¹³² and *The "Parlement belge"* (1880).¹³³ This could be considered as corresponding to the acceptance of a restrictive rule of immunity. Sir Robert Phillimore, an unsurpassed authority on British admiralty law in the nineteenth century since Lord Stowell, held that the commercial nature of the service or employment of the vessel disentitled it to State immunity. Since the *Charkieh* was, *inter alia*, engaged in trading ventures, it was not accorded immunity. Another lesser ground for rejecting immunity was the fact that it was owned by the Khedive of Egypt, probably in his private capacity. Furthermore, it was chartered to a British subject at the time

the proceeding had started. Sir Robert Phillimore, in his oft-cited dictum, stated *per curiam*:

... No principle of international law, and no decided case, and no dictum of jurists of which I am aware, has gone so far as to authorise a sovereign prince to assume the character of a trader, when it is for his benefit; and when he incurs an obligation to a private subject to throw off, if I may so speak, his disguise, and appear as a sovereign, claiming for his own benefit, and to the injury of a private person, for the first time, all the attributes of his character.¹³⁴

148. The reign of restricted immunity was confirmed in regard to the domestic sovereign in *The "Cybele"* (1877)¹³⁵ by Sir Robert Phillimore himself, who also, in the later case of *The "Constitution"* (1879),¹³⁶ distinguished between an American vessel of war entitled to immunity, although at the critical time it was carrying cargo for the Paris Exhibition, and a public ship employed for commercial purposes, which would not be accorded jurisdictional immunity. Sir Robert Phillimore went a step further in the more controversial case *The "Parlement belge"* (1879),¹³⁷ concerning a ship used only partly, not exclusively, for commercial purposes.

149. His decision rejecting immunity was reversed in 1880¹³⁸ by the Court of Appeal, which, per Lord Justice Brett, accorded immunity on the grounds, *inter alia*, that

... the ship has been mainly used for the purpose of carrying the mails, and only subserviently to that main object for the purposes of trade. The carrying of passengers and merchandise has been subordinated to the duty of carrying the mails.¹³⁹

Besides, the *Parlement belge* was intrinsically a mail packet, owned by the King of Belgium in his sovereign capacity, and at no time was it exclusively employed on commercial and non-governmental service. Nevertheless, the reversal of Sir Robert Phillimore's decision by the Court of Appeal in 1880 marked a decline in the attractiveness of the restrictive doctrine and, owing to a system of rigid adherence to *stare decisis*, the 40-year period following *The "Parlement belge"* (1880)¹⁴⁰ until 1920 has been characterized perhaps less accurately as a period of uncertainty, with a tendency in favour of a more unqualified rule of State immunity. The uncertainty was more of an erroneous appreciation of the true nature of the service or the preponderant employment of the *Parlement belge* in the carriage of mail. In addition, under the bilateral treaty then in force between Belgium and the United Kingdom,

¹²⁶ See, for example, *The "Dictator"* (1892) (footnote 99 above); *The "Gemma"* (1899) (*ibid.*); and *The "Jassy"* (1906) (*The Law Reports, Probate Division, 1906*, p. 270).

¹²⁷ See, for example, *The "Twee Gebroeders"* (1800) (footnote 104 above); *The "Helen"* (1801) (*ibid.*); *The "Anna"* (1805) (C. Robinson, *op. cit.*, vol. V (1806), p. 373); *The "Comus"* (1816), referred to in connection with *The "Prins Frederik"* (Dodson, *op. cit.*, vol. II (1815-1822), p. 464). Cf. *The "Charkieh"* (1873) (footnote 132 below) and *The "Thomas A. Scott"* (1864) (*The Law Times Reports* (London), vol. X (March-September 1864), p. 726).

¹²⁸ See footnote 118 above.

¹²⁹ J. Haggard, *Reports of Cases Argued and Determined in the High Court of Admiralty* (London), vol. III (1833-1838) (1840), p. 246.

¹³⁰ W. Robinson, *Reports of Cases Argued and Determined in the High Court of Admiralty* (London), vol. I (1838-1842) (1844), p. 374. See also *The "Swallow"* (1856) and *The "Inflexible"* (1856) (M. C. Swabey, *Reports of Cases Decided in the High Court of Admiralty, 1855-1859* (London, 1860), pp. 30 and 32); and *The "Ticonderoga"* (1857) (Swabey, *op. cit.*, p. 215).

¹³¹ See footnote 127 above, *in fine*; the term "ships of war" was held to include a transport owned by a State.

¹³² *The Law Reports, High Court of Admiralty and Ecclesiastical Courts*, vol. IV (1985), p. 59; see also C. F. Gabba in *Journal du droit international privé* (Clunet) (Paris), vol. 17 (1890), p. 41.

¹³³ See footnote 138 below.

¹³⁴ *The Law Reports, High Court of Admiralty . . .*, vol. IV (1875), pp. 99-100.

¹³⁵ *The Law Reports, Probate Division*, vol. II (1877), p. 224. See also *Young, Master of SS "Furnesia" v. SS "Scotia"* (1903) (*The Law Reports, House of Lords . . .*, 1903, p. 505).

¹³⁶ See footnote 120 above.

¹³⁷ *The Law Reports, Probate Division*, vol. IV (1879), p. 129. After reviewing English and American cases, Judge Phillimore concluded that the *Parlement belge* was neither a ship of war nor a pleasure-boat and was thus not entitled to immunity.

¹³⁸ *Ibid.*, vol. V (1880), p. 197.

¹³⁹ *Ibid.*, p. 220.

¹⁴⁰ See footnote 138 above. See also F. Wharton, "Le cas du vapeur postal: le *Parlement belge*", *Revue de droit international et de législation comparée* (Paris), vol. XII (1880), p. 235.

mail packets such as the *Parlement belge*, regardless of its subsidiary employment, which was partly commercial, were to be treated as men-of-war for the purposes of jurisdictional immunities.¹⁴¹ Lord Justice Brett, after an intensive review of earlier cases, recognized that

... as a consequence of the absolute independence of every sovereign authority, ... each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the *public property** of any State which is destined to public use....¹⁴²

150. The principle thus laid down does not appear to be incompatible with a restrictive view of immunity, for the public property of a foreign State is further required to be destined for public use (*publicis usibus destinata*) or in use for public purposes in order to be entitled to State immunity. The case *Vavasseur v. Krupp* (1878)¹⁴³ was therefore cited in support of the view that the public property of a foreign sovereign in use for public purposes was exempt from the jurisdiction of English courts. The requirement of public use or public purposes of the public property was weakened by a further dictum of Lord Justice Brett in *The "Parlement belge"*, which contained a suggestion that a declaration of a foreign sovereign as to the nature or character of the use of his public property was determinative and was binding on the courts.¹⁴⁴ This suggestion was subsequently overruled by English courts in a series of much more recent cases, the first of which was *Juan Ysmael & Co. Inc. v. Government of the Republic of Indonesia* (1954).¹⁴⁵ In the meantime, however, a more unqualified rule of State immunity continued to assert itself in British practice in all its various aspects, except directly on the point under investigation, namely the exclusive use of public vessels on commercial and non-governmental service.

151. In the 40 years that followed *The "Parlement belge"* (1880), which have been classified as a period of uncertainty with a favourable tendency towards absolute immunity, and also for a few years after, a series of cases were decided which clarified a number of salient points regarding procedures in admiralty and the circumstances in which it could be said whether or not a foreign sovereign would be impleaded in a process *in rem* against a ship not

owned by a foreign sovereign, but in his possession, without other interests such as the right to possess.¹⁴⁶ Thus it follows that actions *in rem* could be brought against privately owned vessels at any time regardless of the actual employment by the State, provided that the proceedings did not relate to the activities of the State operating them, while actions *in personam* were equally permissible against the private owners in respect of acts unconnected with the employment by the State.¹⁴⁷ A writ *in rem* could be issued against a privately owned vessel which did nothing to interfere with the use of the vessel by the sovereign State.¹⁴⁸ An action *in rem* could be instituted against a requisitioned ship, but no arrest could be made while it was in public service or use or in the possession of a foreign Government.¹⁴⁹ It appears that the real purpose of this "suspended action *in rem*" was to enable a writ to issue, to prevent the running of time against the plaintiff, who would thus be able eventually to call the owner to account with the possibility of attaching the property when it reverted to him.¹⁵⁰ It follows that, after the termination of public service of a privately owned vessel, actions *in rem* which had been suspended could now proceed against the vessel inasmuch as they did not touch the personal liability of the foreign Government. Thus actions for salvage services have been allowed, while actions for damage by collision during the employment of the ship by a foreign State have been set aside for impleading the foreign State, as the State was responsible for the safe navigation of the ships, while in the former case the private owners had benefited from the salvage services.¹⁵¹ Lastly, it should also be noted that no maritime lien could attach to privately owned ships while in the public service of a foreign Government.¹⁵² Pre-existing maritime liens, prior to requisition or charter of a ship by the State, would be suspended during the term of State employment, after which they would once again become operative.¹⁵³

¹⁴¹ Article VI of the postal Convention of 17 February 1876 between the United Kingdom and Belgium provides:

"VI. ...

"These vessels shall be considered, and treated . . . as vessels of war, and be there entitled to all the honours and privileges which the interests and importance of the service in which they are employed demand.

"..."

(*British and Foreign State Papers, 1875-1876* (London), vol. LXVII (1883), p. 21). See also, concerning foreign mail packets, Lord McNair, *International Law Opinions* (Cambridge, University Press), vol. I (1956), pp. 95 *et seq.*

¹⁴² *Loc. cit.* (footnote 138 above), pp. 214-215.

¹⁴³ *The Law Reports, Chancery Division*, vol. IX (1878), p. 351. The case concerned quantities of shells bought in Germany by the Emperor of Japan. The shells were destined for use in guns to be fitted to battleships forming part of the Japanese imperial fleet.

¹⁴⁴ *Loc. cit.* (footnote 138 above), pp. 212-213.

¹⁴⁵ *The Law Reports, House of Lords* . . . , 1955, p. 72. Cf. the *Hong Kong Aircraft case* (1953) (*ibid.*, 1953, p. 70).

¹⁴⁶ See, for example, *The "Broadmayne"* (1916) (*Annual Digest of The Times Law Reports* (London), vol. XXXII, p. 304); *The "Messicano"* (1916) (*ibid.*, p. 159); *The "Erissos"* (1917) (*Lloyd's List* (London), 23 October 1917); *The "Eolo"* (1918) (*The Irish Law Reports*, vol. 2, p. 78); *The "Crimdon"* (1918) (*Annual Digest of The Times Law Reports*, vol. XXXV, p. 81); *The "Koursk"* (1918) (*Lloyd's List*, 19 June 1918); *The "Espozende"* (1918) (*ibid.*, 18 and 25 February 1918); and *The "Jupiter"* No. 1 (1924) (see footnote 99 above, *in fine*, and *Annual Digest* . . . , 1925-1926 (London), vol. 3 (1929), p. 136, case No. 100).

¹⁴⁷ See, for example, *The "Messicano"* (1916), *The "Erissos"* (1917) and *The "Crimdon"* (1918) (cases referred to in footnote 146 above).

¹⁴⁸ See the opinion of Judge Hill in *The "Crimdon"* (1918), (footnote 146 above).

¹⁴⁹ See the opinion of Sir Samuel Evans in *The "Messicano"* (1916) (*ibid.*).

¹⁵⁰ See *The "Gagara"* (1919) (*The Law Reports, Probate Division, 1919*, p. 95, especially p. 101). In this case, immunity was accorded to a ship requisitioned by the Estonian Government and which remained in its possession. Cf. the opinion expressed by Lord Justice Bankes in *The "Jupiter"* No. 1 (1924) (footnote 99 above), and the refusal of immunity in *The "Jupiter"* No. 2 (1925) (*The Law Reports, Probate Division, 1925*, p. 69), where the Soviet Government was no longer in possession of the *Jupiter* and claimed no interest in it.

¹⁵¹ See *The "Meandros"* (1924) (*The Law Reports, Probate Division, 1925*, p. 61). The owners were held liable for the salvage services rendered.

¹⁵² See *The "Sylvan Arrow"* (1923) (*ibid.*, 1923, p. 220). The personal liability *in rem* of a ship for a delict depended on the amenability to the local jurisdiction of the persons operating it.

¹⁵³ See also *The "Tervaete"* (1922) (*ibid.*, 1922, pp. 197 and 259); *The*

152. It is interesting to note that, on the eve of 1920, Judge Hill made a suggestion in *The "Annette"; The "Dora"* (1919)¹⁵⁴ that a ship chartered or requisitioned by a Government and merely employed in ordinary trading voyages was to enjoy no immunity. This commendable suggestion was rejected by the Court of Appeal the following year in *The "Porto Alexandre"* (1920).¹⁵⁵ The *Porto Alexandre* was formerly a German privately-owned vessel named the *Ingbert*, adjudged lawful prize by the Portuguese Prize Court in 1917. She had earlier been requisitioned by the Portuguese Government and handed over to the Committee of Services of the Transportes Marítimos do Estado (TMDE)¹⁵⁶ and had since been employed exclusively in ordinary trading operations, earning freight for the Government. In the Admiralty Division of the High Court, Judge Hill declined jurisdiction, setting aside the writ *in rem* against the ship, her cargo and freight, and against her owners in so far as the ship and freight were concerned, pointing out the undesirability of such hard cases, but having to assert then what he "conceived to be the law".¹⁵⁷ Absolute immunity was applied with reluctance. The Court of Appeal showed no less hesitation in confirming this decision. Lord Justice Bankes felt the difficulty but deemed himself, rightly or wrongly, bound by the decision of the same court in *The "Parlement belge"*.¹⁵⁸ Lord Justice Warrington was of a similar opinion.¹⁵⁹ Lord Justice Scrutton appreciated the difficulty and shared the doubts felt by Judge Hill in the court below, but refused the judicial remedy sought and went out of his way to suggest some practical remedies which were extra-legal. He observed: "no one can shut his eyes, now that the fashion of nationalization is in the air . . . and if these national ships wander about without liabilities, many trading affairs will become difficult".¹⁶⁰ The phrase *publicis usibus destinata* was much discussed, while on the whole Judge Hill and the Court of Appeal appear to have gratuitously declared themselves bound by the authority of *The "Parlement belge"*. The principles favouring an absolute view of State immunity as laid down in *The "Porto Alexandre"* were admitted by counsel in *The "Jupiter"* No. 1 (1924)¹⁶¹ without any argument and were applied in subsequent cases,

"*Utopia*" (1893) (*The Law Reports, House of Lords . . . , 1893*, p. 492), especially the opinion of Sir Francis Jeune (pp. 497 and 499); and *The "Castlegate"* (1892) (*ibid.*, p. 38), especially the opinion of Lord Watson (p. 52).

¹⁵⁴ *The Law Reports, Probate Division, 1919*, p. 105 especially pp. 112-113.

¹⁵⁵ *Ibid.*, 1920, p. 30.

¹⁵⁶ An organization similar to the United States Shipping Board (USSB).

¹⁵⁷ *The Law Reports, Probate Division, 1920*, p. 31.

¹⁵⁸ Lord Justice Bankes stated:

"But in modern times sovereigns have taken to owning ships, which may . . . be employed as ordinary trading vessels engaged in ordinary trading. The fact of itself indicates the growing importance of the particular question, if vessels so employed are free from arrest." (*Ibid.*, p. 34.)

¹⁵⁹ *Ibid.*, pp. 35-36.

¹⁶⁰ *Ibid.*, pp. 38-39. An accurate résumé of the position in English case-law before 1921 is given in A. D. McNair, "Judicial recognition of States and Governments and the immunity of public ships", *British Year Book of International Law, 1921-22* (London), vol. 2, p. 74 (d) and (e); cf. W. R. Bisschop, "Immunity of States in maritime law", *ibid.*, 1922-23, vol. 3, p. 159.

¹⁶¹ See footnote 99 above.

such as *Compañía Mercantil Argentina v. United States Shipping Board* (1924).¹⁶² This rule was applied in a long line of recognition cases during the Spanish civil war.¹⁶³

153. The next period in the history of English case-law on the point under review started with *The "Cristina"* (1938).¹⁶⁴ It was another period of uncertainty, with tendencies towards more and more restrictions, culminating in the final confirmation of absence of State immunity in respect of ships employed by a foreign State exclusively on commercial and non-governmental service. *The "Cristina"* was a turning-point in 1938; the vessel was in use for public purposes and not employed in trading voyages. The five Law Lords in the House of Lords took occasion to express their views on the question. State immunity was allowed for privately owned ships chartered or requisitioned by foreign States. It was held, per Lord Atkin, that the courts would not, by their process, seize or detain "property which is . . . [the sovereign's] or of which he is in possession or control".¹⁶⁵ In his view, immunity would have applied also to public property used for purely commercial purposes. That view was shared also by Lord Wright, approving the correctness of the judgment of the Court of Appeal in *The "Porto Alexandre"* (1920)¹⁶⁶ and the decision of the United States Supreme Court in *The "Pesaro"* (1926),¹⁶⁷ but observing: "This modern development of the immunity of public ships has not escaped severe, and, in my opinion, justifiable criticism on practical grounds of policy, at least as applied in times of peace."¹⁶⁸ Lord Macmillan reserved his opinion, and expressed his doubts:

I confess that I should hesitate to lay down that it is part of the Law of England that an ordinary foreign trading vessel is immune from civil process within this realm by reason merely of the fact that it is owned by a foreign State, for such a principle must be an importation from international law and there is no proved consensus of international opinion or practice to this effect.¹⁶⁹

154. This marked absence of consensus of international opinion or practice seems to go a long way towards denying any pre-existing principle of State immunity for vessels employed by foreign Governments exclusively in trading

¹⁶² *Law Journal Reports, 1924, King's Bench Division* (London), vol. 93, p. 816; *Annual Digest . . . , 1923-24* (London), vol. 2 (1933), p. 138, case No. 73.

¹⁶³ See, for example, *The "El Condato"* (1937) (*Lloyd's List Law Reports* (London), vol. 59 (1937), p. 119); *The "Rita García"* (1937) (*ibid.*, p. 140); *The "Arraiz"* (1938) (*ibid.*, vol. 61 (1938), p. 39); *The "El Neptuno"* (1938) (*ibid.*, vol. 62 (1938), p. 7); *The "Arantzazu Mendi"* (1939) (*The Law Reports, House of Lords . . . , 1939*, p. 256); *The "Abodi Mendi"* (1939) (*The Law Reports, Probate Division, 1939*, p. 178); *The "Kabalo"* (1940) (*Lloyd's List Law Reports*, vol. 67 (1940), p. 572). See also *Annual Digest . . . , 1938-1940* (London), vol. 9 (1942), cases Nos. 25 and 88-92.

¹⁶⁴ *The Law Reports, House of Lords . . . , 1938*, p. 485. See also H. Lauterpacht, "The Cristina", *The Law Quarterly Review* (London), vol. LIV (1938), p. 339; F. A. Mann, "Immunity of foreign States", *The Modern Law Review* (London), vol. II (1938-1939), p. 57; R. Y. Jennings, "Recognition and sovereign immunities", *ibid.*, p. 287; note in *The British Year Book of International Law, 1938* (London), vol. 19, pp. 243-249.

¹⁶⁵ *The Law Reports, House of Lords . . . , 1938*, p. 490.

¹⁶⁶ See footnote 155 above.

¹⁶⁷ See footnote 179 below.

¹⁶⁸ *The Law Reports, House of Lords . . . , 1938*, p. 512.

¹⁶⁹ *Ibid.*, p. 498.

voyages. Thus Lord Thankerton and Lord Maugham shared the view that *The "Parlement belge"* did not actually lay down the principle of immunity of State-trading vessels, and that the decision in that case was misinterpreted by Judge Hill and the Court of Appeal in *The "Porto Alexandre"*. Lord Thankerton said: "... I express no opinion on the matter, but I desire to make clear that I hold myself free to reconsider the decision in *The "Porto Alexandre"*."¹⁷⁰ Lord Maugham entertained no doubt that, had the *Parlement belge* been used solely for trading purposes, the decision would have gone the other way, and considered that it was "high time steps were taken to put an end to a state of things which in addition to being anomalous is most unjust to our own nationals".¹⁷¹

155. What it was high time to do in 1938 according to Lord Maugham, whose opinion was "shared by many judges and by nearly all persons engaged in maritime pursuits",¹⁷² took more than four decades to accomplish, before a final judicial confirmation was delivered by the House of Lords in the much awaited decision in *The "I Congreso del Partido"* (1981).¹⁷³ This judicious *coup de grâce* was in fact preceded or superseded, if not conceded, by the United Kingdom's ratification of the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, signed at Brussels in 1926, and of its 1934 Protocol, with effect on 3 January 1980, more than half a century after signature.¹⁷⁴ The decision in *The "I Congreso del Partido"* was final and the judgment decisive on the question at issue, although the basis for the assumption and exercise of sister-ship jurisdiction is not completely free from controversy. The House of Lords, reversing the decision of the Court of Appeal (1979)¹⁷⁵ and allowing the appeals, held:

(a) That, at the time of the transactions (before the common law was superseded by the *State Immunity Act 1978*), restrictions were applied to the scope of sovereignty to permit individuals with whom sovereign States had entered into commercial transactions to bring such transactions before the court; but where the act complained of was sovereign, and not a private commercial act, it could not be challenged, and in deciding into which category the act fell municipal courts, conforming to accepted international standards, had to consider the whole context.

(b) That, in accordance with those principles, the restrictive doctrine of sovereign immunity applied (i) to the case of the *Playa Larga*, since, in taking her out of Chilean waters for her own safety, no governmental authority was invoked, even though the instruction might not have been given had the owner not been the Republic of Cuba, and also (ii) (Lord Wilberforce and Lord Edmund-Davies dissenting) to the case of the *Marble Islands*, since the right asserted by the master to sell the perishable cargo in Vietnam was based by him on the contractual terms of the bills of lading and the law of Cuba.¹⁷⁶

156. The House of Lords thus applied common-law principles as they existed before the entry into force of the *State*

Immunity Act 1978 and before ratification by the United Kingdom of the 1926 Brussels Convention and its 1934 Protocol. The decisions in *The "Philippine Admiral"* (1975)¹⁷⁷ and *Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria* (1977)¹⁷⁸ were applied, thereby putting an end once and for all to whatever doubts and hesitations might have lingered in the past regarding the judicial practice of the United Kingdom. It can no longer be said that the case-law of the United Kingdom supports an absolute theory of immunity to the extent that a vessel, employed wholly on commercial and non-governmental service, whether Government-owned or State-operated, would be entitled to immunity from actions *in rem* or from arrest and detention by English courts.

(ii) *United States of America*

157. The practice of United States courts has also been marked by a quaint doctrine of unqualified State immunity. The strongest trace of an "absolute" view of sovereign immunity in the present connection could be found in the decision of the Supreme Court in *Berizzi Brothers Co. v. SS "Pesaro"* (*The "Pesaro"*) (1926),¹⁷⁹ refusing to adopt the suggestion of the State Department that immunity should not be accorded to vessels employed by a foreign Government in commercial operations.¹⁸⁰ The practice of American courts also allows actions *in rem* against a ship having a personalized responsibility. For all acts connected with the ship, the ship and its owners are jointly and severally answerable. In addition to this somewhat "noxal" liability of shipowners, the ship as such may be liable for the tortious acts of anyone who is lawfully in possession of the ship and directs its navigation, be that person charterer, agent or crew.¹⁸¹ As for foreign State-owned vessels, the rules of the English Admiralty Court seem to have been adopted to the extent that the legal personality of a publicly owned ship merged into that of the State.¹⁸² Although, as

¹⁷⁷ *The Law Reports, House of Lords*... 1977, p. 373. Lord Wilberforce regarded *The "Philippine Admiral"* as one of the two landmark cases in the history of English case-law. The Judicial Committee of the Privy Council, in an appeal from Hong Kong, declined to follow *The "Porto Alexandre"* (1920) (see footnote 155 above) and decided to apply the "restrictive doctrine to an action *in rem* against a State-owned trading vessel". In a comprehensive judgment delivered on behalf of the Board, it was said that to do so was more consonant with justice. Lord Wilberforce did not limit the application of the restrictive doctrine to actions commenced *in rem* but regarded it as applicable to nations generally (*The All England Law Reports*, 1981, vol. 2, pp. 1069-1070).

¹⁷⁸ *The All England Law Reports*, 1977, vol. 1, p. 881. The decision of the Court of Appeal upheld general application of the "restrictive" theory.

¹⁷⁹ *United States Reports*, vol. 271 (1927), p. 562.

¹⁸⁰ A suggestion made by Secretary of State Lansing in his letter of 8 November 1918 to Attorney-General Gregory. In his reply of 25 November 1918, the Attorney-General refused to adopt that suggestion, stating: "The Department of Justice is convinced that, as the law now stands, these ships [foreign State-trading vessels] are immune." (See G. H. Hackworth, *Digest of International Law* (Washington, D.C.), vol. II (1941), pp. 429-430.)

¹⁸¹ See, for example, *The "Attualità"* (1961) (*The Federal Reporter*, vol. 238 (1917), p. 909); *The "Siren"* (1868) (J. W. Wallace, *Cases Argued and Adjudged in the Supreme Court of the United States* (New York), vol. VII (1903), p. 152).

¹⁸² See *The "Western Maid"* (1922) (*United States Reports*, vol. 257 (1922), p. 419), where, according to Judge Holmes (p. 433): "It may be said

¹⁷⁰ *Ibid.*, p. 496.

¹⁷¹ *Ibid.*, p. 521.

¹⁷² *Ibid.*

¹⁷³ *The All England Law Reports*, 1981, vol. 2, p. 1064.

¹⁷⁴ See footnotes 294 and 299 below.

¹⁷⁵ *The All England Law Reports*, 1981, vol. 1, p. 1092.

¹⁷⁶ *Ibid.*, vol. 2, pp. 1066-1083, opinions of Lord Wilberforce, Lord Diplock, Lord Edmund-Davies, Lord Keith of Kinkel and Lord Bridge of Harwich.

Judge Julian Mack of the United States Southern District Court of New York pointed out in *The "Pesaro"* (1921),¹⁸³ the English criterion of "public property" has not been accepted by American courts as the basis of immunity for property of foreign Governments. The actual possession or control by foreign Governments seems to offer a solid ground for immunity of public vessels. Thus, in *The "Carlo Poma"* (1919), the court said, with reference to English law: "The law of the United States is the same, except that the immunity of property of a sovereign, whether the United States or foreign sovereign, depends, not merely upon ownership, but also upon the actual possession by the sovereign of the property at the time process is served."¹⁸⁴

158. The ground upon which the Supreme Court disclaimed jurisdiction in the leading case concerning the *Pesaro* is to be found in the ownership and actual possession of the vessel by the Italian Government and its operation by the foreign sovereign in its service and interest, although the vessel was described as a general ship engaged in the common carriage of merchandise for hire. The Supreme Court was particularly timid in its treatment of this delicate subject of the immunities of State-trading vessels. Mr. Justice Van Devanter made the following observation:

We think the principles are applicable alike to all ships held and used by a Government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a Government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that warships are. We know of no international usage which regards the maintenance and advancement of economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force.¹⁸⁵

159. For a brief spell following *The "Pesaro"* the suggestion of the double character of States was rejected by the Supreme Court, for unlike sovereigns and ambassadors, States could act only in their public and sovereign capacities.¹⁸⁶ Nevertheless, ownership and actual possession or operation of a ship might have more than one continuing capacity in the life span of a ship, which may remain within or outside the possession of, or use by, the State owning it.

that . . . the ship for this purpose is regarded as a person. . . . The personality of a public vessel is merged in that of the sovereign." See also *The "Fidelity"* (1879) (S. Blatchford, *Reports of Cases Argued and Determined in the Circuit Court of the United States, Second Circuit* (New York), vol. XVI (1880), p. 569); *Ex parte State of New York* (1921) (*United States Reports*, vol. 256 (1922), p. 503).

¹⁸³ *The Federal Reporter*, vol. 277 (1922), p. 473.

¹⁸⁴ *Ibid.*, vol. 259 (1920), p. 369, at p. 370.

¹⁸⁵ *Berizzi Brothers Co. v. SS "Pesaro"* (1926) (*United States Reports*, vol. 271 (1927), p. 574); see the opinion of the court as stated by Mr. Justice Van Devanter (*ibid.*, pp. 569 *et seq.*). Cf. *Ex parte in the Matter of Muir, Master of the "Gleneden"* (1921) (*ibid.*, vol. 254 (1921), p. 531); and *Ex parte in the Matter of Hussein Lutfi Bey, Master of the "Gul Djemal"* (1921) (*ibid.*, vol. 256 (1922), p. 619). *The "Parlement belge"* (1880), *The "Porto Alexandre"* (1920) and a number of other English decisions in support of immunity for public merchant vessels were cited with approval.

¹⁸⁶ Cf. *Berizzi Brothers Co. v. SS "Pesaro"* (1926) (see footnote 179 above). In *Briggs v. Light-Boats* (1865) (C. Allen, *Reports of Cases Argued and Determined in the Supreme Judicial Court of Massachusetts* (Boston), vol. XI (1878), p. 163), Justice Gray stated: "These vessels were not held by the United States, as property might perhaps be held by a monarch, in a private or personal rather than in a public or political character. They were . . . held and owned by the United States for public uses."

The decision in *The "Pesaro"* may be regarded as having been decisive for a very brief period during which it was not altogether free from reservation and controversy. Indeed, the Supreme Court¹⁸⁷ and the Department of Justice¹⁸⁸ appeared to hold similar views, whereas Judge Julian Mack in the District Court¹⁸⁹ and the Department of State seemed to have a different theory.¹⁹⁰ The attitude of the State Department is reflected in the letter of 2 August 1921 from Mr. Nielsen, Solicitor for the Department of State, to Judge Mack, stating:

It is the view of the Department that government-owned merchant vessels or vessels under requisition of governments whose flag they fly employed in commerce should not be regarded as entitled to the immunities accorded public vessels of war. The Department has not claimed immunity for American vessels of this character. In cases of private litigation in American ports involving merchant vessels owned by foreign governments, the Department has made it a practice carefully to refrain from taking any action which might constitute an interference by the authorities of this Government in such litigation.¹⁹¹

160. The triumph of the Supreme Court over the State Department in matters affecting foreign relations appeared to be short-lived. The temporary victory of the judiciary was attributable partly to the prevailing view of American judges of that period that "it is for the foreign government and not for the court to decide whether a merchant ship is public or private, or whether an act of the foreign government is governmental or non-governmental".¹⁹² Judge Mack's dichotomy as a basis of restricted immunity was thus rejected on mechanical or formal as opposed to substantive grounds. The role of the American executive in this connection became clearly recognized in the lucid dictum of Chief Justice Stone in *Republic of Mexico et al. v. Hoffman* (1945), where he said: "It is therefore not for the

¹⁸⁷ *Berizzi Brothers Co. v. SS "Pesaro"* (1926) (see footnote 179 above).

¹⁸⁸ See, for example, Attorney-General Gregory's letter of 25 November 1918 (footnote 180 above).

¹⁸⁹ *The "Pesaro"* (1921) (see footnote 183 above).

¹⁹⁰ See the suggestion made by Secretary of State Lansing in his letter of 8 November 1918, and the Attorney-General's refusal to adopt that suggestion (footnote 180 above). See also *Sloan Shipyards Corporation et al. v. United States Shipping Board* (1922) (*United States Reports*, vol. 258 (1923), p. 549); the State Department's reply to the Italian Ambassador regarding the arrest of the *Pesaro* (see Hackworth, *op. cit.*, p. 437); Secretary of State Hughes's instructions to United States diplomatic and consular officers, "General Instructions, consular, No. 871", of 11 January 1923 (*ibid.*, p. 440); and the State Department's decisions regarding the merchant vessels *Chaco* (1918), owned by the Argentine State, and *Dio* (1919), owned by the United States (*ibid.*, pp. 460-461).

¹⁹¹ See Hackworth, *op. cit.*, pp. 438-439. See also the United States *Shipping Act, 1916* (*The Statutes at Large of the United States of America from December 1915 to March 1917*, vol. XXXIX, part 1, chap. 451, pp. 728 and 730-731), section 9 of which provides: "Every vessel purchased, chartered or leased from the board . . . while employed solely as merchant vessels shall be subject to all laws, regulations and liabilities governing merchant vessels . . ." This provision must be read subject to section 7 of the *Suits in Admiralty Act, 1920* (*The Statutes at Large . . . from May 1919 to March 1921*, vol. XLI, part 1, chap. 95, pp. 525 and 527); see also "Special instruction, consular, No. 722", of 21 May 1920 (Hackworth, *op. cit.*, p. 434), as well as the inquiry made by the British Ambassador as to the interpretation of section 7, and the reply by the State Department (*ibid.*, pp. 440-441).

¹⁹² For example, in *The "Roseric"* (1918) (*The Federal Reporter*, vol. 254 (1919), p. 154), the court declared (p. 158): "Such idea [the privilege] is as cogently applicable to an unarmed vessel . . . as it is to one of his [the sovereign's] battleships."

courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."¹⁹³ American judges were predisposed to regard the interpretation of a foreign State's use of its vessels as a matter of diplomatic rather than judicial determination.¹⁹⁴ The judicial primacy in this field has therefore been relegated. The trend in the Supreme Court in favour of following the lead of the political branch of the Government in this connection is significant in view of the restatement of the policy of the United States Government limiting immunity in certain classes of case, as enunciated in the famous Tate Letter of 19 May 1952.¹⁹⁵

161. The Tate Letter put an end to any lingering doubts regarding the policy to be followed by the executive, as well as by the courts. Restricted immunity based on a distinction between public acts (*jure imperii*) and private acts (*jure gestionis*) was adopted and the practice of the State Department of making suggestions of immunity gradually developed. The role of the judiciary became that of a "second chamber", and the practice of pre-trial by the political branch of the Government grew, until it became too onerous to maintain.¹⁹⁶ Thus the legislative branch of the Government intervened to restore a new balance in the form of the *Foreign Sovereign Immunities Act of 1976*.¹⁹⁷ The determination of questions of jurisdictional immunities and their extent was once again restored to the original authority, namely the judiciary, with far less likelihood of interventions by the executive branch of the Government.¹⁹⁸ What is clear, however, is that, since the Tate

Letter (1952), it has become settled law in the practice of the United States that State ships operated exclusively on commercial and non-governmental service are not granted immunities from seizure, attachment or detention.

162. It should also be observed that, even prior to and during the period between *Berizzi Brothers Co. v. SS "Pesaro"* (1926)¹⁹⁹ and the dictum of Chief Justice Stone in *Republic of Mexico et al. v. Hoffman* (1945),²⁰⁰ when ships employed by foreign Governments exclusively on commercial and governmental service were accorded immunity from the jurisdiction of United States courts, immunity was subject to further restrictions and qualifications. Unlike English practice, which gave prominence to ownership by a foreign sovereign, United States practice based immunity on actual possession. Thus immunity was recognized if the ship was either owned and possessed, or merely possessed and controlled or managed by a foreign Government, as in *The "Roseric"* (1918)²⁰¹ and *The "Carlo Poma"* (1919).²⁰² Conversely, immunity was denied in cases like *The "Attualità"* (1916)²⁰³ and *The "Beaverton"; the "Daisai Maru"* (1919),²⁰⁴ where the ship in question was neither owned, nor possessed, nor operated by the State, though it was chartered or requisitioned by it. The requirement of actual possession as evidence of dedication to public service was regarded as determinative. In United States law, property does not necessarily become a part of the sovereignty because it is owned by the sovereign. To make it so it must be devoted to the public use and must be employed in carrying on the operations of the Government.²⁰⁵

163. There are also strict requirements as to the methods of claiming immunity in United States practice. Not only must immunity be positively claimed, but also it must be properly claimed according to the *lex fori*.²⁰⁶ Immunity would not be considered *d'office* or *proprio motu* but must be claimed through a proper channel, otherwise it could not be considered by reason of inadmissibility of evidence.²⁰⁷ Immunity of a public ship may be effectively

¹⁹³ *United States Reports*, vol. 324 (1946), p. 30, at p. 35. Cf. the opinion of Chief Justice Stone in *Ex parte Republic of Peru* (1943) (*ibid.*, vol. 318 (1943), p. 578, at pp. 588-589). See also *F. W. Stone Engineering Co. v. Petróleos Mexicanos* (1945) (*Pennsylvania State Reports*, vol. 352 (1946), p. 12; *Annual Digest* . . ., 1946 (London), vol. 13 (1951), p. 76, case No. 31); *United States of Mexico et al. v. Peter Schmuck et al.* (1944) (*Reports of Cases Decided in the Court of Appeals of the State of New York*, vol. 293 (1945), p. 264; *Annual Digest* . . ., 1943-1945 (London), vol. 12 (1949), p. 75, case No. 21); A. B. Lyons, "The conclusiveness of the 'suggestion' and certificate of the American State Department", *The British Year Book of International Law*, 1947 (London), vol. 24, p. 116.

¹⁹⁴ For example, in *The "Maipo"* (1919) (*The Federal Reporter*, vol. 259 (1920), p. 367), Judge Hough considered that, if a Government engaged in trade, it should be subject to the same liabilities as private individuals, but this would invoke the Chilean Government's interpretation of what was a public function. It was, as such, a matter of diplomatic rather than judicial determination. Cf. *The "Roseric"* (1918) (footnote 192 above).

¹⁹⁵ *The Department of State Bulletin* (Washington, D.C.), vol. XXVI, No. 678 (23 June 1952), pp. 984-985. See also W. W. Bishop, Jr., "New United States policy limiting sovereign immunity", *The American Journal of International Law* (Washington, D.C.), vol. 47 (1953), p. 93.

¹⁹⁶ Pre-1976 judicial practice was to a greater or lesser extent influenced by the "views" or "suggestions" of the executive branch of the Government, especially when they were favourable to the granting of immunity. See *Chemical Natural Resources v. Republic of Venezuela* (1966) (*International Law Reports* (London), vol. 42 (1971), p. 119); *Isbrandtsen Tankers v. President of India* (1970) (*International Legal Materials* (Washington, D.C.), vol. X, No. 5 (September 1971), p. 1046); *Amkor Corporation v. Bank of Korea* (1969) (*International Law Reports* (Cambridge), vol. 53 (1979), p. 291).

¹⁹⁷ See footnote 282 below.

¹⁹⁸ The procedure still exists for foreign Governments to ask the State Department to intervene through the Department of Justice as *amicus curiae*. See, for example, *Maritime International Nominees Establishment v. Republic of Guinea* (1982) (footnote 38 above), in which the United States of America was an intervener; the conclusions of the United States are reproduced in *International Legal Materials* (Washington, D.C.), vol. XX, No. 6 (November 1981), pp. 1436 *et seq.*

¹⁹⁹ See footnote 179 above.

²⁰⁰ See footnote 193 above.

²⁰¹ See footnote 192 above.

²⁰² See footnote 184 above.

²⁰³ See footnote 181 above. See also *The "Mina"; the "Attualità"* (1917) (*The Federal Reporter*, vol. 241 (1917), p. 530). Cf. *Maru Navigation Co. v. Società Commerciale Italiana di Navigazione* (1921) (*ibid.*, vol. 271 (1921), p. 97).

²⁰⁴ *The Federal Reporter*, vol. 273 (1921), p. 539; this decision followed *United States v. Wilder* (1838) (*The Federal Cases*, vol. 28 (1896), p. 601, case No. 16,694) and *The Johnson Lighterage Co. No. 24* (1916) (*The Federal Reporter*, vol. 231 (1916), p. 365).

²⁰⁵ Opinion of Chief Justice Waite in *The "Fidelity"* (1879) (see footnote 182 above); see the opinion of Chief Justice Stone in *Republic of Mexico et al. v. Hoffman* (1945) (*loc. cit.* (footnote 193 above), p. 37). See also *The "Davis"* (1869) (Wallace, *op. cit.*, vol. X (1909), p. 15); *Long v. the "Tampico"* (1883) (*The Federal Reporter*, vol. 16 (1883), p. 491, especially pp. 493-494); *The "Uxmal"* (1941) (*Federal Supplement*, vol. 40 (1942), p. 258); *The "Katingo Hadjipatera"* (1941) (*ibid.*, p. 546; on appeal, *Federal Reporter*, 2d Series, vol. 119 (1941), p. 1022; and *United States Reports*, vol. 313 (1941), p. 593); *The "Ljubica Matkovic"* (1943) (*Federal Supplement*, vol. 49 (1943), p. 936).

²⁰⁶ Unlike United States practice, British courts, instead of qualifying the methods of claiming immunity, have laid down stricter requirements for a valid waiver of immunity.

²⁰⁷ *Società Commerciale Italiana di Navigazione v. Maru Navigation Co. (The "St. Charles"; The "Tea"; The "Armando")* (1922) (*The Federal*

claimed through the diplomatic channel,²⁰⁸ or by direct intervention of the foreign Government concerned,²⁰⁹ alternatively, the public status of the ship may be brought to the notice of the courts by the State Department.²¹⁰ Immunity has been withheld where the claim was represented by the master of the ship or by private counsel,²¹¹ or by a consul²¹² or by an ambassador of a third country.²¹³

(iii) France

164. The position of public vessels in France is different from that in the Anglo-American world. France does not recognize admiralty actions *in rem*. Damage resulting from the use of government vessels generally entails actions *in personam* against the State owning the ships or the captain commanding the vessels.²¹⁴ Immunity of public ships *per se* is considered only in connection with their liability to seizure, either in a *saisie conservatoire* or *préliminaire* or *préventive*, or in a *saisie exécutoire* or *exécution* or *définitive*.²¹⁵ Owing to certain technicalities of a *saisie conservatoire*, attachments of public vessels have been frequent, while cases arising from a *saisie exécutoire* have been comparatively rare,²¹⁶ and would have closer relations to part IV of the draft articles than to the present study.

Reporter, vol. 280 (1922), p. 334); *The "Uxmal"* (1941) (see footnote 205 above).

²⁰⁸ See, for example, *The "Maipo"* (1918) (*The Federal Reporter*, vol. 252 (1919), p. 627); *The "Maipo"* (1919) (*ibid.*, vol. 259 (1920), p. 367); *The "Rogdai"* (1920) (*ibid.*, vol. 278 (1922), p. 294); *Berizzi Brothers Co. v. SS "Pesaro"* (1926) (footnote 179 above). *The "Secundus"* (1926) (*The Federal Reporter, 2d Series*, vol. 13 (1926), p. 469; *ibid.*, vol. 15 (1927), p. 711).

²⁰⁹ *Fields v. Predionica i Tkanica* (1941) (*New York Supplement, 2d Series*, vol. 31 (1942), p. 739).

²¹⁰ *The "Florence H."* (1918) (*The Federal Reporter*, vol. 248 (1918), p. 1012); *The "Lake Monroe"* (1919) (*United States Reports*, vol. 250 (1923), p. 246); *The "Western Maid"* (1922) (see footnote 182 above).

²¹¹ See, for example, *Ex parte in the Matter of Muir, Master of the "Gleneden"* (1921) (footnote 185 above); *The "Roseric"* (1918) (footnote 192 above).

²¹² See, for example, *The "São Vicente"*, *The "Murmugão"*—*Rose v. Transportes Marítimos do Estado* (1922) (*The Federal Reporter*, vol. 281 (1922), p. 111); *The "São Vicente"*—*Transportes Marítimos do Estado v. T. A. Scott Co.* (1924) (*ibid.*, vol. 295 (1924), p. 829).

²¹³ See, for example, *The "Gul Djemal"* (1920) (1922) (*The Federal Reporter*, vol. 296 (1924), pp. 563 and 567); *The "Gul Djemal"* (1924) (*United States Reports*, vol. 264 (1924), p. 90). During suspension or severance of diplomatic relations between the United States and Turkey, the Spanish Ambassador could not claim immunity for a merchant ship operated by the Turkish Government. Such a claim should be made through the United States Department of State.

²¹⁴ See, for example, *The "Hungerford"* (1918) (1919) (footnote 222 below); cf. E. W. Allen, *The Position of Foreign States before French Courts* (New York, Macmillan, 1929); and C. J. Hamson, "Immunity of foreign States: the practice of the French courts", *The British Year Book of International Law, 1950* (London), vol. 27, p. 293.

²¹⁵ A *saisie conservatoire* is by way of *cautio iudicatum solvi*, i.e. security for judgment. In commercial cases, any creditor who has a reasonable fear of the debtor's insolvency may apply for such a *saisie* without the appearance of the defendant. A *saisie exécutoire* is an attachment in execution of a judgment rendered against the owner or possessor of the property seized.

²¹⁶ A *saisie préliminaire* is a *fait accompli* before the owner has a chance to assert his public status, while a *saisie conservatoire* against State-owned property is generally not allowed. See *Veuve Caratier-Terrasson v. Direction générale des chemins de fer d'Alsace-Lorraine* (1885) (Dalloz, *Recueil périodique et critique de jurisprudence*, 1885 (Paris), part I, p. 341); *Battarel v. Ephrussi* (1889) (*Journal du droit international privé* (Clunet)

165. Before the First World War, French courts appear to have applied a principle of unqualified immunity. Since then, the contradiction between the principle of inviolability of State-owned property²¹⁷ and the application of the distinction between *actes de puissance publique* and *actes de gestion privée* or *actes de commerce*²¹⁸ has given rise to considerable inconsistency in the judicial practice of France with regard to the immunity from arrest and attachment of foreign public vessels employed exclusively in commerce—*dans un but commercial et non gouvernemental*. In *The "Campos"* (1919),²¹⁹ *The SS "Balosaro"* (1919)²²⁰ and *The "Englewood"* (1920),²²¹ there were traces of a more absolute principle being applied, as it was held that ships employed by foreign States for trading purposes could not be seized or attached.

166. Such traces were overshadowed by the distinction formulated in *The "Hungerford"* (1918) by the Tribunal de commerce of Nantes between State ships employed for public purposes and vessels employed in ordinary trading voyages. Although the judgment of the commercial court was reversed by the Court of Appeal of Rennes (1919), the distinction formulated was restated and adopted. At the time the proceedings started, the *Hungerford*, a merchant ship requisitioned by the British Admiralty, was carrying a cargo of wheat and wool for the British and French Governments. It was therefore conceivable, as was found by the Court of Appeal of Rennes, that the *Hungerford* was employed in public law activities.²²² The distinction was upheld in a number of subsequent cases.²²³

167. It is of interest to note that, although France had signed the 1926 Brussels Convention, but was not to ratify it until 1955, the Tribunal de commerce of La Rochelle, in *Etienne v. Gouvernement des Pays-Bas* (1947),²²⁴

(Paris), vol. 16 (1889), p. 461); but see J. G. Castel, "Immunity of a foreign State from execution: French practice", *The American Journal of International Law* (Washington, D.C.), vol. 46 (1952), p. 520.

²¹⁷ See, for example, *The "Campos"* (1919) (*Journal du droit international* (Clunet) (Paris), vol. 46 (1919), p. 747; *Revue internationale du droit maritime* (Paris), vol. XXXII (1920-1921), p. 600).

²¹⁸ See the cases cited in *Annual Digest . . . 1938-1940* (London), vol. 9 (1942), pp. 241-242.

²¹⁹ See footnote 217 above; G. Ripert was of the opinion in this case that a vessel employed by the Brazilian Government for commercial purposes could not be attached (*Revue internationale du droit maritime* (Paris), vol. XXXIV (1922), p. 19).

²²⁰ *La Gazette des Tribunaux*, 1920 (Paris), part. 2, p. 93.

²²¹ *Journal du droit international* (Clunet) (Paris), vol. 47 (1920), p. 621; *Revue internationale du droit maritime* (Paris), vol. XXXII (1920-1921), p. 602; the Tribunal civil of Bordeaux lifted the attachment of the vessel *Englewood*, which was owned by the United States Government. See also *The "Glenridge"* (1920) (*Revue internationale du droit maritime*, vol. XXXII (1920-1921), p. 599); *The "Avensdaw"* (1922) (*ibid.*, vol. XXIV (1922), p. 1074).

²²² *Société maritime auxiliaire de transports v. Capitaine du vapeur anglais "Hungerford"* (1918) and *Capitaine Seabrook v. Société maritime auxiliaire de transports* (1919) (*Revue internationale du droit maritime* (Paris), vol. XXXII (1920-1921), p. 345). With regard to the immunities of requisitioned ships, contrast the judgments concerning the *Axpe Mendi* (*Rousse et Maber v. Banque d'Espagne et autres* (1937)) and the *Itxas Zuri* (*Société Cementos Resola v. Larrasquitu et Etat espagnol* (1937)) (*Journal du droit international* (Clunet) (Paris), vol. 65 (1938), pp. 53 and 287).

²²³ See, for example, *Hertzfeld v. Dobroflotte* (1930) (*Journal du droit international* (Clunet) (Paris), vol. 57 (1930), p. 692); *Hertzfeld v. Union des Républiques socialistes soviétiques* (1938) (*ibid.*, vol. 65 (1938), p. 1034).

²²⁴ Case concerning the vessel *Ittersum* (*Recueil Dalloz*, 1948 (Paris), p. 84).

expressed its approval of the principles of the Convention limiting immunity in regard to public ships engaged in commercial activities, although jurisdiction was declined in that case on the ground that the *Ittersum* was employed by the Netherlands for political purposes, namely the carriage of wheat for revictualing the country.

(iv) *Germany*

168. Before the First World War, German courts appear to have applied the principle of unqualified immunity with little hesitation.²²⁵ War vessels were accorded complete immunity.²²⁶ By the close of that war, the legal status of Government-owned vessels employed in trade was judicially determined. In the few years following the end of the war, immunity was recognized for foreign State ships even when engaged in commercial activities. In *The "Schenectady"* (1920),²²⁷ the Supreme Court (Reichsgericht) dismissed an appeal against immunity from seizure and attachment of a vessel owned by the United States of America for failure to deliver some 100 bales of cotton as contracted. The same court affirmed the decision of the higher regional court (Oberlandesgericht) in *The "Ice King"* (1921)²²⁸ and upheld immunity, although the vessel was operated by the United States Shipping Board (USSB) for commercial purposes. On the same day, the court reversed the judgments of the lower courts in *The "West Chatala"* (1921),²²⁹ granting immunity to another ship employed by USSB on the ground that the American line was acting merely as agent for the United States Government.

169. In *The "Coimbra"* (1923),²³⁰ the regional court (Landgericht) affirmed an order of attachment against a vessel apportioned to Portugal after the First World War, but equipped and maintained by a private company. Assuming that the practice of German courts during the decade that followed the war tended to favour an absolute view of immunity, that tendency was reversed by Germany's ratification of the 1926 Brussels Convention, at least in so far as public ships and cargoes were concerned. *The "Oituz"* (1930)²³¹ was probably the last case in which *The "Ice King"* was followed. There, immunity was ac-

corded to a government ship employed for commercial purposes. The reversal of the absolute rule of immunity was pronounced in *The "Visurgis"; the "Siena"* (1938),²³² in which the extent and limits of the immunities of public vessels both before and after the Brussels Convention and its Additional Protocol were fully discussed.²³³

(v) *Netherlands*

170. Before the First World War, State immunities were not recognized by Netherlands courts.²³⁴ In 1917, the executive filled the gap by introducing a general enactment recognizing the immunities of foreign States in accordance with international law.²³⁵ In 1921, immunity was admitted by the courts in regard to acts *jure imperii*.²³⁶ In regard to public ships, it appears from two leading cases²³⁷—one of which was, however, decided before the entry into force of the 1926 Brussels Convention—that State-operated vessels employed in trade would be accorded immunity from arrest and that the distinction between the private and public character of the service of the ship was irrelevant. On the other hand, since the entry into force of the Brussels Convention and the Netherlands' deposit of its instrument of ratification, there has been no question that such immunity would no longer be recognized except to the extent and subject to the limitations provided in the Brussels Convention.²³⁸

(vi) *Italy*

171. Italy has been regarded as being foremost among States which have adopted a restrictive view of immunity from the very beginning. The distinctions between *atti d'impero* and *atti di gestione* and between the State as *ente politico* and *ente civile* were recognized by Italian courts as early as 1886.²³⁹ Apart altogether from this restrictive practice, the problem of State immunities in respect of public vessels employed in trade does not arise in Italian law, owing to certain peculiarities of the internal law. The personification of seagoing vessels has been pushed to its log-

²²⁵ See, for example, E. W. Allen, *The Position of Foreign States before German Courts* (New York, Macmillan, 1928). See also *Heizer v. Kaiser-Franz-Joseph-Bahn A.G.* (1885) (*Gesetz- und Verordnungsblatt für das Königreich Bayern* (Munich), vol. I (1885), pp. 15-16). Cf. article 7 of the Harvard Law School draft convention on competence of courts in regard to foreign States (*Supplement to The American Journal of International Law* (Washington, D.C.), vol. 26 (1932), pp. 533-534).

²²⁶ See, for example, *The "Ismir"; the "Assari Tewfik"* (1901) (*Zeitschrift für Internationales Privat- und Öffentliches Recht* (Leipzig), vol. XIII (1903), p. 397).

²²⁷ *Hanseatische Gerichtszeitung* (Hamburg), vol. XLII (1921), p. 76, No. 38.

²²⁸ *Entscheidungen des Reichsgerichts in Zivilsachen* (Berlin), vol. 103 (1922), p. 274, No. 82; *Revue internationale du droit maritime* (Paris), vol. XXXIII (1922), p. 868.

²²⁹ *Entscheidungen des Reichsgerichts . . .*, vol. 103 (1922), p. 280, No. 83; *Revue internationale du droit maritime*, vol. XXXIV (1922), p. 668.

²³⁰ *Hanseatische Gerichtszeitung* (Hamburg), vol. XLIV (1923), p. 178, No. 101; *Revue de droit maritime comparé* (Paris), vol. 4 (1923), p. 89.

²³¹ *Juristische Wochenschrift* (Leipzig), vol. 60 (1931), p. 150, No. 6; *Annual Digest . . . 1929-1930* (London), vol. 5 (1935), p. 129.

²³² *Entscheidungen des Reichsgerichts . . .*, vol. 157 (1938), p. 389, No. 62; *Revue de droit maritime comparé* (Paris), vol. 39 (1939), p. 50; *Annual Digest . . . 1938-1940 (op. cit.)*, p. 284, case No. 94. An action *in rem* was permissible, although the arrest of the ship while it was in the service of a foreign State was not allowed.

²³³ For further discussion of the application of the Brussels Convention, see paragraph 207 below.

²³⁴ See Phillimore, *loc. cit.* (footnote 100 above), pp. 466-467.

²³⁵ See, for example, article 13 (a) of the Act of Parliament of 26 April 1917 (*Staatsblad van het Koninkrijk der Nederlanden* (The Hague, 1917), No. 303).

²³⁶ *Union of South Africa v. Herman Grote* (1921) (*Nederlandse Jurisprudentie* (Zwollen, 1921), p. 849; *Annual Digest . . . 1919-1922* (London), vol. 1 (1932), p. 22, case No. 8).

²³⁷ *F. Advokaat v. I. Schuddinck & den Belgischen Staat* (1923) (*Weekblad van het Recht* (The Hague), No. 11088; *Annual Digest . . . 1923-1924* (London), vol. 2 (1933), p. 133, case No. 69); and *The "Garbi"* (1938) (*Weekblad van het Recht en Nederlandse Jurisprudentie* (Zwollen, 1939), No. 96; *Annual Digest . . . 1919-1942* (London), vol. 11 (1947), p. 155, case No. 83).

²³⁸ See paragraphs 199 *et seq.* below.

²³⁹ See, for example, *Guttieres v. Elmilik* (1886) (*Il Foro Italiano* (Rome), vol. XI, part 1 (1886), p. 913, especially pp. 920-922).

ical extreme, so that, with the exception of ships of war, seafaring vessels within Italian waters are amenable to the jurisdiction of Italian courts and are governed by the same law as private persons.²⁴⁰ It should be further noted that Italy has also ratified the 1926 Brussels Convention and consistently followed the principle enunciated therein.

(vii) *Belgium*

172. In Belgium, as in France, the problem of immunity of public ships arises only in connection with the inviolability or exemption from seizure, arrest and attachment of property of foreign Governments. In this connection, it appears, quite contrary to the established practice of Belgian courts in favour of a restrictive view of immunity from jurisdiction,²⁴¹ that, since the First World War and until recently,²⁴² the immunity of public property from attachment and execution has been regarded as absolute. In the cases concerning the *Joulan* (1920)²⁴³ and the *Lima* and the *Pangim* (1921),²⁴⁴ it was held that a public vessel in use for commercial purposes did not lose its immunity from arrest by way of attachment or execution. It was also held in a number of cases that the act of requisition by a foreign State was an *actum imperii* over which Belgian courts had no jurisdiction.²⁴⁵ The position of State-trading vessels was brought into line with the principle of restricted immunity by Belgium's ratification, both international and constitutional,²⁴⁶ of the Brussels Convention. A direct application of this Convention is to be found in *Sáez*

Murua v. Pinillos et García (1938),²⁴⁷ in which the Court of Appeal of Brussels permitted the arrest of a vessel employed by Spain in trading.

(viii) *Egypt*

173. The mixed courts of Egypt have been consistent in denying immunity to foreign States with regard to their *actes de gestion privée, jure gestionis*.²⁴⁸ The same is true regarding government ships. It was held in *Capitaine Hall v. Capitaine Bengoa* (1920)²⁴⁹ that the immunity of a public ship applied only where the act complained of was performed in the exercise of the powers of the State in its public capacity, and not where a civil wrong had been done by an employee of the State in the management of its private interests. As regards the nature of the service of public ships, the courts have been somewhat arbitrary in giving immunity in one case to merchant ships chartered for the transport of troops²⁵⁰ and denying it in another case concerning a public ship employed in the carriage of pilgrims, although the ship was designed for coastal defence.²⁵¹ On the other hand, the seizure of two Egyptian vessels by the Soviet Government was held to be outside Egyptian jurisdiction, for the act of seizure was a clear manifestation of the sovereign authority of the Soviet Union.

(ix) *Portugal*

174. In *The "Cathelamet"* (1926),²⁵² the Court of Appeal of Lisbon exercised jurisdiction in respect of a vessel of commerce owned and employed by the United States Shipping Board for trading purposes. On the other hand, in 1920, immunity was claimed by the Portuguese Government in connection with an attempted seizure of the *Porto Alexandre*, a ship employed by the Transportes Marítimos do Estado wholly in commercial activities (see paragraph

²⁴⁰ See, for example, the case concerning the collision between the Soviet vessel *Plekhanoff* and the Italian vessel *Generale Pettiti: Società di Navigazione Generale "Gerolimich" v. Rappresentanza commerciale dell'URSS in Italia* (court of first instance, 1934, and Court of Appeal of Genoa, 1936) (*Rivista di diritto internazionale* (Rome), 27th year (1935), p. 419; *ibid.*, 30th year (1938), p. 226), and *Rappresentanza commerciale dell'URSS v. Società di Navigazione Generale "Gerolimich"* (Court of Cassation, 1938) (*Il Foro Italiano* (Rome), vol. LXIII (1938), p. 1216; *Rivista del diritto della navigazione* (Rome), vol. IV-I (1938), p. 460, with a note by R. Quadri; *Il Diritto marittimo* (Rome), 40th year (1938), p. 465, with a note by B. Bissaldi; *Journal du droit international* (Clunet) (Paris), vol. 66 (1939), p. 180; *Revue de droit maritime comparé* (Paris), vol. 39 (1939), p. 190; *Annual Digest . . . , 1938-1940 (op. cit.)*, p. 247, case No. 84). See also Phillimore, *loc. cit.* (footnote 100 above).

²⁴¹ See, for example, *Etat du Pérou v. Kreglinger* (1857) (*La Belgique judiciaire* (Brussels), vol. XVII (1959), p. 331).

²⁴² See, for example, *Socobelge et Etat belge v. Etat hellénique, Banque de Grèce et Banque de Bruxelles* (1951) (*Journal du droit international* (Clunet) (Paris), vol. 79 (1952), p. 244).

²⁴³ *West Russian Steamship Company Ltd. v. Capitaine Sucksdorff* (*Pasicrisie belge, 1922* (Brussels), part 3, p. 3; *Annual Digest . . . , 1919-1922 (op. cit.)*, p. 152, case No. 103).

²⁴⁴ *Etat portugais v. Sauvage* (*Journal du droit international* (Clunet) (Paris), vol. 49 (1922), p. 739; *Annual Digest . . . , 1919-1922 (op. cit.)*, p. 154, case No. 104).

²⁴⁵ See, for example, *Brasseur et consorts v. République hellénique et Société Socobel* (Tribunal civil of Anvers, 1932) (*Journal du droit international* (Clunet) (Paris), vol. 59 (1932), p. 1088), (Court of Appeal of Brussels, 1933) (*Pasicrisie belge, 1933* (Brussels), part. 2, p. 197; *Annual Digest . . . , 1931-1932* (London), vol. 6 (1938), p. 164, case No. 85); *Capitaine Urrutia et capitaine Amollobieta v. Martiarena et consorts* (1937) (*Revue de droit maritime comparé* (Paris), vol. 38 (1938), p. 69; *Annual Digest . . . , 1935-1937* (London), vol. 8 (1941), p. 237, case No. 94).

²⁴⁶ See the Act of 28 November 1928 for the introduction into Belgian law of provisions corresponding to those of the 1926 Brussels Convention (*Recueil des lois et arrêtés royaux de Belgique, 1929*, p. 74); cf. the note by M. R. Hennebicq concerning the *Socobelge* case (*loc. cit.*, footnote 242 above).

²⁴⁷ *Revue critique de droit international* (Paris), vol. XXXIV (1939), p. 317; for the judgment of the Court of Cassation (1939), see *Pasicrisie belge, 1939* (Brussels), part 2, p. 116; *Annual Digest . . . , 1938-1940 (op. cit.)*, p. 289, case No. 95.

²⁴⁸ See *Gouvernement égyptien v. Chemins de fer de l'Etat palestinien* (1942) (*Bulletin de législation et de jurisprudence égyptiennes* (Alexandria), vol. 54 (1941-1942), part 2, p. 242; *Annual Digest . . . , 1919-1942 (op. cit.)*, p. 146, case No. 78).

²⁴⁹ *The "Sumatra" case* (*Bulletin de législation et de jurisprudence égyptiennes*, vol. 33 (1920-1921), p. 25; *Journal du droit international* (Clunet) (Paris), vol. 48 (1921), p. 270; *Annual Digest . . . , 1919-1922 (op. cit.)*, p. 157, case No. 107).

²⁵⁰ *Stapledon & Sons v. S. E. le Premier lord de l'Amirauté britannique* (1924) (*Gazette des tribunaux mixtes d'Egypte* (Alexandria), vol. XIV (1923-1924), p. 253; *Annual Digest . . . , 1923-1924 (op. cit.)*, p. 140, case No. 74).

²⁵¹ *Saglietto v. Tawill* (1923) (*Gazette des tribunaux mixtes d'Egypte*, vol. XIV . . . , p. 252; *Annual Digest . . . , 1923-1924 (op. cit.)*, p. 144, case No. 77). See also *The National Navigation Company of Egypt v. Tavoularidis et Cie* (1927) (*Gazette des tribunaux mixtes d'Egypte*, vol. XIX (1928-1929), p. 251).

²⁵² *Gazeta Judicial* (Ponta Delgada, Azores), vol. 11, No. 170, 2nd series, p. 68; *Annual Digest . . . , 1925-1926* (London), vol. 3 (1929), p. 184, case No. 133. See, however, *The "Curvello"* (1922) (*Gazeta da Relação de Lisboa*, vol. 18, p. 36), in which a Brazilian State-owned ship carrying passengers and goods, as well as government mail, was entitled to immunity from jurisdiction and seizure.

152 above). There appears to be an inconsistency between the judicial practice and the practice of the executive branch of the Government in the recognition or granting of immunity, on the one hand, and in making a like claim on behalf of the State, on the other.

(x) *Scandinavian States*

175. From the few reported cases available,²⁵³ it can be gathered that the distinction between acts *jure imperii* and acts *jure gestionis* has been recognized and accepted in the practice of the Scandinavian States.²⁵⁴ In *Norway*, the immunities from attachment and execution of merchant ships employed in commerce have been upheld so long only as the vessels remained in the possession of the foreign Governments.²⁵⁵ In *Sweden*, in the well-known case of *The "Rigmor"* (1942),²⁵⁶ the Supreme Court, applying the 1926 Brussels Convention, upheld the immunity from arrest of a vessel requisitioned by the Norwegian Government and appropriated to the public service of the British Ministry of War Transport. When the proceedings started, the *Rigmor* was in the possession of the British Government and employed by it in the carriage of non-commercial cargo for public purposes. It may be added that Denmark, Sweden and Norway were among the 13 countries that ratified the 1926 Brussels Convention before the Second World War, and that Norway has actually applied the principles of the Convention in two interesting cases concerning Norwegian ships requisitioned by German occupying authorities.

176. Thus, in a case decided in 1949 concerning the *Fredrikstad*, a Norwegian ship requisitioned by German occupation authorities in Norway, the Supreme Court held that no maritime lien could attach to ships employed by an occupying power for State purposes in respect of collision, on the ground that no execution could be levied against the ships so used. The distinction was maintained between *public ships being used exclusively for State purposes* and other ships.²⁵⁷ On the other hand, in *A/S Irania under Public Administration v. A/S Franmaes mek. Verksted*

²⁵³ Cf. H. Lauterpacht, "The problem of jurisdictional immunities of foreign States", *The British Year Book of International Law*, 1951, vol. 28, pp. 264-265.

²⁵⁴ See, for example, A. Ross, *A Textbook of International Law* (London, Longmans, 1947), p. 190; F. Castberg, *Folkerett* (Oslo, Lindkvist, 1948), p. 100. See also Comité maritime international, *Bulletin No. 57. Conférence de Londres (octobre 1922)* (Anvers, 1923), pp. 122 *et seq.* and p. 194, concerning, in particular, trading vessels; and the more recent work of L. Pelin, *Statsimmunitetens omfattning* (Juridiska Föreningen i Lund No. 29), Acta Societatis Juridicae Lundensis (1979).

²⁵⁵ *The "Guernica"* (1938) (*Norsk Retstidende*, 1938 (Oslo), p. 584; *Annual Digest . . . , 1919-1942 (op. cit.)*, p. 139, case No. 73); and *The "Hanna I"* (1948) (*Norsk Retstidende*, 1948, p. 706; *Annual Digest . . . , 1948* (London), vol. 15 (1953), p. 146, case No. 46).

²⁵⁶ See *The American Journal of International Law* (Washington, D.C.), vol. 37 (1943), p. 141; *Annual Digest . . . , 1941-1942* (London), vol. 10 (1945), p. 240, case No. 63. See also *Russian Trade Delegation v. Carlbon* No. 2 (1944) (*Nytt Juridiskt Arkiv*, 1944 (Lund), p. 269; *Annual Digest . . . , 1943-1945 (op. cit.)*, p. 112, case No. 31). The court declined jurisdiction against the *Toomas* on the ground that the vessel was in actual possession of the Soviet Union and that the seizure was in execution of a judgment against the master of the *Toomas* and not against the Soviet Union, so that the law implementing the 1926 Brussels Convention was inapplicable.

²⁵⁷ *Fredrikstad Havnevesen v. A/S Bertelsens mek. Verksted* (1949) (*Norsk Retstidende*, 1949, p. 881; *International Law Reports*, 1950 (London), vol. 17 (1956), p. 167, case No. 42).

(1950),²⁵⁸ it was held by the Court of Appeal that a Norwegian ship requisitioned by German authorities could be detained by a Norwegian shipyard in respect of repairs carried out on the ship by order of the German authorities, the latter having failed to pay for the repairs. The ship in question was found not to have been used *exclusively on governmental and non-commercial service*, as provided in the 1926 Brussels Convention, having been employed for the transport of edible fats to merchants in Norway.²⁵⁹

(xi) *Latin-American States*

177. It would be presumptuous to refer to the practice of Latin-American States in a generalized way. There seems to be a clear indication in the practice of some of the Latin American systems limiting State immunity with respect to State ships engaged in trade. In *Argentina*, two decisions clearly illustrate this. In *The "Cokato"* (1924),²⁶⁰ the Federal Court of Appeal assumed jurisdiction over a Government-operated vessel engaged in trade despite its ownership by the United States Shipping Board. On the other hand, in *The "Ibai"* (1937),²⁶¹ the same court declined jurisdiction against a Spanish requisitioned ship on the grounds, *inter alia*, that its voyage was not of a commercial nature and that it was employed for national defence, which had nothing to do with speculation or gain, but was prompted by the necessity of providing efficiently for the defence of the State.²⁶² It may be added that, by 1938, *Chile*²⁶³ and *Brazil*²⁶⁴ had deposited their ratifications of the 1926 Brussels Convention.

(b) *A tentative indication*

178. The preceding survey of legal developments in the judicial practice of States does not in itself furnish conclusive evidence of an established set of interna-

²⁵⁸ *Nordiske Dommer i Sjøfartssaker*, 1950 (Oslo), p. 181; *International Law Reports*, 1950 (*op. cit.*), p. 168, footnote 1.

²⁵⁹ By comparison with English admiralty practice, the two cases could be distinguished on the further ground that the former was a collision case, in which allowing a maritime lien would have implicated the foreign sovereign, while the latter concerned repairs effected on a privately owned ship, and upholding immunity would have allowed unjust enrichment in favour of the private shipowner for the repairs.

²⁶⁰ *Jurisprudencia Argentina* (Buenos Aires), vol. 14, p. 705; *Annual Digest . . . , 1923-1924 (op. cit.)*, p. 136, case No. 71.

²⁶¹ *Ibarra y Cia v. Captain of the "Ibai"* (*Fallos de la Corta Suprema de Justicia de la Nación* (Buenos Aires), vol. 178, p. 173; *Revue de droit maritime comparé* (Paris), vol. 38 (1938), p. 50; *Annual Digest . . . , 1935-1937* (London), vol. 8 (1941), p. 247, case No. 100; *Annual Digest . . . , 1938-1940 (op. cit.)*, p. 293, case No. 96).

²⁶² See also *Gobierno de Italia v. Consejo Nacional de Educación* (1940) (*Jurisprudencia Argentina*, vol. 71, p. 400; *Annual Digest . . . , 1941-1942 (op. cit.)*, p. 196, case No. 52).

²⁶³ See, for example, *Pacey v. Barroso* (1926) (*Revista de derecho, jurisprudencia y ciencias sociales y Gaceta de los Tribunales* (Santiago, Chile), vol. 25, parte II, p. 49; *Annual Digest . . . , 1927-1928* (London), vol. 4 (1931), p. 369, case No. 250); and the *Chayet* case (1932) (*Revista de derecho . . . y Gaceta de los Tribunales*, vol. 30, p. 70; *Annual Digest . . . , 1931-1932 (op. cit.)*, p. 329, case No. 181).

²⁶⁴ See, for example, *The "Lone Star"* (1944) (*Diário da Justiça* (Rio de Janeiro), No. 45 (24 February 1945), annex; *Annual Digest . . . , 1947* (London), vol. 14 (1951), p. 84, case No. 31); and the *Gilbert* case (1944) (*Diário da Justiça* (Rio de Janeiro), No. 190 (21 August 1945), annex; *Annual Digest . . . , 1946* (London), vol. 13 (1951), p. 86, case No. 37).

tional law governing jurisdictional immunities in respect of ships owned, possessed or employed by States. Yet it may serve as a strongly persuasive indication of the direction in which the case-law or judicial practice of States has been developing in the recent past. One outstanding fact is clearly beyond controversy: that is the marked absence of a consistent practice of States in support of immunities in respect of State-owned or State-operated vessels, regardless of the nature of their service or employment. Whenever a court has exercised or disclaimed jurisdiction in a given case on the point under examination, it has done so on grounds which invariably related to the nature of the service or employment of the ship in question.

179. Owing to the existence of certain technicalities peculiar to the law and practice of the various legal systems on the points examined, the survey of reported decisions does not and cannot lend itself to a general conclusion applicable to all systems, but it appears to indicate certain developments favouring a number of legal propositions. In the first place, it has helped to delineate or delimit the areas where the question of State immunities could arise in respect of State-owned or State-operated vessels. Vessels owned by or in the possession of States are generally immune if employed in the governmental or public service of the State, whereas privately owned vessels chartered, hired or requisitioned by a foreign Government, as long as they continue to be possessed and operated by it, are to some extent immune from measures of arrest, seizure, detention, attachment and execution, but not necessarily from actions *in rem* not followed by arrest or attachment. Nor subsequently could a maritime lien attach to such ships by reason of collision caused during operation or possession by the foreign Government. In other words, actions against vessels owned, possessed or operated by States may be allowed to proceed if they in fact do not implead the foreign Governments, whether the actions are *in rem* against the vessels, or *in personam* against their private owners or private operators. There is no State immunity because the question simply does not arise. In *The "Visurgis"; the "Siena"*, decided in Germany in 1938 (see paragraph 169 above), the court declared:

Allowing for minor differences of view in the matter of the definition of State ships and of the extent of the immunities accorded to them, it is possible to summarize Continental, British and American practice as follows: "A vessel chartered by a State but not commanded by a captain in the service the State does not enjoy immunity if proceedings *in rem* are brought against it; still less can the owner of the vessel claim such immunity in an action for damages."²⁶⁵

180. The second proposition rests on the unmistakable and cogent evidence indicating almost conclusively that the practice of States has undergone some changes since the First World War. Shipping came under direct State control and indeed the control of a group of States.²⁶⁶ An English judge once described this state of affairs: "In 1917-18 any shipowner who had a tanker free from government control could have become rich beyond the dreams of avarice."²⁶⁷

²⁶⁵ English translation in *Annual Digest . . . 1938-1940 (op. cit.)*, p. 287, case No. 94.

²⁶⁶ See J. A. Salter, *Allied Shipping Control. An Experiment in International Administration* (Oxford, Clarendon Press, 1921).

²⁶⁷ Opinion of Judge Hill in *The "Sylvan Arrow" (1923) (The Law Reports, Probate Division, 1923, p. 230)*.

This rather sudden change of circumstances was vividly pictured by G. van Slooten as follows:

Before the war, there had been very few opportunities for States which owned vessels other than those used for national defence or public service to invoke jurisdictional immunity for themselves or immunity from seizure for their vessels. Once the war was over and peace treaties entered into force, the situation changed abruptly. Several States were in possession of sizeable merchant fleets; . . . [they] became shipowners in earnest, engaged in the carriage of passengers and cargo. . . .²⁶⁸

181. If, in some jurisdictions, there were decisions during the last century and even in the mid-1920s upholding the immunities of privately owned but State-operated vessels from arrest and attachment and the immunities of State-owned or State-possessed²⁶⁹ vessels from all judicial proceedings irrespective of the trading or commercial nature of their service or employment, such decisions have now been overruled or reversed, if not rejected or disavowed, by the courts themselves, or with the assistance of the legislature, or upon application of the relevant provisions of an international convention. There is today no outstanding judicial decision which has not been overruled or which has been reconfirmed as still valid that upholds an absolute rule of immunity for vessels owned or operated by States regardless of the nature of their service or employment. It follows accordingly that, whatever may have been the belief in the nineteenth century which may have lingered into the first quarter of the present century, contemporary State practice does not require States to grant jurisdictional immunities in respect of public vessels employed by other States exclusively on commercial and non-governmental service. This does not mean that States are in any way prevented by law from displaying courtesy or forbidden by custom to extend especially courteous treatment to trading vessels of friendly neighbours or allies, should States so wish or should their courts feel so inclined. Such in any truly reflects the essentially flexible nature of the rule of international law regarding State immunity.

182. A third proposition appears to emerge as a necessary consequence, namely that the practice of States as examined in the brief general survey of judicial developments is indicative of a clear and irreversible trend in favour of non-recognition of jurisdictional immunities in respect of a category of public vessels, or vessels requisitioned, employed or operated by States, based on the criterion of their exclusive commercial use or service and absence of connection with any governmental service. Immunity need not be accorded to ships employed by States exclusively on commercial and non-governmental service, while such public ships employed on governmental and non-commercial service continue to enjoy the privilege or protection of

²⁶⁸ G. van Slooten, "La Convention de Bruxelles sur le statut juridique des navires d'Etat", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. VII (1926), p. 457. Cf. L. van Praag, "La question de l'immunité de juridiction des Etats étrangers et celle de la possibilité de l'exécution des jugements qui les condamnent", *ibid.*, 3rd series, vol. XVI (1935), pp. 116 et seq.

²⁶⁹ Possession of a ship by a State is generally considered to be sufficient evidence of its State ownership; cf. R. E. Megarry in *The Law Quarterly Review* (London), vol. 71 (1955), p. 1. See also *The "Manuel Arnus" (1944) (Federal Reporter, 2d Series, vol. 141 (1944), p. 585)*, in which the United States Supreme Court disclaimed jurisdiction over a vessel in the possession of the United States under a claim of ownership (*United States Reports*, vol. 323 (1945), p. 728).

State immunities from measures of attachment, seizure, detention and execution to the extent indicated in the first proposition, depending on the type of proceedings or causes of actions brought, on whether the vessel in question is privately owned, State-owned, requisitioned, chartered or government-operated, and on the fact of actual possession by the foreign Government claiming its immunity.

183. The rules of State immunity as applied to vessels owned or operated by States were restated with accuracy by Lord Wilberforce in *The "I Congreso del Partido"* (1981), as follows:

... I would unhesitatingly affirm as part of English law the advance made by *The "Philippine Admiral"* with the reservation that the decision was perhaps unnecessarily restrictive in, apparently, confining the departure made to actions *in rem*. In truth an action *in rem* as regards a ship, if it proceeds beyond the initial stages, is itself in addition an action *in personam*, viz. the owner of the ship (see *The "Cristina"*...), the description *in rem* denoting the procedural advantages available as regards service, arrest and enforcement. It should be borne in mind that no distinction between actions *in rem* and actions *in personam* is generally recognized elsewhere so that it would in any event be desirable to liberate English law from an anomaly if that existed. In fact there is no anomaly and no distinction. The effect of *The "Philippine Admiral"* if accepted, as I would accept it, is that, as regards State-owned trading vessels, actions, whether commenced *in rem* or not, are to be decided according to the "restrictive" theory.²⁷⁰

184. As shown in the above examination of legal developments, it has taken the House of Lords more than a century and a half to rejoin the starting-point made by Lord Stowell in *The "Swift"* (1813), where he said:

The utmost that I can venture to admit is that, if the King traded, as some sovereigns do, he might fall within the operation of these statutes (Navigation Acts). Some sovereigns have a monopoly of certain commodities, in which they traffick on the common principles that other traders traffick; and, if the King of England so possessed and so exercised any monopoly, I am not prepared to say that he must not conform his traffick to the general rules by which all trade is regulated.²⁷¹

185. As also examined earlier, judicial pronouncements by United States judges have been more consistent, with the exception of the decision of the Supreme Court in *Berizzi Brothers Co. v. SS "Pesaro"* (1926).²⁷² Thus, in *Ohio v. Helvering* (1934),²⁷³ the court said: "When a State enters the market-place seeking customers, it divests itself of its quasi sovereignty *pro tanto*, and takes on the character of a trader." This dictum merely reaffirmed the view expressed a century earlier by Chief Justice Marshall in *Bank of the United States v. Planters' Bank of Georgia* (1824),²⁷⁴ where he observed: "It is, we think, a sound principle that, when a Government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen." That was but a rep-

etition of an earlier observation made by the same Chief Justice in *The Schooner "Exchange" v. McFaddon and others* (1812), where he said:

... there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; ...²⁷⁵

3. GOVERNMENTAL PRACTICE

(a) *Relative relevance of views and attitudes of Governments*

186. It is difficult to assess the relevance of views and attitudes of Governments expressed or reflected in certain actions or statements as evidence or indications of governmental practice on questions relating to the immunities to be accorded to vessels owned or operated by Governments. The first practical problem is one of determining to whom to attribute a particular view expressed by a certain official of a State organ, or an attitude adopted or reflected in a statement or declaration by a representative of a Government. Views or considered opinions given by legal advisers to a Government on matters of general concern or on a particular issue may be regarded as views of that Government at a particular time. To what extent the expression of such views in an official capacity by an authority of the State could constitute evidence of State practice is another matter, for practice refers to concrete acts performed by the State rather than mere expression of considered reflections. Statements or declarations made by representatives of a Government before the judicial authorities of other States as regards the status of certain government agencies, government ownership of State property and claims of jurisdictional immunities for such agencies or property may afford evidence of the positions taken by Governments, which, if sufficiently clear or consistently maintained, could furnish proof of usage or practice of a State on a particular question.

187. Another difficulty relates, therefore, to the ascertainment of views or attitudes of Governments on a particular issue at the material time, for Governments change as often as do their views and attitudes on a particular question. It is not surprising, therefore, that the views expressed officially by internationally recognized experts who may also hold positions or bear certain responsibility within a Government do not necessarily reflect the views or attitude of that Government; and even when they do formally represent the views of the Government, such views are subject to changes and modifications without notice. Such is the prerogative of the sovereign authority with which the State, like its executive branch, is vested. If the views and attitude attributable to one Government or to one State may change at will, as they are susceptible to sudden alteration, modification, clarification or indeed reversal without prior notice, the views of various

²⁷⁰ *The All England Law Reports, 1981*, vol. 2, p. 1070.

²⁷¹ Dodson, *op. cit.*, vol. I (1815), p. 339; see also the opinion of Sir Robert Phillimore in *The "Charkieh"* (1873) (see paragraph 147 and footnote 134 above) and *The "Parlement belge"* (1879) (see footnote 137 above), a judgment overruled by the Court of Appeal (1880) (see footnote 138 above).

²⁷² See footnote 179 above.

²⁷³ *United States Reports*, vol. 292 (1934), p. 360, at p. 369.

²⁷⁴ Wheaton, *op. cit.*, vol. IX (4th ed.) (1911), p. 907.

²⁷⁵ Cranch, *op. cit.* (footnote 114 above), p. 145; cf. J. G. Hervey, "The immunity of foreign States when engaged in commercial enterprises: a proposed solution", *Michigan Law Review* (Ann Arbor, Mich.), vol. XXVII (1929), p. 751.

Governments on the same questions can and do vary according to their vital interests, political ideologies, economic theories and social backgrounds.

188. This is on the assumption that the views sought relate to the same aspect of the issue. In reality, however, there are often several questions involved in a particular situation and even one and the same issue may have more than one aspect. There is always the other side of the coin, as demonstrated by the views and attitudes of Governments regarding State immunity, which may vary with the side of the coin, whether it is heads when it is the duty of the Government to recognize and accord State immunity to another Government, or tails when the Government expects to be the recipient or beneficiary of State immunity to be recognized and accorded by the courts of another State. Thus it is not surprising that Governments which are obliged to submit their publicly owned or State-operated vessels to their own national or territorial jurisdiction would think twice before agreeing to submit such vessels employed exclusively on commercial service to the jurisdiction of the courts of another State. Examples in the judicial practice examined earlier amply demonstrate this phenomenon.²⁷⁶ As also frequently occurs, a Government is likely to support its own claim of State immunity from the jurisdiction of the courts of another State in respect of the vessels owned or operated by one of its agencies, without necessarily raising a similar objection when actions are brought against the vessel before one of its own courts, and regardless of whether its own courts adhere to a restrictive or unqualified view of State immunity in regard to foreign vessels or vessels owned or employed by a foreign Government. A Government can maintain a consistent attitude and adhere strictly to the view that its own public vessels should be accorded absolute immunity by the courts of other States, subject always to the important reservation of reciprocity. When it comes to the granting of like immunity to the vessels of other States, reciprocity may in fact operate to prevent such recognition, either because of the restrictive practice prevailing in the State requesting immunity, or on the ground of lack of positive evidence that the same extent of jurisdictional immunity would, by law and practice, be assured, if not guaranteed, for the benefit of the vessels owned or operated by the State before whose courts immunity is being sought.²⁷⁷ It is not difficult, as in reality often happens, for one State to advocate the theory or principle of absolute immunity for foreign public vessels, regardless of the nature of their employment or service, while in actual performance there is no concrete evidence to substantiate the adoption of the practice of such an unqualified principle, which in any event is invariably qualified by the principle of reciprocity.²⁷⁸

²⁷⁶ See, for example, *Compañía Mercantil Argentina v. United States Shipping Board* (1924) (see footnote 162 above); the United States *Shipping Act, 1916 and Suits in Admiralty Act, 1920* (see footnote 191 above); and *The "Cathelamet"* (1926) (see footnote 252 above).

²⁷⁷ See, for example, *The "Jupiter" No. 1* (1924) (*The Law Reports, Probate Division, 1924*, p. 236), and compare with *The "Jupiter" No. 2* (1925) (*ibid.*, 1925, p. 69); but in the latter case the Soviet Government was no longer in possession of the *Jupiter* and claimed no interest in her. The Italian Government's requirement of reciprocity is more exacting in practice than it might be in the case of a possible claim of immunity before a Soviet court.

²⁷⁸ See article 61 of the Fundamentals of Civil Procedure of the USSR

189. It is subject to these cautions and bearing in mind the relative relevance of views and attitudes of Governments that governmental practice will be examined in the light of national legislation and international agreements or conventions bearing on the questions under review.

(b) National legislation

190. There appears to be a growing volume of national legislation dealing directly with, or closely relating to, the point at issue. In an effort to examine relevant provisions of national legislation, regard should be had to the commentaries or views expressed in the replies to question 12 of the questionnaire addressed to the Governments of Member States in 1979.²⁷⁹ National legislation directly in point includes laws regulating the extent of immunities accorded to vessels owned or operated by foreign States, which invariably depends on the governmental and non-commercial nature of their service or the public, as opposed to private or commercial, purposes of their employment.

191. In this particular connection, it will be noted in relation to States which have ratified the 1926 Brussels Convention and its 1934 Protocol that legislative enactments have invariably been adopted giving effect to their ratification of the international agreement. Thus Norway's national legislation of 17 March 1939²⁸⁰ may be cited as a typical example. The relevant sections provide:

§ 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 cases 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 owns or uses 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.

...

and the Union Republics of 1961 (United Nations, *Materials on Jurisdictional Immunities* . . . , p. 40).

²⁷⁹ The replies to the questionnaire are published in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 555 *et seq.*

²⁸⁰ *Norges Lov, 1682-1961* (Oslo, Grondahl & Sons, 1962); English translation in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 19-20.

§ 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, 1st paragraph, 1 and 2, when a requisition is made for the annulment of enforcements or interim orders.

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

192. By 1980, some 20 countries, which included a wide variety of States, maritime as well as land-locked, European, Latin-American, African and socialist countries, had ratified the 1926 Brussels Convention and its 1934 Protocol and seven others had acceded to the Convention. Furthermore, it is not insignificant to note that Estonia and Hungary also ratified the Convention in 1937. Although Poland and Romania subsequently denounced it in 1952 and 1959, respectively, Poland reratified the Convention once again in 1976, effective 16 January 1977. Zaire, Greece, Turkey, Syria and Egypt were also bound by the Convention. There are therefore various legislative enactments giving effect to the rules contained in the Convention.

193. Among countries which have not ratified the Convention, the United States of America stands out among the States which have adopted national legislation along the same lines. The United States explained its absence from the Brussels Conference in 1926 by stating that it had already given, effect to the wish for uniformity in the law relating to State-owned ships by adopting the *Public Vessels Act* on 3 March 1925.²⁸¹ But a more specific provision is to be found in a more recent act, the *Foreign Sovereign Immunities Act of 1976*,²⁸² of which the relevant section reads:

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

...

(b) A foreign State shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign State, which maritime lien is based upon a commercial activity of the foreign State: *Provided*, That:

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; but such notice shall not be deemed to have been delivered, nor may it thereafter be delivered, if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit—unless the party was unaware that the vessel or cargo of a foreign State was involved, in which event the service of process of arrest shall be deemed to constitute valid delivery of such notice; and

(2) notice to the foreign State of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in subsection (b) (1) of this section or, in the case of a party who was unaware that the vessel or cargo of a foreign State was involved, of the date such party determined the existence of the foreign State's interest.

²⁸¹ *The Statutes at Large of the United States of America from December 1923 to March 1925*, vol. XLIII, part 1, chap. 428, pp. 1112-1113, sects. 1, 3 and 5 (reciprocity); *United States Code Annotated, Title 46, Shipping, Sections 721 to 1100*, sects. 781-799.

²⁸² *United States Code, 1976 Edition*, vol. 8, title 28, chap. 97; reproduced in United Nations, *Materials on Jurisdictional Immunities . . .*, pp. 55 *et seq.*

Whenever notice is delivered under subsection (b) (1) of this section, the maritime lien shall thereafter be deemed to be an *in personam* claim against the foreign State which at that time owns the vessel or cargo involved: *Provided*, That a court may not award judgment against the foreign State in an amount greater than the value of the vessel or cargo upon which the maritime lien arose, such value to be determined as of the time notice is served under subsection (b) (1) of this section.

194. Section 10 of the United Kingdom *State Immunity Act 1978*²⁸³ deals rather exhaustively with the question of absence or non-recognition of State immunity in respect of ships used for commercial purposes. It provides:²⁸⁴

Exceptions from immunity

...

10. (1) This section applies to:

(a) Admiralty proceedings; and

(b) proceedings on any claim which could be made the subject of Admiralty proceedings.

(2) A State is not immune as respects:

(a) an action *in rem* against a ship belonging to that State; or

(b) an action *in personam* for enforcing a claim in connection with such a ship,

if, at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes.

(3) Where an action *in rem* is brought against a ship belonging to a State for enforcing a claim in connection with another ship belonging to that State, subsection (2) (a) above does not apply as respects the first-mentioned ship unless, at the time when the cause of action relating to the other ship arose, both ships were in use or intended for use for commercial purposes.

(4) A State is not immune as respects:

(a) an action *in rem* against a cargo belonging to that State if both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes; or

(b) an action *in personam* for enforcing a claim in connection with such a cargo if the ship carrying it was then in use or intended for use as aforesaid.

(5) In the foregoing provisions references to a ship or cargo belonging to a State include references to a ship or cargo in its possession or control or in which it claims an interest; and, subject to subsection (4) above, subsection (2) above applies to property other than a ship as it applies to a ship.

(6) Sections 3 to 5 above do not apply to proceedings of the kind described in subsection (1) above if the State in question is a party to the Brussels Convention and the claim relates to the operation of a ship owned or operated by that State, the carriage of cargo or passengers on any such ship or the carriage of cargo owned by that State on any other ship.

195. The United Kingdom *State Immunity Act*, which was adopted on 20 July 1978, was procedurally and substantively qualified by the *State Immunity (Merchant Shipping) (Union of Soviet Socialist Republics) Order 1978*,²⁸⁵ which came into operation on 22 November 1978, the same date as the Act itself. The Order provides:

...

3. Notwithstanding section 13 (4) of the State Immunity Act 1978, no application shall be made for the issue of a warrant of arrest in an action *in*

²⁸³ United Kingdom, *The Public General Acts, 1978*, part I, chap. 33, p. 715; reproduced in United Nations, *Materials . . .*, pp. 41 *et seq.*

²⁸⁴ See also the United Kingdom's reply to question 12 of the questionnaire (United Nations, *Materials . . .*, p. 627).

rem against a ship owned by the Union of Soviet Socialist Republics or cargo aboard it until notice has been served on a consular officer of that State in London or in the port at which it is intended to cause the ship to be arrested.

4. Notwithstanding section 13 (4) of the State Immunity Act 1978, no ship or cargo owned by the Union of Soviet Socialist Republics shall be subject to any process for the enforcement of a judgment or for the enforcement of terms of settlement filed with and taking effect as a court order.

196. This Order has the effect of preserving the immunity from execution of ships and cargoes of the Soviet Union which would otherwise have been lost by virtue of section 13 (4) of the *State Immunity Act 1978*, and requires notice to be given to a Soviet Consul before a warrant of arrest is issued in an action *in rem* against a ship of that State or a cargo on it. It gives effect to articles 2 and 3 of the Protocol to the Treaty on Merchant Navigation of 3 April 1968 between the two countries.²⁸⁶ The special treatment accorded to ships and cargoes belonging to the Soviet Union therefore constitutes an important exception to the general rule adopted by the United Kingdom in this connection.

197. Section 10 of the United Kingdom *State Immunity Act 1978* has served as a model for several other acts adopted by other countries, mostly within or related to the British Commonwealth. Thus section 11 (Ships used for commercial purposes) of Pakistan's *State Immunity Ordinance, 1981*²⁸⁷ literally reproduces the British provision, as do section 12 of Singapore's *State Immunity Act, 1979*²⁸⁸ and section 7 of Canada's 1982 "Act to provide for State immunity in Canadian courts".²⁸⁹ Section 18 of the draft Australian legislation of 1984 on the immunities of foreign States, *Foreign States Immunities Bill 1984*, contains essentially the same provision.²⁹⁰

(c) International or regional conventions

198. On the point under examination, several conventions have been concluded having a more or less direct bearing on State practice, and having special relevance or a more general application; some have been ratified and come into operation, while others are yet to be processed and finalized for signature and ratification. It is useful to highlight the main features of some of the conventions, international or regional, which have a close relevance to the issue under consideration.

(i) *The Brussels Convention of 10 April 1926 and its Additional Protocol of 24 May 1934*

199. Pre-1926 efforts by jurists to assimilate the position of public trading vessels to that of private merchantmen

²⁸⁵ United Kingdom, *Statutory Instruments, 1978*, Part III, Section I, p. 4553; reproduced in United Nations, *Materials . . .*, pp. 51-52.

²⁸⁶ United Nations, *Treaty Series*, vol. 857, p. 217.

²⁸⁷ *The Gazette of Pakistan* (Islamabad), 11 March 1981; reproduced in United Nations, *Materials . . .*, pp. 20 *et seq.*

²⁸⁸ Reproduced in United Nations, *Materials . . .*, pp. 28 *et seq.*

²⁸⁹ *The Canada Gazette, Part III* (Ottawa), vol. 6, No. 15 (22 June 1982). Cf. also section 11 of South Africa's *Foreign States Immunities Act, 1981* (reproduced in United Nations, *Materials . . .*, pp. 34 *et seq.*).

²⁹⁰ See *International Legal Materials* (Washington, D.C.), vol. XXIII, No. 6 (November 1984), pp. 1398 *et seq.*

were reflected in a number of draft conventions;²⁹¹ but it was not until 1926 that the first international convention was adopted dealing directly with the question of the immunities of public ships engaged in trade.

200. In 1922, Sir Maurice Hill, the celebrated English admiralty judge, proposed the abolition of jurisdictional immunities of public vessels, in particular regarding their commercial activities. That proposal was adopted in the resolutions of the International Maritime Committee at its 1922 London Conference.²⁹² The draft treaty prepared at Gothenburg in 1923 and slightly modified at Genoa in 1925²⁹³ was finally submitted to the Conférence diplomatique de droit maritime at Brussels. On 10 April 1926, the Conference adopted the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, commonly referred to as the Brussels Convention.²⁹⁴ That Convention, as Gilbert Gidel, the Rapporteur, put it, "avait pour raison d'être essentielle les navires publics engagés dans des opérations commerciales".²⁹⁵

201. The main object of the Convention was to assimilate the position of State-exploited merchant ships to that of private vessels of commerce in regard to the question of immunities. Article 1 provides:²⁹⁶

Article 1

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

202. Article 1 merely reaffirms the rule that public vessels and cargoes carried on State ships are subject to local laws with respect to their substantive liabilities. Article 2 contains provisions relating more specifically to jurisdiction, as follows:

²⁹¹ The forerunners of the Brussels Convention include article 4, paragraph 3, of the "Draft international regulations on the competence of courts in proceedings against foreign States, sovereigns or heads of State", adopted by the Institute of International Law on 11 September 1891 and revised in September 1892 (Institute of International Law, *Tableau général des résolutions (1873-1956)* (Basel, 1957), pp. 14-15); article 11 of the International Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels (Brussels, 23 September 1910), and article 14 of the Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea (Brussels, 23 September 1910) (cf. G. Gidel, *Le droit international public de la mer* (Paris, Sirey, 1932), vol. I, p. 99); article XVII of the "Barcelona Statute" of 1921 (*ibid.*); article XIII, paragraph 1, of the "Geneva Statute" of 1923 (*ibid.*). See also N. Matsunami, *The Publication of "Immunity of State Ships" and its Sequences* (Japanese edition, 1925), pp. 110 *et seq.*

²⁹² International Maritime Committee, *Bulletin No. 57. London Conference (October 1922)* (Antwerp, 1923), p. v.

²⁹³ International Maritime Committee, *Bulletin No. 65. Gothenburg Conference (August 1923)* (Antwerp, 1924), p. vi; and International Maritime Committee, *Bulletin No. 74. Genoa Conference (September 1925)* (Antwerp, 1926), p. v.

²⁹⁴ League of Nations, *Treaty Series*, vol. CLXXVI, p. 199.

²⁹⁵ Gidel, *op. cit.*, vol. II, p. 362.

²⁹⁶ In interpreting article 1 of the Convention, municipal courts have preferred the official English version. Thus the term *exploités*, which can mean "used" or "operated", has been interpreted according to the term "operated" which appears in the English text (see *The "Visurgis"; the "Siena"* (1938), footnote 232 above).

Article 2

For the enforcement of such liabilities and obligations there shall be the same rules concerning the jurisdiction of tribunals, the same legal actions, and the same procedure as in the case of privately owned merchant vessels and cargoes and of their owners.

Article 2 thus assimilates the position of State-owned and State-operated ships engaged in trade and their cargoes to that of ordinary private commercial vessels and cargoes by subjecting the former to the jurisdiction of local courts. In addition, it also assimilates the position of States as shipowners and shippers to that of private persons engaged in the shipping business by making States accountable before the local courts in respect of maritime commerce.

203. For the purposes of jurisdictional immunities, article 3 draws a distinction between the exploitation of vessels by States and other governmental maritime activities. Paragraph 1 of article 3 is thus worded:

Article 3

§ 1. The provisions of the two preceding articles shall not be applicable to ships of war, government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships, and other craft owned or operated by a State, and used at the time a cause of action arises exclusively on governmental and non-commercial service, and such vessels shall not be subject to seizure, attachment or detention by any legal process, nor to judicial proceedings *in rem*.²⁹⁷

204. Even for public vessels for which immunities from local jurisdictions are provided, article 3 further authorizes, in paragraph 1, certain remedies before the courts of the countries that own or operate the vessels in question, recognizing the right of claimants to take

... proceedings in the competent tribunals of the State owning or operating the vessel, without that State being permitted to avail itself of its immunity:

- (1) In case of actions in respect of collision or other accidents of navigation;
- (2) In case of actions in respect of assistance, salvage and general average;
- (3) In case of actions in respect of repairs, supplies, or other contracts relating to the vessel.

205. Article 3 includes similar provisions in paragraphs 2 and 3 concerning State-owned cargoes carried on board public vessels of a governmental and non-commercial nature and State-owned cargoes carried on board merchant vessels for governmental and non-commercial purposes.

206. By 1931, none of the signatories of the Brussels Convention had deposited its ratification at Brussels.²⁹⁸ Meanwhile, doubts arose as to the correct interpretation of the phrase "operated by a State" in article 3. The United Kingdom objected to the extension of exemption from

actions *in rem* to private vessels employed or operated, but not owned, by a State, which in English case-law was not entitled to immunity. That objection was sustained and the Brussels Convention was accordingly modified by the Additional Protocol signed at Brussels on 24 May 1934.²⁹⁹ Article I³⁰⁰ reads, in part, as follows:

Vessels chartered by States either for a given time or by the voyage, provided they are exclusively used on governmental and non-commercial service, and the cargoes carried by such vessels, shall not be subject to seizure, attachment or detention of any kind, *but this immunity shall not prejudicially affect any other rights or remedies open to the parties concerned*. * . .

207. It is true that the Brussels Convention and its Additional Protocol cannot claim to have had universal application. It is also true that the Convention has left out many important matters. Nevertheless, the Convention has provided most encouraging guidance for municipal courts to assume jurisdiction against foreign States in this particular connection of maritime transport or the carrying trade. The list of ratifications and accessions to the Convention and Protocol is not meagre, with 20 or so States ratifying and seven acceding to the Convention. The application is not confined to one region, nor to Europe alone, although it includes important European maritime nations such as Belgium, Denmark, France, the Federal Republic of Germany, Greece, Italy, the Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom. Switzerland and some Eastern European countries such as Hungary, Poland, Romania and Yugoslavia have also adopted the Convention. Adherents from other continents include Argentina, Brazil, Chile, Egypt, Mexico, Turkey, Uruguay and Zaire. Its coverage is sufficiently scattered and fairly distributed. Its significance cannot be underestimated, especially in view of its ratification by the United Kingdom on 3 January 1980 after more than half a century of silence since it signed the Convention.

(ii) *Codification conventions prepared by the United Nations Conference on the Law of the Sea, Geneva, 1958*

208. The United Nations Conference on the Law of the Sea, held at Geneva from 24 February to 27 April 1958, prepared and opened for signature four conventions, two of which have some bearing on the immunities of public ships. The first is the Convention on the Territorial Sea and the Contiguous Zone, done on 29 April 1958,³⁰¹ part I, section III, of which deals, *inter alia*, with the position of ships exercising the right of innocent passage through foreign territorial waters. This section is divided into four subsections: A. Rules applicable to all ships; B. Rules applicable to merchant ships; C. Rules applicable to government ships other than warships; D. Rule applicable to warships. The distinction between merchant ships and warships has its counterpart in the subdivision of government ships other than warships into (a) government ships

²⁹⁷ This provision operates to extend immunity from proceedings *in rem* to privately owned ships chartered or requisitioned by a foreign State and operated by it in governmental service.

²⁹⁸ See J. W. Garner, "Legal status of government ships employed in commerce", *The American Journal of International Law* (Washington, D.C.), vol. 20 (1926), p. 759.

²⁹⁹ League of Nations, *Treaty Series*, vol. CLXXVI, p. 215.

³⁰⁰ See also article II of the Additional Protocol.

³⁰¹ United Nations, *Treaty Series*, vol. 516, p. 205.

operated for commercial purposes, and (b) government ships operated for non-commercial purposes. A number of interesting points may be noted in connection with this classification of ships:

(a) For the purposes of the Convention, ships are classified according to the nature of their service or activities. The old distinction between public and private ships based exclusively on ownership appears to have been abandoned.

(b) Government ships other than warships are further subdivided according to the nature of their operation. Government ships operated for commercial purposes are treated in the same manner as merchant vessels, while those operated for non-commercial purposes may be compared with warships. In terms almost identical with the provisions of the 1926 Brussels Convention, upholding the immunities of vessels employed exclusively on governmental and non-commercial service,³⁰² article 22 of the Convention on the Territorial Sea and the Contiguous Zone reserves the immunities of government ships operated for non-commercial purposes; paragraph 2 provides that "nothing in these articles affects the immunities which such ships enjoy under these articles or other rules of international law".

(c) No reference is made in article 21 of the latter Convention to the immunities of government ships operated for commercial purposes, either under these articles or other rules of international law. Indeed, paragraphs 2 and 3 of article 20 give the coastal State jurisdiction to levy execution against or arrest foreign ships (including government ships operated for commercial purposes by application of article 21)³⁰³ in certain cases in respect of ships exercising the right of innocent passage,³⁰⁴ and in all cases in respect of foreign ships lying in its territorial waters.³⁰⁵

209. The other convention is the Convention of the High Seas, done on 29 April 1958,³⁰⁶ which contains provisions concerning the status of ships on the high seas. Paragraph 1 of article 8 provides: "Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State." Article 9 assimilates the position of "ships owned or operated by a State and used only on government non-commercial service" to that of warships inasmuch as these ships, like warships, "shall, on the high

³⁰² See article 3, paragraph 2, of the 1926 Brussels Convention (paragraphs 203-204 above).

³⁰³

"Article 21

"The rules contained in sub-sections A and B shall also apply to government ships operated for commercial purposes."

³⁰⁴ Paragraph 2 of article 20 provides:

"2. The coastal State may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State."

³⁰⁵ Paragraph 2 of article 20 provides:

"3. The provisions of the previous paragraph are without prejudice to the right of the coastal State, in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving internal waters."

³⁰⁶ United Nations, *Treaty Series*, vol. 450, p. 11.

seas, have complete immunity from the jurisdiction of any State other than the flag State". While this Convention expressly reaffirms State immunities as applied to ships, it limits the application of immunities to certain classes of public vessels only, viz. (a) warships, and (b) ships owned or operated by a State and used exclusively on governmental and non-commercial service, thus precluding from participation in the enjoyment of State immunities ships owned or operated by a Government on commercial and non-governmental service and ships not exclusively employed for government and non-commercial service.

210. In effect, these two codification conventions serve to reconfirm the principles of the 1926 Brussels Convention. In a sense, these provisions may be said to consolidate the existing rules of customary international law. While the absolute immunity of warships and government vessels operated for non-commercial purposes is kept intact, the position of government vessels operated for commercial purposes is assimilated as far as possible to that of private merchant vessels. Apart from reaffirming governmental policies regarding non-recognition of immunity of public vessels employed in commerce, the 1958 Geneva Convention may be said to be declaratory of the existing practice of States in this particular connection.

(iii) *The 1982 United Nations Convention on the Law of the Sea*

211. This continuing trend seems to have been given added vigour by the incorporation of section 10, entitled "Sovereign immunity", into part XII, entitled "Protection and preservation of the marine environment", of the 1982 United Nations Convention on the Law of the Sea.³⁰⁷ Article 236, with the same strange title as the section, provides:

Article 236. Sovereign immunity

The provisions of this Convention regarding the protection and preservation of the marine environment do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State used, for the time being, only on government non-commercial service. However, each State shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with this Convention.

212. The scope of this Convention is intended to be universal. The provisions of this article are not without significance in confirming again the distinction between ships operated by a State exclusively on governmental non-commercial service and those operated on commercial non-governmental service. The criterion of the nature of the service or operation of the ship appears to be decisive in determining its status and the extent of State immunities to be accorded.

(iv) *Other miscellaneous conventions*

213. In addition to the three main conventions examined, there are other miscellaneous conventions relating to

³⁰⁷ *Official Records of the Third United Nations Conference on the Law*

navigation at sea which tend to distinguish between the position of vessels on the criterion of the nature of their service or operation, rather than on that of public ownership or possession or control by the State. By way of example, the Treaty on International Commercial Navigation Law, signed at Montevideo on 19 March 1940,³⁰⁸ contains the following interesting provisions:

Art. 34. Vessels which are the property of the contracting States or operated by them, the freight and passengers carried by such vessels, and the cargoes which belong to the States, in so far as concerns claims relative to the operation of the vessels or the transport of passengers and freight, are subject to the laws and rules of responsibility and competency applicable to private vessels, cargo and equipment.

Art. 35. The rule laid down in the preceding article does not apply to men-of-war, yachts, airplanes, or hospital-, coast guard-, police-, sanitation-, supply-, and public-works vessels; nor to other vessels which are the property of the State, or operated by it, and which are employed, at the time when the claim arises, in some public service outside the field of commerce.

214. A further example of an international convention confirming this line of distinction is provided by the International Convention on Civil Liability for Oil Pollution Damage, signed at Brussels on 29 November 1969,³⁰⁹ of which article XI provides:

Article XI

1. The provisions of this Convention shall not apply to warships or other ships owned or operated by a State and used, for the time being, only on government non-commercial service.

2. With respect to ships owned by a Contracting State and used for commercial purposes, each State shall be subject to suit in the jurisdictions set forth in Article IX and shall waive all defences based on its status as a sovereign State.

(d) *Treaty practice*

215. A similar "waiver clause" is to be found in a growing number of bilateral treaties, reaffirming a clear trend in the treaty practice of States supporting the exercise of jurisdiction by competent courts in admiralty proceedings *in rem* or *in personam* against vessels, cargoes and owners, regardless of the status of the sovereign States, provided the cause of action arose out of commercial shipping forming part of the business activities of the State, whether or not conducted by a national enterprise, agency or instrumentality of government. A typical example of this trend in treaty practice is provided by article XVIII of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Federal Republic of Germany, signed at Washington on 29 October 1954:³¹⁰

³⁰⁷ (Footnote continued)

of the Sea, vol. XVII (United Nations publication, Sale No. E.84.V.3), p. 151, document A/CONF.62/122.

³⁰⁸ See *Supplement to The American Journal of International Law* (Washington, D.C.), vol. 37 (1943), p. 109; United Nations, *Materials on Jurisdictional Immunities* . . . pp. 177-178. See also articles 36 to 42 of the Convention.

³⁰⁹ United Nations, *Treaty Series*, vol. 973, p. 3.

³¹⁰ *Ibid.*, vol. 273, p. 3; see also the relevant provisions of other bilateral treaties cited in United Nations, *Materials on Jurisdictional Immunities* . . . pp. 131-150.

Article XVIII

. . .

2. No enterprise of either Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, *shipping or other business activities** within the territories of the other Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.

4. INTERNATIONAL OPINION

216. In contrast to the three preceding draft articles, international opinion on the question at issue in draft article 19 is prolific. Views and attitudes of Governments, apart from being far from uniform, are also changing,³¹¹ and they do have a bearing and a certain influence on the development of international opinion. Just as there are two mainstreams of theories and views regarding the immunities of States in general, including those of sovereigns and ambassadors, the opinions of writers and publicists are divided in regard to the immunities of public vessels employed exclusively for trade into two groups: (a) those favouring unqualified or more absolute immunity; (b) those supporting one or more criteria for restricting immunity.

(a) *Absolute immunity*

217. Writers who hold an absolute view of immunity generally think that State vessels are exempt from the jurisdiction of foreign courts regardless of the nature of their service or employment, even if they are in fact operated solely for commercial purposes. Among these must be mentioned Sir Gerald Fitzmaurice,³¹² Hackworth,³¹³ Hall,³¹⁴ van Praag,³¹⁵ Lawrence,³¹⁶ Ross,³¹⁷ Ushakov,³¹⁸ Wheaton³¹⁹ and Westlake.³²⁰

³¹¹ See especially the replies of Governments to question 12 of the questionnaire, in United Nations, *Materials* . . . pp. 557-644.

³¹² G. Fitzmaurice, "State immunity from proceedings in foreign courts", *The British Year Book of International Law*, 1933 (London), vol. 14, p. 101.

³¹³ G. H. Hackworth, *Digest of International Law* (Washington (D.C.), U.S. Government Printing Office, 1941), pp. 423 *et seq.*

³¹⁴ W. E. Hall, *Treaties on International Law* (8th ed.,) (Oxford, Clarendon Press, 1924), pp. 307 *et seq.*

³¹⁵ L. van Praag, "La question de l'immunité de juridiction des Etats étrangers et celle de la possibilité de l'exécution des jugements qui les condamnent", *Revue de droit international et de législation comparée* (Brussels), vol. XV (1934), p. 652; and *ibid.*, vol. XVI (1935), p. 100.

³¹⁶ T. J. Lawrence, *The Principles of International Law* (7th ed., revised by P. H. Winfield) (London, Macmillan, 1923), p. 225, sect. 107.

³¹⁷ A. Ross, *A Textbook of International Law* (London, Longmans, 1947), pp. 144-145, 179 and 189.

³¹⁸ Memorandum presented by N. A. Ushakov to the thirty-fifth session of the Commission, see *Yearbook* . . . 1983, vol. II (Part One), p. 53, document A/CN.4/371.

³¹⁹ H. Wheaton, *Elements of International Law* (Philadelphia (Pa.), 1836); 6th ed., revised by A. B. Keith (London, Stevens, 1929), vol. I, pp. 241-242.

³²⁰ J. Westlake, *International Law* (2nd ed.) (Cambridge, The University Press, 1910), part I, p. 265.

218. The main argument in support of immunity of State trading vessels has been that the mere fact that government vessels are engaged in trading should not take away the immunities enjoyed by public vessels.³²¹ This argument presupposes the existence of a rule that immunity is accorded to all classes of State vessels, which is simply untrue historically. It should be noted, however, that in some jurisdictions in which immunities have been recognized even for State ships employed in trade, two theories have been advanced in explanation of such practice. First, the position of ships is determined by that of their owners. The criterion of State ownership is determinative of immunity. Public merchant ships are also included in the category of "public property" (*res publica, publicis usibus destinata*). This theory of "public property" had received judicial countenance in the practice of British courts, which have now denounced it.³²² According to this theory, since States were exempt from foreign jurisdiction, their public property was also immune, for a judicial process against such property would directly implead the State owning it.³²³ The logic of that proposition reflected the peculiarity of the rules of British admiralty courts. It had been held that, if the owner of a ship could not be sued, the ship could not be attached or arrested or proceeded against *in rem*, nor could a maritime lien exist or come into being during the continuing *dominium* or operation of that ship by the foreign Government. This theory was first propounded by the Crown Advocate in *The "Prins Frederik"* (1820).³²⁴ It went back to the Roman law division of things. *Res publicae* are things which lie outside commerce, *extra commercium quorum non est commercium, extra patrimonium*. The advocates of this theory appear to have borrowed the Roman term without fully appreciating that "public property" in the Roman sense means things which are publicly owned. Moreover, they cannot be the subjects of private rights and their use is open to the public at large. It would also seem odd to regard ships actively engaged in commerce as *res extra commercium*. The phrase *publicis usibus destinata* (destined for public use) means in Roman law that the property can be used by any member of the public, and that no one can prevent another from using it. A public merchant ship could not be open to the public like *ager publicus*, highways or sea-shores.³²⁵ In English law, the term "public property" merely means that a State has an interest in the property concerned, and the phrase *publicis usibus destinata* means "employed by a State for public purposes", or "in the public service of a State".³²⁶

³²¹ See, for example, the opinion of Lord Justice Brett in *The "Parlement belge"* (1880) (see paragraph 149 above); W. Friedmann, "The growth of State control over the individual and its effects upon the rules of international State responsibility", *The British Year Book of International Law* (London), vol. 19 (1938), p. 118.

³²² See, for example, *The "I Congreso del Partido"* (1981) (see paragraphs 155-156 above).

³²³ See, for example, the opinion of Lord Atkin in *The "Cristina"* (1938) (see paragraph 123, *in fine*, and paragraph 153 above).

³²⁴ See footnote 118 above.

³²⁵ See, for example, the *Institutes* of Justinian, book II.1: De rerum divisione; book II.4: De usu fructu; book III.19: De inutilibus stipulationibus; and the *Digest*, book XLIII.87: Ne quid in loco publico vel itinere fiat.

³²⁶ See, for example, *Juan Ysmael & Co. Inc. v. Government of the Republic of Indonesia* (1954) (see footnote 145 above), and the *Hong Kong Aircraft case* (1953) (*ibid.*).

219. The second theory is that of "State possession", which found early acceptance in the courts of the United States of America. Under this theory, the public property of a State was exempt from the jurisdiction of foreign courts provided that, and so long as, it was in the actual possession of the foreign Government,³²⁷ regardless of the fact that a ship had been employed in ordinary trading voyages. Actual possession was believed to constitute sufficient evidence of public use or government service. This theory is no longer followed in view of recent developments in the policy of the United States Government as confirmed by legislation.

220. Both theories appear to have based immunity on the public character of the functions, employment, service, operation or purposes of ships. In England, for a long time, the test of that "public character" had been that of the foreign State and not of English judges. The varying nature of the English test had led to the granting of immunity in a number of commercial shipping cases. In the United States, the test of "governmental function" had been the "actual possession" of the property in question by a foreign Government.³²⁸

221. A third theory is the one recently propounded by Mr. Ushakov;³²⁹ although without the support of concrete evidence of judicial practice, it could be regarded as similar to views held by certain Governments. This theory of complete immunity is based on the principle of complete sovereignty and equality of States and on the fact that the origin of State immunity is also based initially on waiver of jurisdiction, express or implied, or on the consent of the State having territorial jurisdiction. It is conditional also on the principle of reciprocity, and immunity itself, like jurisdiction of a sovereign State, being an attribute of sovereignty, can in the same manner be waived by an expression or implication of consent, or communication of consent, express or implied. It will be seen how the various theories, including this one, could be reconciled in a meaningful and objective approach to this difficult and delicate question.

(b) Restricted immunity

222. It is generally agreed among writers holding a restrictive view of State immunity that State-owned and State-operated ships are not entitled to jurisdictional immunities if employed by the State in commercial ventures. Recently, publicists have increasingly adopted such a view. Prominent among proponents of this thesis may be mentioned Bisschop,³³⁰ McNair,³³¹ Sir Robert Phillimore,³³²

³²⁷ See, for example, *Berizzi Brothers Co. v. SS "Pesaro"* (1926) (see paragraphs 157-158 above).

³²⁸ See, for example, the opinion of Justice Frankfurter in *Republic of Mexico et al. v. Hoffman* (1945) (*United States Reports*, vol. 324 (1946), pp. 39-40).

³²⁹ See footnote 318 above.

³³⁰ W. R. Bisschop, "Immunity of States in maritime law", *The British Year Book of International Law, 1922-23* (London), vol. 3, pp. 159 *et seq.*

³³¹ A. D. McNair, "Judicial recognition of States and Governments and the immunity of public ships", *ibid.*, 1921-22, vol. 2, pp. 67-74.

³³² R. Phillimore, *Commentaries upon International Law* (3rd ed.) (London, Butterworths, 1882), vol. II, pp. 140-141.

G. G. Phillimore,³³³ Allen,³³⁴ Hayes,³³⁵ Hervey,³³⁶ Borchard,³³⁷ Garner,³³⁸ Gidel,³³⁹ Bonfils and Fauchille,³⁴⁰ Ripert,³⁴¹ Fox,³⁴² Nielsen,³⁴³ Matsunami³⁴⁴ and Watkins.³⁴⁵

223. No fewer than six arguments have been put forward in support of the proposition that State merchant vessels should be subject to the jurisdiction of competent foreign courts. It has been argued, in the first place, that even assuming that a rule of customary international law existed in the nineteenth century in favour of immunity for all types of State ships, it is now no longer tenable that such a rule could still have a general application. When the immunities of State ships became crystalized, it could not be predicted that coastal States would soon become engaged in maritime trade and employ their newly acquired merchant fleets side by side with private shipowners in commercial ventures.³⁴⁶ There would appear to be a fallacy in the assumption that a rule of law concocted to suit the economic and social conditions of the nineteenth century should still apply today, when not only circumstances, but also theories and ideas are fundamentally different.

224. Secondly, a closer inspection of government merchant ships discloses some cardinal resemblances between this class of public vessels and ordinary trading vessels. Public merchantmen, in spite of State ownership and State operation, possess the same intrinsic characteristics as private traders and are employed for the same commercial purposes. The reasons for assimilating their legal position to that of private ships of commerce seem stronger than the

³³³ G. G. Phillimore, "Immunité des Etats au point de vue de la juridiction ou de l'exécution forcée", *Recueil des cours* . . . , 1925-III (Paris, Hachette), vol. 8 (1926), p. 461.

³³⁴ E. W. Allen, *The Position of Foreign States before National Courts* (New York, Macmillan, 1933).

³³⁵ A. Hayes, "Private claims against foreign sovereigns", *Harvard Law Review* (Cambridge, Mass.), vol. 38 (1924-1925), p. 599.

³³⁶ J. G. Hervey, "The immunity of foreign States when engaged in commercial enterprises: a proposed solution", *Michigan Law Review* (Ann Arbor, Mich.), vol. 27 (1927), p. 751.

³³⁷ E. M. Borchard, in a series of articles referred to by G. G. Phillimore, *loc. cit.* (footnote 333 above), pp. 469-471.

³³⁸ J. W. Garner, "Immunities of State-owned ships employed in commerce", *The British Year Book of International Law, 1925* (London), vol. 6, p. 128.

³³⁹ G. Gidel, *Le droit international de la mer* (Paris, Sirey), vol. II (1932), pp. 337 *et seq.*

³⁴⁰ P. Fauchille, *Traité de droit international public*, 8th ed. (revised) of *Manuel de droit international public* by H. Bonfils (Paris, Rousseau, 1925), vol. I, 2nd part, p. 1116, para. 625 (*Navires marchands d'Etat*).

³⁴¹ G. Ripert, in *Revue internationale du droit maritime* (Paris), vol. XXXIV (1922), p. 1; cf. G. G. Phillimore, *loc. cit.* (footnote 333 above), pp. 468-469.

³⁴² W. T. R. Fox, "Competence of courts in regard to 'non sovereign' acts of foreign States", *The American Journal of International Law* (Washington, D.C.), vol. 35 (1941), pp. 632-636 and 640.

³⁴³ F. K. Nielsen, "The lack of uniformity in the law and practice of States with regard to merchant vessels", *ibid.*, vol. 13 (1919), pp. 12-21.

³⁴⁴ N. Matsunami, *Immunity of State Ships* (London, Richard Flint, 1924); cf. *The British Year Book of International Law, 1925* (London), vol. 6, p. 239.

³⁴⁵ R. D. Watkins, *The State as a Party Litigant* (Baltimore (Md.), The Johns Hopkins Press, 1927), pp. 189-191. See also S. A. Riesenfeld, "Sovereign immunity for foreign vessels in Anglo-American law", *Minnesota Law Review* (Minneapolis, Minn.), vol. 25 (1940), pp. 7 *et seq.*

³⁴⁶ See, for example, van Praag, *loc. cit.*, 1935 (footnote 315 above, *in fine*), p. 116.

argument that they should benefit from the immunities of States originally accorded to men-of-war. There appears to be no cogent reason for an ordinary vessel of commerce to be accorded immunity by the mere circumstance that it is owned or operated by a State. As Sibert suggested, public vessels should be further subdivided, for the purposes of immunity, into trading and non-trading vessels, public trading vessels being subject to the local jurisdiction like private ships.³⁴⁷

225. Thirdly, it seems harsh and inequitable to draw a line of distinction, for the purposes of immunity, between public and private merchant vessels, while States are in fact competing with private shippers and shipowners. If it is open to States to enter the market of maritime trade, they should be placed on the same footing as other traders. The mere fact of ownership or operation by a State should provide no ground for distinguishing such public vessels from trading ships. The trading character or the commercial nature of the operation of the vessels should be sufficient to assimilate their position to that of private merchant vessels.³⁴⁸

226. Fourthly, to allow proceedings *in rem* against government ships employed in commerce is in no way inconsistent with the dignity, equality, sovereignty and independence of the States owning or operating the vessels,³⁴⁹ nor does it appear that permitting such proceedings will interfere with the political arms of the Government in the conduct of foreign relations.³⁵⁰

227. Fifthly, the ever-growing number of ships employed by States in ordinary trading voyages is all the more reason for restricting their exemptions from local jurisdiction. In the interest of safe navigation, it would seem undesirable to allow to navigate the seas so many vessels whose owners are aware that these ships can never be arrested while in the service of States, however negligently they may have navigated.³⁵¹ Furthermore, there is a danger that immunity may operate to the detriment of States owning or operating such merchantmen, for shippers will hesitate to trade with them, and salvors will run few risks to save the property of States, if these ships are to be exempt from the jurisdiction of coastal States.³⁵²

³⁴⁷ M. Sibert, "Les voies de communication en droit international public", *Cours de droit*, Paris (1953-1954) (mimeographed), pp. 181-185 and 203-204. According to Gidel, *op. cit.*, vol. I, pp. 98-99:

"Le critère essentiel dont on s'inspire à l'heure actuelle pour classer les navires et déterminer leur statut juridique au point de vue du droit international public est le *genre de navigation** effectué par ces navires. *Ce qui importe, c'est leur affectation à telle ou telle activité et non pas la qualité de leurs propriétaires, particuliers ou personnes publiques.* . . ."

³⁴⁸ See, for example, E. D. Dickinson, "The immunity of public ships employed in trade", *The American Journal of International Law* (Washington, D.C.), vol. 21 (1927), p. 108. See also *The "Attualità"* (1916) (footnote 181 above).

³⁴⁹ In *The "Cristina"* (1938) (*loc. cit.* (footnote 164 above), p. 521), Lord Maugham posed the question: "Is it consistent with sovereign dignity to acquire a tramp steamer and to compete with ordinary shippers and shipowners in the markets of the world?"

³⁵⁰ According to Judge Mack, in *The "Pesaro"* (1921) (*loc. cit.* (footnote 183 above), p. 485), "it seems improbable that in these days the judicial seizure of a publicly owned merchantman like the *Pesaro* would affect our foreign relations in any greater degree than the judicial seizure of a great privately owned merchantman like the *Aquitania*."

³⁵¹ See the opinion of Judge Hill in *The "Espozende"* (1918) (footnote 146 above) and in *The "Crimdon"* (1918) (*ibid.*).

228. Last, but not least, there is the argument that world trade, which depends largely on carriage by sea, may suffer, for few shippers will ship their goods on public merchantmen for fear of accidents at sea and resulting loss of merchandise with relatively little hope of salvage and without any remedies against the States or their merchant ships. In this respect, free international trade will be difficult if States and individuals continue to carry on their maritime commerce on different levels. Lord Justice Scrutton advanced the same argument in *The "Porto Alexandre"* (1920).³⁵³

5. AN UNDEVIATING TREND

229. While there is no general agreement either in the practice of States or in international opinion as to the basis for vessels operated by States for commercial non-governmental purposes, there appears to have emerged a clear and unmistakable trend in support of the absence of immunity for vessels employed by States exclusively on commercial non-governmental service. This trend appears to be undeviating and reasserts itself in all its manifestations: in judicial practice, in the traditionally "absolute immunity" jurisdictions, in legislation even in countries where the most unqualified theory of immunity had prevailed, such as the United Kingdom and the United States of America, in the adoption of international conventions, such as the 1926 Brussels Convention, and in other more general conventions, such as the law of the sea conventions of 1958 and 1982. There seems to be emerging an inevitable trend in national legislation recognizing the possibility of assimilating the position of State-operated merchant vessels to that of private merchantmen. Romania's decree-law No. 443, of 20 November 1972,³⁵⁴ concerning civil navigation, may also be cited as re-enforcing this undeviating trend. It provides:

Article 103. The provisions of articles 97, 100 and 101 do not apply to military vessels or to vessels in government service flying a foreign flag.

230. Writers whose opinions differed widely in the past appear to have narrowed their differences. Contemporary writers are more inclined to favour less unqualified immunity and sympathizers of the more absolute view of immunity have begun to recognize important qualifications and limitations, such as the principle of reciprocity and the theory of implied consent or presumption of waiver by conduct, in addition to the significant restriction of express consent or explicit agreement.³⁵⁵ A compromise solution could be found along these lines which, while not completely satisfactory for all, might produce generally tolerable results.

³⁵² See the opinion of Judge Mack in *The "Pesaro"* (1921) (footnote 183 above).

³⁵³ "... no one can shut his eyes, now that the fashion of nationalization is in the air, to the fact that many States are trading... with ships...; and if these national ships wander about without liabilities, many trading affairs will become difficult;..." (*The Law Reports, Probate Division, 1920*, pp. 38-39).

³⁵⁴ See United Nations, *Materials on Jurisdictional Immunities...*, p. 27.

³⁵⁵ See, for example, Ushakov (footnote 318 above).

C. Formulation of draft article 19

231. It is against this background of an undeviating trend in favour of restricting State immunity with regard to trading vessels operated by States on commercial non-governmental service that draft article 19 should be formulated. Several elements of fundamental importance should be noted and be taken carefully into consideration:

(a) The question of State immunity in respect of attachment and execution of its property as such is outside the scope of article 19, for it belongs properly to part IV of the draft articles—Immunities of State property from attachment and execution. Thus ships owned or operated by States for commercial purposes, which form the subject-matter of draft article 19, are not considered as public property or property of the State for the purpose of execution of judgment against the State or attachment of State property in a proceeding against the State.

(b) The question at issue concerns primarily the immunities of States from admiralty proceedings for public vessels employed by them exclusively on non-governmental and commercial service.

(c) Such public vessels should not be accorded immunities from jurisdiction in proceedings *in rem* against the vessels of their owners, the foreign States.

(d) Privately owned vessels operated by a State for commercial non-governmental purposes should not be accorded any immunity, although while under requisition or charter to a foreign Government, they may be entitled to some special treatment in respect of suspension of measures such as seizure, arrest, detention or attachment while in the public or governmental and non-commercial service of a foreign State. Proceedings *in rem* may certainly be permitted against privately owned ships at all times, although actual arrest, seizure, detention or attachment would have to be suspended pending operation or employment by the State on governmental non-commercial service.

(e) *A fortiori*, proceedings *in rem* followed by arrest, seizure, detention or attachment of privately owned vessels are generally permissible while they are in the service of a State, provided the nature of the service is exclusively commercial and non-governmental.

(f) What has been said of vessels is also applicable to cargo belonging to the State.

1. ALTERNATIVE A

232. Accordingly, draft article 19 might be couched in the following terms:

Article 19. Ships employed in commercial service

1. This article applies to:

(a) admiralty proceedings; and

(b) proceedings on any claim which could be made the subject of admiralty proceedings.

2. Unless otherwise agreed, a State cannot invoke

immunity from the jurisdiction of a court of another State in:

(a) an action *in rem* against a ship belonging to that State; or

(b) an action *in personam* for enforcing a claim in connection with such a ship if, at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes.

3. When an action *in rem* is brought against a ship belonging to a State for enforcing a claim in connection with another ship belonging to that State, paragraph 2 (a) above does not apply in regard to the first-mentioned ship unless, at the time when the cause of action arose, both ships were in use for commercial purposes.

4. Unless otherwise agreed, a State cannot invoke immunity from the jurisdiction of a court of another State in:

(a) an action *in rem* against a cargo belonging to that State if both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes; or

(b) an action *in personam* for enforcing a claim in connection with such a cargo if the ship carrying it was then in use or intended for use as aforesaid.

5. In the foregoing provisions, references to a ship or cargo belonging to a State include a ship or cargo in its possession or control or in which it claims an interest; and, subject to paragraph 4 above, paragraph 2 above applies to property other than a ship as it applies to a ship.

2. ALTERNATIVE B

233. Draft article 19 could take a more simplified form, on the model of article 12, and might read as follows:

Article 19. Ships employed in commercial service

1. If a State owns, possesses or otherwise employs or operates a vessel in commercial service and differences arising out of the commercial operations of the ship fall within the jurisdiction of a court of another State, the State is considered to have consented to the exercise of that jurisdiction in admiralty proceedings *in rem* or *in personam* against that ship, cargo and owner or operator if, at the time when the cause of action arose, the ship and/or another ship and cargo belonging to that State were in use or intended for use for commercial purposes, and accordingly, unless otherwise agreed, it cannot invoke immunity from jurisdiction in those proceedings.

2. Paragraph 1 applies only to:

(a) admiralty proceedings; and

(b) proceedings on any claim which could be made the subject of admiralty proceedings.

ARTICLE 20 (Arbitration)

A. General considerations

1. SCOPE OF ARBITRATION

234. When a State agrees to submit a dispute or difference to arbitration, either in advance in a written agreement or on an *ad hoc* basis, it is interesting to examine the extent to which that consent or agreement to submit to arbitration may constitute an exception to the application of State immunity. Clearly, arbitration is a well-known method of pacific settlement of legal disputes. As such, it is distinguishable from judicial settlement as a separate and different method of dispute settlement. However, a closer examination of procedures available in internal laws will reveal the closest connection between arbitration and judicial settlement, even to the extent that there are areas where the two methods of dispute settlement may and, in fact, do overlap, if not completely coincide with each other. In certain areas, the operation of one is inextricably linked to the other. Arbitration may exist as a legal process in court or out of court. As an out-of-court settlement, an arbitral proceeding is still not entirely free from judicial control, by way of judicial review, appeal or enforcement order. Thus it could be misleading to suppose that arbitration is always to be viewed in contradistinction to judicial settlement, or that the judiciary applies rules of law while arbitration applies equitable rules. In reality, apart from historical developments in English courts, law and equity are applicable alike by the courts just as much as they are by arbitral tribunals or by arbitration.

235. In view of the twilight zone which blurs the distinction between arbitration and judicial settlement, it is difficult to state precisely in what manner an agreement to submit to arbitration constitutes submission to jurisdiction or an inevitable eventual waiver of immunity from that jurisdiction. This, in turn, would appear to depend on the link between the arbitration to which a State has agreed to submit the dispute in question and the disposition of the court to exercise its otherwise competent and available jurisdiction. There are many types of arbitration, some of which may be to a greater or lesser degree subject to the control or under the jurisdiction of a court, or under judicial supervision, others being essentially part and parcel of the judicial process of adjudication.

236. Having thus clarified the conceptual ambiguity inherent in this connection, it is still not easy to envisage the interplay of the two analogous concepts. Just as a court of law may appoint a commission of inquiry, a jury, or a panel of experts or assessors, a panel of arbitrators could be so appointed to consider certain questions assigned to it by the court. The court might also be called upon to approve, revise or enforce an arbitral award or judgment, as if arbitration merely formed part of the pre-trial phase of a judicial process. It is perhaps because of their closeness that the two notions cannot be sharply focused upon as distinct, but rather as overlapping concepts, the court rising above arbitration, which is inevitably eclipsed by the finality of judicial prerogative. This overlapping of concepts, resulting in a certain confusion, gives rise to a tendency to equate an agreement to submit to arbitration with consent to submit to jurisdiction. Arbitration could be viewed, at first

sight, as an exception to the exercise of jurisdiction, almost tantamount to exemption or immunity from the jurisdiction of a competent court; but on reflection it could at best operate only to postpone or temporarily suspend the exercise of jurisdiction and only eventually to confirm the ultimate submission to the jurisdiction or the expression of choice of jurisdiction. In the final analysis, therefore, arbitration is more like an exception to jurisdictional immunity than a substitute for jurisdiction or an alternative method of dispute settlement, as it may well be in the regulation of differences between States or settlement of disputes between Governments. Thus arbitration as a notion has more than one meaning, depending on the type of dispute and the status of the parties thereto. Arbitration between States or Governments as a method of dispute settlement is subject to public international law, while international arbitration in which parties are of different nationalities or in which there is a foreign element involved, whether or not one of the parties is a State, belongs to the realm of internal law or private international law.

2. TYPES OF ARBITRATION

237. It is therefore not irrelevant to mention the different types of arbitration in order to illustrate conceptual difficulties in an initial approach to the question of "arbitration" in relation to jurisdictional immunities of States.

(a) *Arbitration under internal law*

238. The most common of all types of arbitration, having the greatest relevance to the present study, is arbitration under internal, domestic or municipal law, or indeed national law, as opposed to public international law. In this sense, the expressions "internal law" or "internal legal system" necessarily include the notions of private international law or of conflict of laws. Arbitration under internal law may take many forms. To take a simple example, section 210 of Thailand's Code of Civil Procedure (B.E. 2477)³⁵⁶ provides:

In any case pending before a court of first instance, the parties may agree to submit the dispute, in reference to all or any of the issues, to one or more arbitrators for settlement, by filing with the court a joint application stating the terms of such agreement.

If the court is of the opinion that the agreement is not contrary to law, it shall grant the application.

239. Under the Thai internal legal system, there are two types of arbitration, *viz.* arbitration appointed by the court or within the court, and arbitration out of court. For arbitration in the court under section 210 of the Code of Civil Procedure, section 218 requires the arbitrators "to file their award with the court" and provides that the court "shall give judgment in accordance therewith". However, if the court is of the opinion that the award is contrary to law in any respect, it shall have the power to issue an order refusing to confirm the award, or it may amend the award

³⁵⁶ The 1934 Code was enacted on 15 June 1935; unofficial translation, edited by Mr. Suchart Chivachart.

within a reasonable time so as to confirm it by a judgment.

240. Section 221 provides that "where a dispute is submitted to arbitration out of court, if any party refuses to abide by the award, such award may not be enforced unless the court of territorial competence upon the request of the opposing party gives judgment in accordance with the award". It is further provided that "in such case, the court of territorial competence shall be the court designated by the parties in the agreement or, in the absence of such designation, the court which would have territorial jurisdiction and competence to try and adjudge the dispute".

241. Thus both types of arbitration under the prevailing legal system of Thailand, arbitration in court and arbitration out of court, are intimately linked to the existing machinery of justice, the administration of which is in the hands of the court in the name of the King under the country's Constitution. The closeness of the linkage or association with the court renders an agreement to arbitration equivalent to consent to the exercise of jurisdiction by the competent court.

242. In other internal systems, it is also conceivable that there could be other types of arbitration more or less connected with the framework of the judiciary or the system of administration of justice, depending for implementation and enforcement upon the existing machinery of justice. Even in the most independent type of arbitration, whether under internal law or in transboundary arbitration or international arbitration, the ultimate resort for enforcement is open to the judiciary for satisfaction or implementation of the award.

(b) *International commercial arbitration*

243. International commercial arbitration is but another type of arbitration under national law or an internal legal system, but in which the dispute involves a foreign element or two parties of different nationalities. In the field of commerce and trade, attempts have been made to provide for uniform rules or procedures for the settlement of differences or disputes by commercial arbitration.³⁵⁷ Thus the International Chamber of Commerce³⁵⁸ and the United Nations Commission on International Trade Law (UNCITRAL)³⁵⁹ have also prepared model rules to be adopted by parties seeking to settle their differences by arbitration, generally covering, but not necessarily confined to, commercial activities.

(c) *Arbitration for investment disputes*

244. Another specific area in which international arbitration between private enterprises and government agen-

³⁵⁷ See P. I. Benjamin, "The European Convention on International Commercial Arbitration", *The British Year Book of International Law, 1961* (London), vol. 37, pp. 478-487; International Union of Lawyers, *International Commercial Arbitration*, rapporteur général P. Sanders, vol. I (Paris, Dalloz et Sirey, 1956), vol. II (The Hague, Martinus Nijhoff, 1960), vol. III (The Hague, Martinus Nijhoff, 1965).

³⁵⁸ P. Sanders, "ECAFE rules for international commercial arbitration", *International Arbitration: Liber Amicorum for Martin Domke*, P. Sanders, ed. (The Hague, Martinus Nijhoff, 1967), p. 252.

³⁵⁹ See the report of UNCITRAL on the work of its twelfth session

cies has grown in practice is the settlement of investment disputes.³⁶⁰ The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature at Washington on 18 March 1965,³⁶¹ may be cited as an example of efforts to resolve investment disputes between States and foreign nationals by arbitration, which may be said to assume an international character, and whose award may depend for judicial enforcement upon several jurisdictions, where assets happen to be located or where enforcement measures are available.

(d) *International arbitration*

245. International arbitration in the sense of inter-State or intergovernmental arbitration is a method of pacific settlement of disputes between nations or States under the Charter of the United Nations. It can take many different forms, with one or more arbitrators applying various rules and different procedures. The Permanent Court of Arbitration at The Hague is a striking example of an arbitral institution with a permanent panel of arbitrators, from which parties could propose or select international arbitrators. While international arbitration, being as such a means of pacific settlement of disputes between States, appears to lie outside the scope of the present study,³⁶² an award of such international arbitration may well derive its force from municipal judicial authority for an eventual enforcement measure, which incidentally forms the subject of the next part of the study and need not be further discussed in relation to the present draft article.

3. ARBITRATION CLAUSE

246. An arbitration clause or *compromis* is a clause in a contract—in the present context a State contract, which could be a contract of loan,³⁶³ a commercial contract, or another type of transaction—whereby the parties, including the State or government agency, agree to submit a dispute which has arisen or which may arise to arbitration of one type or another, with or without an effective means of enforcing the award. An arbitration clause depends on the volition of the parties at the outset, but may become obligatory or compulsory once the clause is adopted or incorporated in a contract or loan or other commercial transaction.

B. The practice of States

1. JUDICIAL PRACTICE

247. Judicial practice on the point under examination is bound to be scanty, owing to the conceptual difficulty

(Footnote 359 continued)
(1979), *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17 (A/34/17)*, paras. 57-70.

³⁶⁰ See, for example, American Society of International Law, *Proceedings of the International Investment Law Conference* (Washington (D.C.), 1956), part 1, pp. 22-32; revised in *The Business Lawyer* (Chicago, Ill.), vol. 12 (1957), pp. 264-271.

³⁶¹ United Nations, *Treaty Series*, vol. 575, p. 159.

³⁶² See, for example, *Société commerciale de Belgique*, judgment of

which tends to becloud the issue. A State agreeing to submit to arbitration is entitled to insist on settlement by or through arbitration before judicial settlement. Should the case be brought before a court, it is not always clear whether the State could or should claim immunity from the jurisdiction of the court. The answer to this question is likely to depend on the stage of the proceedings, judicial or arbitral, since in more ways than one an arbitral award is essentially linked, in its initiation or enforcement, to judicial process. Of course, an agreement to submit to arbitration may operate to suspend or postpone the initial exercise of jurisdiction by the court pending the appointment, examination and award of the arbitrators, especially if the court in question is that of a State which recognizes the type of arbitration to which parties have agreed to submit their difference or dispute.

248. Thus, in 1982, in the arbitration case *Maritime International Nominees Establishment v. Republic of Guinea* (the latter being the appellant, and the United States of America the intervenor),³⁶⁴ the United States Court of Appeal concluded that the defendant was immune under the *Foreign Sovereign Immunities Act of 1976*³⁶⁵ and that the court lacked subject-matter jurisdiction to confirm the award, as the suits were between foreign plaintiffs and foreign States. Had the court found itself with sufficient original jurisdiction without conferment by the arbitration clause in the contract, the question of immunity might have been only temporarily postponed and the award judicially confirmed. The type of arbitration selected by the parties was in conformity with the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Such an agreement was not considered as a valid waiver of immunity under the *Foreign Sovereign Immunities Act*. The connection between the enforcement or confirmation of the arbitral award and the agreement by Guinea to submit to arbitration was severed by non-immunity as a condition to subject-matter jurisdiction. To look at the decision in a different legal context, the agreement to submit to arbitration did not create new jurisdiction where none existed. If the decision appears to complicate still further the confusion between consent to arbitration and consent to the exercise of jurisdiction, it does clarify the distinction between agreement to submit to arbitration and absence of judicial jurisdiction.

2. GOVERNMENTAL PRACTICE

(a) *National legislation*

249. National legislation in the field of jurisdictional immunities contains some reference to arbitration as an exception to State immunity from the existing jurisdiction of an otherwise competent court. An interesting provision

15 June 1939, *P.C.I.J., Series A/B, No. 78*, p. 160; and the *Socobelge case* (see footnote 242 above).

³⁶³ See, for example, M. Domke, "Arbitration clauses and international loans", *The Arbitration Journal* (New York), vol. 3 (1939), p. 161.

³⁶⁴ See footnote 38 above.

³⁶⁵ See footnote 282 above.

is to be found in section 9 of the United Kingdom State Immunity Act 1978,³⁶⁶ which reads:

Exceptions from immunity

...

9. (1) Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.

(2) This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States.

250. Similar provisions are found in section 10 of Pakistan's *State Immunity Ordinance, 1981*,³⁶⁷ section 11 of Singapore's *State Immunity Act, 1979*³⁶⁸ and section 10 of South Africa's *Foreign States Immunities Act, 1981*,³⁶⁹ and in the draft Australian legislation, *Foreign States Immunities Bill 1984*.³⁷⁰ Since consent of the State is all that matters with regard to arbitral competence and may imply, in some measure, submission to the jurisdiction of a court, neither the United States of America nor Canada has considered it necessary to include such a provision in its legislation.

(b) *International or regional conventions*

(i) *1972 European Convention on State Immunity*

251. The 1972 European Convention on State Immunity³⁷¹ contains an interesting article 12,³⁷² which reads as follows:

Article 12

1. Where a Contracting State has agreed in writing to submit to arbitration a dispute which has arisen or may arise out of a civil or commercial matter, that State may not claim immunity from the jurisdiction of a court of another Contracting State on the territory or according to the law of which the arbitration has taken or will take place in respect of any proceedings relating to:

- (a) the validity or interpretation of the arbitration agreement;
- (b) the arbitration procedure;
- (c) the setting aside of the award,

unless the arbitration agreement otherwise provides.

2. Paragraph 1 shall not apply to an arbitration agreement between States.

³⁶⁶ See footnote 283 above.

³⁶⁷ See footnote 287 above.

³⁶⁸ See footnote 288 above.

³⁶⁹ See United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 37-38.

³⁷⁰ See section 17 (footnote 290 above), which resembles more closely the provisions of the 1972 European Convention.

³⁷¹ See Council of Europe, *European Convention on State Immunity and Additional Protocol* (1972), European Treaty Series (Strasbourg), No. 74 (1972).

³⁷² See the commentary to article 12, Council of Europe, *Explanatory Reports on the European Convention on State Immunity and the Additional Protocol* (Strasbourg, 1972), p. 21.

(ii) *1923 Protocol on Arbitration Clauses*

252. The Protocol on Arbitration Clauses, signed at Geneva on 24 September 1923,³⁷³ provides, in article 1, for recognition of:

... the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.

...

(iii) *1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards*

253. In a different context, but not entirely irrelevant to the relationship between consent to submit to arbitration and waiver or renunciation of jurisdictional immunity in regard to judicial proceedings connected with the arbitration, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed at New York on 10 June 1958,³⁷⁴ contains provisions regarding, *inter alia*, recognition of an agreement in writing to submit to arbitration (art. II) and recognition of arbitral awards as binding and enforceable in accordance with the rules of procedure of the State where the award is relied upon (art. III).

3. INTERNATIONAL OPINION

254. Leaving aside for the moment the question of enforcement of arbitral awards or of foreign arbitral awards by national courts, which will be taken up in part IV of the draft articles on immunities from attachment and execution, it is convenient at this juncture to note an emerging consensus of legal opinion favouring arbitration as a means of settling international trade, loan or investment disputes. However, the extent of consent to submit to arbitration, being regarded also as consent to the exercise of jurisdiction in appropriate circumstances, is a matter for States to decide and agree upon. After all, it is an implication to be drawn from the expression of consent to submit current and future differences and disputes to arbitral settlement in regard to possible exercise of existing jurisdiction in relation to the arbitration, from the appointment of arbitrators and interpretation of arbitration clauses to recognition and enforcement of arbitral awards.³⁷⁵

4. AN IRRESISTIBLE IMPLICATION OF CONSENT

255. Once a State agrees in a written instrument to submit to arbitration disputes which have arisen or may arise

³⁷³ League of Nations, *Treaty Series*, vol. XXVII, p. 157.

³⁷⁴ United Nations, *Treaty Series*, vol. 330, p. 38.

³⁷⁵ See, for example, *International Arbitration: Liber Amicorum for Martin Domke* (op. cit.) (footnote 358 above).

between it and other private parties to a transaction, there is an irresistible implication, if not an almost irrebuttable presumption, that it has waived its jurisdictional immunity in relation to all pertinent questions arising out of the arbitral process, from its initiation to judicial confirmation and enforcement of the arbitral awards. A crucial point is the existence of available jurisdiction which is competent to consider the subject-matter, whether it be the appointment or challenging of arbitrators, arbitral procedures, the setting aside or confirmation of an award, or judicial supervision of the arbitral process.

C. Formulation of draft article 20

256. In the light of the foregoing, draft article 20 might be formulated as follows:

Article 20. Arbitration

1. If a State agrees in writing with a foreign natural or juridical person to submit to arbitration a dispute which has arisen, or may arise, out of a civil or commercial matter, that State is considered to have consented to the exercise of jurisdiction by a court of another State on the territory or according to the law of which the arbitration has taken or will take place, and accordingly it cannot invoke immunity from jurisdiction in any proceedings before that court in relation to:

- (a) the validity or interpretation of the arbitration agreement;**
- (b) the arbitration procedure;**
- (c) the setting aside of the awards.**

2. Paragraph 1 has effect subject to any contrary provision in the arbitration agreement, and shall not apply to an arbitration agreement between States.