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Seventh 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 4]

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Introductory note

1. This report is the seventh in the series of reports on jurisdictional immunities of States and their property[1] submitted to the International Law Commission by the Special Rapporteur. Since the present report was begun a few months after the end of the Commission's thirty-sixth session and completed shortly after the conclusion of the thirty-ninth session of the General Assembly, it was not possible to include any account of the discussion on the topic in the Sixth Committee of the General Assembly.[2] However, sufficient progress has been made in the examination of the draft articles in first reading to warrant consideration of the seventh report as a direct extension of the sixth. The introductory note in the sixth report and the introduction to chapter IV of the Commission's report on its thirty-sixth session[3] may serve as an introduction to the present report.

2. The draft articles submitted to the Commission so far are contained in three parts. Part I, entitled "Introduction", contains articles 1 to 5; part II, entitled "General principles", contains articles 6 to 10; and part III, entitled "Exceptions to State immunity", contains articles 11 to 20. The status of work on the draft articles may be briefly stated: articles 1, 7 to 10, and 12 to 18 have been provisionally adopted by the Commission,[4] as have some provisions of articles 2 and 3;[5] the Commission has taken note of draft articles 4 and 5[6] and set them aside for examination after the rest of the articles have been considered; article 6 has been provisionally adopted[7] but the Commission subsequently decided to re-examine it and asked the Drafting Committee to revise it in the light of the new discussion and of the revision of article 1;[8] draft article 11, as revised by the Special Rapporteur,[9] will be examined after the other articles in part III have been considered; draft articles 19 and 20, submitted by the Special Rapporteur in his sixth report, are due to be considered by the Commission at its thirty-seventh session.[10]

3. The draft articles hereinafter submitted constitute part IV of the draft, entitled "State immunity in respect of property from attachment and execution", and part V of the draft, entitled "Miscellaneous provisions".

[1] The six 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. 125, document 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; (*f*) sixth report: *Yearbook ... 1984*, vol. II (Part One), p. 5, document A/CN.4/376 and Add.1 and 2.

[2] See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-ninth session of the General Assembly" (A/CN.4/L.382), sect. D.

[3] *Yearbook ... 1984*, vol. II (Part Two), pp. 58 *et seq.*

[4] The texts of these articles, and the commentaries thereto, are reproduced as follows: art. 1 (revised) and arts. 7, 8 and 9: *Yearbook ... 1982*, vol. II (Part Two), pp. 99 *et seq.*; arts. 10 and 12: *Yearbook ... 1983*, vol. II (Part Two), pp. 22 *et seq.*; arts. 13 and 14: *Yearbook ... 1984*, vol. II (Part Two), pp. 63 *et seq.*; art. 15: *Yearbook ... 1983*, vol. II (Part Two), pp. 36-38; arts. 16, 17 and 18: *Yearbook ... 1984*, vol. II (Part Two), pp. 67 *et seq.*

[5] For the texts of draft articles 2 and 3, see *Yearbook ... 1982*, vol. II (Part Two), pp. 95-96, footnotes 224 and 225. The provisions of these articles with commentaries thereto provisionally adopted by the Commission are reproduced as follows: art. 2, para. 1 (*a*): *ibid.*, p. 100; art. 2, para. 1 (*g*): *Yearbook ... 1983*, vol. II (Part Two), pp. 34-35; art. 3, para. 2: *ibid.*, pp. 35-36.

[6] For the texts, see *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

[7] For the text and commentary thereto, see *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*

[8] Article 6 has not yet been revised by the Drafting Committee; see *Yearbook ... 1984*, vol. II (Part Two), p. 61, footnote 206.

[9] See *Yearbook ... 1982*, vol. II (Part Two), p. 99, footnote 237, and *Yearbook ... 1984*, vol. II (Part Two), p. 59, footnote 200.

[10] For the revised text of draft article 19 submitted by the Special Rapporteur, *ibid.*, p. 61, footnote 202. For the text of draft article 20, see document A/CN.4/376 and Add.1 and 2 (see footnote 1 (*f*) above), para. 256.

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

PART IV. STATE IMMUNITY IN RESPECT OF PROPERTY FROM ATTACHMENT AND EXECUTION

I. *Introduction*

4. Part IV, concerning State immunity in respect of property from attachment and execution, constitutes the final substantive part of the set of draft articles on jurisdictional immunities of States and their property and marks a separate phase in the study undertaken by the Commission on the topic. The title of the topic, appropriately "Jurisdictional immunities of States and their property", might, however, give the impression that there are two main types of jurisdictional immunities, one concerning States and the other their

property. As explained earlier,[11] however, the topic concerns exclusively State immunity and not "property immunity". Property is conceived as "object" rather than "subject" of rights or immunities. The expression "property", whether "State property" or property in the possession or control of a State or in which a State has an interest, cannot be used as indicating a holder of rights or a beneficiary of jurisdictional immunities in the same sense as a State or one of its organs, agencies or even instrumentalities. It is therefore not strictly speaking property, as such, that is entitled to immunity. Immunity belongs to States and States are immune in two sets of circumstances: when they themselves are impleaded or proceeded against *eo nomine,* as well as when measures are taken or contemplated or proceedings instituted in respect of their property. It is only in this sense that the title of the topic is so loosely worded that its meaning is wide enough to cover all types of legal proceedings, whether directed against States themselves, or entailing measures of arrest, attachment or execution against their property, even though they themselves are not named as parties to the proceedings. It may therefore be pertinent to examine some of the significant connections in which property has a central role to play in the overall concept of jurisdictional immunities of States.

A. Relevant connections between property and jurisdictional immunities of States

5. In the context of State immunity, State property is closely relevant in more ways than one. Before proceeding briefly to examine these connections, it is useful to recall that the expression "State property" needs little or no clarification. According to paragraph 1 (*e*) of draft article 2 (Use of terms), it refers to the "property, rights and interests which are owned by a State according to its internal law".[12] This definition may raise another question, especially in regard to property taken in violation of the generally accepted principles of international law, such as property expropriated without compensation. It is convenient to restate at this point that the question of the determination of proprietary rights or of the constitutionality of seizures of property, in the face of conflicting claims under different legal systems, belongs more appropriately to the realm of private international law. The question of illegality of method of acquisition of title or of government actions under public international law forms a separate topic and clearly lies beyond the scope of the current enquiry. The present topic is concerned directly with jurisdictional immunities of States and their property and not with the acquisition of legal titles or the legality or illegality of State acts in the seizure of property under international law.

6. The first important area of close connection between State property and State immunity was identified by Lord Atkin in *The "Cristina"* (1938) as proceedings indirectly impleading a foreign sovereign. In an oft-cited dictum, Lord Atkin said:

> The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted into our domestic law which seem to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.
>
> The second is that they 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.[13]

7. The fact that proceedings affect State property or property in the possession or control of a State may constitute an important factor in determining whether a State may claim jurisdictional immunity by virtue of either of the two propositions of international law cited by Lord Atkin. Thus paragraph 2 of article 7, provisionally adopted by the Commission, contains a provision on which State property appears to have had an important bearing:[14]

> *Article 7. Modalities for giving effect to State immunity*
>
> ...
>
> 2. A proceeding before a court of a State shall be considered to have been instituted against another State, whether or not that other State is named as a party to that proceeding, so long as the proceeding in effect seeks to compel that other State either to submit to the jurisdiction of the court or to bear the consequences of a determination by the court which may affect the rights, interests, properties or activities of that other State.
>
> ...

8. As noted with regard to part III of the draft (Exceptions to State immunity), several specific areas may deserve special attention in an effort to delineate the extent or limits of State immunity. Thus, as provided in article 15, questions of ownership, possession and use of property may, in appropriate circumstances, be determined by a court of the State where the property is situated (*forum rei sitae*) without another State which claims a right or interest in such property being able to invoke jurisdictional immunity.[15] Similarly, proceedings relating to intellectual or industrial property which enjoys legal protection in the State of the forum will not be barred by the rule of State immunity.[16]

9. In another entirely separate connection, property comes into direct contact with jurisdictional immunities of States. Under part IV of the draft, States are immune not only in respect of property belonging to them, but also invariably in respect of property in their possession or control or in which they have an interest, from attachment, arrest and execution by order of a court of another State. Property connections with State immun-

[11] See, for example, the preliminary report, document A/CN.4/323 (see footnote 1 (*a*) above), para. 47; and the second report, document A/CN.4/331 and Add.1 (see footnote 1 (*b*) above), para. 26.

[12] See the second report, document A/CN.4/331 and Add.1 (see footnote 1 (*b*) above), paras. 26 and 33.

[13] United Kingdom, *The Law Reports, House of Lords ..., 1938,* p. 490.

[14] See paragraphs (19) and (20) of the commentary to article 7 (*Yearbook ... 1982*, vol. II (Part Two), p. 106).

[15] See the commentary to article 15 (Ownership, possession and use of property) (*Yearbook ... 1983*, vol. II (Part Two), pp. 36-38).

[16] See the commentary to article 16 (Patents, trade marks and intellectual or industrial property) (*Yearbook ... 1984*, vol. II (Part Two), pp. 67-69).

ity in this more direct manner may occur in the form of pre-trial or rather pre-judgment attachment or arrest, or may take the form of post-judgment measures by way of execution.[17] The question of jurisdictional immunities relates, in this property connection, to the nature of the use of State property or the purpose to which property is devoted rather than to the particular acts or activities of States which may provide a criterion to substantiate a claim of State immunity.[18]

B. Projected structure of part IV of the draft articles

10. The draft articles constituting part IV of the draft may be arranged in such a pattern as to present a vivid picture of the whole structure of the treatment of State immunities. This part is composed of only four articles.

11. Draft article 21, entitled "Scope of the present part", delineates the scope of part IV. The commentary draws some distinctions and underlines the close connection between State immunities from the jurisdiction of the courts of another State under parts II and III and State immunities from attachment and execution in respect of property by order of the courts of another State under part IV, including attachment in the pre-judgment phase and enforcement measures in aid of execution of the judgment.

12. Draft article 22, entitled "State immunity from attachment and execution", deals with the unavailability of means of enforcement of judgments against foreign States in general. Courts normally avoid issuing orders of injunction or specific performance against foreign States, since they would not be enforceable. Even the satisfaction of a judgment against a foreign State is clearly subject to the general rule of State immunity from attachment, arrest and execution. State practice will be examined, including judicial decisions, treaty practice, legal opinions and legislative enactments in the relevant fields, to justify the existence of a general rule of State immunity in respect of property from enforcement measures at various phases of legal proceedings: pre-trial, pre-judgment and post-judgment measures of detention, arrest, attachment and execution against the types of property that are susceptible to such measures with the consent of the States concerned. Of course, nothing will prevent a State from voluntarily submitting to execution or complying with the injunction or specific performance order.

13. Draft article 23, entitled "Modalities and effect of consent to attachment and execution", deals with the various methods by which a State may express consent and endeavours to place appropriate limitations on the validity or effectiveness of consent to attachment and execution. Consent may be expressed in advance in a written agreement or contract. It may be of a general nature which would allow attachment and execution against assets connected with the commercial transactions in question. It may also be related to specific assets or property allocated for the purpose of satisfying judgment debts. In any event, attachment and execution may not be levied against assets forming part of the public property of a State which is qualified as *publicis usibus destinata*, or devoted to public services or public purposes.

14. Draft article 24, entitled "Types of State property permanently immune from attachment and execution", enumerates the types of public property that are usually specifically exempt from measures of attachment and execution. This provision is designed to protect the higher interests of weaker developing nations from the pressure generating from industrialized or developed countries and multinational corporations to give prior consent to possible attachment and execution against certain types of property that are entitled to protection under public international law in the form of inviolability, such as diplomatic and consular premises or assets forming part of the *instrumentum legati*. Of course, nothing will prevent a State from complying with a judgment or order by the courts of another State to perform an act or to refrain from an act, such as occupying certain premises or vacating the same following an ejectment order by the courts of the forum State. By nature, no judicial organ of one State may enforce its order of injunction or specific performance against another unwilling State. There is no machinery of justice in the State of the forum to compel another State to perform a specific act, or to deliver a specific object or to refrain from specific actions. *A fortiori*, a State is not bound to part with or submit to attachment or execution any of the types of property listed in this draft article as unattachable, regardless of any previous commitment or prior consent.

II. *Draft articles*

ARTICLE 21 (Scope of the present part)

A. General considerations

1. DISTINCTIONS BETWEEN IMMUNITY FROM ATTACHMENT AND EXECUTION AND IMMUNITY FROM JURISDICTION

15. If part IV is to qualify as a distinct part of the draft, separate from part II (General principles) and part III (Exceptions to State immunity), it should be possible to distinguish immunity from attachment and execution from other types of jurisdictional immunities, especially immunity from jurisdiction. The need for such an exercise has become more apparent with particular regard to the different connections in which State property may come into play in considering the possible application of the rule of State immunity to a given set of circumstances. If parts II and III are concerned principally with immunity from jurisdiction as opposed to immunity from attachment and execution, then it remains to be seen in what ways and to what extent the notion of State property could be said to be relevant to State immunity.

[17] See the preliminary report, document A/CN.4/323 (see footnote 1 (*a*) above), para. 47.

[18] *Ibid.*, paras. 68-69.

16. As already indicated in the preliminary report,[19] the expression "jurisdictional immunities" can include both types of immunities, namely immunity from jurisdiction and immunity from attachment and execution. The former is essentially different from the latter in kind as well as in the stage at which it occurs. The term "jurisdiction" or *jurisdictio* literally means the pronouncement or determination of the law or right of the parties in litigation. "Immunity from jurisdiction" refers to exemption from the judicial competence of the court or tribunal having power to adjudicate or settle disputes by adjudication. On the other hand, "immunity from attachment and execution" relates more specifically to the immunities of States in respect of their property from pre-judgment attachment and arrest, as well as from execution of the judgment rendered.

17. Thus waiver of "immunity from jurisdiction"—i.e. consent to the exercise of jurisdiction by the courts of another State in accordance with article 8,[20] or participation in a proceeding before a court in accordance with article 9[21]—does not imply submission to measures of execution. Consent by a foreign State to the exercise of local jurisdiction is not consent to execution of judgment against its property. Waiver of immunity from jurisdiction does not constitute or automatically entail waiver of immunity from execution. A separate waiver will be needed at the time satisfaction of judgment is sought.[22] The separation of the two phases has found unequivocal support in judicial decisions of common-law as well as civil-law countries. In the United Kingdom, the House of Lords, in *Duff Development Company Ltd.* v. *Government of Kelantan and another* (1924),[23] refused to allow attachment of the property of the Sultan of Kelantan, although the Government of Kelantan had in a previous proceeding submitted to the jurisdiction of English courts on the merits. Similarly, in the United States of America, in *Dexter & Carpenter, Inc.* v. *Kunglig Järnvägsstyrelsen et al.* (1930),[24] a court refused attachment of the property of the Swedish State Railways, although Sweden had previously submitted to the jurisdiction. It was held, in both cases, that submission to the jurisdiction does not imply submission to execution. As the Court of Appeal of Aix-en-Provence has observed: "These two immunities are not interconnected, and the waiver of one has never, before French courts, entailed the loss of the right to invoke the other."[25]

2. Linkage between immunity from attachment and execution and immunity from jurisdiction

18. While immunity from execution belongs to the post-judgment phase of proceedings, immunity from attachment of property may be invoked at any stage before trial or judgment or during trial, either pre-trial in order to found jurisdiction (*ad fundandam jurisdictionem*) or as security for satisfaction of judgment in the event of a decision favourable to the plaintiff, which may require seizure of property of the State judgment debtor for partial or total satisfaction of the judgment debt. The immunities of States from attachment and execution of property are distinguishable and separable from their immunities from jurisdiction. Yet there are circumstances in which the two types or phases of immunity are so closely linked that they are not clearly independent of each other. Indeed, there may be areas or circumstances in which both types or phases of immunity partially or wholly overlap.

19. The passage from immunity from jurisdiction to immunity from attachment and execution involves an increasing volume and variety of difficulties, as the complex problem areas appear to multiply. If there were difficult problems in the selection of competing criteria for determining State activities to be covered by immunity from jurisdiction and those which are in practice subject to territorial jurisdiction, there are indeed more difficulties in regard to the corresponding question of immunity from attachment and execution.[26] The question continues to be validly asked whether distinctions such as between *acta jure imperii* and *acta jure gestionis* persist in the practice of States beyond the immunity from jurisdiction stage. It is necessary to establish the extent to which such distinctions remain relevant in the classification of the types of State property or the nature of the uses of property by States that could determine the question of immunity from attachment and execution. The answer may well be that, in the ultimate analysis, immunity from attachment and execution is far more absolute than immunity from jurisdiction, which admits of several possible exceptions, as identified in part III. On the other hand, only express consent to execution could deprive States of this immunity and such consent is not always effective if it relates to the types of property that are not attachable. The interplay between the two types of immunity has given rise to different legal propositions.

3. Linkage as justification for absolute immunity from jurisdiction

20. It has sometimes been argued that, because there is no possibility of enforcing judgment against a foreign State, there should be no possibility of exercising jurisdiction against a foreign State. In other words, absolute immunity from execution breeds absolute immunity from jurisdiction. Thus there might be some—but only some—justification for the following argument advanced by an Italian writer in 1890:

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[19] *Ibid.*, paras. 49-52.

[20] See the commentary to article 8 (Express consent to the exercise of jurisdiction) (*Yearbook ... 1982*, vol. II (Part Two), pp. 107-109).

[21] See the commentary to article 9 (Effect of participation in a proceeding before a court) (*ibid.*, pp. 109-111).

[22] See the preliminary report, document A/CN.4/323 (see footnote 1 (*a*) above), para. 67.

[23] United Kingdom, *The Law Reports, House of Lords ..., 1924*, p. 797, at pp. 809-810.

[24] United States of America, *The Federal Reporter, 2d Series*, vol. 43 (1931), p. 705; *Annual Digest of Public International Law Cases, 1929-1930* (London), vol. 5 (1935), p. 109, case No. 70.

[25] See *Socifros* v. *USSR* (1938) (*Annual Digest ..., 1938-1940* (London), vol. 9 (1942), p. 237, case No. 80); see also the decision of the Court of Appeal of Aix-en-Provence in *Oficina del Aceite* v. *Domenech* (1938) (*ibid.*, p. 239, case No. 81).

[26] See, for example, I. Sinclair, "The law of sovereign immunity: Recent developments", *Collected Courses of The Hague Academy of International Law, 1980-II* (Alphen aan den Rijn, Sijthoff and Noordhoff, 1981), vol. 167, pp. 218-220.

... In fact, a sentence pronounced against a foreign State or sovereign cannot be executed in the foreign State; nor can it be executed in the State in which it was handed down, at least not against the foreign State. But a sentence which cannot be executed either by the judge who passed it or by another authority is a legal monstrosity. This is sufficient reason for any serious thinker to consider the doctrine which we are combating entirely false and ill-founded.[27]

21. Whatever the merits of this argument, the facts upon which it is based are not borne out by the current practice of States.[28] As will be seen, the judicial practice of several countries, such as Italy, Egypt, France, Belgium and more recently Switzerland, the Netherlands, the Federal Republic of Germany, the United Kingdom and the United States of America, appears to have permitted execution against the property of foreign States on several occasions, especially in matters *jure gestionis*,[29] and there appears to have been no serious objection to such execution except in regard to property covered by diplomatic immunities.[30]

4. Execution as a corollary of the exercise of jurisdiction

22. Another view, different from the foregoing, has been advanced in judicial reasoning in some civil-law jurisdictions. In Belgium, the decision of the Tribunal civil of Brussels in the *Socobelge* case (1951) is a classic example;[31] the court rejected immunity from execution once jurisdiction was exercised on the merits. It stated:

Considering that it is not clear on what considerations the judge would be warranted in refusing to confirm a lawfully justified distraint to the benefit of a Belgian company because such confirmation might be damaging to the interests of a foreign State summoned by a Belgian national to appear in the case before Belgian courts; that, in so doing, the judge is merely carrying out his mission in its most comprehensive meaning, subject to appeal, for which in this respect and having regard to a higher interest, [the] Belgian legislator has made provision in order to guard against any inadvertence on the part of the judge ...[32]

23. This view was reflected in the conclusion of the Court of Cassation in an earlier Belgian case concerning the *Société anonyme des chemins de fer liégeois-luxembourgeois* (1930)[33] that the power to proceed to forced execution is but the consequence of the power to exercise jurisdiction. Or, as one eminent jurist put it:

... It is at first sight difficult to admit logically that a refusal to grant jurisdictional immunity should not involve forced execution against the property of the foreign State.[34]

24. This view is further reflected in the case-law of some countries, such as Switzerland. Immunity from execution is rejected once jurisdiction has been exercised and judgment rendered by a Swiss court against a foreign State.[35] Thus, in *Kingdom of Greece* v. *Julius Bär & Co.* (1956),[36] the Swiss Federal Tribunal refused to accord absolute immunity from execution, linking absence of immunity from execution to submission to the jurisdiction. The court observed:

... As soon as one admits that in certain cases a foreign State may be a party before Swiss courts to an action designed to determine its rights and obligations under a legal relationship in which it had become concerned, one must admit also that that foreign State may in Switzerland be subjected to measures intended to ensure the forced execution of a judgment against it. If that were not so, the judgment would lack its most essential attribute, namely that it will be executed even against the will of the party against which it is rendered. ... There is thus no reason to modify the case-law of the Federal Tribunal in so far as it treats immunity from jurisdiction and immunity from execution on a similar footing.[37]

5. Interrelationship between immunity from jurisdiction and immunity from attachment and execution

25. While the two types of immunity are by nature no doubt distinguishable, as they are indeed separable in time, the interplay between the two notions, in theory as well as in practice, leaves room for considerable doubts and controversy. The complete absence of an interconnecting link between the two types of immunity is clearly not well founded, as one seems to cast a shadow on the other in more ways than one.

26. Let us consider in turn the different sets of circumstances. First, in cases where immunity from jurisdiction has been upheld, the question of seizure of property of a foreign State *ad fundandam jurisdic-*

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[27] C. F. Gabba, "De la compétence des tribunaux à l'égard des souverains et des Etats étrangers", *Journal du droit international privé* (Clunet) (Paris), vol. 17 (1890), p. 34; for the other parts of this article, *ibid.*, vol. 15 (1888), p. 180, and *ibid.*, vol. 16 (1889), p. 538.

[28] Sir Gerald Fitzmaurice noted in 1933 that, with the exception of Italy and, to a lesser extent, Czechoslovakia, it was not possible to proceed to actual execution of a sentence without the consent of the State concerned, *in* "State immunity from proceedings in foreign courts", *The British Year Book of International Law, 1933* (London), vol. 14, pp. 119-120.

[29] For Italy, see, for example, *Rappresentanza commerciale dell'U.R.S.S.* v. *De Castro* (1935) (*Il Foro Italiano* (Rome), 1935, part 1, p. 240; *Annual Digest ..., 1933-1934* (London), vol. 7 (1940), p. 179, case No. 70); for Egypt, see *Egyptian Delta Rice Mills Co.* v. *Comisaría General de Abastecimientos y Transportes de Madrid* (1943) (*Bulletin de législation et de jurisprudence égyptiennes* (Alexandria), vol. 55 (1942-1943), p. 114; *Annual Digest ..., 1943-1945* (London), vol. 12 (1949), p. 103, case No. 27); for France, see *U.R.S.S.* v. *Association France-Export* (1929) (*Journal du droit international* (Clunet) (Paris), vol. 56 (1929), p. 1043; *Annual Digest ..., 1929-1930* (*op. cit.*), p. 18, case No. 17); for Belgium, see the *Socobelge* case (see footnote 31 below); for Switzerland, see *State Immunity (Switzerland) (No. I)* (1937) (*Blätter für Zürcherische Rechtsprechung*, vol. XXXVII (1938), p. 319; *Annual Digest ..., 1941-1942* (London), vol. 10 (1945), p. 230, case No. 60); for Greece, see the *Romanian legation* case (1949) (*Revue hellénique de droit international* (Athens), vol. 3 (1950), p. 331).

[30] See, on this subject, S. Sucharitkul, *State Immunities and Trading Activities in International Law* (London, Stevens, 1959), pp. 263-264.

[31] *Socobelge et Etat belge* v. *Etat hellénique, Banque de Grèce et Banque de Bruxelles* (*Journal du droit international* (Clunet) (Paris), vol. 79 (1952), p. 244; for a review of both the doctrinal and the jurisprudential authorities cited by the court, see pp. 248-258).

[32] *Ibid.*, p. 261.

[33] *Société anonyme des chemins de fer liégeois-luxembourgeois* v. *Etat néerlandais (Ministère du Waterstaat)* (*Pasicrisie belge, 1903* (Brussels), part 1, p. 294); the judgment of the Court of Cassation is cited in the Harvard Law School draft convention on competence of courts in regard to foreign States, see *Supplement to The American Journal of International Law* (Washington, D.C.), vol. 26 (1932), pp. 613-614.

[34] J.-F. Lalive, "L'immunité de juridiction des Etats et des organisations internationales", *Recueil des cours de l'Académie de droit international de La Haye, 1953-III* (Leyden, Sijthoff, 1955), vol. 84, p. 273.

[35] See Lalive, "Swiss law and practice in relation to measures of execution against the property of a foreign State", *Netherlands Yearbook of International Law, 1979*, vol. X, p. 154: "powers of execution are derived from powers of jurisdiction".

[36] *Recueil officiel des arrêts du Tribunal fédéral suisse*, vol. 82 (1956), part 1, p. 75; *International Law Reports, 1956* (London), vol. 23 (1960), p. 195.

[37] *International Law Reports, 1956 ...*, pp. 198-199.

tionem does not arise. Nor indeed will the execution of judgment on the merits against State property be at issue. Non-exercise of jurisdiction, or the upholding of immunity from jurisdiction, clearly imports immunity from attachment and execution of property of a foreign State.

27. On the other hand if, hypothetically, jurisdiction is assumed or exercised against a foreign State, further enquiry will be necessary as to whether jurisdiction was founded on the seizure of property or otherwise, and also as to whether a judgment is rendered against or in favour of the foreign State. Only in the event that an unfavourable judgment is rendered against the foreign State can there emerge a possibility of execution and, therefore, arise the question of immunity from execution of assets or property owned by the foreign State. Since no injunction or specific performance could well be forcibly ordered against a foreign State, satisfaction of a judgment debt would have to be sought from among the available assets of the debtor State which happen to be situated within the territory of the State of the forum. It is only in this last hypothesis that the question of immunity from execution may be said to have arisen. Of the various eventualities, only one seems relevant to the consideration of a possible claim of immunity from execution. Nevertheless, it is undeniable that the examination of this immunity from execution is not totally divorced from all considerations of immunity from jurisdiction.

28. It should be added that immunity from attachment, whether *ad fundandam jurisdictionem* or as an interim measure to secure satisfaction of judgment, is inextricably tied up with immunity from jurisdiction or the absence thereof. Thus, if property is seized in order to found jurisdiction, such as the arrest of a vessel, and jurisdiction is declined on the ground of State immunity from jurisdiction, it follows that there is also immunity from seizure and detention. Pre-judgment attachment will likewise have to be vacated, either because the court declined jurisdiction or because judgment was not rendered against the foreign State. The chance of attachment being allowed could be short-lived if ultimately the judgment is favourable to the State or if the plea of sovereign immunity is upheld.

29. Apart from questions relating to State property already dealt with in the three preceding parts of the draft,[38] all other matters relating to immunity from attachment, arrest and execution will be examined in part IV. This part is primarily concerned with enforcement measures, both as security for satisfaction of prospective judgment and as measures in aid of execution. Parts II and III deal more explicitly with immunities of States from judicial jurisdiction rather than with exemption from arrest, detention and measures of sequestration and from execution in satisfaction of judgments of foreign courts.

[38] See article 2 (Use of terms); article 7 (Modalities for giving effect to State immunity); article 15 (Ownership, possession and use of property); article 16 (Patents, trade marks and intellectual or industrial property); and article 19 (Ships employed in commercial service).

6. Possible scope of part IV

30. The foregoing considerations may warrant a tentative conclusion that part IV is entitled to separate treatment on the basis of the legal distinctions between the two notions of jurisdictional immunities as opposed to immunities from the application of substantive law, namely immunity from jurisdiction and immunity from execution. In between the two operates immunity from seizure and attachment, measures which are designed to provide foundation for jurisdiction or guarantee for satisfaction of payment of judgment debts.

31. The scope of part IV should cover all the possibilities of immunity from attachment, arrest and execution at all stages of a trial, before and after the rendering of judgment. Such possibilities are circumscribed by the prospect of a judgment being rendered against a foreign State. Precautionary as well as executionary measures may be taken against State property, or property in the possession or control of a State or in which a State has an interest. All the circumstances in which immunity from attachment and execution could successfully be claimed and the extent to which measures of attachment and execution are permissible deserve careful examination. So, too, does the question of the classification of State property as property that is attachable or susceptible to execution by consent of the State, or as assets and property that are beyond the reach of legal machinery to enforce compliance with, or satisfaction of, a judgment against a foreign sovereign State, irrespective of consent explicitly given or applied to specified assets or specific objects of State property.

B. Formulation of draft article 21

32. In the light of the foregoing, article 21 might be formulated as follows:

Article 21. Scope of the present part

The present part applies to the immunity of one State in respect of State property, or property in its possession or control or in which it has an interest, from attachment, arrest and execution by order of a court of another State.

ARTICLE 22 (State immunity from attachment and execution)

A. General considerations

1. Jurisdictional immunities in respect of State property

33. In parts II and III, provisions have been made for jurisdictional immunities from legal proceedings in respect of State property or property in the possession or control of a State or in which a State has an interest, both in confirmation of the principle of State immunity and in respect of possible exceptions to that principle.[39] In connection with article 22, an examination will be

[39] See footnote 38 above.

made of State practice concerning the application of various types of immunity, not so much from judicial jurisdiction, but more particularly from attachment, arrest and execution. Three types of State immunity deserve attention for the purposes of this article.

(a) *Immunity from seizure to found jurisdiction*

34. A State is immune from seizure of its property *ad fundandam jurisdictionem*, especially if the property is *publicis usibus destinata* or devoted to public services, such as a State-owned vessel employed in governmental non-commercial service. The vessel is immune from arrest for the purpose of bringing a suit against the vessel and its owner or operator. Such a proceeding, as noted earlier,[40] now inevitably entails an action against the owner, so that the vessel could in practice actually be released upon deposit of a bond, and the action could proceed against the owner. The court could exercise jurisdiction in circumstances where the State has initiated or participated in the proceeding or otherwise submitted to its jurisdiction. The State may have agreed to have the dispute settled by the court of the forum State, having regard to the private or commercial nature of the subject-matter of litigation, which, in the case of a State-operated vessel, may relate to the commercial and non-governmental use of that vessel. In this context, therefore, the State owning property, such as a seagoing vessel, would have the same extent of immunity from seizure and arrest to found jurisdiction as it would immunity from a proceeding *in personam* or from a suit in admiralty against it or from other similar actions. Immunity may be limited to the public activities or services to which the property is devoted. There is a close link here between the exercise of jurisdiction involving a foreign State as property-owner and the power to seize the property in order to found jurisdiction.

(b) *Immunity from pre-judgment attachment*

35. This type of immunity in respect of State property is connected with a proceeding or litigation in progress. An order may be issued by a court to secure performance or satisfaction of a prospective judgment through the assets attached. This immunity from attachment appears to be more absolute in the sense that pre-judgment or pre-trial attachment is not normally permitted against State property or property in the possession or control of a State. Various instances may be noted in which the need for upholding immunity from pre-judgment attachment is apparent. In the first place, if the suit is directed against the State or its property, immunity could be invoked by the State to prevent the continuation of the proceeding.[41] Immunity from jurisdiction thus upheld would make attachment of State property pointless, as there would be no principal suit in respect of which to seek to attach assets to satisfy an eventual judicial pronouncement against the State.

36. If, on the other hand, the proceeding is not against the State in its own name, but attachment is being sought against its property, then immunity of the State from attachment may be maintained on its own strength, especially if the property in question is public or is in use for public purposes or dedicated to public services. Immunity from attachment is sustainable even if the property is not owned by the State but is used by it or is under its control for public services, such as military aircraft, transboundary trains and other means of public transport, unless there is a special conventional régime applicable to vehicles owned or operated by one State in, over or through the territory of another State or on the high seas.

37. Because of its provisional nature, pre-judgment attachment (*saisie préliminaire ou conservatoire*) is designed to provide security or guarantee for payment or satisfaction of a judgment debt. If, however, there is no final judgment, either because the court refuses to exercise jurisdiction on the ground of State immunity or on other grounds, or because, upon judicial examination, the court rejects the claim or refuses to award the compensation requested, the *raison d'être* for the attachment would cease and the attachment order, being groundless, would have to be vacated as a matter of course. In normal circumstances, the general rule does not appear to support such attachment against State property without its consent. The possibility and duration of pre-judgment attachment could be said to bear a close relationship to State immunity from jurisdiction, with regard to both the substance of the litigation and the ultimate outcome of its adjudication.

(c) *Immunity from execution*

38. Unless a judgment is rendered against a State in such a way that it can be satisfied, the question of possible execution against State property does not arise. If and when such a judgment is delivered, the State could still raise a plea of immunity from execution to oppose an execution order. The extent to which immunity from execution is recognized and upheld in practice remains to be examined. Its rationale is to be found in the principle of the sovereignty and equality of States, as indeed is the foundation of the rule of State immunity from the jurisdiction of foreign courts.

39. It should be observed at this juncture that the ultimate objective of litigation involving a foreign State is invariably to obtain some measure of redress or compensation, since *restitutio in integrum* or an injunction or specific performance could not conceivably be forced upon a State against its will. It is true that States may consent to abide by the judgment of a court or an arbitral award. Nevertheless, the available method of enforcing the award or judgment against a State appears to be practically out of reach in the absence of an express waiver or explicit agreement by the State to the exercise of the power of execution by the forum State. Even when such consent is validly given, it is to be very restrictively construed, subject to several imperative norms; and consent is in no sense to be lightly presumed. Immunity from execution comes into question only when a judgment has been pronounced or an award given by a judicial or arbitral tribunal. Prior to such pronouncement, pre-judgment attachment is

[40] See the sixth report, document A/CN.4/376 and Add.1 and 2 (see footnote 1 (*f*) above), paras. 122-123.

[41] See footnote 14 above.

permissible only in exceptional circumstances, as previously stated (paras. 35 and 37).[42]

40. The core of the problem of jurisdictional immunities of States relates, in the final analysis, to immunity from execution. Its possible limitations, entailing possibilities of execution, remain to be explored. Reference will be made to national legislation, international agreements, treaty practice, contracts and judicial decisions relating to possible measures of execution and to the types of State property exposed to execution as well as those that are normally unattachable or absolutely unassailable, regardless of consent. Immunity from execution is, as such, separate from immunity from jurisdiction, both in substance and chronologically. Execution is subsequent to, and dependent upon, positive judgment requiring satisfaction and sometimes also upon failure on the part of the debtor to comply with the award within a reasonable time-limit. Execution is not automatic but is a process that serves to expedite and secure payment or satisfaction of a judgment debt. Immunity from execution is, in this way, linked to the existence of a judgment whereby a foreign State is an adjudged debtor.

2. Immunity from attachment, arrest and execution as a general rule

41. In part II of the draft, it has been possible, by use of the inductive method, to establish the existence of the rule of State immunity from jurisdiction, although its formulation and the precise extent of its application are still to be finalized. The rule of State immunity is founded on the equality and sovereignty of States as expressed in the maxim *par in parem imperium non habet*. The rule of State immunity from execution, although distinct from immunity from jurisdiction, is derived from the same source of authority. Once it is established that State immunity is a rule of general application subject to certain conditions and exceptions, it is not difficult to add the dimension of State property as an ancillary proposition and necessary corollary of State immunity from jurisdiction. Immunity from attachment, arrest and execution is an inevitable consequence of immunity from jurisdiction. The converse is not generally true. The exercise of jurisdiction or non-immunity from jurisdiction does not necessarily entail the power to order execution against State property or non-immunity from execution.

42. Inasmuch as immunity from attachment, arrest and execution is essentially linked to immunity from jurisdiction, its formulation and the scope of its application must be circumscribed by the conditions and exceptions applicable to the rule of State immunity from jurisdiction. For this reason, the application of article 22 will be in accordance with the qualifications, conditions and exceptions contained in parts II and III of the draft articles. A cross-reference to the two pending parts in the text of the article appears warranted.

3. Extent of immunity from attachment, arrest and execution

43. Proceeding from the assumption that a general rule is established in support of immunity from attachment, arrest and execution, together with its close connections or linkage with various stages of immunity from judicial jurisdiction or the exercise of jurisdiction by the court in proceeding involving another State, the next question to which attention should be directed is the precise extent of this immunity. It would not be accurate to state categorically that immunity from execution is absolute, since, like other jurisdictional immunities, it is relative. It operates only when the State does not consent to the exercise of the power of execution. Nothing can prevent a State from consenting thereto. With the consent of the State, immunity from execution disappears. A State cannot invoke its immunity from execution once it has expressly consented to execution. The extent to which such an expression of consent operates as a bar to a claim of immunity from execution is a matter to be further scrutinized. It is this same extent that determines the scope of State immunity or non-immunity in respect of property from attachment, arrest and execution. Thus it is not always practicable to attempt to formulate the rule of immunity in absolute terms without regard to the inherent limitations or restricted scope of its application.

44. Relativity appears to prevail from all standpoints and in all directions. It is important none the less to begin somewhere. Since this study has started from the proposition that there exists a prevailing rule of State immunity, it seems equally convenient to pursue an enquiry from that same proposition in regard to immunity from attachment, arrest and execution. It will be seen, in the practice of States examined, that the extent of immunity is circumscribed by the expression or communication of consent and by the generality or specificity of property in regard to which consent to attachment or execution has been given. It is also further confined to the types of property or assets against which execution could be levied without undue adverse effect on the sovereign attributes of the State. For instance, attachment or execution against operating bank accounts of an embassy could not but disrupt normal diplomatic intercourse between the receiving State, which is the State of the forum, and the sending State, which is the adjudged debtor. Similarly, the seizure of the residence of an accredited ambassador would not only infringe the inviolability of diplomatic premises forming part of the *instrumentum legati* protected by the 1961 Vienna Convention on Diplomatic Relations,[43] but also prevent the normal performance of diplomatic functions. Finally, the taking, even as a judicial sanction, of property constituting the cultural heritage of a nation or the pillage of natural resources over which a State is entrusted with permanent sovereignty cannot be condoned by mere judicial confirmation by a municipal tribunal. A State no more has the power to alienate its own natural resources than to reduce statehood to a colonial régime. The process of decolonization is irreversible. The opposite is not permissible with or without the consent of any State. A State may consent to give up its immunity from attachment and execution up to a certain limit beyond which no national jurisdiction or power is recognized. In this connection, there exists a standard from which there can be no derogation. The seizure of a

[42] For State practice on this question, see paragraphs 45-67 below.

[43] United Nations, *Treaty Series*, vol. 500, p. 95.

gunboat or a military aircraft of another State may spark off an endless process of hostilities or international conflicts.

B. State practice

1. General observations

45. An examination of the current practice of States with regard to the question of immunity from execution brings us closer to the climax of the study on jurisdictional immunities. If the dignity and sovereignty of States justify their immunity from jurisdiction, the disallowance of measures that threaten the very existence and survival of a State, especially a weaker, smaller and poorer State in the long process of national development, is a matter of life and death for an independent sovereign State. Immunity is consistent not only with the dignity of a State, but also with the very concept of independent statehood. Without such immunity chaos might ensue, since States are now obliged to keep certain funds and assets abroad and to own properties in foreign lands for various representational and governmental functions in addition to their international trade or commercial activities.

46. It may be convenient for the purposes of article 22 to change the order in which State practice is usually reviewed. As immunity from execution touches more deeply the life of States, it might be pertinent to start with governmental rather than judicial practice. This might help to present legal developments in a clearer perspective, since Governments are often claimants of immunity from execution and, as such, are likely to be highly sensitive in the converse case when properties of foreign States are being attached or execution is being levied against assets of foreign Governments. In many countries, the consent of the executive branch of the Government is needed for execution to be ordered against property of a foreign State. There seems to be a parallel in this connection between the positions of local and foreign sovereigns, although the analogy cannot be stretched to its logical conclusion.

2. Governmental practice

47. Governmental practice offers a clue to the solution of some of the practical problems involved, since in the final analysis the seizure, attachment and execution of property of foreign States raise more difficulties for Governments than for the courts which order such measures. For practical considerations, the executive branch of the Government in various countries prefers to reserve a certain control over action by the judiciary in matters of enforcement against property of foreign States, as the political branch of the Government may be expected to answer certain queries from other Governments in that connection. It is also in this area of immunity from execution that the notion of reciprocity may play a prominent, if not decisive role. Governmental practice in this connection will cover national legislation and treaty practice as well as international and regional conventions. It may also serve as guidance for the examination of judicial practice, which is susceptible to vacillation due to countless factors that cannot always be identified.

(a) *National legislation*

48. National legislation as a governmental measure is designed to bring the law up to date or to place judicial practice on a more consistent basis and bring it more into line with government policies or public policy in matters of execution of State property or property of a foreign Government situated in the territory of the forum State. Legislation is often a reflection of the need to correct judicial error or simply of the legal confusion caused by decisions following difficult cases. The laws of certain countries deserve special attention.

(i) *Italy*

49. Italy has enacted two pieces of legislation on immunity from execution: Executive Order No. 1621 of 30 August 1925 and Law No. 1263 of 15 July 1926. These measures were prompted by the institution of sequestration proceedings against Greece[44] and against the trade delegation of the USSR.[45] Article 1 of the *decreto-legge* of 30 August 1925[46] provides:

> No steps shall be taken for the sequestration, attachment or sale of, or in general for the execution of any measure directed against, the movable or immovable property, the vessels, the funds, the securities or any other assets of a foreign State without the authorization of the Minister of Justice.
>
> This provision shall apply only in respect of those States which accord reciprocity.[47]

50. This text, after amendment, became Law No. 1263 of 15 July 1926,[48] article 1 of which reads:

> No steps shall be taken for the sequestration or attachment of, or in general for the execution of any measure directed against, the movable or immovable property, the vessels, the funds, the securities, the investments or any other assets of a foreign State without the authorization of the Minister of Justice.
>
> Actions already in course may not be continued without the aforesaid authorization.
>
> The above provisions shall apply only in respect of States which accord reciprocity, which must be declared by a decree of the Minister.
>
> No action, neither in the civil nor in the administrative courts, shall lie to challenge the above-mentioned authorization.

51. It should be noted that in the law of 15 July 1926, the verification of reciprocity is placed within the exclusive competence of the Government. Both the certificate of the Government establishing the existence of reciprocity and the authorization or refusal of execution are regarded as political acts against which no appeal or remedy is to be allowed. Execution is not possible without leave from the executive. There appears to be virtually complete immunity from execution once

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[44] See A. Klitsche de la Grange, "Giustizia e Ministro della Giustizia nei processi contro gli Stati esteri (Il caso Castiglioni-Jugoslavia)", *Rivista trimestrale di diritto e procedura civile* (Milan), vol. VII (1953), p. 1152.

[45] See R. Provinciali, *L'immunità giurisdizionale degli Stati stranieri* (Padua, Milani, 1933), p. 163.

[46] A *decreto-legge* (executive order) is a normative act with the force of law emanating from the Government in cases of emergency following a summary procedure. See A. Rocco, "Limitazioni agli atti esecutivi e cautelari contro Stati esteri", *Rivista di diritto processuale civile* (Padua), vol. III-1 (1926), p. 1.

[47] See *Rivista di diritto internazionale* (Rome), 18th year (1926), p. 159, "Atti esecutivi sopra beni di Stati esteri nel Regno".

[48] *Ibid.*, p. 407; see also the proceedings of the twenty-seventh legislature of the Italian Senate (1924-1925), *Atti parlamentari, Senato*, Leg. XXVII, document No. 279.

reciprocity is established. This principle appears to be based on comity of nations and national interest rather than on a pre-existing rule of international law.[49] Such reciprocity has been established for a number of States.[50] This fact could not be so interpreted as to exclude the application of immunity to States for which reciprocity has not yet been established. The Ministry of Foreign Affairs could provide a certificate declaring the existence of a reciprocal rule once a note verbale is issued by the embassy confirming the principle of immunity from execution in the foreign State concerned.

(ii) *Union of Soviet Socialist Republics*

52. The relevant law of the Soviet Union is directly applicable. Article 61 of the Fundamentals of Civil Procedure of the USSR and the Union Republics, of 8 December 1961, provides:

Article 61. Suits against foreign States. Diplomatic immunity

The filing of a suit against a foreign State, *the collection of a claim against it** and *the attachment of the property located in the USSR** may be permitted only with the consent of the competent organs of the State concerned.

Diplomatic representatives of foreign States accredited in the USSR and other persons specified in relevant laws and international agreements shall be subject to the jurisdiction of the Soviet court in civil cases only within the limits determined by the rules of international law or in agreements with the States concerned.

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.[51]

53. The Soviet law confirms the same principle of State immunity from execution as does the Italian legislation, but its application is more positive and does not depend on proof of a reciprocal legislative provision. Rather, reciprocity provides a reason for the State to withhold immunity from attachment and execution in respect of property of another State which does not recognize the same extent of immunity. In practice, State immunity is a general rule and non-application is excusable only on the ground of reciprocity, which is not presented as a *sine qua non* of immunity.

54. The Soviet legislation also underlines the importance of consent of the State concerned, whereas the Italian law refers to consent of the executive. In Italian practice, as in the practice of many other States, this requirement opens the door for intervention by the political branch of the Government, such as the Minister of Justice or the Ministry of Foreign Affairs. The question of immunity could therefore be raised at the political or executive level rather than in court. If the State concerned consents or does not raise a plea of immunity, it is not unlikely that the court will proceed to levy execution unopposed.

(iii) *Netherlands*

55. A Netherlands law[52] contains one provision specifically affecting State immunity from jurisdiction and from execution in matters of private law. Article 13a *Wet AB* reads:

The judicial jurisdiction of the courts and the execution of court decisions and of legal instruments drawn up by legally authorized officials (*authentieke akte*) are subject to the exceptions acknowledged under international law.[53]

56. This provision led to the amendment of article 13 of the *Deurwaardersreglement* (Regulations concerning the bailiff), paragraph 4 of which now reads:

The *deurwaarder* [bailiff] shall be bound to refuse the service of a writ where he has been informed by or on behalf of [the Minister of Justice] that the service of a writ would be contrary to the obligations of the State under international law. Such refusal shall not entail liability to the parties involved.[54]

57. A rule has also been introduced in article 438a of the Netherlands Code of Civil Procedure,[55] as well as in a number of special provisions, barring enforcement proceedings which are liable to affect the public interest. This rule exempts "property intended for public service" from seizure and, consequently, from all forms of execution performed through seizure. This provision apparently applies to State-owned property and has been enacted for domestic purposes. Yet its scope has in practice been extended to cover foreign public property, not just State-owned but all forms of property intended for public service (*publicis usibus destinata*). Netherlands law therefore does not allow attachment or execution of property owned by a foreign State and "intended for public service", even though it is situated in the Netherlands.

(iv) *United States of America*

58. The *Foreign Sovereign Immunities Act of 1976*[56] contains one directly pertinent provision, which reads:

Section 1609. Immunity from attachment and execution of property of a foreign State

Subject to existing international agreements to which the United States is a party at the time of enactment this Act, the property in the United States of a foreign State shall be immune from attachment, arrest and execution except as provided in sections 1610 and 1611 of this chapter.

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[49] See L. Condorelli and L. Sbolci, "Measures of execution against the property of foreign States: the law and practice in Italy", *Netherlands Yearbook of International Law, 1979*, vol. X, p. 197.

[50] For example, Yugoslavia, the United Kingdom, Saudi Arabia, Argentina and Hungary.

[51] English translation in United Nations, *Materials on Jurisdictional Immunities of States and their Property* (Sales No. E/F.81.V.10), p. 40. The Code of Civil Procedure of the Byelorussian SSR contains identical provisions in article 395 (*ibid.*, p. 6).

[52] Entitled *Wet Algemene Bepalingen (Wet AB)* (Statute containing general provisions on legislation).

[53] See C. C. A. Voskuil, "The international law of State immunity, as reflected in the Dutch civil law of execution", *Netherlands Yearbook of International Law, 1979*, vol. X, p. 260. Cf. the Code of Civil Procedure of Colombia, art. 336 (Execution against public entities): "Execution shall not be levied against the nation" (*Codigo de Procedimiento Civil*, 13th ed. (Bogotá, Temis, 1982), p. 150; English trans. in United Nations, *Materials on Jurisdictional Immunities ...*, p. 13).

[54] Voskuil, *loc. cit.*, p. 261.

[55] *Ibid.*, pp. 261-264.

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

59. The same law sets out exceptions to State immunity from attachment and execution in section 1610 and enumerates the types of property immune from execution in section 1611. Both sections deserve closer examination in connection with the scope or extent of immunity and the types of property that are permanently unattachable, despite apparent consent (see paras. 107-108 below).

(v) *United Kingdom*

60. Section 13, subsection (2), of the *State Immunity Act 1978*[57] provides as follows:

Procedure

...

13. ...

(2) Subject to subsections (3) and (4)[58] below:

(*a*) reflief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property; and

(*b*) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action *in rem*, for its arrest, detention or sale.[59]

...

(vi) *Canada*

61. Section 11 of Canada's *State Immunity Act, 1982*[60] contains a provision similar to that of the United Kingdom:

11. (1) Subject to subsections (2) and (3), property of a foreign State that is located in Canada is immune from attachment and execution and, in the case of an action *in rem*, from arrest, detention, seizure and forfeiture ...

(vii) *Pakistan*

62. Section 14 of Pakistan's *State Immunity Ordinance, 1981,*[61] which closely resembles the corresponding provision of the United Kingdom Act, provides:

Procedure

...

14. *Other procedural privileges.*

...

(2) Subject to subsections (3) and (4),

...

(*b*) the property of a State, not being property which is for the time being in use or intended for use for commercial purposes, shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action *in rem*, for its arrest, detention or sale.

...

(viii) *Yugoslavia*

63. As pointed out earlier in connection with Italian legislation (para. 51), the laws of Yugoslavia, Saudi Arabia, Argentina and Hungary also recognize State immunity from attachment and execution. Thus article 13 of Yugoslavia's Law on Executive Procedure[62] provides:

The property of a foreign State in the Socialist Federal Republic of Yugoslavia is not subject to execution, nor attachment, without the prior consent of the Federal Organ for Administration of Justice, except in case that a foreign State explicitly agreed to the execution, that is attachment.

(ix) *Norway*

64. The law of 17 March 1939 providing various regulations for foreign State-owned vessels[63] contains the following interesting provision:

§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.[64]

...

(b) *International and regional conventions*

(i) *1972 European Convention on State Immunity and Additional Protocol*

65. The 1972 European Convention on State Immunity[65] stipulates in article 23:

No measures of execution or preventive measures against the property of a Contracting State may be taken in the territory of another Contracting State except where and to the extent that the State has expressly consented thereto in writing in any particular case.

66. This provision in effect reconfirms the classic position in favour of immunity from attachment and execution of property of a State in the absence of its consent. It may, however, be argued that this reaffirmation is based on mutual confidence within a close community. This confidence is further strengthened by an undertaking on the part of each contracting State to honour a judgment given against it. This firm undertaking is contained in article 20, paragraph 1, of the Convention, which provides:

1. A Contracting State shall give effect to a judgment given against it by a court of another Contracting State:

(*a*) if, in accordance with the provisions of articles 1 to 13, the State could not claim immunity from jurisdiction; and

(*b*) if the judgment cannot or can no longer be set aside if obtained by default, or if it is not or is no longer subject to appeal or any other form of ordinary review or to annulment.

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[57] United Kingdom, *The Public General Acts, 1978*, part 1, chap. 33, p. 715; text reproduced in United Nations, *Materials ...*, pp. 41 *et seq.*

[58] Subsection (3) deals with written consent by the State concerned, and subsection (4) with property intended for use for commercial purposes.

[59] This provision is reproduced in section 15, subsection (2), of Singapore's *State Immunity Act, 1979* (text reproduced in United Nations, *Materials ...*, pp. 28 *et seq.*), and in section 14, subsection (1), of South Africa's *Foreign States Immunities Act, 1981*, (*ibid.*, pp. 34 *et seq.*).

[60] "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] *The Gazette of Pakistan* (Islamabad), 11 March 1981; text reproduced in United Nations, *Materials ...*, pp. 20 *et seq.*

[62] United Nations, *Materials ...*, p. 69.

[63] *Norges Lover, 1682-1961* (Oslo, Grondahl & Sons, 1962), p. 1939; English trans. in United Nations, *Materials ...*, pp. 19-20.

[64] Cf. 1926 Brussels Convention, especially article 3 (see para. 69 below).

[65] See Council of Europe, *European Convention on State Immunity and Additional Protocol*, European Treaty Series (Strasbourg), No. 74 (1972).

67. The undertaking by a contracting State under article 20, paragraph 1, is limited by paragraph 2, which exonerates a contracting State from giving effect to a judgment given against it where it is manifestly contrary to public policy of that State to do so or where proceedings between the same parties, based on the same facts and having the same purpose, are pending before another court. Paragraph 3 contains a further provision exempting the contracting State from giving effect to such a judgment in regard to a right to movable or immovable property arising by way of succession, gift or *bona vacantia* if the court would not have been entitled to assume jurisdiction or if it had applied a law other than that applicable under the rules of private international law of that State. Thus the undertaking to give effect to an adverse judgment contains many loopholes and saving clauses, and a contracting State can find several excuses for not complying with the judgment. Read together with article 23, article 20 of the European Convention clearly recognizes an almost absolute rule of State immunity from execution.

(ii) *Other multilateral treaties on enforcement of arbitral awards*

68. Among earlier multilateral treaties containing a guarantee to enforce arbitral awards may be mentioned the 1923 Protocol on Arbitration Clauses (art. 3),[66] the 1927 Convention on the Execution of Foreign Arbitral Awards (art. 1),[67] the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (art. III)[68] and the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (art. 54).[69]

(iii) *1926 Brussels Convention and 1934 Additional Protocol*

69. Another example of an international convention of more than regional character which provides for uniform rules relating to immunity from attachment and execution for certain types of public property is the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels—commonly referred to as the 1926 Brussels Convention—and its Additional Protocol of 1934.[70] Article 3, paragraph 1, confirms the rule that

> ... 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 ... shall not be subject to seizure, attachment or detention by any legal process, nor to judicial proceedings *in rem*.[71]

Paragraph 3 of the same article provides:

> §3. State-owned cargoes carried on board merchant vessels for governmental and non-commercial purposes shall not be subject to seizure, attachment, or detention, by any legal process, nor to judicial proceedings *in rem*.
>
> ...

Thus ships and cargoes of certain types and classifications owned by States are immune from attachment, arrest and execution.

(iv) *Other multilateral treaties regulating immunity from attachment and execution*

70. Other specialized conventions contain provisions similar to those of the 1926 Brussels Convention relating to the special status of public ships or men-of-war or other State-owned or State-operated vessels used, for the time being, only on governmental non-commercial service. The 1940 Treaty on International Commercial Navigation Law[72] contains a typical provision (art. 35). The 1969 International Convention on Civil Liability for Oil Pollution Damage[73] illustrates clearly the principle of immunity from seizure (art. XI, para. 1). The 1982 United Nations Convention on the Law of the Sea[74] also contains a comparable provision (art. 236).[75] With the consent of the State owning the property, an aircraft may also be the object of precautionary attachment.[76] The same applies to seagoing ships under the 1952 International Convention relating to the Arrest of Seagoing Ships[77] (art. 1, para. 3, and arts. 2 and 3), subject to the prescribed conditions.

(c) *Bilateral treaties*

71. It is difficult to demonstrate the existence of a general treaty practice of States from an examination of treaty provisions alone. However, a study has been made of some 85 treaties, including 10 multilateral treaties, containing provisions on immunity from attachment and execution as well as on enforcement of or undertaking to give effect to arbitral awards. The examination of the 75 bilateral treaties appears to show the emergence of a trend to the effect that, while States recognize and respect the general rule of State immunity from attachment, arrest and execution, there are some specified areas in which they may agree to allow certain measures of execution against property used or intended

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[66] Signed at Geneva on 24 September 1923 (League of Nations, *Treaty Series*, vol. XXVII, p. 157).

[67] Signed at Geneva on 26 September 1927 (*ibid.*, vol. XCII, p. 301).

[68] Signed at New York on 10 June 1958 (United Nations, *Treaty Series*, vol. 330, p. 3).

[69] Signed at Washington on 18 March 1965 (*ibid.*, vol. 575, p. 159).

[70] Convention signed at Brussels on 10 April 1926; Additional Protocol signed at Brussels on 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.*).

[71] Article 1, however, assimilates the position of State-owned and State-operated seagoing vessels engaged in the carriage of cargoes to that of privately owned ships, cargoes and equipment.

[72] Signed at Montevideo on 19 March 1940 (see *Supplement to The American Journal of International Law* (Washington, D.C.), vol. 37 (1943), p. 109; United Nations, *Materials ...*, pp. 177-178).

[73] Signed at Brussels on 29 November 1969 (United Nations, *Treaty Series*, vol. 973, p. 3).

[74] Signed at Montego Bay (Jamaica) on 10 December 1982 (*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).

[75] Cf. article 9 of the Convention on the High Seas, and articles 21 and 22 of the Convention on the Territorial Sea and the Contiguous Zone, both signed at Geneva on 29 April 1958 (United Nations, *Treaty Series*, vol. 450, p. 11, and vol. 516, p. 205, respectively).

[76] See article 3, para. 1 (*a*), of the Convention for the Unification of Certain Rules relating to the Precautionary Attachment of Aircraft, signed at Rome on 29 May 1933 (League of Nations, *Treaty Series*, vol. CXCII, p. 289).

[77] Signed at Brussels on 10 May 1952 (United Nations, *Treaty Series*, vol. 439, p. 193).

for use at the time for commercial purposes. Nevertheless, immunity is jealously guarded, so that not only are vessels of war immune, but also public ships and even State-operated or State-owned merchantmen employed in governmental non-commercial service are not subject to arrest, detention or execution.[78] Provisions in several treaties prohibit or discourage interim measures or pre-judgment attachment against State property of any kind.[79] Even when bilateral treaty provisions allow sequestration of State property, it is invariably confined to proceedings relating to acts *jure gestionis* as opposed to acts *jure imperii*, and to claims in private law having a close connection with the country in which the property is located.[80]

72. As already noted, multilateral treaties providing for voluntary execution and also forced execution of judgments are numerous. Most of these treaties deal with special types of property, for example the arrest of State-owned commercial ships other than warships or other public ships in aid of maritime claims,[81] or pre-judgment attachment of ordinary commercial aircraft.[82] Bilateral treaties have also been concluded which are designed to express the consent of States for possible execution against property in respect of guaranteed transactions,[83] often on the basis of reciprocity.[84] Several such treaties also regulate the types of property specifically allocated for satisfaction of judgments, while reserving unattachability of other types of assets.[85] Such treaties deserve further consideration as illustrations of waiver of immunity or, more precisely, of the expression by States of consent to execution.

3. Judicial practice

73. Judicial practice concerning immunity from attachment, arrest and execution of property of foreign States is not as plentiful as the case-law on immunity from jurisdiction, since for obvious reasons the questions are treated as separate and not interconnected,[86] despite some judicial declarations to the contrary,[87] and the question of immunity from execution does not arise in the absence of the exercise of judicial jurisdiction resulting in a final judgment against a State.

(a) *International adjudication and arbitration*

74. Occasionally international decisions may lead to execution, although international tribunals are not equipped with enforcement measures, except perhaps that to an appreciable extent non-compliance with decisions of the ICJ may constitute or lead to a threat to the peace.[88] International arbitration often provides for some means of "self-execution" or voluntary undertaking of compliance with or satisfaction of the award.[89] Actual forced execution invariably depends on the machinery of justice existing at the local or national level. Thus, in the *Socobelge* case,[90] actual execution was initiated by a Belgian court.[91] International politics or comity of nations may also operate to prevent such enforcement measures from being brought to fruition, having regard to the multifaceted problems connected with international adjudication and international co-operation for national economic development.[92]

(b) *The case-law of States*

75. It will be seen, in connection with the question of consent and of the types of property not subject to

[78] See, for example, the agreements on maritime transport concluded by the USSR with the following States: Netherlands (1969), art. 16 (*ibid.* vol. 815, p. 159; cf. Voskuil in *Netherlands Yearbook of International Law, 1979,* vol. X, pp. 266-268); Bulgaria, Czechoslovakia, German Democratic Republic, Hungary, Poland and Romania (1971), art. 13 (*Sbornik mezhdunarodnykh dogovorov SSSR* [Collected international treaties concluded by the USSR], vol. 29, p. 363); Algeria (1973), art. 16 (United Nations, *Treaty Series,* vol. 990, p. 211); Iraq (1974), art. 15 (*Sbornik ...*, vol. 31, p. 434); and Portugal (1974), art. 15 (*ibid.*, p. 468). Concerning the four latter agreements, cf. M. M. Boguslavsky, "Foreign State immunity: Soviet doctrine and practice", *Netherlands Yearbook ... 1979*, pp. 173-174.

[79] The agreements concluded by the USSR with the following eight States prohibit interim attachment: Switzerland (1948) (United Nations, *Treaty Series,* vol. 217, p. 87); France (1951) (*ibid.*, vol. 221, p. 79); Lebanon (1954) (*ibid.*, vol. 226, p. 109); Togo (1961) (*ibid.*, vol. 730, p. 187); Netherlands (1969) (*ibid.*, vol. 815, p. 159); Belgium and Luxembourg (1971) (*ibid.*, vol. 883, p. 83); and Czechoslovakia (1973) (*ibid.*, vol. 904, p. 17).

[80] The agreements concluded by Switzerland with the following five States contain a requirement of close territorial connection between the claim and the *forum rei sitae*: Czechoslovakia (1953), art. 13 (*Recueil des lois fédérales, 1954,* p. 745); Bulgaria (1972), art. 9 (United Nations, *Treaty Series,* vol. 915, p. 9); Romania (1972), letter 1 of the exchange of letters relating to the Agreement (*ibid.*, vol. 890, p. 153); Poland (1973), art. 4 (*ibid.*, vol. 1000, p. 211); and Hungary (1973), art. 5 (*Recueil des lois fédérales, 1973*, p. 2261).

[81] See, for example, the 1926 Brussels Convention and its 1934 Additional Protocol (footnote 70 above), and the treaties referred to in paragraph 71 above.

[82] See the 1933 Rome Convention (footnote 76 above).

[83] See, for example, the series of treaties and agreements concluded by the Soviet Union before 1945 with 10 States, including Norway (1921), art. 4, para. 2 (League of Nations, *Treaty Series*, vol. VII, p. 293); Denmark (1923), art. 3, para. 4 (*ibid.*, vol. XVIII, p. 15); and Austria (1923), art. 12 (*ibid.*, vol. XX, p. 153).

[84] See the agreements concluded by the Soviet Union with Norway (1921) and Denmark (1923), mentioned in footnote 83 above.

[85] This is the case with the series of treaties and agreements dealing with trade delegations and maritime transport concluded by the Soviet Union after 1945 with 21 States, including Switzerland (1948), arts. 4 and 5 (see footnote 79 above), and France (1951), art. 10 (*ibid.*).

[86] See, for example, *Oficina del Aceite* v. *Domenech* (1938) (footnote 25 above); see also *Socifros* v. *USSR* (1938) (*ibid.*); and *Rappresentanza commerciale dell'U.R.S.S.* v. *De Castro* (1935) (footnote 29 above).

[87] See, for example, *Kingdom of Greece* v. *Julius Bär & Co.* (1956) (footnote 36 above); *République arabe unie* v. *Dame X.* (1960) (*Recueil officiel des arrêts du Tribunal fédéral suisse, 1960,* vol. 86, part 1, p. 23; *The American Journal of International Law,* vol. 55 (1961), p. 167); and *Trendtex Trading Corporation Ltd.* v. *Central Bank of Nigeria* (1977) (*The All England Law Reports, 1977*, vol. 1, p. 881).

[88] See Article 59 of the Statute of the ICJ and Chapter VII of the Charter of the United Nations.

[89] See, for example, the multilateral treaties concerning enforcement of arbitral awards mentioned in paragraph 68 above.

[90] In this case, involving a dispute between the Société commerciale de Belgique and the Greek Government, the PCIJ, in its judgment of 15 June 1939, recognized the definitive and obligatory character of the arbitral awards of 3 January and 25 July 1936 given in favour of the Société commerciale de Belgique (*P.C.I.J., Series A/B, No. 78,* p. 160).

[91] Judgment of the Tribunal civil of Brussels of 30 April 1951 (see footnote 31 above).

[92] In the longer run, the large sums deposited in Belgian banks on behalf of the Greek Government included certain Marshall Aid funds allotted to Greece and attachment could indeed have jeopardized the United States plan for European economic recovery. The Organisation for European Economic Co-operation threatened cessation of Marshall Aid to Belgium. The Belgian Government thereupon agreed to seek a friendly arrangement by way of conciliation between Socobelge and the Greek Government, so that the Greek Marshall Aid funds could go solely for new equipment for the Greek railways.

attachment, arrest or execution, that reference to case-law has not given any indication of an emerging trend with regard to restriction of State immunity when it comes to the execution of judicial decisions and arbitral awards. Immunity has consistently been upheld. Absolute immunity was confirmed in a number of important decisions, as early as 1910 by the Prussian court of jurisdictional conflicts in *Hellfeld* v. *den Fiskus des russischen Reiches,*[93] in 1930 by the Swiss Federal Court in *Greek Republic* v. *Walder and others,*[94] in 1933 by the Court of Appeal of Brussels in *Brasseur et consorts* v. *République hellénique,*[95] in 1938 by the Court of Appeal of Paris in *Hertzfeld* v. *USSR*[96] and in 1959 by the Supreme Court of the United States of America in *Weilamann et al.* v. *Chase Manhattan Bank,*[97] although many of these decisions have since been qualified or become subject to legislative changes.

76. As will be seen in connection with draft article 23 on the modalities and effect of consent to attachment and execution, and in connection with draft article 24 on the classification of unattachable State property, the case-law of many States, mostly European, may be said to have begun an upward trend in favour of allowing execution in respect of property in use or intended for use in commercial transactions or for commercial purposes,[98] especially where there has been an expression or explicit indication of consent to such a measure, or waiver of immunity from attachment or execution, as the case may be. Thus so-called absolute immunity from attachment and execution may be subject to some qualifications, such as consent or prior acceptance of jurisdiction, including enforcement,[99] or, if the object is immovable property situated in the forum State,[100] immunity could be upheld for lack of jurisdiction due to inadequacy of the territorial connection[101] or because the object of attachment is a general embassy account or public funds, or diplomatic premises.[102]

77. While the case-law of States has not unsettled the general rule of State immunity from attachment and execution, it may furnish ample grounds for supporting the distinction between certain types of property that are not normally subject to attachment or execution, such as property devoted to public service (*publicis usibus destinata*), and other types of property in use or intended for use in commercial transactions or for commercial purposes, which are clearly intended for possible seizure if the need arises: attachment or execution with such consent customarily given would not offend the sovereign dignity of the consenting State in the ordinary conduct of commercial transactions. Questions concerning title to property, movable or immovable, situated in the territory of the forum State, including titles arising by way of succession, gift or *bona vacantia*, would not involve immunity from enforcement of judgment unless the property in question was in the hands of a foreign State or in premises occupied by its agents or representatives and the State was not willing to release it or to vacate the property. Specific performance or injunction could not be forcibly ordered against a foreign State. Immunity thus takes precedence, since physical compulsion against a foreign State, even with judicial sanction, is still unwelcome.

4. International opinion

78. Legal opinions are far from uniform on this as well as on other phases and facets of jurisdictional immunities. Perhaps in this particular area there is a little less controversy over the more absolute nature of the rule of State immunity from attachment and execution, having regard to the fact that the problem arises at a later stage and that there is a much smaller likelihood of an order of attachment or execution being levied against property or assets of a foreign Government. Nevertheless, the controversy began to flare up as soon as some European courts and judicial decisions of the United States started to expand the categories and types of property that could be seized, arrested, detained and sold or executed for satisfaction of judgments in practice. Contemporary writers appear to be hesitant and seem more disposed to set specific limits to the power to attach and levy execution in respect of foreign State property. Immunity from attachment and execution continues to be recognized in general legal opinion,

[93] *Zeitschrift für Internationales Recht* (Erlangen), vol. XX (1910), p. 416; *The American Journal of International Law*, vol. 5 (1911), p. 490.

[94] *Recueil officiel des arrêts du Tribunal fédéral suisse, 1930*, vol. 56, p. 237; *Annual Digest ..., 1929-1930 (op. cit.)*, p. 121, case No. 78.

[95] *Pasicrisie belge, 1933* (Brussels), part 2, p. 197; *Annual Digest ..., 1931-1932* (London), vol. 6 (1938), p. 164, case No. 85. The Court of Appeal of Brussels confirmed the judgment of the Tribunal civil of Anvers (1932) (*Journal du droit international* (Clunet) (Paris), vol. 59 (1932), p. 1088).

[96] *Journal du droit international* (Clunet) (Paris), vol. 65 (1938), p. 1034; *Annual Digest ..., 1938-1940 (op. cit.)*, p. 243, case No. 82. See also the judgment of the Court of Appeal of Paris in *Clerget* v. *Représentation commerciale de la République démocratique du Viet Nam* (1969) (*Annuaire français de droit international, 1970* (Paris), vol. 16, p. 931); and the judgment of the Court of Appeal of Aix-en-Provence in *Banque d'Etat tchécoslovaque* v. *Englander* (1966) (*ibid., 1967*, vol. 13, p. 825; *International Law Reports* (London), vol. 47 (1974), p. 157).

[97] *New York Supplement, 2d Series*, vol. 192 (1960), p. 469; *International Law Reports* (London), vol. 28 (1963), p. 165.

[98] See, for example, the cases: *Hertzfeld* v. *USSR* (1938) (footnote 96 above); *Socobelge* (1951) (footnote 31 above); *Soviet Distillery in Austria* (1954) (*International Law Reports, 1954* (London), vol. 21 (1957), p. 101); *Neustein* v. *Republic of Indonesia* (1958) (*Netherlands Yearbook of International Law, 1979*, vol. X, p. 107); *N. V. Cabolent* v. *National Iranian Oil Company* (1968) (*Nederlandse Jurisprudentie* (Zwollen, 1969), No. 484; English trans. in United Nations, *Materials on Jurisdictional Immunities ...*, pp. 344 *et seq.*); *The "Philippine Admiral"* (1975) (*The Law Reports, House of Lords ..., 1977*, p. 373); *Hispano Americana Mercantil S.A.* v. *Central Bank of Nigeria* (1979) (*Lloyd's Law Reports, 1979*, vol. 2, p. 277; reproduced in United Nations, *Materials ...*, pp. 449 *et seq.*); *National Iranian Oil Company* v. *British and United States companies* (1983) (Entscheidungen des Bundesverfassungsgerichts (Tübingen), vol. 64 (1984), p. 2; *International Legal Materials* (Washington, D.C.), vol. XXII, No. 6 (November 1983), p. 1279).

[99] *Austrian Minister of Finance* v. *Dreyfus* (1918) (*Recueil officiel des arrêts du Tribunal fédéral suisse*, vol. 44, part I, p. 49); and *Turkish Purchases Commission* case (1920) (*Annual Digest ..., 1919-1922* (London), vol. 1 (1932), p. 114, case No. 77).

[100] *Enforcement of International Awards (Czechoslovakia)* case (1928) (*Annual Digest ..., 1927-1928* (London), vol. 4 (1931), p. 174, case No. 111).

[101] See *Kingdom of Greece* v. *Julius Bär & Co.* (1956) (footnote 36 above); *République italienne* v. *Beta Holding S.A.* (1966) (*Annuaire suisse de droit international, 1975*, vol. XXXI, p. 219).

[102] See footnote 100 above.

although the precise extent of such immunity is a matter for individual conjecture.[103]

79. It is interesting, in this regard, to gain an idea of international opinion by examining various draft articles at the different stages in their preparation. For example, at its session in Hamburg in September 1891, the Institute of International Law adopted a draft resolution entitled "Draft international regulations on the competence of courts in proceedings against foreign States, sovereigns or heads of State",[104] which contained the following provisions:

Article 1

The movable property, including horses, carriages, railway carriages and ships, belonging to a foreign sovereign or head of State and intended directly or indirectly for the current use of that sovereign or head of State or of the persons accompanying him in his service cannot be attached.

Article 2

The movable and immovable property belonging to a foreign State and used in the service of that State with the express or implicit approval of the State in whose territory it is situated is likewise exempt from attachment.[105]

80. Sixty years later, in June 1951, the same Institute of International Law adopted an updated resolution entitled "Draft provisional convention on the immunity of foreign States from jurisdiction and forced execution",[106] section B of which reads:

B. IMMUNITY OF FOREIGN STATES FROM FORCED EXECUTION

Article 14

States have the right to immunity from forced execution in foreign territory only with respect to movable and immovable property belonging to them which is situated in that territory and used in the exercise of their public powers.

However, such immunity cannot be invoked with respect to property that they have expressly given as security or mortgaged.

Immunity from forced execution cannot be invoked with respect to property, rights and interests originating in acts relating to the administration of property.

When execution is possible it must be implemented by diplomatic means.

Article 15

A State cannot be subject to any precautionary attachment in foreign territory unless the debt originates in acts relating to the administration of property.

Article 16

If a State deliberately refuses to execute the judgment of a foreign court arising from an act relating to the administration of property, attachment or forced execution measures may be taken against it in its own territory or in the territory of the State of which the creditor is a national, once diplomatic negotiations have demonstrated that the State refuses to meet its obligations of its own accord.

Thus, in this latest resolution, the Institute does not advocate outright exercise of power of execution but seems to prefer diplomatic negotiations and exhaustion of other means of persuasion, execution being viewed as a possible remote measure of last resort.

81. More recently, the International Law Association, at its Sixtieth Conference in Montreal from 29 August to 4 September 1982, adopted a draft convention on State immunity.[107] In so far as the content of this draft may reflect the contemporary thinking of writers, or *opiniones doctorum*, it may be of interest to cite the following provision:

Article VII. Immunity from attachment and execution

A foreign State's property in the forum State shall be immune from attachment, arrest and execution, except as provided in article VIII.

82. Article VIII of the draft convention, which deals with exceptions to immunity from attachment and execution, contains the following three exceptions in section A: (i) if there has been a waiver of immunity, for example in the case of commercial activities; (ii) if the property in question is in use for commercial purposes; (iii) if the property in question has been taken in violation of international law or has been exchanged for such property. Section B of the article deals with mixed bank accounts and limits unattachability to that proportion of an account duly identified as used for non-commercial activities. Section C gives a list of the types of property in respect of which attachment or execution shall not be permitted. Finally, section D provides for the possibility of pre-judgment attachment in exceptional circumstances.

C. Formulation of draft article 22

83. In the light of the foregoing examination of State practice and legal opinions, it is possible to identify some of the salient factors that should be taken into account in formulating draft article 22 to express or restate the general rule of State immunity from attachment, arrest and execution.

(*a*) The general rule of immunity of State property from attachment, arrest and execution is a valid one.

(*b*) The notion of forced execution when applied to State property, or to property in the possession or control of a State or in which it has an interest, may cover a wider field than mere seizure, arrest or detention. It may take the form of an injunction or specific performance

[103] See, for example, L. J. Bouchez, "The nature and scope of State immunity from jurisdiction and execution", *Netherlands Yearbook of International Law, 1979*, vol. X, p. 3; see also the papers contributed by several authors on the practice followed by various States, *ibid.*, pp. 35 *et seq.* See further M. Brandon, "Immunity from attachment and execution", *International Financial Law Review* (London), July 1982, p. 32.

[104] The Institute entrusted the topic of "Competence of courts in proceedings against foreign States or sovereigns" to a study-group having as rapporteurs L. von Bar and J. Westlake: see *Annuaire de l'Institut de droit international, 1891-1892* (Brussels), vol. 11, pp. 408 *et seq.*; see in the same *Annuaire* (pp. 414 *et seq.*) the report by L. von Bar, followed by the observations of J. Westlake. The articles published on the topic by two other members of the study-group had also been taken into consideration: see C. F. Gabba, *loc. cit.* (footnote 27 above), and A. Hartmann, "De la compétence des tribunaux dans les procès contre les Etats et souverains étrangers", *Revue de droit international et de législation comparée* (Brussels), vol. XXII (1890), p. 425.

[105] Text revised in 1892. See Institute of International Law, *Tableau général des résolutions (1873-1956)* (Basel, 1957), pp. 14-15.

[106] *Annuaire de l'Institut de droit international, 1952* (Basel), vol. 44, part 1, pp. 39 *et seq.*

[107] See ILA; *Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), pp. 5-10, resolution No. 6: "State Immunity".

order, such as an order to return or vacate a movable or immovable property. State immunity should also cover this type of situation, except of course where title is at stake and where its acquisition is by way of succession, gift or *bona vacantia* as provided for in article 15 of the draft (Ownership, possession and use of property).

(*c*) Property in use or intended for use for commercial purposes or specifically for satisfaction of judgment debts, or plainly for payment of the claim, must be regarded as attachable by consent expressly given or indicated by clear conduct.

(*d*) Property that is not normally subject to attachment or does not form an object against which to levy execution includes all types of property devoted by the State to public service. It is the nature of the use or dedication of the property that determines the immunity to be accorded—not necessarily proprietorship, but the use to which the property is devoted, *publicis usibus destinata.*

(*e*) Precautionary or pre-judgment attachment is not permissible and should be discouraged. There is no need to over-protect creditors *vis-à-vis* a State debtor. Compulsion of whatever form cannot afford an ideal solution to any difference with a foreign State. The existence of a final judgment is enough ground in support of diplomatic negotiations.

84. Article 22 might thus be formulated as follows:

Article 22. State immunity from attachment and execution

1. In accordance with the provisions of the present articles, State property, or property in the possession or control of a State, or property in which a State has an interest, is protected by the rule of State immunity from attachment, arrest and execution by order of a court of another State, as an interim or precautionary prejudgment measure, or as a process to secure satisfaction of a final judgment of such a court, unless:

(*a*) the State concerned has consented to such attachment, arrest or execution against the property in question; or

(*b*) the property is in use or intended for use by the State in commercial and non-governmental service; or

(*c*) the property, being movable or immovable, intellectual or industrial, is one in respect of which it is the object of the proceeding to determine the question of ownership by the State, its possession or use, or any right or interest arising for the State by way of succession, gift or *bona vacantia*; or

(*d*) the property is identified as specifically allocated for satisfaction of a final judgment or payment of debts incurred by the State.

2. A State is also immune in respect of its property, or property in its possession or control or in which it has an interest, from an interim or final injunction or specific performance order by a court of another State, which is designed to deprive the State of its enjoyment, possession or use of the property or other interest, or otherwise to compel the State against its will to vacate the property or to surrender it to another person.

ARTICLE 23 (Modalities and effect of consent to attachment and execution)

A. General considerations

1. Consent as a sound basis for the exercise of the power of attachment and execution

85. Consent provides a clue to a number of hypotheses made in the analysis of rules applicable to the exercise of jurisdiction, whether before, during or after trial and judgment. Consent constitutes a firm basis upon which the judicial authority of a State may exercise jurisdiction in a proceeding against or affecting another State. As has been seen, consent is requried at two separate levels in two successive phases or stages. First, consent to the jurisdiction is needed, which may be express, implied by conduct, or presumed by law in the form of accepted exceptions that prove the validity and general applicability of the rule of jurisdictional immunity.[108] A second consent is required once a judgment has been rendered to permit measures of execution to proceed.[109] In normal circumstances, the application of the rule of State immunity from attachment, arrest and execution means that no attachment, arrest or execution can be effectively ordered by a court of another State, unless the State against which the attachment or execution will be levied has intimated or given its consent.

86. In a way, consent removes some of the hardship inherent in enforcing an attachment order or execution against State property or property in the possession or control of a State. Consenting to attachment or execution is tantamount to tolerating or agreeing to an enforcement measure, whether or not, willingly or involuntarily, the absence of objection will have to be reinforced by a more positive indication of concurrence, or even tolerance, which is more than mere tacit acquiescence, although possibly short of active approbation. Once a trace of consent is established in respect of attachment, arrest and execution, the authorities of another State may proceed with an interim measure of seizure, detention or prejudgment attachment or a more definite measure of forced execution of a final judgment. Consent, once given, cannot be revoked or withdrawn, since a sound basis has thereby been created for the exercise of the power of jurisdiction to attach, arrest and execute against State property that is open to attachment and execution.

2. Consent insufficient to found jurisdiction where none exists

87. Consent is an important element for the exercise of jurisdiction or of the power to attach and execute against State property. But consent alone should not be construed as creating or constituting jurisdiction. Consent as such cannot afford a sound basis on which to found jurisdiction where none exists. Thus consent to

[108] See part III of the draft: "Exceptions to State immunity".

[109] See, for example, the judgment of the Court of Appeal of Aix-en-Provence in *Banque d'Etat tchécoslovaque* v. *Englander* (1966) (footnote 96 above); see, however, the judgment of the Court of Cassation in *Englander* v. *Banque d'Etat tchécoslovaque* (1969) (*Journal du droit international* (Clunet) (Paris), vol. 96 (1969), p. 923; *International Law Reports* (Cambridge), vol. 52 (1979), p. 335); and *Clerget* v. *Représentation commerciale de la République démocratique du Viet Nam* (1969) (footnote 96 above).

attachment of State property *ad fundandam jurisdictionem* is inoperative or ineffective to permit the exercise of jurisdiction or of the power to attach and execute, which are not constituted or created by the mere fact of consent. Jurisdiction and the power to execute, which is a consequence of the power to say what the law is, are linked in the sense that they must have foundation in the law and not be based purely on the consent of the parties. In many countries, a court may have jurisdiction as a *forum pro rogatum*, but courts often decline to exercise such jurisdiction on the grounds of being a *forum non conveniens*, or of there being other *fora* more competent, with closer connection. Thus even the Swiss Federal Courts, whose practice goes very far in exercising the power to attach and execute, would hesitate to assume such power where the cause of action or the object to be seized or attached or against which execution was to be levied did not bear the closest connection with the forum State, even if it were situated in its territory. Being a *forum rei sitae* does not oblige a court to examine either jurisdiction or the power that flows from it, namely the power of attachment and execution, especially when the cause of action is far removed from the judicial interest of the State of the forum. The Swiss Federal Courts are correct in not encouraging the judicial authorities to seek international litigations.[110]

3. Expression of consent or waiver of immunity from attachment and execution

88. The expression of consent to attachment and execution is sometimes referred to as waiver of immunity from attachment and execution. In each case, immunity may be waived or waiver may be contained in an agreement, such as a private-law contract or a bilateral or multilateral treaty, with or without a condition of reciprocity. The expression of consent operating as a waiver of such immunity may take several different forms. Consent has to be clearly expressed and explicit. It can be implied by conduct only in very limited and exceptional circumstances, such as placing funds or other assets specially for the purpose of settling disputes or making payments for the obligations or debts incurred in relation to a particular transaction or set of transactions. It will be seen how consent is given in practice or what the modalities are for waiving immunity, as well as the effect of waiver and the extent of the consequences entailed by a waiver of immunity from execution.

B. Modalities of expressing consent to attachment and execution of State property

89. There are several ways of expressing consent to attachment and execution of State property. An examination of State practice is revealing in this regard. The instruments in which consent is expressed by States may take different forms, such as multilateral treaties or conventions, bilateral treaties with regard to specific property or transactions of bodies or enterprises, commercial contracts and loan agreements. It would be useful to give some illustrations of each category of such instruments.

1. Multilateral treaties or international conventions

90. As noted earlier in connection with draft article 22, there are at least half a dozen multilateral treaties or international conventions which contain provisions on execution of judicial decisions affecting State property (see paras. 69-70 above). The 1926 Brussels Convention and a few other treaties provide for the possibility of arrest of State-owned commercial ships other than warships and public ships employed in governmental non-commercial service. One treaty even permits pre-judgment attachment of commercial aircraft. Those provisions amount to an expression of waiver of immunity from attachment, arrest and execution or an indication of consent to attachment and execution in respect of special types of property, while maintaining immunity for other types of State property.[111]

91. Four multilateral treaties have also been concluded containing provisions recognizing the binding effect of arbitral awards, either in accordance with the rules of procedure of the country in which the award is invoked, or in accordance with the provisions of that country's national laws (see para. 68 above). One of these treaties specifies that the parties agree to enforce the award "as if it were a final judgment of a court".[112]

No specific reference is made, however, to the property in respect of which attachment or execution may be permitted.

2. Bilateral treaties

92. State practice is rich in bilateral treaties containing provisions amounting to an expression of consent to attachment and execution in respect of special types of property in connection with particular transactions. Thus, before 1945, 9 out of 10 treaties concluded by the USSR contained provisions making Soviet State property of certain types liable to final execution in respect of guaranteed transactions.[113] Six of these treaties

[110] The distinction is drawn in Switzerland between acts *jure imperii* and acts *jure gestionis*; execution is based on the existence of a sufficient connection with Swiss territory; cf., for example, *Greek Republic* v. *Walder and others* (1930) (footnote 94 above). See Lalive, *loc. cit.* (footnote 35 above), p. 160; Sinclair, *loc. cit.* (footnote 26 above), p. 236; and Lord Denning's observations in *Thai-Europe Tapioca Service Ltd.* v. *Government of Pakistan et al.* (1975) (*The All England Law Reports, 1975*, vol. 3, pp. 963 *et seq.*).

[111] See the treaties mentioned in paragraph 70 and in footnotes 75 and 76 above.

[112] Article 54, paragraph 1, of the 1965 Washington Convention (see footnote 69 above).

[113] With the exception of the treaty it concluded with Italy (1924), art. 3 (*British and Foreign State Papers, 1924*, part II, vol. CXX, p. 659), the USSR concluded treaties or agreements with the following ten States providing for the possibility of execution against State property: Norway (1921), art. 4, para. 2 (see footnote 83 above); Denmark (1923), art. 3, para. 4 (*ibid.*); Austria (1923), art. 12 (*ibid.*); Germany (1925), arts. 6, 7 and 9 (League of Nations, *Treaty Series*, vol. LIII, p. 7); Latvia (1927), art. 5, para. 7, and art. 6 (*ibid.*, vol. LXVIII, p. 321); Sweden (1927), art. 6 (*ibid.*, vol. LXXI, p. 411); Greece (1929), art. 7, para. 14 (*British and Foreign State Papers, 1929*, part II, vol. CXXXI, p. 480); United Kingdom (1934), art. 5, paras. 6, 7 and 8 (League of Nations, *Treaty Series*, vol. CXLIX, p. 445); Belgium and Luxembourg (1935), arts. 11, 14 and 15 (*ibid.*, vol. CLXXIII, p. 169).

excluded interim attachment.[114] Two regulated immunities between the parties on a reciprocal basis.

93. Another series of treaties or agreements concluded by the USSR after 1945 with 21 States deal with trade delegations and maritime transport.[115] All the treaties concerning trade delegations, with the exception of one,[116] provide for enforcement of a final court decision and assumption of responsibility for all transactions concluded by the trade representation.[117] However, seven treaties stipulate that enforcement is applicable to funds of the trade delegations and to goods being their property,[118] while another eight treaties permit execution against all State property of the USSR,[119] excluding only property necessary for the exercise of sovereign authority or official, diplomatic and consular functions.[120] Seven treaties prohibit interim attachment.[121]

94. Soviet treaty practice on shipping is less explicit but also worth citing. Thus the Agreement concerning shipping signed with the Netherlands in 1969[122] provides, in article 16, paragraph 2, for execution of judgments rendered in proceedings relating to the operation of ships engaged in commercial activities, including transportation of passengers and cargoes. This provision reads:

> 2. No ship belonging to one Contracting Party may be seized in the territory of the other Contracting Party in connection with a civil action within the meaning of paragraph 1 if the defendant designates a representative in the territory of the latter Contracting Party.

95. Four other Soviet treaties on shipping[123] uphold the immunity of State merchant vessels by excluding attachment and seizure of such vessels in the ports of the other party in connection with civil-law disputes, although in two treaties seizure is prohibited provided that the plaintiff instructs his agent in the territory of the first party to accept any resulting legal obligation.[124]

96. Between 1946 and 1958, the United States of America concluded with 14 States treaties of friendship, commerce and navigation containing provisions voluntarily waiving or disclaiming immunity in respect of State enterprises from execution of judgment and other liability.[125] The 1972 Agreement between the United States and the USSR regarding trade also provides for non-immunity from execution of judgment and other liability with respect to commercial transactions.[126] In addition, the treaties concluded by Switzerland with five Eastern European States permit sequestration of the property of the other party in relation to "claims in private law having a close connection with the country in which the property is located".[127] Another example is provided by the 1958 exchange of notes between Romania and Iraq, in which the two parties, having agreed that litigious problems regarding the commercial transactions concluded in Iraq by Romania's Commercial Agency would be subject to the jurisdiction of Iraqi courts, stipulated that execution of the final sentences of such courts "will affect only the goods, debts and other assets of the Commercial Agency directly relating to the commercial transactions concluded by it".[128]

97. An examination of multilateral and bilateral treaties appears to confirm the proposition that the law, in this connection, is not regulated by a common general rule governing in every detail the fullest extent of immunity or non-immunity in respect of various types of State property in accordance with the significant nature of their use. Diversity in State treaty practice justifies the conclusion that, in the absence of a homogeneous trend, States prefer to regulate on a strictly bilateral or State-by-State basis questions that affect them so

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[114] See the treaties or agreements with Norway (1921), Denmark (1923), Italy (1924), Latvia (1927), Greece (1929) and Belgium and Luxembourg (1935) cited in footnote 113 above.

[115] For example, with Switzerland (1948), art. 5 (see footnote 79 above); with France (1951), art. 10 (*ibid.*); and with Singapore (1966), art. 16 (United Nations, *Treaty Series*, vol. 631, p. 125).

[116] See the 1965 Protocol on Trade Representation of the USSR in the Republic of Cyprus, art. 4 (*ibid.*, vol. 673, p. 25).

[117] See, for example, the treaties mentioned in footnotes 114 and 115 above.

[118] See, for example, the treaties or agreements concluded by the USSR with Switzerland (1948), art. 5 (see footnote 79 above); with Lebanon (1954), letter III annexed to the agreement (*ibid.*); with the Republic of Egypt (1956), art. 6 (*b*) (United Nations, *Treaty Series*, vol. 687, p. 221); with Iraq (1958), art. 6 (*ibid.*, vol. 328, p. 117); with Singapore (1966), art. 16 (see footnote 115 above); and with Czechoslovakia (1973), art. 4 (*b*) (see footnote 79 above). Execution is permissible in respect of funds of the trade delegation or goods belonging to it.

[119] See the agreements concluded by the USSR with France (1951), art. 10 (see footnote 79 above); with Togo (1961), art. 4 (*ibid.*); with Ghana (1961), art. 6 (United Nations, *Treaty Series*, vol. 655, p. 171); with Brazil (1963), art. 5 (*ibid.*, vol. 646, p. 277); with Costa Rica (1970), art. 4 (*b*) (*ibid.*, vol. 957, p. 347); with Bolivia (1970), art. 6, para. 2 (*ibid.*, p. 373); with the Netherlands (1971), art. 6 (*ibid.*, vol. 965, p. 423); and with Belgium and Luxembourg (1971), art. 7 (see footnote 79 above).

[120] See, for example, the agreements concluded by the USSR with the Netherlands: Agreement of 28 May 1969 concerning shipping, art. 6 (see footnote 79 above); and Protocol of 14 July 1971 concerning the status of the trade mission of the USSR in the Netherlands, art. 6 (see footnote 119 above).

[121] These are the agreements concluded by the USSR with Switzerland (1948), arts. 4 and 5; with France (1951), art. 10; with Lebanon (1954), letter III annexed to the agreement; with Togo (1961), art. 4; with the Netherlands (1971), art. 6; with Belgium and Luxembourg (1971), art. 7; and with Czechoslovakia (1973), art. 4 (*b*). (The references relating to these agreements are given in footnote 79 above.)

[122] See footnote 79 above.

[123] Agreements with Bulgaria, Czechoslovakia, etc. (1971), art. 13; with Algeria (1973), art. 16; with Iraq (1974), art. 15; and with Portugal (1974), art. 15. (The references relating to these agreements are given in footnote 78 above).

[124] See the agreements with Iraq and Portugal (*ibid.*).

[125] Treaties concluded by the United States of America with Italy (1948), art. XXIV, para. 6 (United Nations, *Treaty Series*, vol. 79, p. 171); with Uruguay (1949), art. XVIII, para. 5 (not ratified); with Ireland (1950), art. XV, para. 3 (*ibid.*, vol. 206, p. 269); with Colombia (1951), art. XV, para. 2 (not ratified); with Greece (1951), art. XIV, para. 5 (*ibid.*, vol. 224, p. 279); with Israel (1951), art. XVIII, para. 3 (*ibid.*, vol. 219, p. 237); with Denmark (1951), art. XVIII, para. 3 (*ibid.*, vol. 421, p. 105); with Japan (1953), art. XVIII, para. 2 (*ibid.*, vol. 206, p. 143); with the Federal Republic of Germany (1954), art. XVIII, para. 2 (*ibid.*, vol. 273, p. 3); with Haiti (1955), art. XVIII, para. 2 (not ratified); with Iran (1955), art. XI, para. 4 (*ibid.*, vol. 284, p. 93); with Nicaragua (1956), art. XVIII, para. 3 (*ibid.*, vol. 367, p. 3); with the Netherlands (1956), art. XVIII, para. 2 (*ibid.*, vol. 285, p. 231); and with Korea (1956), art. XVIII, para. 2 (*ibid.*, vol. 302, p. 281).

[126] Article 6, para. 2, of the Agreement (not ratified); text published in The Department of State Bulletin (Washington, D.C.), vol. LXVII, No. 1743 (20 November 1972), p. 595.

[127] See footnote 80 above.

[128] See the exchange of notes relating to the 1958 Trade Agreement between Romania and Iraq, note 1, third paragraph (United Nations, *Treaty Series*, vol. 405, p. 243).

closely, such as waiver of immunity from attachment and execution or the expression of consent, depending on the degree of confidence placed in particular bilateral relations, which vary from country to country, requiring readjustment from time to time.[129]

3. Government contracts

98. The flexibility and variety of the modalities of expressing consent are further enhanced by the *ad hoc* or specific nature of particular transactions requiring a special degree of tailor-made consent. This mode of expressing consent deserves even more meticulous consideration than State-to-State or multilateral treaties; it is regulated by the terms of commercial transactions or special agreements concluded on an *ad hoc* or contract-by-contract basis. For simplicity and convenience, this category of transactions is termed "government contracts".

99. Among contracts concluded by Governments or State agencies with private companies, the most common type concerns petroleum exploration and production. Of the 57 such government contracts that may be consulted at the United Nations Centre on Transnational Corporations, 20 contain provisions relating to the enforcement of arbitral awards. Among these contracts, some expressly provide for judicial enforcement,[130] while others merely specify that the award is final and binding.[131] In the latter group there is one contract which stipulates that the parties shall comply with the award in good faith.[132]

100. Government contracts other than those relating to petroleum exploration or production may be classified as "management contracts", "construction contracts", "service contracts", "production-sharing contracts", "investment contracts" or "contracts of loan", including "guarantees".[133] An example is the agreement concerning the advance of credit to Thai Airways International by the Banque française du commerce extérieur for the purchase of Airbus aircraft, repayment of which is guaranteed by the Ministry of Finance of Thailand. This agreement provides that, for the purposes of jurisdiction and execution or enforcement of any judgment or award, the guarantor certifies that he waives any right to assert before an arbitration tribunal or court of law or any other authority any defence or exception based on his sovereign immunity.[134] This is a very sweeping expression of consent, the effect of which needs to be more circumscribed.

4. Judicial decisions

101. The case-law on waiver of immunity or expression of consent does not indicate the ways in which consent may be validly expressed. It merely seeks to determine the existence of genuine consent and, if need be, the extent of its effect. In other words, case-law does not normally settle the question of the choice of modalities in a particular case, but merely illustrates the extent to which waiver is effective in respect of the types of property against which execution may be levied.

C. Effect of the expression of consent to attachment and execution of State property

102. Effect may be given to the expression of consent to attachment and execution of State property by means of any one of the modalities listed—multilateral or bilateral treaties and government contracts. If the wording is too general and bears no relation to any specific property, it is to be assumed that the application of consent is limited to the types of State property that are not devoted to public or governmental service but are used or intended for use for commercial purposes, and to property which is situated in the territory of the forum State and which should also have a close connection with the principal claim. If consent relates to specific property, it is easier to apply, subject to further limitations to be discussed in connection with article 24.

D. Formulation of draft article 23

103. Article 23 might be worded as follows:

Article 23. Modalities and effect of consent to attachment and execution

1. A State may give its consent in writing, in a multilateral or bilateral treaty or in an agreement or

[129] In this connection, see, for example, the 1972 European Convention on State Immunity, art. 23, and its Additional Protocol (footnote 65 above); the Protocol of 1 March 1974 to the Treaty of Merchant Navigation of 3 April 1968 between the United Kingdom and the USSR, arts. 2 and 3 (United Kingdom, *Treaty Series No. 104* (1977) (Cmnd. 7040)); the Agreement on Merchant Shipping of 4 August 1978 between the USSR and Ethiopia, art. XIII, para. 2 (to be published in United Nations, *Treaty Series*, No. 18997).

[130] For example, the following contracts provide for enforceable arbitral awards: Petroleum/Sale and Purchase, between Iran, National Iranian Oil Company, Gulf Oil Corp. and others (1973), art. 28 (F); Petroleum Exploration and Production/Production Sharing, between Sudan and Chevron Oil Co. of Sudan (1975), art. XXIII (*g*) and (*h*); Petroleum, Natural Gas/Sale and Purchase, between Pertamina (Indonesia) and Pacific Lighting International S.A. (1973), art. 15 (1); Petroleum, Refinery/Technical and Management Services, between Agip SpA and Indeni Petroleum Refinery Co. Ltd. (1978), art. 9.

[131] For example, the following contracts provide for non-enforceable arbitral awards: Petroleum/Production Sharing, Exploration and Production, between Pertamina (Indonesia), Phillips Petroleum Co. of Indonesia and Tenneco Indonesia Inc. (1975), sect. XI, art. 1.3; Petroleum (Offshore)/Concession, Joint Venture, between Thailand and Weeks Petroleum (Thailand) Ltd. (1972), clause 13 (12); Petroleum, Exploration and Production/Concession (Management), Export and Marketing, between Iran and National Iranian Oil Company (1954), art. 45 (A) and (B).

[132] Petroleum, Exploration and Production/Production Sharing contract between Pertamina (Indonesia), Virginia International Co. and Roy M. Huttington Inc. (1968), sect. X.

[133] See J.-F. Lalive, "Contrats entre Etats ou entreprises étatiques et personnes privées—Développements récents", *Collected Courses ..., 1983-III* (The Hague, Martinus Nijhoff, 1984), vol. 181, pp. 172-175.

[134] Art. III, para. 3.04, of the agreement signed on 23 March 1978 in Paris by the authorized representative of the Minister of Finance and Thailand (see S. Sucharitkul, "Immunity from attachment and execution of the property of foreign States: Thai practice", *Netherlands Yearbook of International Law, 1979*, vol. X, p. 151, footnote 21). With regard to clauses waiving sovereign immunity, see A. O. Adede, "Legal trends in international lending and investment in the developing countries", *Collected Courses ..., 1983-II* (The Hague, Martinus Nijhoff, 1984), vol. 180, pp. 65-69.

contract concluded by it or by one of its agencies with a foreign person, natural or juridical, not to invoke State immunity in respect of State property, or property in its possession or control or in which it has an interest, from attachment, arrest and execution, provided that the property in question, movable or immovable, intellectual or industrial:

(*a*) forms part of a commercial transaction or is used in connection with commercial activities, or is otherwise in use for non-public purposes unconnected with the exercise of governmental authority of the State; and

(*b*) is identified as being situated in the territory of the State of the forum.

2. The effect of paragraph 1 is further limited by the provisions of article 24.

ARTICLE 24 (Types of State property permanently immune from attachment and execution)

A. General considerations

1. Limited effect of consent

104. Consent to attachment and execution does not confer general licence to attach or levy execution against any type of State property, whatever the nature of its use, or wherever it is situated, or indeed regardless of its public or governmental purpose. States parties to multilateral or bilateral treaties or to government contracts are often pressured into concluding agreements containing a clause waiving sovereign immunity not only from jurisdiction, but also from attachment and execution.

105. Protection should be accorded to developing countries, which might otherwise be lured into including in an agreement an expression of consent affecting certain types or property which should under no circumstances be seized or detained, owing to the vital nature of their predominantly public use (such as warships), or to their inviolability (such as diplomatic premises), or to their vulnerability (such as the funds of central banks).

2. Types of unattachable State property

106. Draft article 24 deals with the categories of property that are unattachable irrespective of prior consent or explicit waiver. The reasons why they should be treated as entitled to permanent immunity, being otherwise inviolable or of an unattachable national value, such as a special cultural heritage, are examined below. The permanence of such unattachability or untouchability by legal process is based on State practice. It is therefore particularly important to examine the practice of States in this domain.

B. Governmental practice

1. National legislation

107. The legislation of several countries contains provisions regarding the unattachability of certain types of property, for which waiver of immunity will have no effect. In the United States of America, the *Foreign Sovereign Immunities Act of 1976*[135] contains such provisions. Thus section 1610 provides a preliminary time-lapse requirement:

Section 1610. Exceptions to the immunity from attachment or execution

...

(*c*) No attachment or execution referred to in subsections (*a*) and (*b*) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608 (*e*) of this chapter.

...

108. Section 1611 provides:

Section 1611. Certain types of property immune from execution

...

(*b*) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign State shall be immune from attachment and from execution, if:

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign Government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or Government may purport to effect in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

109. Similarly, section 11, subsections (3) and (4), of Canada's *State Immunity Act, 1982*[136] provide:

(3) Property of a foreign State

(*a*) that is used or is intended to be used in connection with a military activity, and

(*b*) that is military in nature or is under the control of a military authority or defence agency

is immune from attachment and execution and, in the case of an action *in rem*, from arrest, detention, seizure and forfeiture.

(4) Subject to subsection (5), property of a foreign central bank or monetary authority that is held for its own account and is not used or intended for a commercial activity is immune from attachment and execution.

2. International and regional conventions

110. Various international conventions contain provisions protecting the inviolability of official premises. Thus the 1961 Vienna Convention on Diplomatic Relations[137] provides:

Article 22

...

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

111. Articles 24 and 30 of the 1961 Vienna Convention also deal with the inviolability of the archives and documents of the mission and of the private residence of

[135] See footnote 56 above.

[136] See footnote 60 above. See also sect. 14, subsect. (2) (*b*), of Pakistan's *State Immunity Ordinance, 1981* (para. 62 above).

[137] United Nations, *Treaty Series*, vol. 500, p. 95.

a diplomatic agent. Similar provisions are found in the 1963 Vienna Convention on Consular Relations[138] (art. 31, para. 4, and arts. 33 and 61), the 1969 Convention on Special Missions[139] (art. 25, para. 3, and arts. 26 and 30) and the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character[140] (art. 23, para. 3, and arts. 25 and 29).

112. A number of conventions, such as the 1926 Brussels Convention (art. 3, para. 1),[141] the 1958 Convention on the Territorial Sea and the Contiguous Zone (art. 22)[142] and the 1982 United Nations Convention on the Law of the Sea (art. 236),[143] provide some protection from seizure, attachment, arrest and execution for certain types of vessels, particularly warships and public ships, as well as other ships employed in governmental non-commercial service.

3. Bilateral treaties

113. A great many bilateral treaties relating to shipping also exempt ships in use or intended for use in governmental non-commercial service from arrest, attachment and execution.[144]

4. Judicial practice

114. The case-law of States is far from settled. National legislation and governmental practice represent efforts to harmonize judicial practice (see paras. 107-109 above). The most controversial issue appears to relate to bank accounts of embassies. On this question, State practice varies: attachment of mixed bank accounts is sometimes allowed, for an embassy can easily protect its government funds by segregating its "public purpose funds from comercial activity funds".[145] In this connection, the practice of the Federal Republic of Germany in the case involving the Philippine Embassy[146] was the right solution and was confirmed by the House of Lords in its decision in *Alcom Ltd.* v. *Republic of Colombia* (1984).[147] Canadian case-law appears to have reached virtually the same conclusion regarding the premises of a diplomatic mission. Execution was regarded as improper since the leased premises were for governmental use and the funds attached were in the possession of the Republic of Cuba.[148] United States case-law appears to depend on judicial interpretation of the *Foreign Sovereign Immunities Act of 1976*, requiring reasonably explicit wording of the waiver and not verbatim recitation of the legislative provision.[149]

115. The practice of the courts of various countries has not lent itself to simplified conclusions. There is a tendency in the practice of some highly developed countries, such as Austria, the Federal Republic of Germany, the Netherlands, Switzerland and the United States of America, to allow attachment or execution against foreign State property to a greater extent than hitherto warranted, provided that certain conditions are fulfilled.[150] The developing countries are in need of authoritative protection to arrest this trend.

C. International opinion

116. The most recent opinion on this question is articulately expressed in the draft convention on State immunity adopted by the International Law Association in 1982.[151] The relevant provision reads:

Article VIII. Exceptions to immunity from attachment and execution

...

C. Attachment or execution shall not be permitted if:

1. The property against which execution is sought to be had is used for diplomatic or consular purposes; or
2. The property is of a military character or is used or intended for use for military purposes; or
3. The property is that of a State central bank held by it for central banking purposes; or
4. The property is that of a State monetary authority held by it for monetary purposes; ...

...

D. Formulation of draft article 24

117. The preceding survey of State practice and opinion may be considered to provide the elements for a list of the types of State property that lie beyond the reach of judicial or administrative machinery to arrest, freeze, attach, detain or execute. It is possible to classify the different categories of property according to the relative absoluteness of their immunity from attachment and execution regardless of consent, or according to the rationale behind their unattachability or exemption from execution, whether it concerns open hostility or *casus belli*, disruption of diplomatic relations, or interference with the normal functioning of the fiscal authorities of a State. Article 24 might thus be formulated as follows:

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[138] *Ibid.*, vol. 596, p. 261.

[139] United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 125.

[140] *Ibid. 1975* (Sales No. E.77.V.3), p. 87.

[141] See paragraph 69 above.

[142] See footnote 75 above.

[143] See footnote 74 above.

[144] See, for example, the treaties and agreements mentioned in footnotes 78, 79, 80 and 83 above.

[145] See *Birch Shipping Corp.* v. *Embassy of Tanzania* (1980) (*Federal Supplement*, vol. 507 (1981), p. 311, at p. 313).

[146] 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).

[147] *The All England Law Reports, 1984*, vol. 2, p. 6.

[148] See *Corriveau* v. *Republic of Cuba* (1979) (*Dominion Law Reports, 3d Series*, vol. 103 (1980), p. 520); *Re Royal Bank of Canada and Corriveau et al.* (1980) (*ibid.*, vol. 117 (1981), p. 199); cf. *Intpro Properties (UK) Ltd.* v. *Sauvel and others* (1983) (*The All England Law Reports, 1983*, vol. 2, p. 495).

[149] See, for example, *Maritime International Nominees Establishment* v. *Republic of Guinea* (1981) (*Federal Supplement*, vol. 505 (1981), p. 141); decision reversed on appeal (1982) (*Federal Reporter, 2d Series*, vol. 693 (1983), p. 1094), the Court having concluded that agreement to ICSID arbitration did not constitute a waiver of immunity. For a judgment in the opposite direction, see *Libra Bank Ltd.* v. *Banco Nacional de Costa Rica* (1982) (*Federal Reporter, 2d Series*, vol. 676 (1982), p. 47).

[150] See *Netherlands Yearbook of International Law, 1979*, vol. X; and Sinclair, *loc. cit.* (footnote 26 above), pp. 218-242.

[151] See footnote 107 above. See also the draft resolutions of the Institute of International Law mentioned in paragraphs 79 and 80 above.

Article 24. Types of State property permanently immune from attachment and execution

1. Notwithstanding article 23 and regardless of consent or waiver of immunity, the following property may not be attached, arrested or otherwise taken in forced execution of the final judgment by a court of another State:

(*a*) property used or intended for use for diplomatic or consular purposes or for the purposes of special missions or representation of States in their relations with international organizations of universal character internationally protected by inviolability; or

(*b*) property of a military character, or used or intended for use for military purposes, or owned or managed by the military authority or defence agency of the State; or

(*c*) property of a central bank held by it for central banking purposes and not allocated for any specified payments; or

(*d*) property of a State monetary authority held by it for monetary and non-commercial purposes and not specifically earmarked for payments of judgment or any other debts; or

(*e*) property forming part of the national archives of a State or of its distinct national cultural heritage.

2. Nothing in paragraph 1 shall prevent a State from undertaking to give effect to the judgment of a court of another State, or from consenting to the attachment, arrest or execution of property other than the types listed in paragraph 1.

PART V. MISCELLANEOUS PROVISIONS

I. Introduction

118. A draft convention on jurisdictional immunities of States covers a wide variety of fields and subject-matter, which are not easily grouped under the same meaningful headings. At the end of this long and arduous task, it seems necessary to group a number of provisions in a final part entitled "Miscellaneous provisions". They include areas not covered by articles in the preceding parts, notably the immunities of personal sovereigns or heads of State, which have two aspects: *ratione materiae*, already considered for State organs, and *ratione personae*, which remains to be examined. Other questions that should be dealt with concern procedural matters such as the service of writs or other documents to institute proceedings against a foreign State, the costs to be awarded, immunity or exemption of States from the requirement to give security for costs, other procedural privileges, and the final clauses. A general saving clause may also be in order providing for the possibility of granting more or wider immunity from jurisdiction, as well as from attachment and execution, than otherwise required under customary international law or stipulated in the present draft articles.

II. Draft articles

ARTICLE 25 (Immunities of personnal sovereigns and other heads of State)

A. Immunities *ratione personae*

119. It is not the intention of the present draft articles to exclude consideration of questions relating to the immunities enjoyed by personal sovereigns and other heads of State, not in their official capacity as State organs, but in their personal capacity. Personal sovereigns and other heads of State enjoy in their personal capacity a certain degree of jurisdictional immunity *ratione personae*, in the same manner as ambassadors and other diplomatic agents. This means, in effect, that immunities follow the person of the head of State only so long as he remains in office. Once he is divested of that office and becomes an ex-sovereign or ex-head of State, he may be sued like any ex-ambassador for all the personal acts performed during his office that were unconnected with the official functions covered by his immunities *ratione materiae* or State immunities.

B. State practice and opinion

120. Personal sovereigns and other heads of State have been identified with the States of which they are the heads and also representatives. Their role beyond the confines of their national territory has recently widened. Although not residing abroad, as is ordinarily the case with ambassadors or diplomats, sovereigns and other heads of State do frequently visit by invitation, at other times unofficially with or without invitation, and at other times also *incognito* or privately for recreation. Some measure of immunity *ratione personae* is recognized and accorded in practice.

121. Writers have often treated foreign sovereigns in the same category as foreign States[152] and not in that of accredited diplomats. In the United Kingdom, the immunity of foreign sovereigns has been the result of an extended application of English constitutional practice, in which the domestic sovereign cannot be sued in his own courts.[153] Few distinctions have been made between the private and public capacities of the foreign sovereign,[154] in spite of an earlier dictum by Lord Stowell in *The "Swift"* (1813)[155] tending to limit the ap-

[152] See, for example, the Harvard Law School draft convention on competence of courts in regard to foreign States, art. 1 (*a*) (*op. cit.* (footnote 33 above), p. 475).

[153] See, for example, *De Haber* v. *Queen of Portugal* (1851) (*Queen's Bench Reports*, vol. XVII (1855), p. 171).

[154] See, for example, *Mighell* v. *Sultan of Johore* (1893) (*The Law Reports, Queen's Bench Division, 1894*, vol. I, p. 149).

[155] J. Dodson, *Reports of Cases Argued and Determined in the High Court of Admiralty* (London), vol. I (1815), p. 320.

plication of immunity in the case of the private trading activities of a foreign sovereign.[156]

122. Immunities accorded to foreign sovereigns in their private capacity do not appear to have been unlimited even at an early date. The classic dictum of Chief Justice Marshall in *The Schooner "Exchange" v. McFaddon and others* (1812) may be cited:

> ... 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; ...[157]

123. The case-law of other countries inclines towards a more restrictive interpretation, recognizing immunity only for public, and not for private, acts of a foreign sovereign. Italian practice is typical in this regard.[158]

124. Granting, therefore, that heads of State should be, as they often are in practice, accorded no less jurisdictional immunities *ratione personae* than ambassadors, it is now accepted that even diplomatic immunities are subject to certain exceptions, such as trading[159] and actions relating to movable or immovable property, including ownership of shares and participation in corporate bodies.[160] The duration of jurisdictional immunities *ratione personae* is necessarily limited to the tenure of the office of head of State, beyond which no immunity *ratione personae* survives as a matter of law or of right.[161]

C. Formulation of draft article 25

125. In accordance with the scope of the immunities of diplomatic representatives, the immunities *ratione personae* of heads of State might be formulated as follows:

Article 25. Immunities of personal sovereigns and other heads of State

1. A personal sovereign or head of State is immune from the criminal and civil jurisdiction of a court of another State during his office. He need not be accorded immunity from its civil and administrative jurisdiction:

(*a*) in a proceeding relating to private immovable property situated in the territory of the State of the forum, unless he holds it on behalf of the State for governmental purposes; or

(*b*) in a proceeding relating to succession to movable or immovable property in which he is involved as executor, administrator, heir or legatee as a private person; or

(*c*) in a proceeding relating to any professional or commercial activity outside his sovereign or governmental functions.

2. No measures of attachment or execution may be taken in respect of property of a personal sovereign or head of State if they cannot be taken without infringing the inviolability of his person or of his residence.

ARTICLE 26 (Service of process and judgment in default of appearance)

A. Service of process

126. The practical question relates to the procedure by which process should be served against a foreign State. By definition, a foreign State is physically outside the territory of the forum State, and extraterritorial service of process is difficult and should be done through proper diplomatic channels. In this connection, there is growing practice—endorsed by recent national legislation[162]—in support of the proposition that service of any writ or other document instituting proceedings against a foreign State should be transmitted through the Ministry of Foreign Affairs of the forum State to the Ministry of Foreign Affairs of the State against which the proceeding is instituted, and that service is deemed to have been effected when the writ or document is received at the Ministry. Other means of service, more complex, have been prescribed, including bilaterally agreed methods, internationally agreed procedures, use of the diplomatic channel, and registered mail addressed to the head of the Ministry of Foreign Affairs of the State against which the proceeding is instituted.[163]

127. A reasonable period of time is allowed to elapse, such as two months after the date of receipt of process, to enable the foreign State to enter an appearance. Should the State enter an appearance even though service was not properly effected, it may not later object to that defect in the service of process.

128. There appears to be an established practice requiring proof of compliance with the procedure for service of process and of the expiry of the time-limit before any judgment may be rendered against a foreign State in default of appearance. There is also a further requirement that such a judgment, when rendered in default of appearance, should be communicated to the State concerned through the same procedure or channel as the service of process.

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[156] Lord Stowell stated:

> "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." (*Ibid.*, p. 339.)

[157] W. Cranch, *Reports of Cases Argued and Adjudged in the Supreme Court of the United States,* vol. VII, 3rd ed. (New York, 1911), p. 145.

[158] See, for example, *Carlo d'Austria* v. *Nobili* (1921) (*Giurisprudenzia Italiana* (Turin), vol. I (1921), p. 472; *Annual Digest ..., 1919-1922* (*op. cit.*), p. 136, case No. 90).

[159] See, for example, art. 31, para. 1 (*c*), of the 1961 Vienna Convention on Diplomatic Relations (footnote 137 above).

[160] According to article 18 (Participation in companies or other collective bodies) of the draft articles, States are also subject to the jurisdiction of the courts of the State in which the company is incorporated or has its principal place of business.

[161] There is nothing to prevent a court from according immunity to an ex-sovereign as a matter of courtesy.

[162] See, for example, sect. 12, subsect. (1), of the United Kingdom *State Immunity Act 1978* (footnote 57 above).

[163] See, for example, sect. 1608 of the United States *Foreign Sovereign Immunities Act of 1976* (footnote 56 above), dealing with service, time to answer and default.

B. Formulation of draft article 26

129. Article 26 might be worded as follows:

Article 26. Service of process and judgment in default of appearance

1. Service of process by any writ or other document instituting proceedings against a State may be effected in accordance with any special arrangement or international convention binding on the forum State and the State concerned or transmitted by registered mail requiring a signed receipt or through diplomatic channels addressed and dispatched to the head of the Ministry of Foreign Affairs of the State concerned.

2. Any State that enters an appearance in proceedings cannot thereafter object to non-compliance of the service of process with the procedure set out in paragraph 1.

3. No judgment in default of appearance shall be rendered against a State except on proof of compliance with paragraph 1 above and of the expiry of a period of time which is to be reasonably extended.

4. A copy of any judgment rendered against a State in default of appearance shall be transmitted to the State concerned through one of the channels as in the case of service of process, and any time for applying to have the judgment set aside shall begin to run after the date on which the copy of the judgment is received by the State concerned.

ARTICLE 27 (Procedural privileges)

A. General considerations

130. Since States are accorded immunities from jurisdiction as well as from attachment and execution in respect of their property, other fringe benefits also accrue in their favour. States are accorded a number of procedural privileges in proceedings before a court of another State. Although, strictly speaking, such privileges are incidental to their jurisdictional immunities, it might be useful to group them under the heading of procedural privileges.

1. Exemption from unenforceable orders

131. As has been seen in connection with the formulation of paragraph 2 of draft article 22, some orders of a court designed to compel a foreign State to perform a specific act or to refrain, under an injunctive order or interdict, from certain acts would be difficult to enforce or, indeed, unenforceable against any State. These two types of remedial measures have been included in paragraph 2 of article 22 (see para. 84 above), but may be reiterated in this separate but related connection.

2. Exemption from certain penalties

132. Unlike an individual, and in a manner not too dissimilar to the case of a national sovereign in connection with the Crown's privileges, a foreign State cannot be fined or penalized by way of committal in respect of any failure or refusal to disclose or produce any document or other information for the purposes of proceedings to which it is a party.[164]

3. Exemption from security for costs

133. The question of costs is one closely related to jurisdictional immunities and may be covered by a brief provision exempting a State party to proceedings before a court of another State from the requirement to provide security for costs. The meaning of "costs" varies widely in the different legal systems; it would not be practical to attempt to regulate the question of the awarding of costs, which is best left to the discretion of the judicial authority concerned.

B. Formulation of draft article 27

134. Article 27 might be worded as follows:

Article 27. Procedural privileges

1. A State is not required to comply with an order by a court of another State compelling it to perform a specific act or interdicting it to refrain from specified action.

2. No fine or penalty shall be imposed on a State by a court of another State by way of committal in respect of any failure or refusal to disclose or produce any document or other information for the purposes of proceedings to which the State is a party.

3. A State is not required to provide security for costs in any proceedings to which it is a party before a court of another State.

ARTICLE 28 (Restriction and extension of immunities and privileges)

A. General considerations

135. To maintain a desirable degree of flexibility for readjustment, it would be useful to add a provision enabling a State to accord the correct amount of jurisdictional immunities and privileges to another State, whether or not on the basis of reciprocity. As State immunity is accorded in varying circumstances and the practice of States will require further adjustments, it is not unlikely that a State may find itself giving more or fewer immunities than are otherwise required of it. In the circumstances, the door will be left open for a State to readjust its practice accordingly, either by revising its law so as to add more immunity where such is required, or by withholding immunity where none is desirable.[165] Such a provision seems a necessary adjustment at this point.

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[164] See, for example, sect. 13, subsect. (1), of the United Kingdom *State Immunity Act 1978* (footnote 57 above).

[165] See, for example, sect. 15 of the United Kingdom Act (*ibid.*).

B. Formulation of draft article 28

136. Article 28 might be worded as follows:

Article 28. Restriction and extension of immunities and privileges

A State may restrict or extend with respect to another State the immunities and privileges provided for in the present articles to the extent that appears to it to be appropriate for reasons of reciprocity, or conformity with the standard practice of that other State, or the necessity for subsequent readjustments required by treaty, convention or other international agreement applicable between them.