Part V
REPLIES TO THE QUESTIONNAIRE

Cinquième partie
RÉPONSES AU QUESTIONNAIRE

Questionnaire on the topic "jurisdictional immunities of States and their property"

Question 1

Are there laws and regulations in force in your State providing either specifically for jurisdictional immunities for foreign States and their property, or generally for non-exercise of jurisdiction over foreign States and their property without their consent? If so, please attach a copy of the basic provisions of those laws and regulations.

Question 2

Do courts of your State accord jurisdictional immunities to foreign States and their property? If so, please indicate whether they have based their decisions on any provisions of internal law in force or on any principle of international law.

Question 3

What are the main trends of the judicial practice of your State in regard to jurisdictional immunities of foreign States and their property? Do the courts regard the doctrine of State immunity as "absolute", and if not, is its application subject to qualifications or limitations?

Question 4

What is the role of the Executive branch of the Government of your State in matters of recognition of jurisdictional immunities of foreign States and their property, especially in the definition or delimitation of the extent of the application of State immunity?

Question 5

Is the principle of reciprocity applicable in the matters relating to jurisdictional immunities of States and their property? *Inter alia*, would courts of your State be expected to apply the principle of reciprocity to a foreign State which would deny your State immunity in a dispute similar to the one pending before your courts, even if the courts would normally grant immunity to other foreign States in such disputes?

Question 6

Do the laws and regulations referred to under Question 1, or the judicial practice referred to in Question 3, make any distinction, as far as jurisdictional immunities of foreign States and their property are concerned, between "public acts" and "non-public acts" of foreign States? If so, please outline the distinctions, and provide examples of their application.

Question 7

If the answer to Question 6 is "yes":

(*a*) can jurisdictional immunities be successfully invoked before courts in your State in connexion with "non-public acts" of foreign States? If not, please indicate the types of "non-public acts" of foreign States not covered by immunities.

(*b*) in a dispute relating to a contract of purchase of goods, would courts of your State be expected to grant immunity to a foreign State which establishes that the ultimate object of the contract was for a public purpose or the contract was concluded in the exercise of a "public" or "sovereign" function?

(*c*) in a dispute relating to a foreign State's breach of a contract of sale, would courts of your State be expected to grant immunity to a foreign State which establishes that its conduct was motivated by public interests?

(*d*) in any dispute concerning a commercial transaction, is the nature of the transaction decisive of the question of State immunity, if not, how far is ulterior motive relevant to the question?

Question 8

If "non-public" activities of a foreign State in the territory of your State are such as to be normally susceptible to payment of taxes, duties or other levies, would the foreign State be required to pay them or would it be exempted in all cases or on the basis of reciprocity?

Question 9

Are courts of your State entitled to entertain jurisdiction over any public acts of foreign States? If so, please indicate the legal grounds on which competence is based, such as consent, or waiver of immunity, or voluntary submission, etc. If jurisdiction is exercised in such cases, does it mean that the doctrine of State immunity is still recognized by the courts?

Question 10

What rules are in force in your State, if any, governing:

(*a*) waiver of jurisdictional immunities of foreign States;

(*b*) voluntary submission by foreign States; and

(*c*) counter-claims against foreign States?

Question 11

What are the exceptions or limitations, if any, provided by laws and regulations in force or recognized by judicial or governmental practice in your State with respect to jurisdictional immunities of foreign States and their property?

Question 12

What is the status, under laws and regulations in force or in practice in your State, of ships owned or operated by a foreign State and employed in commercial service?

Question 13

If a foreign State applies to administrative authorities of your State for a patent, a licence, a permit, an exemption or any other administrative action, would it be treated, proeedurally or substantively, like any other applicant or would it receive special treatment on the procedure or on the substance?

Question 14

If a foreign State owns or succeeds to an immovable or movable property sit-

uated in your State, how far is the foreign State subject to territorial jurisdiction in respect of title to that property or other property rights?

Question 15

Can a foreign State inherit or become a legatee or a beneficiary in a testate or intestate succession? If so, is voluntary submission essential to a meaningful involvement in the judicial process?

Question 16

Under laws and regulations in force in your State, does the property of a foreign State enjoy immunity from attachment and other provisional or interim measures prior to an executory judicial decision? Is there any distinction based on the nature or on the use of property involved?

Question 17

Similarly, does the property of a foreign State enjoy immunity from distraint and other forcible measures in aid of execution of a judicial decision? Is there any distinction based on the nature or on the use of the property involved?

Question 18

Are there procedural privileges accorded a foreign State in the event of its involvement in a judicial process? If so, please elaborate.

Question 19

Are foreign States exempt from costs or security for costs in the event of participation in a judicial process?

Question 20

Is your State inclined to invoke jurisdictional immunities before foreign courts, where, in like circumstances, none would be accorded to foreign States by the courts of your State? Or conversely, are courts in your State prepared to grant jurisdictional immunities to foreign States to the same extent as that to which your State is likely to claim immunities from foreign jurisdiction?

Questionnaire relatif à "l'immunité juridictionnelle des Etats et de leurs biens"

Question 1

Y a-t-il dans votre pays des lois et règlements en vigueur prévoyant soit de manière spécifique l'immunité juridictionnelle des Etats étrangers et de leurs biens, soit de façon générale le non-exercice de la juridiction sur les Etats étrangers et leurs biens, sans leur consentement? Le cas échéant, veuillez joindre une copie des principales dispositions de ces lois et règlements.

Question 2

Les tribunaux de votre pays accordent-ils l'immunité juridictionnelle aux Etats étrangers et à leurs biens ? Le cas échéant, veuillez indiquer s'ils ont fondé leurs décisions sur des dispositions en vigueur du droit interne ou sur un principe de droit international.

Question 3

Quelles sont dans votre pays les principales tendances de la jurisprudence pour ce qui est de l'immunité juridictionnelle des Etats étrangers et de leurs biens ? Les tribunaux considèrent-ils la doctrine de l'immunité des Etats comme "absolue" Sinon, l'application qu'ils en font est-elle assortie de réserves ou de restrictions:

Question 4

Quel est, au sein de votre Gouvernement, le rôle de l'exécutif touchant la reconnaissance de l'immunité juridictionnelle des Etats et de leurs biens, en particulier pour ce qui est de définir ou de délimiter la portée de l'application du principe de l'immunité des Etats?

Question 5

Le principe de la réciprocité s'applique-t-il pour les questions relatives à l'immunité juridictionnelle des Etats et de leurs biens ? Ainsi, vos tribunaux appliqueraient-ils le principe de la réciprocité à l'endroit d'un Etat étranger qui refuserait à votre pays l'immunité dans un différend du même ordre que celui dont ils connaissent, alors qu'en pareil cas ils accorderaient normalement l'immunité à d'autres Etats étrangers?

Question 6

Les lois et règlements évoqués dans la première question ou la jurisprudence dont il s'agit dans la troisième question établissent-ils une distinction, touchant l'immunité juridictionnelle des Etats étrangers et de leurs biens, entre activités des Etats étrangers revêtant un caractère public et activités ne revêtant pas un caractère public ? Le cas échéant, veuillez indiquer ces distinctions, en fournissant des exemples quant à leur application.

Question 7

En cas de réponse affirmative à la question 6:

a) Le principe de l'immunité juridictionnelle peut-il être dûment invoqué devant les tribunaux de votre pays, s'agissant d'activités d'Etats étrangers ne revêtant pas un caractère public? Dans la négative, veuillez indiquer quel est le genre d'activités d'Etats étrangers ne revêtant pas un caractère public que ne couvre pas cette immunité.

b) Dans un différend relatif à un contrat d'achat de marchandises, les tribunaux de votre pays accorderaient-ils l'immunité à l'Etat étranger qui établirait que ledit contrat avait pour fin ultime l'intérêt public ou qu'il avait été conclu dans l'exercice d'une fonction "publique" ou du droit "de souveraineté"?

c) Dans un différend relatif à l'inexécution par un Etat étranger d'un contrat de vente, les tribunaux de votre pays accorderaient-ils l'immunité à l'Etat étranger qui établirait que sa conduite est motivée par l'intérêt public?

d) Dans un différend relatif à une transaction commerciale, la nature de ladite transaction a-t-elle une importance décisive pour l'octroi de l'immunité? Sinon, dans quelle mesure les mobiles non avoués entrent-ils en ligne de compte?

Question 8

Si les activités ne revêtant pas un caractère public auquel se livre un Etat étranger sur le territoire de votre Etat sont de nature à être normalement assujetties

au versement d'impôts, droits ou autres redevances, un Etat étranger est-il tenu de les payer, en est-il exempté dans touts les cas ou l'est-il sur la base de la réciprocité?

Question 9

Les tribunaux de votre pays sont-ils fondés à exercer leur juridiction sur toutes les activités revêtant un caractère public auquel se livrent les Etats étrangers? Le cas échéant, veuillez indiquer quel est le fondement juridique de cette compétence — consentement, levée de l'immunité ou renonciation volontaire, etc. Si, en pareil cas, les tribunaux exercent leur juridiction, est-ce à dire qu'ils continuent à reconnaître la doctrine de l'immunité des Etats?

Question 10

Quelles sont, le cas échéant, les règles en vigueur dans votre pays concernant:

a) La levée de l'immunité juridictionnelle des Etats étrangers;

b) La renonciation volontaire de la part d'Etats étrangers; et

c) Les demandes reconventionnelles à l'encontre d'Etats étrangers?

Question 11

Le cas échéant, quelles sont les exceptions ou limitations prévues par les lois et règlements en vigueur ou reconnues en pratique par les instances judiciaires ou administratives de votre pays touchant l'immunité juridictionnelle des Etats étrangers et de leurs biens?

Question 12

Quel est, en vertu des lois et règlements en vigueur ou en pratique dans votre pays, le statut des navires appartenant à un Etat étranger ou exploités par lui et utilisés pour des activités commerciales?

Question 13

Si un Etat étranger dépose auprès des autorités administratives de votre pays une demande de brevet, de licence, de permis ou d'exemption, ou s'adresse à elles pour tout autre acte administratif, le traite-t-on, sur le plan de la procédure ou du fond, comme n'importe quel autre requérant ou fait-il l'objet d'un traitement spécial en matière de procédure ou pour le fond?

Question 14

Si un Etat étranger possède ou se voit léguer des biens, meubles ou immeubles, se trouvant dans votre pays, ledit Etat est-il soumis à votre juridiction territoriale pour ce qui est du droit de propriété ou des autres droits afférents à ces biens?

Question 15

Dans le cas d'une succession *ab intestat* ou d'une succession testamentaire, un Etat étranger peut-il être héritier, légataire ou bénéficiaire? Le cas échéant, la renonciation volontaire à l'immunité juridictionnelle est-elle indispensable pour lui permettre de participer utilement à la procédure?

Question 16

En vertu des lois et règlements en vigueur dans votre pays, les biens d'un Etat étranger jouissent-ils, avant que n'intervienne une décision judiciaire exécutoire, de l'immunité en ce qui concerne la saisie et autres mesures, conservatoires ou transi-

toires ? Etablit-on des distinctions fondées sur la nature ou sur l'utilisation des biens en cause ?

Question 17

De même, les biens d'un Etat étranger jouissent-ils de l'immunité en ce qui concerne la saisie et autres procédures visant à assurer l'exécution d'une décision judiciaire ? Etablit-on des distinctions fondées sur la nature ou sur l'utilisation des biens en cause ?

Question 18

Si un Etat étranger est partie à une action judiciaire, jouit-il de privilèges en matière de procédure ? Le cas échéant, veuillez donner des précisions.

Question 19

Les Etats étrangers qui sont parties à une action judiciaire sont-ils exonérés des frais ou du versement d'une caution ?

Question 20

Votre pays est-il porté à invoquer l'immunité juridictionnelle devant des tribunaux étrangers dans des cas où, à situation analogue, vos tribunaux refuseraient de l'accorder à des Etats étrangers ? Inversement, vos tribunaux seraient-ils prêts à accorder à des Etats étrangers le même degré d'immunité juridictionnelle que votre pays serait susceptible d'invoquer auprès d'Etats étrangers ?

A. BRAZIL

Question 1

There is none.

Question 2

Yes, the Brazilian courts' decisions being based upon what they consider to be a principle of international law.

Question 3

Yes, the Brazilian courts consider the doctrine of immunity of States as absolute.

Question 4

None.

Question 5

No.

Question 6

No.

Question 8

The foreign State would have to pay the taxes, duties or other levies in connection with "non-public" activities.

Question 9

There is no precedent on the subject. However, in Brazilian law there is no rule that prevents Brazilian courts from suing and trying foreign States for their public acts, provided the foreign States concerned agree to such an exercise of jurisdiction.

Question 10

There is no precedent on the subject. But probably Brazilian courts would apply to this question the procedural rules which regulate the prorogation of their jurisdiction in general.

Question 11

The only exception recognized by judicial practice is based on the voluntary acceptance of jurisdiction.

Question 12

From the point of view of Navigation Law, ships owned or operated by a foreign State are granted the same status as that of merchant ships; as to the arrest of or bond posting on such ships as a result of judicial orders, there are no precedents in jurisprudence or legal texts covering the question but probably Brazilian courts would consider such ships as not subject to arrest.

Question 13

Yes. They will be treated as any other applicant.

Question 14

Totally subject.

Question 15

The answer is yes to both questions.

Question 16

There are no precedents on this question. But it is probable that all property of a foreign State in Brazil would enjoy immunity from attachment.

Question 17

There are no precedents on this question. But it is probable that all property of a foreign State in Brazil would enjoy immunity from distraint.

Question 18

There is none.

Question 19

No.

Question 20

Brazil invokes abroad absolute jurisdictional immunities, such as those Brazilian courts grant to foreign States. The courts referred to, however, do not take into account, in their decisions, the attitudes of the Brazilian State before foreign courts, but merely invoke what they consider a general principle of International Law.

B. CZECHOSLOVAKIA

Question 1

According to Czechoslovak law, judicial practice and legal theory, the doctrine of the sovereignty of States and their equality corresponds to that of their "absolute" immunity.

According to the provisions of Sect. 47, par. 1 of Act on private international law No. 97/1963 of Collection of Laws of Czechoslovakia and the rules of procedure relating thereto, foreign States are not subject to the jurisdiction of Czechoslovak courts and notarial offices. However, the jurisdiction of Czechoslovak courts and notarial offices is applicable in cases where the subject of the proceedings is unmovable property located in Czechoslovakia or to rights of States on such unmovable property belonging to other persons, as well as to rights on such property arising from lease, but not in cases where the subject of the proceedings is payment of rentals and in cases where foreign States voluntarily submit to the jurisdiction of Czechoslovak courts and notarial offices (Sect. 47, par. 3, lit. (d) of the above mentioned Act).[1]

Question 2

See answer sub 1.[2]

Question 3

See answer sub 1.

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[1] Section 47 provides:

Exclusion from the jurisdiction of Czechoslovak courts and notarial offices

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

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

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

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

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

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

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

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

[2] "Sub" refers to "question".

Question 4

In matters regulated by Act No. 97/1963 of Collection, judicial organs may, in case of doubt, ask the Ministry of Justice for an opinion (Sect. 53, par. 2 of the above mentioned Act).[3]

This opinion given in the matter of exemption of foreign States from the jurisdiction of Czechoslovak courts and notarial offices is of those which are not binding for judicial organs.

Question 5

According to Czechoslovak laws and regulations, the principle of absolute immunity is not bound to reciprocity.

Question 6

Czechoslovak laws and regulations do not make any distinction between "public acts" and "non-public acts". This would contravene to the principle of absolute immunity of States.

Question 7

With regards to answer ad 6, no answer is required here.

Question 8

Czechoslovak laws and regulations do not explicitly regulate this matter.

Question 9

No.

Question 10

(*a*) See Act No. 97/1963 Collection, Sect. 47, par. 3.[4]

(*b*) Ditto.

(*c*) None.

Question 11

Act No. 97/1963 Collection, Sect. 47, par. 3.[5]

Question 12

Czechoslovak laws and regulations do not explicitly regulate this matter. When signing the Convention on the High Seas at Geneva on 29th April 1958, the Czechoslovak Socialist Republic made the following reservations concerning Article 9:

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[3] Section 53 provides:

1. The judicial organ shall take all necessary measures to ascertain the provisions of a foreign law; if such provisions are not known to such an organ, it may request the information for this purpose from the Ministry of Justice.

2. If any doubt arises in the consideration of the cases listed in paragraph 1, the judicial organs may ask the Ministry of Justice for an opinion.

[4] See foot-note 1.

[5] See foot-note 1.

"The Government of the Czechoslovak Republic holds that under international law in force government ships operated for commercial purpose also enjoy on the high seas complete immunity from the jurisdiction of any state other than the flag state".

Question 13

States are in principle treated in the same way as any other applicant.

Special régime might result from bilateral or multilateral agreements.

Question 14

According to Sect. 47, par. 3, lit. (a) of Act No. 97/1963 Coll., a foreign State is subject, in these cases, to the jurisdiction of Czechoslovak organs. It is exempted from such jurisdiction only in matters related to the payment of rentals.

Question 15

Unless stipulated otherwise by an international agreement (cf. Sect. 2 of Act No. 97/1963 Coll.[6]), matters of inheritance are governed by the law of the State whose citizen the decedent was at the time of his death (according to Sect. 17 of the above mentioned Act). If the testator was a Czechoslovak citizen, Czechoslovak law does not limit the testator in the choice of the heir when drawing up his will. The heir may therefore be even a foreign State.

With regards to escheats of foreign citizens, agreements on judicial assistance concluded by Czechoslovakia with other States provide that movable escheats go to the State whose citizen the decedent was at the time of his death, unmovable escheats to the State on the territory of which the unmovable escheat is located.

Question 16

Yes, they enjoy immunity, with the exceptions mentioned in Sect. 47, par. 3, lit. (a) of Act No. 97/1963 Coll., concerning unmovable property.

Question 17

See answer ad 16.

Question 18

There are none. According to the provisions of Sect. 48 of Act No. 97/1963 Coll.,[7] Czechoslovak courts and notarial offices apply Czechoslovak rules of procedure with all participants enjoying equal status in claiming their rights.

Question 19

They are not.

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[6] Section 2 provides:

"The provisions of the present Act shall be applied only if an international treaty binding on the Czechoslovak Socialist Republic does not provide otherwise."

[7] Section 48 provides:

In proceedings, Czechoslovak courts and notarial offices shall act in accordance with Czechoslovak procedural rules and all parties shall have an equal status in claiming their rights.

Question 20

The Czechoslovak Socialist Republic proceeds from the opinion that it enjoys before courts of foreign States absolute immunity which it grants itself to foreign States before its own courts.

C. ECUADOR

Question 1

Yes. Article 333 of the Bustamante Code of Private International Law, which became a law of the Republic upon ratification of the Convention on Private International Law, provides as follows:

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

Question 2

Yes, on the basis of the article quoted above.

Question 3

As already indicated, national judges are not competent to consider claims against foreign States, except in cases of express submission or of counterclaims.

Question 4

Under the present Constitution, the functions of the Executive Branch include signing treaties and other international agreements, in conformity with the Constitution and the law; ratifying such agreements with the prior approval of the House of Representatives; and exchanging or depositing, as appropriate, instruments of ratification. Pursuant to the foregoing, the Executive Branch has the duty to respect, and to ensure respect for, the laws of the country and the international commitments entered into.

Question 5

Ecuadorian law would not permit the application of the principle of reciprocity in cases relating to the jurisdictional immunities of States or their property in the circumstances described in the question.

Question 6

Yes. Article 334 of the above mentioned Code makes such a distinction as follows:

> "In the same case and with the same exception, they shall be incompetent when real actions are exercised, if the contracting State or its head has acted on the case as such and in its public character, when the provisions of the last paragraph of Article 318 shall be applied."

Question 7

(*a*) No. Article 335 of the same Code stipulates that:

> "If the foreign contracting State or its head has acted as an individual

or private person, the judges or courts shall be competent to take cognizance of the cases where real or mixed actions are brought, if such competence belongs to them in respect to foreign individuals in conformity with this Code."

(*b*) Yes.

(*c*) Yes.

(*d*) Yes. The transaction must clearly have originated in a public act of the State, otherwise the appropriate judges or courts shall have jurisdiction.

Question 8

Yes, the principle of reciprocity would be applied.

Question 9

Ecuadorian courts recognize State immunity insofar as the State's acts do not affect national sovereignty or integrity. This should be understood as being without prejudice to the State's duty to respect Ecuador's laws and regulations.

Question 10

Reference is made to the pertinent articles of the Bustamante Code. In addition, the subject matter is governed by the provisions of the national Code of Procedures containing the rules to be applied in the various types of lawsuit.

Question 11

This question is covered by the answer to question 9.

Question 12

They are subject to territorial laws, except in the case of an existing agreement.

Question 13

It would receive the same treatment and be subject to the same procedure as any other applicant.

Question 14

It is subject to territorial jurisdiction as regards the formalities for securing realization of property rights.

Question 15

Yes. The State must submit to territorial jurisdiction.

Question 16

Yes. The rules are laid down in articles 333 *et seq.* of the Bustamante Code of Private International Law.

Question 17

Yes, it enjoys immunity provided that the cases in question have their origin in a public act of the State concerned.

Question 18

Yes. It is granted special privilege.

Question 19

No, not in a case where the State is acting as an individual.

Question 20

Ecuadorian courts would be prepared to grant jurisdictional immunities to foreign States to the extent to which Ecuador is accorded immunities from foreign jurisdiction.

D. EGYPT

Question 1

No.

Question 2

Yes. Egyptian courts accord jurisdictional immunities to foreign States and their property in accordance with the principles of international law (see decision of Cairo Court of Appeal in case No. 1230 of judicial year 81 issued on 4 May 1966).

Question 3

The main judicial trend in Egypt in regard to the jurisdictional immunities of States and their property is that a plea challenging the jurisdiction of national courts to hear a case against a foreign State is a matter of public policy (*ordre public*) (see Cairo Court of First Instance, decision 1173 of 1963 issued on 8 June 1964).

The Egyptian courts do not regard the doctrine of immunity as absolute but rather limit it to acts of sovereign authority (Decisions of Commercial Court of Alexandria on 29 March 1943, Civil Court of Alexandria on 12 May 1951 and Giza Court of First Instance on 10 March 1960).

Question 4

The executive authority adheres to the doctrine. Its decisions in this respect are subject to the control of the judiciary in accordance with the general constitutional principle.

Question 5

In general, the courts in Egypt adhere to the doctrine of immunity which they apply in all cases as a principle of international law (see the answers to questions 2 and 3), although no decisions applying the principle of reciprocity in matters relating to the jurisdictional immunities of States have yet been issued.

Question 6

In accordance with court decisions, immunity is not absolute but is limited to acts of sovereign authority (see the answer to question 3).

Question 7

(*a*) Ordinary acts which are not related to commercial or sovereign acts (see the answer to question 3).

(*b*) See the reply to question 3.

(*c*) See the reply to question 3.

(*d*) See the reply to question 3.

Question 8

The activities of foreign States in Egypt are subject to tax on commercial and industrial profits even if such activities are conducted through a public company belonging to the foreign Government, provided that it is a commercial or industrial establishment operating in Egypt, and even if its economic activity is limited to one transaction. This is in accordance with the provisions of paragraph 2 of article 30, article 30 *bis* and article 33 of Act No. 14 of 1939. The dividends of these companies are subject to tax on income earned in Egypt in any manner whatsoever, even indirectly, under the terms of article 1 (a) of Act No. 14 of 1939.

Question 9

The State may waive jurisdictional immunity and, in such an event, the case would be heard by the Egyptian court (mixed appeal, 29 May 1901).

Question 10

There are no legal provisions governing the waiver of jurisdictional immunities of foreign States.

Although States are entitled to jurisdictional immunity, they may decide to submit voluntarily (see the answer to question 9).

Counter-claims are subject to the same regulations as those governing original claims.

Question 11

There are no laws or regulations relating to jurisdictional immunities of States and no judicial provisions for exceptions to the principle of immunity.

Question 12

The basic legislation governing the commercial activity of foreign ships in Egypt is contained in the Commercial Maritime Code promulgated in 1883.

Question 13

The foreign State submits its applications in this connexion to the authority designated in the laws and decrees governing the subject referred to.

Question 14

Possession, title and other property rights in respect of immovable property are governed by the legal provisions applicable in the location of such property. Movable property is governed by the legal provisions applicable in the location of such property at the time of the event resulting in the acquisition or loss of possession, title or other property rights (art. 18 of the Civil Code).

Question 15

States are regarded as bodies corporate which enjoy all rights except those pertaining exclusively to individuals as defined by law (arts. 52 and 53 of the Civil Code). States can inherit under the terms of Act No. 81 of 1976 which governs the possession of land and immovable property by non-Egyptians.

Questions 16 and 17

There are no legal provisions in force under which jurisdictional immunity is granted in this respect.

Question 18

Egyptian law does not grant privileges to foreign States in this respect.

Question 19

Egyptian law does not grant any privileges to foreign States in this respect.

Question 20

Jurisdictional immunity is a principle of international law which a State is entitled to invoke on the basis of the sovereign independence and equality of all States in the international community. This principle is applied by the Egyptian courts (see the replies to questions 2 and 3).

E. GERMANY, FEDERAL REPUBLIC OF

Questions 1, 2, 3 and 4

The legal system of the Federal Republic of Germany follows general rules of international law under which immunity is construed as restricted to "*acta jure imperii*" ("public acts").

Question 5

German courts have not yet ruled whether, in accordance with the general rules of international law, the granting of immunity should be denied on the grounds that the Federal Republic of Germany would in a similar case not be granted exemption from the jurisdiction of the State in question. The need for a ruling on this subject has not yet arisen.

Question 6

As stated in the Note dated 7 August 1979,[8] a foreign State and its property are subject to German jurisdiction only in the event of "non-public acts" (*acta jure gestionis*).

Accordingly, a company which has carried out repair work on the heating system of an embassy at the request of the ambassador was permitted to file a suit against the State for a claim resulting from the repairs. The Federal Constitutional Court ruled that such a repair contract does not fall within the sphere of public authority and is to be regarded as a non-public act (Federal Constitutional Court Ruling 16, 27—Neue Juristische Wochenschrift 1963, 1732).

The limitation of immunity to "acta jure imperii" also extends to executory proceedings. Accordingly, the enforcement of claims from a foreign embassy's general current bank account, which exists in the country of jurisdiction and is intended for the defrayal of the embassy's general expenses and costs, is not considered permissible (Federal Constitutional Court Ruling 46, 342—Neue Juristische Wochenschrift 1978, 485).

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[8] See Part II.

Furthermore, a suit for the correction of the land register was permitted against a foreign State with respect to the site of its mission since the correction of the land register does not impair the diplomatic mission's performance of its tasks (Federal Constitutional Court Ruling 15, 25—Neue Juristische Wochenschrift 1963, 435; also Federal Court of Justice, Monatsschrift für Deutsches Recht 1970, 222).

The tourist office of the foreign State which shows publicity films for travel in that State and infringes copyright regulations in respect of the film music does not enjoy immunity since the showing of the film, at least indirectly, serves commercial purposes of the State in question (Frankfurt Higher Regional Court, Ruling of 30 June 1977).

Question 7

Please refer to the comments contained in the Note of 7 August 1979 and the above-mentioned court rulings.[9]

Question 8

If the non-public activities of a foreign State meet the substantive requirements of a tax law governing the conditions of tax liability, the levying of the tax is not excluded either on the grounds that the activities are those of a foreign State or because that State does not levy a tax or would not levy a tax for reasons of reciprocity in similar conditions involving the Federal Republic of Germany. Waiver of the levying of taxes on the basis of reciprocity is not provided for either in general rules or in international agreements. There is, in the view of the Federal Government, no general rule of international law requiring the non-public acts of foreign States to be exempted from taxes and levies.

Question 9

According to the general rules of international law which are binding on German courts pursuant to Article 25 of the Basic Law, foreign States in principle enjoy immunity for public activities (Federal Constitutional Court Rulings 16, 27, 61).

However, if the State in question waives immunity, German jurisdiction may be applied. Such renunciation in an individual case does not, however, preclude recognition by the courts of the principle of State immunity.

Question 10

If a State waives immunity, the exemption from jurisdiction afforded under the general rules of international law may be lifted so that the country in which the court is situated may exercise jurisdiction. Such a renunciation takes the form of a statement in international law which, if made before a government body, cannot be revoked.

According to German legal literature, a counter-claim against a State is possible if it has waived immunity in order to institute proceedings itself. However, the counter-claim is considered permissible only if the subject-matter is directly connected with the claim involved in the proceedings. A number of authors make the further restriction that the counter-claim may only be used as a defence against the claim and not for an independent action against the foreign State.

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[9] For court rulings, see Part IV.

Question 11

As repeatedly stated, exemption from German jurisdiction results, pursuant to Article 25 of the Basic Law, from the application by German courts of the general rules of international law.

Question 12

The question as to the status of ships owned or operated by a foreign State and employed in commercial service cannot be answered with a single reply:

(*a*) The Federal Republic of Germany is a contracting State of the following conventions:

(1) Internationales Abkommen vom 10. April 1926 zur einheitlichen Feststellung von Regeln über die Immunität der Staatsschiffe (International Convention of 10 April 1926 for the Unification of Rules Governing the Immunity of State Vessels) (Reich Law Gazette 1927 II p. 483) with Supplementary Protocol of 24 May 1934 (Reich Law Gazette 1936 II p. 303): According to this convention, the vessels belonging to or used by a State, the commercial cargoes, as well as the States to whom these vessels belong or who are using them or to whom the cargoes belong, are subject, with respect to claims concerning the use of the vessels or the transportation of the cargo, to the same rules governing responsibility and the same liabilities as private vessels, cargoes and shipping companies.

(2) International Convention of 29 November 1969 on Civil Liability for Oil Pollution Damage (Federal Law Gazette 1975 II p. 301): Article XI (2) of this convention states that "with respect to ships owned by a Contracting State and used for commercial purposes, each State shall be subject to suit in the jurisdictions set forth in Article IX and shall waive all defences based on its status as a sovereign State".

In reply to reservations made by several States with regard to this provision, the Federal Republic of Germany has, like numerous other States, made counter-declarations.

(*b*) Where there are no specific international arrangements on this matter, the principles on State immunity have to be applied in this area as well.

The question whether a ship directly operated by a State is subject to territorial jurisdiction depends again on whether the operation of the ship is a public act. This is not the case where State ships are used for commercial purposes.

Question 13

The patent granting procedure or other procedures laid down in the Patents Law (or Registered Designs Law) as well as fiscal practice do not provide for special treatment to be accorded to foreign States, either in the positive or the negative sense. Nor are there other special statutory provisions.

Question 14

With regard to ownership or other rights relating to immovable property, foreign States are, in the absence of a general rule of international law to the contrary, subject in principle to territorial jurisdiction. The only exemptions from such jurisdiction are embassy sites and real estate used by diplomatic missions.

Question 15

Any juridical person is legally capable of inheriting (cf. Article 2101 (2) of the Civil Code). Consequently, a foreign State can also become an heir, legatee or beneficiary in a testate succession (Articles 1937, 1939 and 2301 of the Civil Code).

Owing to long-standing legal provisions of certain Federal Länder which are valid alongside the Civil Code pursuant to Article 2 (1) of the Law to Restore Uniformity in Civil Law (Gesetz zur Wiederherstellung der Gesetzeseinheit auf dem Gebiete des bürgerlichen Rechts) of 5 March 1953 (Federal Law Gazette I p. 33), donations and gifts mortis causa to foreign juridical persons and thus to foreign States are subject to government approval if their value exceeds DM 5,000. In some Federal Länder the value of the real estate being acquired is immaterial.

Questions 16 and 17

Provisional precautionary measures of the judiciary (especially attachment and temporary injunctions) as well as measures prior to executory judicial decisions are dependent on the applicability of territorial jurisdiction. Whether such jurisdiction can be applied in turn depends on the principles governing the main judicial proceedings (judgement). These principles are set out in the Note of 7 August 1979 and in the above replies. If, accordingly, the foreign State does not enjoy immunity for the main proceedings, it is also in principle subject to enforcement measures under territorial jurisdiction. However, in accordance with the above distinction between public and non-public activities by foreign States, the enforcement procedures are subject to a substantive restriction. Execution is not possible in respect of objects serving public functions (Federal Constitutional Court Ruling 46, 342; cf. also the example cited in the reply to question 6 above where execution was held inadmissible with respect to an embassy's bank account).

Question 18

There are no specific privileges accorded to a foreign State involved in a judicial process. Although the legal representation is determined by the foreign State's laws, pleading the absence of legal representation is adjudicated according to German law. Apart from this, certain peculiarities result from limited jurisdiction and from the inviolability of objects used for public acts, especially:

Counter-claims and offsetting of claims against a foreign State instituting an action are only permissible if the counter-claim is subject to German jurisdiction; furthermore, the counter-claim should bear a legal relationship to the claim made by the foreign State (cf. also the reply to question 10).

In the event of a genuine change in a suit brought against a foreign State, the changed matter in dispute must also be subject to German jurisdiction.

Documents may not be served on the premises of a foreign mission but only through diplomatic channels, or, if necessary, publicly.

A court is not permitted to inspect a foreign mission or request the submission of documents by the mission; the foreign State, however, must not suffer disadvantages from the exclusion of such evidence.

Question 19

(*a*) Costs

(1) Federal Law:

Neither Article 2 of the Legal Costs Law (Gerichtskostengesetz) nor Article 11 of the Costs Schedule (Kostenordnung) provide for foreign States to be exempt from legal costs.

(2) Land Law:

According to Article 8 (2) (1) of the Bremen Legal Costs Law, foreign States are exempt from the payment of fees if they guarantee reciprocity. According to Article 2 (2) (1) of the North-Rhine/Westphalian Law on Exemption from Legal Costs, legal costs may be waived if this is deemed to be in the public interest. Applying this provision, the Minister of Justice of North-Rhine/Westphalia waives any legal fees arising under non-contentious jurisdiction when real estate is purchased, for example, to build an embassy. This, however, is conditional on reciprocity being guaranteed.

(*b*) Security

According to Article 17 of the Hague Convention of 1 March 1954 (Federal Law Gazette 1958 II p. 576), the contracting States themselves, when acting as plaintiff or intervener, are exempt from the obligation to deposit security for legal costs, insofar as such security is demanded in principle under national law in cases where the plaintiff or intervener is a "foreigner", i.e. in this case a foreign State (e.g. Article 110 of the Code of Civil Procedure). This also applies to any advances to defray legal costs (such advances no longer being required in the Federal Republic of Germany anyway).

It follows that foreign States are not exempt prima facie on the grounds of exterritoriality from depositing security. Rather, outside the scope of the 1954 Hague Convention, the provisions of Article 110 (2) (1) to (5) of the Code of Civil Procedure apply; i.e. the security deposit by foreigners is waived, for example, if reciprocity is guaranteed.

Question 20

General information cannot be provided because there are no known cases in which this problem has arisen.

F. HUNGARY

Question 1

The immunity of a foreign State from the jurisdiction of the Hungarian State is regulated by item (a) of Section 56 of Law-Decree No. 13 of 1979[10] (hereinafter called Law-Decree) and excludes the jurisdiction of a court and other public authority of the Hungarian State. The landed property of a foreign State in Hungary, however, belongs to the exclusive jurisdiction of a Hungarian court of law or other public authority (Law-Decree, Section 55, item (b)). In respect of immunity Hungarian law does not make any distinction between a State and its property, apart from the exception mentioned before.

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[10] The Hungarian Law-Decree is reproduced in Part I.

Question 2

From the coming into force on 1 July 1979 of the Law-Decree the proceedings of the Hungarian court of law or other authority have been based on this Law-Decree, i.e. on internal law. Before the coming into force of the Law-Decree the basis of the proceedings of the Hungarian courts of law and other authorities was the customary law.

Question 3

The conception of the Law-Decree relies on the principle of absolute immunity. The limitation of absolute immunity is signified by waiving (Law-Decree, Section 57, para. (1)) and reciprocity. In respect of the landed property of a foreign State in Hungary see item 1.[11]

Question 4

The administrative authorities i.e. the executive power have a role in the field of State immunity. The Minister of Justice gives information about the existence of reciprocity (Law-Decree, Section 68, para. (2)).

Question 5

The Law-Decree, Section 55, item (d) establishes exclusive jurisdiction for the Hungarian courts of law or other authorities in respect of the organs of the State and administrative bodies as well as the Hungarian State. The Law-Decree, Section 72, para. (1) nevertheless makes it possible to recognize the decision passed in an action instituted abroad against the Hungarian State, an organ of the State or a Hungarian administrative body, if, *inter alia*, reciprocity exists and thus the decision of a foreign court or other authority can be recognized. The reciprocity may be established if a Hungarian court of law or other authority institutes proceedings also in Hungary against a foreign State, or organ of the State or a foreign administrative body (Law-Decree, Section 57, para. (1)). The Minister of Justice shall give information about the existence of such a reciprocity in conformity with the Law-Decree, Section 68, para. (2).

Question 6

The Law-Decree does not make any distinction between public acts and non-public acts of a foreign State. Nevertheless this differentiation will probably develop in the judicial practice as a result of the fact that on the basis of reciprocity the Hungarian authorities will have an opportunity to do that.

Question 7

The new judicial practice, since the Law-Decree came into force only last year, has not yet been developed. It is likely that the judicial practice will develop towards the distinction between the public acts and non-public acts in accordance with the demands of life.

Question 8

If a foreign State displays "non-public activities" it shall pay the taxes, duties or other levies which relate to legal entities under the personal effect of the law. According to paragraph 13 of Decree No. 11/1966 of the Minister of Finance on duties,

[11] Item 1 refers to the reply to question 1.

a foreign State is exempted from duties on the basis of relevant convention, reciprocity or international practice.

Question 9

The jurisdiction of a Hungarian court of law or other authority is excluded (Law-Decree, Section 56, item (a)); if, however, a foreign State, or an organ of the State or a foreign administrative body has expressly waived the right to immunity then the Hungarian jurisdiction exists (Law-Decree, Section 57, para. (1)).

Question 10

In virtue of the Law-Decree, Section 57, para. (1), proceedings against a foreign State may be instituted before a Hungarian court of law or other public authority if the foreign State has expressly waived the immunity. According to this Law-Decree, para. (2), in case of a waiver of immunity the Hungarian jurisdiction shall also extend to a counter-claim arising out of the same legal relation.

Question 11

The limitation is indicated by a waiver of immunity. The reciprocity discussed under item 5 may be evaluated as an exception on the basis of judicial practice. In respect of the landed property of a foreign State in Hungary see item 1.

Question 12

Since the Hungarian People's Republic has no seashores, there are no special regulations in this regard.

Question 13

Item 8 gives reply to the treatment on the merits of the question and there are no special laws and regulations in respect of the procedure.

Question 14

The Law-Decree, Section 55, item (b) establishes exclusive Hungarian jurisdiction over any landed property in Hungary irrespective of the fact whether it is owned or not by a foreign State.

Questions 16 and 17

The Law-Decree, Section 56, item (a) gives replies to these questions as well.

G. KENYA

Question 1

There are no laws or regulations in force in Kenya, either specifically or generally, regarding jurisdictional immunities for foreign states and their property.

Question 2

The Courts in Kenya have not had any occasion to extend or withhold such immunities from foreign states and their property. We therefore have no precedent on the matter.

Question 3

Following from the above 1 & 2 Kenya has no laws, regulations or precedents regulating the subject matter contained in questions 3 to 11 of the questionnaire.

Question 12

As regards question 12 the Kenyan relevant statute, which is the Merchant Shipping Act (Chapter 389 of the Laws of Kenya), makes no distinction between commercial ships owned by individuals and those owned by foreign states. Therefore no special privileges are extended to the latter category.

Question 13

As regards question 13 there is no provision in Kenyan Laws for giving such applications any special treatment.

Question 14

On question 14 all titles to property movable or immovable are in Kenya subject to Kenyan territorial jurisdiction excepting those falling within the expressly excepted domain of diplomatic and consular relations.

Question 15

On question 15, there is nothing to prevent a foreign state from inheriting or becoming a legatee or a beneficiary under testate succession in Kenya.

However in the case of intestate succession the position is that immovable property devolves according to the Kenyan Law while movable property devolves according to the law of the country of the intestate's domicile. In cases where there is no heir the law is that such property movable or immovable escheats to the state.

Questions 16 to 19

As regards questions 16 to 19 the Kenyan Laws do not make any distinction between the property of foreign states and other categories of property. All are fully subject to the Kenyan Laws and judicial process.

Question 20

On question 20 the answer to the first part is "no". As regards the second part the Kenyan Courts have not had the opportunity to evolve any precedent on the matter.

H. LEBANON

Réponse au questionnaire relatif à "l'immunité juridictionnelle des Etats et de leurs biens".

Question 1

De tels textes n'existent pas.

Question 2

L'immunité est accordée principalement à raison des règles du droit international.

Toutefois, en matière de voies d'exécution, on invoque l'art. 594 du Code de procédure civile, déclarant insaisissables, notamment, les biens des Etats étrangers.

Question 3

La tendance est de limiter l'immunité juridictionnelle aux activités de l'Etat étranger ayant leur source dans ses attributions de puissance publique.

Tel est le sens d'un arrêt de la Cour d'appel de Beyrouth du 28 /3/ 1969 (*Revue Al-Adl*, année 1969, p. 539) et d'un autre du 1/2/1967 (*Revue judiciaire libanaise*, année 1969, p. 455) dont il sera encore question plus loin.

Question 4

L'exécutif ne joue aucun rôle en raison de sa séparation du judiciaire.

Question 5

Le cas ne s'est jamais posé à notre connaissance. Mais il n'est pas exclu, s'il venait à se poser, que le principe de la réciprocité, dans la seule matière de l'immunité juridictionnelle, serait retenu. En matière d'exécution, il le serait plus difficilement : le texte de l'art. 594 du Code de procédure civile affirme péremptoirement et sans distinction l'insaisissabilité des biens des Etats étrangers.

Question 6

Les lois et règlements sont muets sur cette question. Mais l'arrêt de la Cour d'appel de Beyrouth du 28/3/1969 semble faire cette distinction concernant le droit d'action contre l'Etat étranger. Toutefois, il refuse de la faire en ce qui concerne l'insaisissabilité de ses biens.

Question 7

Il n'existe pas de jurisprudence suffisante pour répondre à cette question, dans toutes ses branches. On peut cependant relever que, dans le eadre de l'ensemble de ses branches, l'arrêt précité de la Cour d'appel de Beyrouth du 1/2/1967 a fait droit à l'Etat étranger de l'exception d'immunité qu'il a soulevée contre une demande en paiement d'honoraires élevée contre lui par un avocat libanais, et cela au motif que le litige entre lui et l'avocat était né à raison d'une consultation fournie par ce dernier à l'Etat défendeur, relativement à un yacht de plaisance appartenant audit Etat sans qu'il fut établi que ce yacht servait ses intérêts exclusivement privés ou commerciaux, mais qu'il était, par contre, établi que l'avocat, dans sa consultation, avait opiné que l'Etat étranger, propriétaire du yacht, était fondé à soulever l'exception d'immunité en considération de l'intérêt de puissance publique à laquelle le navire était affecté.

Question 8

La loi sur les revenus des professions commerciales et non commerciales du 12/ 6/1959, dans le cadre du questionnaire, établit deux catégories d'exonération sous réserve de réciprocité :

a) En faveur des traitements du personnel diplomatique ou consulaire (art. 7 à 17);

b) En faveur des revenus ou produits des comptes appartenant à des missions diplomatiques ou consulaires (art. 71 à I5).

Mais la loi est muette sur les revenus des opérations commerciales effectuées par des Etats étrangers ou leurs organismes. Il n'existe pas de jurisprudence fiscale sur la question.

Question 9

Dans l'état actuel des lois et de la jurisprudence, la réponse est négative.

Question 10

1) La levée de l'immunité juridictionnelle de l'Etat étranger est exclue, sauf, semble-t-il, en cas d'activité commerciale.

2) La renonciation volontaire est admise.

3) Les demandes reconventionnelles pour leur part supposent la levée de l'immunité (qui est exclue dans les limites indiquées au par. 1 ci-dessus).

Question 11

Il n'y a d'autre limitations que celle indiquée au paragraphe 1 de la réponse à la dixième question.

Question 12

L'article 5 de la loi précitée du 12/6/1959 (voir réponse à la huitième question) exonère, dans son alinéa 5, de l'impôt sur les bénéfices commerciaux, mais sous réserve de réciprocité, les entreprises de navigation maritime étrangères sans distinction entre des entreprises d'Etat et des entreprises privées.

Question 13

L'Etat étranger se présente alors comme un administré par rapport à la loi qu'il s'agit d'appliquer et se trouve traité comme tel.

Question 14

Oui.

Question 15

Du seul fait qu'il se présente comme demandeur au bénéfice des droits successoraux allégués par lui, l'Etat étranger est considéré comme ayant volontairement renoncé à l'immunité juridictionnelle. Il n'existe pas de jurisprudence connue sur la question.

Question 16

L'art. 594 du Code de procédure civile (art. 2) déclare indistinctement insaisissables les biens des Etats étrangers, qu'il s'agisse de saisie conservatoire ou executoire.

Question 17

Ces biens jouissent de l'insaisissabilité établie par l'art. 594 du Code de procédure civile.

Questions 18 et 19

Non.

Question 20

Cette question ne fait l'objet d'aucune pratique antérieure connue.

I. MADAGASCAR

Question 1

Jusqu'à présent, il n'existe aucune loi ou règlement prévoyant, soit de matière spécifique l'immunité juridictionnelle des Etats et de leurs biens, soit de façon générale le non-exercice de la juridiction sur les Etats étrangers et leurs biens, sans leur consentement.

Question 2

Aucune décision judiciaire n'est encore intervenue à ce sujet, mais il est permis de dire que les juridictions malgaches accorderont l'immunité juridictionnelle aux Etats étrangers et à leurs biens, en application des principes pertinents du droit international.

Question 3

En raison de l'inexistence des décisions intervenues en ce domaine, on ne saurait parler de tendances. Cependant, les tribunaux malgaches, compte tenu de l'accroissement d'activités d'organismes étrangers sur le territoire national, seraient plutôt favorables à la doctrine restrictive de l'immunité en vertu de laquelle les activités relevant du *jus gestionis* par opposition au *jus imperii* ressortissent de la compétence des juridictions nationales.

Question 4

A défaut de lois ou règlements en la matière, la définition et la délimitation de la portée de l'application du principe de l'immunité des Etats incombent exclusivement aux tribunaux. L'exécutif ne peut donner que des avis, sollicités éventuellement par le tribunal par voie d'avant-dire-droit, dans le cas où la poursuite de l'instance judiciaire est de nature à entraver des efforts de règlement diplomatique.

Question 5

A priori le principe de la réciprocité devra être appliqué dans le cas cité par ce paragraphe.

Question 6

Il a été déjà répondu à cette question au point 3 ci-dessus.

Question 7

Comme il a été dit ci-dessus, les activités de l'Etat étranger relevant du *jus gestionis*, c'est-à-dire les activités commerciales que pourrait exercer une simple personne privée, ne sont pas couvertes par l'immunité. En raison de l'inexistence des décisions rendues en ce domaine, il est impossible d'énumérer le genre d'activités de l'Etat étranger qui, d'après les tribunaux, revêt un caractère public ou non public.

Logiquement, cependant, et dans la mesure où on admet la thèse de l'immunité restreinte, il est permis de dire que les tribunaux ne peuvent valablement se fonder sur le critère de la finalité du but de l'acte pour faire la distinction entre actes de puissance publique et actes de gestion.

Ce critère suppose, en effet, des recherches d'intention qui conduisent au subjectivisme. En outre, tout acte de l'Etat, quel qu'il soit, a toujours pour ultime fin

l'intérêt public et une recherche des finalités conduira à reconnaître, dans tous les cas, l'existence de l'immunité.

Pour donner un sens à la distinction entre immunité absolue et immunité restreinte, les tribunaux, au cas où ils seront saisis, appliqueront, à notre avis, des critères plus nets tels que la nature de l'acte et la qualité en laquelle l'Etat est intervenu.

Ainsi, si l'acte est la mise en œuvre d'un procédé de souveraineté, il y a acte de puissance publique; si, au contraire, le procédé utilisé est susceptible d'être utilisé par de simples particuliers, il y a acte de gestion.

Question 9

Les tribunaux malgaches sont fondés à exercer leur juridiction sur toutes les activités revêtant un caractère public auquel se livrent les Etats étrangers, soit avec le consentement tacite ou exprès de l'Etat, soit en cas de levée de l'immunité juridictionnelle, soit par voie d'accord bilatéral ou multilatéral, soit enfin en cas de renonciation.

S'agissant là d'une simple dérogation à la règle de l'immunité, les tribunaux ne sauraient être considérés, dans toutes ces hypothèses, comme ayant rejeté le principe de l'immunité.

Question 10

Les règles applicables aux cas visés sont celles du droit commun :

a) La levée de l'immunité peut être faite par voie législative, réglementaire ou conventionnelle.

b) La renonciation volontaire peut être faite sous une forme quelconque, même tacite, pourvu qu'elle soit certaine et régulière.

c) La demande reconventionnelle à l'encontre d'un Etat étranger est possible dès lors que la demande principale est jugée recevable et que la demande reconventionnelle satisfait aux conditions prescrites par l'article 356 du Code de procédure civile ainsi libellé :

Article 356 : Les demandes reconventionnelles ne sont recevables que si, étant de la compétence de la juridiction saisie de la demande principale :

10. Elles servent de défense à la demande principale ou si elles sont connexées.

20. Elles ont pour résultat de retenir la compensation judiciaire.

30. Elles tendent à réclamer des dommages-intérêts pour abus de procédure.

Toutefois une demande en dommages-intérêts fondée exclusivement sur la demande principale n'aura pas d'effet sur la compétence de la juridiction saisie.

Question 11

En l'état actuel de la situation, il est impossible d'énumérer les exceptions ou limitations spécifiées dans ce paragraphe, aucune loi ou règlement ni aucune décision judiciaire n'étant encore intervenu en la matière.

Question 12

Sous réserve de l'application de textes spécifiques sur le statut des navires, il résulte de la Convention sur la mer territoriale et la zone contiguë du 29 avril 1958

(à laquelle Madagascar a adhéré le 31 juillet 1962) que les navires appartenant à l'Etat et utilisés pour le commerce sont assimilés aux navires marchands privés.

Cette doctrine ne saurait qu'être adoptée par la pratique et entérinée par les textes.

Question 13

Sur le plan de la procédure, comme sur le fond, l'Etat étranger est traité exactement comme n'importe quel autre requérant, sauf que sa requête est transmise par le canal de Ministère des affaires étrangères.

Question 14

Aux termes de l'article 29 de l'ordonnance n° 62-041 du 19 septembre 1962 portant dispositions générales de droit privé :

"Les biens relèvent de la loi du lieu de leur situation.

"En particulier, les immeubles sis à Madagascar, même ceux possédés par des étrangers, sont régis par la loi malgache."

En application de cette disposition, si les biens, meubles ou immeubles sont situés à Madagascar, le droit de propriété de l'Etat étranger ou les autres droits afférents à ces biens sont régis par la loi malgache.

Quant à la succession testamentaire :

Si elle est immobilière, elle obéit à la loi de la situation de l'immeuble;

Si elle est mobilière, elle suit la loi du domicile du défunt (art. 31 de l'ordonnance n° 62-041 du 19 septembre 1962).

Question 15

L'article 20 de l'ordonnance n° 62-041 du 19 septembre 1962 dispose en son alinéa premier que : « l'étranger jouit à Madagascar des mêmes droits que les nationaux, à l'exception de ceux qui lui sont refusés expressément par la loi ».

A défaut de dispositions légales expresses lui refusant ce droit, l'Etat étranger, comme tout étranger, peut en matière de succession être héritier, légataire ou bénéficiaire, sous la seule réserve d'une autorisation gouvernementale (administrative) si la succession est immobilière. Pour pouvoir participer utilement à la procédure, il semble indispensable que l'Etat étranger renonce volontairement à l'immunité juridictionnelle.

Question 16

Il semble, *a priori*, que les biens étrangers ne puissent faire l'objet de mesures conservatoires avant toute décision judiciaire exécutoire, et ce sans distinguer selon la nature ou l'utilisation des biens. En effet, seuls les tribunaux sont en mesure d'opérer valablement une telle distinction.

Question 17

L'immunité d'exécution peut être valablement écartée pour les actes relevant du *jus gestionis*.

Question 18

Un Etat étranger partie à une action judiciaire ne peut prétendre à aucun privilège spécial en matière de procédure.

Question 19

Comme tout étranger, l'Etat étranger peut se voir exiger le versement d'une caution ou le paiement des frais.

Question 20

Le principe de la réciprocité doit être la règle en la matière. Il est donc permis de penser que les tribunaux malgaches seraient prêts à accorder à des Etats étrangers le même degré d'immunité juridictionnelle que celui auquel Madagascar pourrait prétendre auprès de ces Etats.

J. MEXICO

With regard to questions 1, 2, 3, 4, 5, 6 and 7, referring respectively to the existence of laws and regulations in force providing specifically for jurisdictional immunities for foreign States and their property; to immunities accorded by the courts; to judicial trends with regard to immunities; to the role of the executive in the recognition of such immunities; to the principle of reciprocity in that respect, and to the distinction made between public and non-public acts concerning jurisdictional immunities of foreign States, it can be stated that the question of the exercise of jurisdiction with respect to State property is closely related to the concept of sovereignty and freedom of regulation and the right to determine, on the basis of the independence of the State, any type of relationship with other States, whose legal equality gives rise to a duty of non-interference in their internal or external affairs, so that the State as such should be outside the jurisdiction of the courts or administrative authorities of another State.

It should be borne in mind that economic, cultural and technological relations, through the principles of international law, have favoured the adoption of rules of conduct involving concessions with various connotations. Recognition of sovereignty is reflected in an acknowledgement of immunity in such cases as the performance by diplomatic legations and embassies of their recognized functions under international law, diplomatic privileges and immunities, the conclusion of treaties to resolve conflicts over the territorial application of laws, etc. Intensified relations and communication among States, together with increased economic activity, have, however, favoured the adoption of a "limited immunity" concept. The acts of a State should be understood as being of a varied nature. In this sense, they enjoy broad immunity with respect to acts performed in the exercise of their sovereign power (*acta jure imperii*) but not with respect to economic, industrial or commercial activities (*acta jure gestionis*).

There is a broadly recognized principle of international law whereby foreign States enjoy immunity with respect to *acta jure imperii* but not with respect to commercial activities. Where the latter are concerned, foreign States engaged in trade, whether directly or through agencies, should be considered as "foreign merchants". In Mexico, pursuant to article 14 of the Commerical Code, such States, "in all trade activities in which they engage, shall be subject to this Code and to other laws of the country". In this connexion, therefore, they are subject to article 28, section V, of the Organic Law of the Federal Public Administration, particularly with respect to authorization granted to foreigners to "acquire real estate in Mexico".

With respect to question 8 of the questionnaire, relating to payment of taxes, duties or other levics, it should be stated that our national fiscal legislation refers expressly to the matter in article 16, section III, of the Fiscal Code of the Federation, which states: The following shall be exempt from taxes: Except as determined by special legislation: III. Foreign States, subject to reciprocity. Financing agencies pertaining to such foreign States, and domiciled outside the Republic, shall not be covered by such exemption".

Thc foregoing provision should be interpreted as meaning that Mexican law recognizes the possibility of exemption for a foreign State only when there is reciprocity with our country, and that such immunity does not cover any "non-public activities" that may be carried out by the State concerned.

As far as the right to property ownership is concerned, the last paragraph of article 27, section I of the Political Constitution of the United Mexican States provides that:

"In accordance with the internal public interest and the principles of reciprocity, the State may, at the discretion of the Ministry of Foreign Affairs, authorize foreign States to purchase at the permanent seat of the Federal Powers, real estate necessary for the direct servicing of their embassies or legations."

The foregoing, in conjunction with the main provision in the first paragraph of the above-mentioned section of article 27, clearly establishes the legal régime concerning ownership of property by foreigners. The first paragraph of article 27, section I of the Constitution states that:

"Only Mexicans by birth or naturalization, and Mexican companies shall have the right to acquire ownership of lands or waters, or their appurtenances or to obtain concessions for the exploitation of mines or of waters. The State may grant the same right to foreigners, provided that they agree before the Ministry of Foreign Relations, to consider themselves as nationals in respect to such property, and underake not to invoke the protection of their Governments in matters relating thereto; the penalty for non-compliance with this agreement shall be forfeiture to the Nation of any property acquired by virtue of the agreement. Under no circumstances may foreigners acquire direct ownership of lands or waters within a zone of 100 kilometres along the frontiers and of 50 kilometres along the shores of Mexico."

The Law and Ordinance relating to article 27, sections I and IV of the Constitution and the corresponding explanatory circulars should be considered in close association.

The legal system granting immunity to foreign States and their property is also based on the provisions of the second title of the second book of the Federal Criminal Code which lists offences under international law. Article 148 in chapter II of that title concerning violations of immunities and neutrality establishes penalites for those who violate duties and legal obligations relating to diplomatic as well as personal immunities, and accordingly has a bearing on the issue.

Special attention should be paid to the sixth International American Conference which adopted the Convention on diplomatic officials recognizing prerogatives and immunities in respect of their "person, private or official residence and property . . . which shall be exempt from taxes, of any kind whatsover, including customs duties and real estate taxes on the mission building . . . and also exempt from the civil or criminal jurisdiction of the State to which they are accredited".

In regard to the role of the executive branch of the Government "in matters relating to the recognition of jurisdictional immunities of foreign States and their property, especially in the defintion or delimitation of the extent of the application of State immunity", it should be borne in mind that article 89, section X of our Political Constitution stipulates that the powers of the President include the power to direct diplomatic negotiations and make treaties with foreign powers, submitting them to the ratification of the Federal Congress.

Under our law it is the federal courts which are competent to try cases involving diplomatic or consular agents; article 12 of the Civil Code for the Federal District, in respect of cases in ordinary law and for the whole Republic in respect of cases, stipulates that Mexican laws, including those relating to the status and capacity of persons, apply to all inhabitants of the Republic, whether citizens or foreigners, whether domiciled there or in transit.

For the purposes of protecting the international legal security of all States, in accordance with international law, article 148, sections I and III, of the Criminal Code provides for imprisonment ranging from three days to two years and a fine ranging from 100 pesos to 2,000 pesos, for: I. Violation of the real or personal diplomatic immunity of a foreign sovereign, of the representative of another nation, whether residing in the Republic or passing through it; III. Violation of the immunity of a member of Parliament or of the immunity conferred by a safe-conduct pass.

Article 360, section II of the Criminal Code states that in the case of offences involving insults, defamation or calumnies against the diplomatic agents of a foreign nation, proceedings must be initiated against the offender.

Paragraph 156 of the Code of Criminal Procedure for the Federal District stipulates that, if it should prove necessary to search the official residence of a diplomatic agent, the judge must seek instructions from the Ministry of Foreign Relations and must act in accordance with such instructions, pending receipt of such instructions, he will take whatever precautions he may deem necessary outside the house.

Article 18 of the General Population Law provides that: "Representatives of foreign Governments present in the country on official business and their families and employees, together with any persons who, in accordance with international laws, treaties or practices, are exempt from territiorial jurisdiction shall be exempt from the inspection specified in article 16 on entering or leaving the national territory subject to reciprocity."

In connexion with the preceding article, article 19 stipulates that: "Officials of foreign Governments present in the country on official business shall be granted the necessary facilities in accordance with international custom and the rules of reciprocity".

The Fiscal Law of the Federal District, in article 42, pargraph I (C), grants exempton from payment of the full amount of the property tax for an indefinite period on real property belonging to a foreign State provided it is totally occupied by its diplomatic mission, as well as in other cases stipulated in international treaties in force, subject to reciprocity in fiscal matters with those countries.

The legal status of ships owned or operated by a foreign State and employed in commercial service is quite clear under the Law on General Communciation Routes which stipulates:

"Navigation in the territorial waters of the Republic is free for the vessels of all

countries in accordance with the provisions of international law and treaties. Foreign vessels navigating in Mexican waters are thus bound by the laws and respective ordinances of the Republic."

The provisions on this subject in Chapter III of the third book of the Law of General Communication Routes are also important. There is likewise linkage with the provisions of chapter I of the single title of the first book of the Law of Navigation and Maritime Commerce.

Equality and fair treatment of the parties to a lawsuit are guaranteed by our Constitution without any exception, whether the issue concerns a foreign State or any physical or moral person.

K. NETHERLANDS

Question 1

Section 13a of the Act of 15 May 1829 concerning General Principles of Legislation reads: "The jurisdiction of the courts and the enforcement of judicial decisions and authentic deeds are subject to restrictions recognized under international law".

Apart from this provision, there is no other law or regulation in the Netherlands relating either directly or indirectly to jurisdictional immunities for States in civil cases.

Question 2

Yes. When immunities are accorded, this is done on the basis of the "restrictions recognized under international law" which are referred to above in reply to Question 1.

Question 3

The doctrine of "absolute immunity" does not apply in Netherlands judicial practice. The law as it now stands was commented upon as follows in a judgment of the Supreme Court of the Netherlands of 26 October 1973 in the case of *Société Européenne d'Etudes et d'Entreprises en liq. v. Socialist Federal Republic of Yugoslavia* (NJ[12] 1974, 361; Netherlands International Law Review 1975, 73): "In many countries it is becoming increasingly common for the State to enter into commercial transactions governed by private law, thus entering into juridical relations with private individuals on a basis of equality; in such cases it seems reasonable to extend the same legal protection to the individuals concerned as if they were dealing with a private person; on these grounds it must be assumed that the immunity from jurisdiction which is enjoyed by foreign states under present day international law does not extend to cases in which a state may act as referred to above".

Question 4

In principle, the definition and delimitation of the extent of the application of State immunity are matters for the judiciary. When issuing a summons or enforcing a

[12] NJ: Nederlandse Jurisprudentie = Netherlands Court Decisions.

court judgment, however, the executive power—i.e. the Minister of Justice—may have to decide whether the State upon which judgment has been passed or which is to be summonsed should enjoy immunity from enforcement; see Article 13 (4) of the Bailiffs' Rules, Decree of 27 December 1960, Bulletin of Acts, Orders and Decrees No. 562: "The bailiff shall refuse to serve a writ if he has been notified by Our Minister (of Justice) that serving the writ would be contrary to the international obligations of the State. He shall not be liable to the parties for such refusal".

Question 5

In principle, reciprocity does not apply to the granting of immunity.

Question 6

See the judgment of the Supreme Court of the Netherlands cited in reply to Question 3. For further examples see C.C.A. Voskuil, Decisions of Netherlands Courts involving State Immunity, Netherlands International Law Review 1973, 302.[13]

Question 7

(*a*) No. For example, immunity will in principle be refused in cases concerning trade contracts and torts under civil law committed by a State against a private person and which could have been committed by a private person.

(*b*) In principle, no.

(*c*) In principle, no.

(*d*) See reply to Question 3; in principle the decisive factor is the nature of the transaction governed by private law and not the motive for the transaction.

Question 8

In principle a foreign State is required to pay such taxes, duties and levies (e.g. VAT in connection with a commercial sales contract between a foreign State and a Dutch vendor).

Question 12

Since 1937, the Netherlands has been a party to the Convention establishing certain uniform rules on the immunity of State ships concluded at Brussels on 10 April 1926. There are also bilateral international agreements which contain provisions on the immunity of State ships; see for example Article 16 of the Agreement between the Kingdom of the Netherlands and the USSR concerning merchant shipping, concluded on 28 May 1969 (Netherlands Treaty Series 1969, 115).

Question 13

In principle a foreign State is treated like any other applicant.

Question 14

In principle a foreign State is subject to territorial jurisdiction in the same way as any other owner of property under private law.

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[13] See *Netherlands International Law Review*, vol. 20, p. 302 (1973).

Question 15

The reply to the first question is in the affirmative, and to the second in the negative.

Question 16

In principle, property of foreign States which is for public use (e.g. embassy buildings) is immune from attachment. Cp. C.C.A. Voskuil, State Immunity from Execution, the international law of State immunity as reflected in the Dutch civil law of execution. Netherlands Yearbook of International Law 10/1979.

Question 17

The property referred to in the reply to Question 16 is in principle likewise immune from distraint. See also the reply to Question 4.

Question 18

No.

Question 19

No.

Question 20

In practice there have been so few cases that it is not possible to give a reply, either affirmative or negative, to the first question.

As regards the second question, State immunity in the Netherlands is not extended on grounds of reciprocity.

L. NORWAY

Question 1

As has been mentioned, there is no general legislation on this question. Where State-owned ships are concerned there are regulations laid down by law regarding limited immunity in Act No. 1 of 17 March 1939[14] concerning the position of foreign State-owned ships, etc.

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[14] *Act of 17th March, 1939, relating to foreign State-owned ships, etc.*

§1. The fact that a ship is owned or is used by a foreign state or that a ship's cargo belongs to a foreign state shall not, apart from the cases mentioned in §§ 2 and 3, be any hindrance to a suit being instituted in this Kingdom in respect of a claim which is a consequence of the use of the ship or the conveyance of the cargo, or to the carrying out in this Kingdom, in respect of such claim, of enforcement action or the taking of temporary measures against the ship or its cargo.

§2. Suit relating to claims such as mentioned in §1 cannot be instituted in this Kingdom if it relates to:

(1) naval ships and other ships which a foreign state owns or uses, if at the time when the claim arose they were being used exclusively for State purposes of a public legal character;

(2) cargo which belongs to a foreign state and is being carried on a ship such as mentioned in item (1);

The provisions of the Act are based on the rules in an international Convention for the unification of certain rules relating to the immunity of State-owned vessels of 10 April 1926. The Convention entered into force for Norway on 25 October 1939.

The principles on which the Act is based regarding foreign State-owned ships are assumed also to be applicable regarding the question of the immunity of foreign States in other sectors. This means that the principle of a limited immunity is applied in Norway, which means that no immunity is granted for any business activity for gain in which a foreign State is engaged in Norway.

Question 2

In accordance with the answer to Question 1 above, it is assumed that the Courts will grant limited immunity. Regarding State-owned ships, this will be based on the Act of 1939, in other cases on the principles of International Law which are presumed to be in agreement with Norwegian law. In case law one case is known. In a decision of 6 July 1938, handed down by the Appeals Selection Committee of Norway's Supreme Court, an appeal against the Spanish State was refused a hearing by Norwegian Courts. In the grounds given, reference was made to "the generally recognized rules of International Law".

Question 3

Since case law is very sparse in this field, it is difficult to indicate any main guidelines. As mentioned above it is assumed that in theoretical doctrine a principle of limited immunity will be applied. This is actually reflected in two judgments rendered by the Supreme Court of Norway on 27 February and 21 November 1936, respectively, in cases brought against the Trade Mission of the Soviet Union in Norway, on behalf of the Union of Soviet Socialist Republics. Both cases concerned the question of whether the Soviet Trade Mission and the Soviet State were responsible for breach of contract of a charter party, which the Trade Mission had signed for "as agents only". Both cases were tried by Norwegian Courts. In the first decision it is expressly stated that the Soviet Trade Mission had not challenged the jurisdiction of the Norwegian Courts.

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(3) cargo which belongs to a foreign state and is carried on a merchant ship for State purposes of a public legal character, unless the claim is based on salvage, general average, or agreements concerning the cargo.

§3. Enforcement action cannot be carried out and temporary measures cannot be taken in this Kingdom, in respect of claims such as mentioned in §1, against:

(1) naval ships and other ships which a foreign state owns, uses or has in its entirety time-chartered or voyage-chartered, if the ship is used exclusively for State purposes of a public legal character;

(2) cargo which belongs to a foreign state, and is carried on ship such as mentioned in item (1), or on a merchant ship for State purposes of a public legal character.

In pursuance of agreement with a foreign state, the King may decide that the same shall apply to other ships which a foreign state owns or uses, and to other cargo which belongs to such state if the foreign state in time of war puts forward a demand for this.

§4. By agreement with a foreign state it may be decided that a certificate from the diplomatic representative of the foreign state concerned shall serve as proof that ship and cargo come within the provisions in §3, first paragraph, items (1) and (2), if demand is made for annulment of enforcement action or temporary measures.

§5. This Act enters into force on the date the King decides.

Question 4

To what extent the Courts have competence is a question determined by the Courts themselves on the basis of written and unwritten rules. The Executive branch does not have the competence to interfere in the activities of the Courts in this sector.

Question 6

As mentioned above, the Act of 1939 is based on the principle of limited immunity. §§2 and 3 of the Act mention those cases where a State-owned ship has immunity, and in other cases it is stated in §1 that a suit may be brought.

Question 7

(*a*) Yes, cf. the initial premise of limited immunity. However, it appears difficult to offer any specific number of cases beyond what has been listed under Question 6, above.

(*b*), (*c*) and (*d*) are difficult to answer on the basis of Norwegian practice.

Question 9

It must be assumed that Norwegian Courts will not consider themselves competent to try directly the validity, for example, of the public acts of foreign States. Another matter, however, is that questions of this kind may arise *pre-judicially* and that the Courts in this conjunction must adopt a standpoint on these questions, such as the question of the validity of a marriage or a divorce.

Question 10

There are no clear rules or case law in this field either. Presuming that the other conditions for the Court's competence are fulfilled, however, it must be assumed that the Court will try a case against a foreign State if the State in question has waived its immunity or has, itself, brought the case before the Court. On these same conditions it must also be assumed that the Court will consider itself competent to try any counter-claims.

Question 11

Cf. Question 3, above.

Question 12

Cf. Questions 1 and 6, above.

Question 14

Basically it must be assumed that the foreign State as owner of real estate in Norway will be considered as being completely subject to the jurisdiction of the Norwegian Courts, unless there are special dispensations such as embassy buildings, etc.

Question 15

It can hardly be assumed that there is any hindrance to a foreign State's becoming a legatee, but in such case this State will be placed on an equal footing with any other legatee according to Norwegian law.

Question 16

There are no specific rules in this sector in Norway.

Question 17

Ditto.

Question 18

No.

Question 19

No.

M. PORTUGAL

Question 1

Aucune loi ne prévoit, au Portugal, l'immunité juridictionnelle des Etats étrangers et de leurs biens ni d'ailleurs, d'une façon générale, le non-exercice de la juridiction sur ces Etats et leurs biens.

Question 2

L'immunité juridictionnelle que les tribunaux portugais reconnaissent aux Etats étrangers et à leurs biens dans la généralité des cas où ces Etats peuvent être défendeurs se fonde sur un principe de droit international reconnu de longue date. C'est ce qui ressort de nombreuses décisions de la Cour suprême administrative et de la Cour de cassation.

Question 3

S'appuyant sur une doctrine que l'on pourrait qualifier de classique, les tribunaux portugais s'accordent pour considérer que cette immunité ne cesse que dans les cas suivants :

—Si l'action a pour objet des biens immobiliers;

—S'il y a renonciation expresse ou tacite;

—Si l'exception *forum heritatis* est admise.

Question 4

L'exécutif est compétent, au Portugal, pour légiférer en matière d'immunité juridictionnelle des Etats étrangers et de leurs biens, en particulier en ce qui concerne la portée de l'application de ce principe.

Question 5

Le principe de la réciprocité n'ayant été jusqu'à ce jour ni discuté ni appliqué par les tribunaux portugais dans des questions se rapportant à l'immunité juridictionnelle des Etats étrangers et de leurs biens, il est difficile de répondre à la question 5 du questionnaire.

Question 6

Il ressort d'une décision de la Cour de cassation que le principe de l'immunité juridictionnelle des Etats étrangers et leurs biens s'applique à la généralité des cas où ces Etats peuvent être défendeurs, aucune distinction ne devant être établie entre activités revêtant un caractère public et activités ne revêtant pas un tel caractère.

Question 7

Ne s'applique pas.

Question 8

Il n'existe aucune disposition dans le droit interne portugais permettant à un Etat étranger d'être exempté du paiement des impôts, droits ou autres redevances que l'exercice par cet Etat d'une activité ne revêtant pas un caractère public entraînerait; par ailleurs, aucun principe de droit international reconnu au Portugal ne consacre une telle exemption. Certains accords internationaux auxquels le Portugal est partie ont toutefois pour objet des exemptions de ce genre.

Question 9

Rien à ajouter aux réponses aux questions 2, 3 et 6.

Question 10

Rien à ajouter aux réponses fournies aux questions 2 et 3.

Question 11

Rien à ajouter à la réponse à la question 3.

Question 12

Ne s'applique pas du fait des réponses précédentes.

Question 13

Le traitement en quelque sorte plus favorable qui serait accordé à un Etat étranger déposant une demande auprès des autorités administratives portugaises serait dû au respect d'une tradition et non à l'application d'une disposition légale.

Question 14

Si un Etat étranger possède des biens se trouvant au Portugal, il y a lieu d'appliquer la règle générale contenue dans le Code civil qui prévoit qu'en matière de droit de propriété la loi applicable est celle dc l'Etat sur le territoire duquel les biens se trouvent. Il sera évidemment tenu compte de la pratique décrite dans la réponse aux questions 2 et 3.

Question 15

Rien dans la loi portugaise n'empêche un Etat étranger d'être héritier, légataire ou bénéficiaire. Mais il ressort des réponses aux questions précédentes que la renonciation volontaire à l'immunité juridictionnelle est indispensable pour permettre à cet Etat de participer utilement à la procédure.

Question 16

Sans objet, du fait des réponses aux questions 1, 2 et 3.

Question 17

Rien à ajouter aux réponses 2 et 3.

Question 18

Ni la loi portugaise, ni aucun principe de droit international admis au Portugal ne reconnaissent des privilèges en matière de procédure aux Etats étrangers parties à une action judiciaire au Portugal.

Question 19

En pareil cas, ces Etats ne seraient exonérés ni des frais, ni du versement des cautions qui seraient normalement dus.

Question 20

Le manque de précédents rend une réponse à cette question difficile, voire impossible.

N. ROMANIA

Question 1

Il n'y a pas, dans la législation roumaine, une réglementation d'ordre général relative à l'immunité juridictionnelle des Etats et de leurs biens.

Question 2

Aux cas où les instances judiciaires roumaines seraient saisies d'affaires concernant l'immunité juridictionnelle des Etats étrangers, elles pourraient fonder les décisions qu'elles auraient à prononcer sur les stipulations pertinentes des conventions et accords internationaux auxquels la Roumanie est partie ainsi que sur les principes généralement reconnus du droit international.

Question 3

Voir la réponse à la question 2.

Question 4

Dans la République socialiste de Roumanie, les organes de l'administration d'Etat développent leurs activités sur la base et aux fins de l'exécution des lois. Lesdits organes n'ont pas d'attributions en ce qui concerne la reconnaissance des immunités juridictionnelles des Etats et de leur biens.

Question 5

La pratique judiciaire roumaine ne connaît pas de cas d'application du principe de la réciprocité pour des questions relatives à l'immunité juridictionnelle des Etats et de leurs biens. Au cas où un Etat étranger refuserait à l'Etat roumain l'immunité juridictionnelle dans un différend quelconque alors que dans des différends pareils il reconnaîtrait l'immunité à d'autres Etats étrangers, il est bien probable que les tribunaux roumains se trouveraient dans une situation qui rendrait nécessaire l'application du principe de la réciprocité lorsque ces tribunaux auraient à se prononcer dans des différends du même genre, concernant ledit Etat.

Questions 6 et 7

Il n'y a pas, dans la législation roumaine, de dispositions d'ordre général qui établiraient une distinction ayant trait à l'immunité juridictionnelle des Etats étrangers et de leurs biens entre les activités de ces Etats revêtant un caractère public et les activités ne revêtant pas un tel caractère.

Pour certaines situations exceptionnelles, comme celle du statut des navires battant pavillon d'un Etat étranger, utilisés pour des services gouvernementaux, les dispositions des lois spéciales sont applicables.

Question 8

Les activités de la nature de celles indiquées à la question 8, effectuées par un Etat étranger sur le territoire de la République socialiste de Roumanie, sont soumises au versement d'impôts, droits ou à d'autres obligations financières prévues par la législation roumaine.

L'Etat étranger peut en être exempté dans les cas où la loi prévoit expressément, à titre d'exception, son exemption ou si l'Etat roumain, en vertu des conventions internationales dont il est lié, ou sur la base de la réciprocité, renonce à percevoir les impôts ou droits respectifs.

Questions 9 et 10

Les tribunaux roumains n'ont pas eu à s'occuper, en pratique, de cas de la nature de ceux mentionnés aux questions 9 et 10.

Question 11

Voir les réponses formulées pour les questions qui précèdent.

Question 12

Les navires appartenant à un Etat étranger ou exploités par lui et utilisés pour des activités commerciales, lorsqu'ils se trouvent dans les ports ou dans les eaux territoriales roumains, sont soumis à la législation roumaine et aux dispositions des conventions internationales auxquelles l'Etat roumain est partie.

Question 13

Conformément à la législation roumaine, les ressortissants des pays membres de l'Union de Paris — créée par la Convention de Paris pour la protection de la propriété industrielle — jouissent de tous les droits reconnus aux nationaux. Quant aux citoyens d'autres Etats, le principe de la réciprocité leur est applicable.

Question 14

Les immeubles d'un Etat étranger se trouvant sur le territoire de l'Etat roumain sont soumis à la juridiction des instances roumaines, sauf si dans les conventions internationales auxquelles la Roumanie est partie il est prévu autrement.

Les différends relatifs aux biens meubles d'un Etat étranger se trouvant en Roumanie sont soumis à la juridiction des instances roumaines, à moins que [qu'en raison] des normes conflictuelles, il ne [n'en] résulte autrement.

Les différends relatifs à la succession des biens meubles se trouvant en Roumanie relèvent de la compétence de l'instance du dernier domicile du défunt.

Question 15

Réponse: Sur la base de la réciprocité, la vocation d'un Etat pour devenir l'héritier d'une succession vacante pourrait être reconnue.

Dans le cas d'une succession testamentaire, l'Etat étranger peut être, dans les conditions établies par la loi roumaine, héritier ou légataire en ce qui concerne les biens successoraux situés dans la République socialiste de Roumanie. Dans une pareille situation, la participation de l'Etat étranger à la procédure successorale devant les tribunaux roumains en qualité de demandeur peut se réaliser sans que, à cette fin, une renonciation expresse de la part dudit Etat à l'immunité juridictionnelle soit indispensable.

Question 16

Réponse: La législation roumaine ne contient pas de dispositions générales sur l'immunité juridictionnelle des biens des Etats étrangers pour le cas où lesdits biens devraient être soumis à une saisie ou à d'autres mesures conservatoires. Au traitement juridique des Etats étrangers et de leurs biens, il sera certainement tenu compte des conventions internationales et, en leur absence, des normes du droit international ainsi que des usages internationaux acceptés par l'Etat roumain.

Question 17

Réponse: Voir la réponse à la question 16.

Question 18

Réponse: Dans la législation roumaine, le déroulement du procès civil tout entier ainsi que l'exercice de tous les droits et garanties procéduraux s'appuient sur le principe de l'égalité des parties au litige. Il n'y a pas de privilèges procéduraux en faveur d'une partie quelconque, même s'il s'agit d'un Etat étranger. Certaines facilités en matière de procédure civile qui ne s'éloignent pas, pour autant, des règles de base du procès civil font l'objet des conventions internationales auxquelles la Roumanie est partie.

Question 19

Réponse: A moins que les conventions internationales auxquelles la Roumanie est partie n'en disposent autrement, les Etats étrangers qui sont parties aux procès civils relevant de la compétence des instances roumaines sont tenus de toutes les obligations qui incombent aux parties litigantes, conformément aux règles générales de la législation roumaine, y compris celles relatives aux frais de procédure.

Question 20

Réponse: Jusqu'à présent il n'y a pas eu de cas où l'Etat roumain aurait invoqué son immunité juridictionnelle devant les tribunaux étrangers dans des affaires du genre de celles où, dans des situations analogues, les tribunaux roumains auraient refusé l'immunité juridictionnelle des Etats étrangers.

O. SENEGAL

Question 1

Il n'existe pas dans la législation sénégalaise de dispositions de lois ou de règlements prévoyant expressément l'immunité juridictionnelle sur des Etats étrangers et de leurs biens.

Question 2

Les tribunaux de notre pays accordent l'immunité juridictionnelle aux Etats étrangers et à leurs biens en se fondant non pas sur des dispositions du droit interne, mais sur les principes du droit international et sur le droit des gens.

Question 3

Les tribunaux accordent l'immunité juridictionnelle des Etats étrangers et de leurs biens lorsque l'Etat remplit une fonction d'intérêt général, mais les actes de

commerce d'un Etat étranger restent en dehors du domaine de l'immunité de juridiction.

Question 4

L'exécutif ne joue aucun rôle en ce qui concerne la reconnaissance de l'immunité juridictionnelle des Etats et de leurs biens, il n'intervient pas non plus dans la définition ou la délimitation de la portée de l'application du principe de l'immunité. Cependant il est possible, dans le cadre d'un traité bilatéral ou multilatéral, sur la compétence juridictionnelle, que l'exécutif puisse être amené à définir et à préciser la portée de l'application du principe de l'immunité juridictionnelle.

Question 5

Le principe de la réciprocité peut s'appliquer pour les questions relatives à l'immunité juridictionnelle des Etats et de leurs biens toujours dans le cadre d'un traité ou d'une convention bilatérale ou multilatérale et les tribunaux sénégalais ne l'appliquent que si cette convention le prévoit expressément.

Question 6

La jurisprudence établit une distinction entre les activités des Etats étrangers revêtant un caractère public et les activités ne revêtant pas un caractère public.

Question 7

a) Le principe de l'immunité juridictionnelle ne peut pas être dûment invoqué devant les tribunaux de notre pays, s'agissant d'activités d'Etats étrangers ne revêtant pas un caractère public.

Par exemple les activités d'un Etat étranger ayant un caractère purement commercial accomplies dans un intérêt non public ne sont pas couvertes par l'immunité juridictionnelle.

b) Oui.

c) Oui.

d) La transaction commerciale doit avoir été faite dans un but d'intérêt général.

Question 8

L'Etat étranger qui accomplit des activités ne revêtant pas un caractère public et assujetties au versement d'impôts, droits ou autres redevances, est tenu de les payer.

S'il en est exempté ce sera sur la base de la réciprocité.

Question 9

Les tribunaux de notre pays sont fondés à exercer leur juridiction sur toutes les activités revêtant un caractère public auquel se livrent les Etats étrangers en cas de renonciation volontaire.

Question 10

Il n'existe pas de règles concernant les questions susvisées.

Question 11

Aucune exception ou limitation prévue par les lois et règlements.

Question 12

Oui (pas de traitement spécial).

Question 13

Oui, cet Etat est soumis à notre juridiction territoriale.

Question 14

Un Etat étranger peut être héritier, légataire ou bénéficiaire dans le cas d'une succession *ab intestat* ou d'une succession testamentaire.

Dans ce cas, la renonciation volontaire à l'immunité juridictionnelle n'est pas indispensable pour lui permettre de participer utilement à la procédure.

L'article 847 du Code de la famille règle la question en ce qui concerne la succession portant sur des immeubles et des fonds de commerce. Aux termes de cet article, c'est la loi de leur situation qui régit la transmission de la propriété des immeubles et des fonds de commerce — Art. 847.

Article 15

En vertu du droit des gens, les biens d'un Etat étranger jouissent, avant l'intervention d'une décision judiciaire exécutoire, de l'immunité en ce qui concerne la saisie et autres mesures, conservatoires ou transitoires, mais il n'existe pas de lois et règlements au Sénégal à ce sujet.

Question 17

Si un Etat étranger est partie à une action judiciaire, il ne jouit pas de privilèges en matière de procédure.

Question 18

Ces Etats ne sont pas exonérés des frais ou de versement de caution.

Question 20

Il est difficile de répondre de façon précise à ces deux questions dans l'état actuel de notre jurisprudence. Cependant, en vertu du droit des gens et du principe de la réciprocité, l'Etat sénégalais peut invoquer l'immunité juridictionnelle devant les tribunaux étrangers et accorder le même degré d'immunité aux Etats étrangers.

P. SPAIN

Question 1

There are no laws or regulations in force relating to the jurisdictional immunities of foreign States and their property in Spain. There are only some treaty provisions regarding the immunities of warships or non-commercial State vessels and the immunities of the United States armed forces in Spain, as well as provisions, although of a special nature, regarding the immunities of the Catholic Church.

Question 2

There are decisions by Spanish courts recognizing the jurisdictional immunity of foreign States, such as:

(1) The ruling of 27 April 1965 by the fourth court of first instance of Madrid, disallowing, "in accordance with international custom", a civil action against the Argentine Republic;

(2) The ruling of 10 April 1967 by the eighth court of first instance of Madrid, declaring lack of jurisdictional competence in an executive action against Algeria, on the basis of the principle of public international law "*par in parem non habet jurisdictionem*";

(3) The ruling of 19 November 1968 by the seventh court of first instance of Valencia, declaring lack of jurisdictional competence in a civil action against the Dominican Republic, on the basis of the same principle of public international law.

As one can see, when jurisdictional immunity has been recognized, such recognition had been by virtue of the principle "*par in parem non habet imperium*".

Decisions by Spanish courts recognizing local jurisdiction in actions against foreign States include the following:

(1) The judgement of 9 March 1960 of the regional court of Seville, differentiating between private and public acts and recognizing the competence of Spanish jurisdiction in a civil action against the United States 16th air force;

(2) The judgement of 4 April 1963 of the twenty-fourth municipal court of Madrid, differentiating between public and private acts and recognizing Spanish jurisdiction with regard to leases signed by the United States armed forces;

(3) The judgement of 17 May 1963 of the court of first instance of Ateca, recognizing its jurisdiction over an American State enterprise in a case of civil liability for a motoring accident.

Question 3

The decisions referred to in the reply to question 2 show that the Spanish courts have no standard approach to legal proceedings involving foreign States, although there is a noticeable tendency to differentiate between "*jure imperii*" and "*jure gestionis*" acts by the State. Only in the case of "*jure imperii*" acts would there be grounds for recognizing the jurisdictional immunity of the State.

Question 4

At present, the executive branch has no role in matters of recognition of jurisdictional immunities of foreign States and their property.

Question 5

While, theoretically, the principle of reciprocity is applicable, no reference to the idea or the term is to be found in any of the cases reviewed or examined.

Question 6

See the replies to questions 1 and 3.

Question 7

In general, the response to the various points raised under question 7 could be as follows: obviously, the jurisdictional immunities of a foreign State may be involved before the Spanish courts in connexion with non-public acts, but with little chance of success. Only in the case referred to in subparagraph (*b*) is there a greater likelihood of recognition for the claim of immunity.

Question 8

A foreign State would be required to pay taxes, duties or other levies in connexion with any non-public activities in Spanish territory which are normally susceptible

to such payment, although, in some cases, an exemption might be granted on the basis of reciprocity.

Question 9

The Spanish courts can exercise their jurisdiction only in cases of explicit or tacit submission. As stated earlier, there has been a tendency to recognize jurisdictional immunity with regard to public acts.

Question 10

(*a*) There are no rules in the Spanish legal code governing the waiver of jurisdictional immunities of foreign States;

(*b*) and (*c*) The voluntary submission of foreign States and counter-claims against foreign States are governed by the provisions contained in the *Ley de Enjuiciamiento Civil*.

Question 11

See the replies to questions 3 and 6.

Question 12

Spain is a party to the Geneva Convention on the Territorial Sea and the Contiguous Zone and the Geneva Convention on the High Seas. The legal status of merchant ships owned or operated by a foreign State and employed in commercial service is derived from the provisions of those Conventions. In other words, such ships are put on the same footing as privately-owned merchant ships.

Question 13

In general, there is no special treatment for foreign States.

Question 14

Matters relating to immovable property situated in Spain come within the jurisdiction of the Spanish courts, and no special distinction is made with regard to foreign States. As far as movable property is concerned, it should be pointed out that, because of its use or purpose, such property could enjoy immunity if designated for a "sovereign" function. Otherwise, the common régime would apply.

Question 15

A foreign State can inherit or become a legatee in a testate or intestate succession. Voluntary submission is essential to involvement in the judicial process when the judge having jurisdiction interprets the law of inheritance in the testate or intestate proceedings.

Question 16

To date the immunity of foreign States has been recognized with regard to the attachment of property in litigation.

Question 17

To date the immunity of foreign States from such execution has been recognized.

Question 18

No procedural privileges are accorded to a foreign State in the event of its involvement in a judicial process.

Question 19

No.

Question 20

To date immunity has not as a rule been accorded on the basis of reciprocity. Accordingly, the Spanish State invokes jurisdictional immunity when an action is brought against it in a foreign court and when such immunity may be claimed under public international law or *lex fori*.

Q. SUDAN

Question 1

Yes. The Immunities and Privileges Act,[15] specifically provides for jurisdictional immunities for foreign states and their property.

Question 2

Yes. Our courts have based their decisions on the provisions of the Immunities and Privileges Act, and also by adopting provisions of the Vienna Convention in the absence of provisions in the national law as being international customary law.

Question 3

The courts regard the doctrine of immunity as absolute but subject to waiver.

Question 4

May widen or restrict the scope of the immunitics and privileges accorded for states and their property as circumstances may dictate.

Question 5

No. The courts are bound by the provisions of the Immunities and Privileges Act which gives foreign states and diplomatic missions immunity from suit and legal process.

Question 6

No.

Question 9

Yes. Competence is based on waiver of immunity and voluntary submission. Yes. The doctrine is recognized and the courts may not order execution unless the foreign state voluntarily waives its immunity in respect thereof (applying the Vienna Convention).

Question 10

Our courts apply English common law rules and the Vienna Convention in respect of (*a*), (*b*) and (*c*).

Question 11

None. Immunity is absolute unless waived.

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[15] The Act is related to diplomatic immunities and privileges.

Question 12

No legislation yet exists covering such matters.

Question 13

Yes. Special treatment on procedure or substance could be conferred on foreign states and their property.

Question 15

There is nothing in our law to prevent such succession. Our courts will look to the Vienna Convention for guidance and also, if necessary, common law. Voluntary submission, in our view, would be essential to a meaningful involvement in the judicial process.

Question 19

No, but in order that a court order may be executed, a further waiver may be required therefor (as provided in the Vienna Convention).

Question 20

The matter does not arise here—as all states enjoy immunity in our courts.

R. SWEDEN

Question 1

Swedish laws and regulations do not expressly accord jurisdictional immunities of a general nature to foreign States.

With regard to foreign government ships, the Brussels Convention 1926 together with its additional Protocol 1934 was ratified by Sweden in 1938, and the basic rules of this Convention have by legislation been made generally applicable in Sweden regardless of whether the State operating or owning a ship is a Party to the Convention or not (Act of June 17, 1938 no. 470).

Question 2

Yes. The basis of the courts' decisions has normally been general international law.

Question 3

The Swedish Supreme Court has in several cases indicated that it does not regard the immunity of foreign States from jurisdiction as absolute and in particular that such immunity cannot generally be invoked in private law disputes. On the other hand, in the actual practice of the Supreme Court there has so far not been any case where a foreign State has been denied immunity.

Question 4

The extent of the jurisdictional immunity to be accorded to foreign States is regarded as a question to be decided exclusively by the courts and not by the Executive branch of government.

Question 5

No.

Questions 6 and 7

The relevance of the distinction between public acts and acts of a private law nature has been acknowledged in judicial practice, at least in general terms by way of a court's *obiter dicta*. However, immunity from jurisdiction has not in fact been denied on the basis of this distinction in any of the cases decided by the Supreme Court and other higher Swedish courts.

Two examples:

In a decision in 1949, the Svea Court of Appeal accorded immunity to Bulgaria in a case regarding payment for work done by a Swedish firm with which the Bulgarian legation had concluded a contract for the construction of Bulgaria's pavilion at a Trade Fair at Stockholm. The Labour Court in 1958 accorded immunity to the Soviet Union in a case regarding damages claimed by a Swedish Trade Union on behalf of a Swedish translator who had been dismissed from his employment at the Soviet Information Office at Stockholm.

Question 8

The foreign State would be required to pay the taxes.

Question 9

The doctrine that the validity of the public acts of a foreign State must not be questioned finds little support in Swedish judicial practice, which does not *a priori* exclude an examination of the validity of such acts under international law if the question arises in litigation between private parties. It is clear, on the other hand, that Swedish courts would not consider themselves entitled to entertain proceedings against the foreign State itself in respect of its public acts.

Questions 10 and 11

No particular rules have been formulated concerning these matters.

Question 12

Ships owned or operated by a foreign State and employed in commercial service have the same status as foreign private ships in cases where such a status follows from the rules of the Brussels Convention 1926 and its additional Protocol 1934 (cf. paragraph 1 above). In other cases, however, the immunity of such ships has been upheld. A claim made against a Soviet-owned formerly Estonian merchant ship by its discharged captain for the payment of wages due to him at the time of his dismissal was considered non-justiciable by Swedish courts (Supreme Court decision 1944 no. 76). Merchant ships requisitioned by the Norwegian Government and chartered by the British Government were considered immune against arrest for the purpose of recovery actions by the Norwegian owners (Supreme Court decision 1942 no. 24).

Question 13

Such applications by a foreign State would be treated like those of any other foreign applicant.

Question 14

In a decision in 1957, no. 22, the Supreme Court held that it had no jurisdiction over a dispute concerning title to real property bought in Stockholm by a foreign

State. The Court, however, expressly based its decision on the fact that the property in question was used by the foreign State as embassy premises.

Question 15

A foreign State can acquire property as a legatee or other beneficiary in a testate succession. The procedure to be followed would be the same as in the case of any other beneficiary.

Questions 16 and 17

No general laws or regulations have been adopted with regard to these matters. As to ships, see above paragraph 1.

Question 18

No.

Question 19

With regard to costs and security for costs in the event of participation in a judicial process, the same rules apply to foreign States as to other foreign subjects of law.

Question 20

The decisions of Swedish courts on State immunity having been relatively few and dispersed in time, the doctrine of State immunity has not yet been fully developed in Swedish judicial practice. When Sweden itself has invoked immunity before foreign courts, the decision to do so has generally been based on the circumstances in the particular case rather than on any of the sparse precedents in Sweden's own judicial practice. Conversely, Swedish courts do not grant immunity on the basis of whether Sweden would be likely to claim immunity from foreign jurisdiction in similar circumstances.

S. SYRIAN ARAB REPUBLIC

Question 1

It is established in international legislation and judicial practice that States are not subject to the jurisdiction of another State.

Accordingly, the Syrian judiciary does not hear cases brought against a foreign State without the consent of that State. The justification for the non-exercise of jurisdiction lies in the principle of State independence, which prevents the courts of any State having the right to investigate the commitments by which a foreign State is bound.

There are some exceptions to this rule, namely:

(1) If the case is brought before the Syrian court by the foreign State, this is regarded as implying consent by the foreign State to be subject to Syrian law.

(2) If the merits of the case are presented by the foreign State through one of its employees, for the administration of its own affairs or the achievement of a commercial purpose which is remote from its operations as a government.

In Syrian national legislation there are no laws regulating the jurisdictional im-

munities of foreign States and their property. This matter, as we have stated, is subject to the application of the provisions and principles of international law relating to sovereignty and to the application of the provisions of the Act promulgated by Legislative Decree No. 189 of 1952, which also lays down the conditions on which non-Syrians can own immovable property.

This Act covers non-Syrian persons, whether natural or juridical, and we include a foreign State in the concept of a foreign juridical person. We have enclosed a copy of the Act.[16]

Question 2

It is not within the competence of Syrian courts to accord jurisdictional immunities to foreign States and their property. The courts endeavour only to apply the legal provisions coming within their sphere of competence. Their decisions relating to such jurisdictional immunities are based, as we have said, on the principles of international law and the provisions of Act 189 of 1952, which we have mentioned above.

Questions 3 and 4

The principle of the jurisdictional immunity of foreign States and their property is regarded as absolute in the Syrian Arab Republic and is based on the principles of international law.

Question 5

Where the national legislation of a foreign State stipulates that it is not subject to the provisions of international law relating to the jurisdictional immunities of foreign States and their property, the Syrian judiciary does not apply the provisions of such immunity in respect of such a State.

Question 6

Act No. 189 of 1952 does not make any distinction between natural and juridical non-Syrian persons with regard to their rights to own immovable property in Syria, within the limits of the conditions and provisions set forth in the Act, with the exception of the special right accorded to non-Syrian Arabs in article 3 of the Act.

Question 7

We have answered to this question in our preceding reply.

Question 8

The non-public acts of a foreign State in Syrian territory are always subject to an agreement concluded between the two States on the matter. The agreement usually states whether the foreign State is exempted from taxes and levies on its non-public activities in Syrian territory.

Question 9

The principles of international law relating to the jurisdictional immunities of foreign States and their property are recognized by Syrian courts.

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[16] The Syrian Act is reproduced in Part 1.

Question 10

We have explained in our reply to question 1 all the circumstances relating to this question.

Question 11

We have given the answer to this question in the reply to question 6.

Question 12

The Syrian Act on Maritime Trade promulgated by Legislative Decree 86 of 1954 regulates questions relating to ships, whether Syrian or foreign, employed in commercial service, with regard to ownership, registration, papers, licences, seizure, vessel and owner insurance, etc.

Question 13

Upon application to the Syrian administrative authorities, a foreign State is treated like any other applicant, unless special treatment is provided for in a special agreement.

Question 14

A foreign State can own immovable property in the Syrian Arab Republic, subject to the provisions and conditions laid down in Act No. 189 of 1952 and, consequently, has the right to dispose of it, within the provisions of the general legislation on this subject. Article 3 of Act No. 189 places a restriction on the right to dispose of such property and states that when immovable property, not being a built-on area in the centre of a governorate, passes to a foreign State by way of inheritance, transfer, testament or liquidation of a religious endowment, that State's right to inherit, transfer, bequeath by testament and endow shall lapse and the immovable property in question shall revert to the Administration of State Property in return for payment of the price under the Expropriation Act.

Of course, this provision applies only to non-built-on immovable property outside the centres of the governorates.

Question 15

This question was answered in the previous reply.

Questions 16, 17 and 18

In accordance with the principles of international law on the jurisdictional immunities of States and their property and the non-competence of the Syrian judiciary to hear cases brought against a foreign State, the Syrian judiciary cannot hand down preventive or interim rulings on such cases.

Question 19

Exemption of a foreign State from the costs or security for costs of a legal suit which it wishes to bring in the Syrian Arab Republic is in accordance with a judicial agreement concluded between the two countries. Where there is no such agreement, a State is not exempt.

Question 20

This question was answered in the reply to question 5.

The Syrian Arab Republic has ratified the Vienna Conventions on Diplomatic

and Consular Relations and is bound by their provisions and the statements contained in the instruments of accession to these two Conventions.

T. TOGO

Question 1

Il n'y a pas au Togo de texte législatif ou réglementaire prévoyant soit de manière spécifique l'immunité juridictionnelle des Etats étrangers et de leurs biens, soit de façon générale le non-exercice de la juridiction sur les Etats étrangers et leurs biens, sans leur consentement.

Question 2

Il ne semble pas que se soit présenté le cas de poursuites devant les Tribunaux togolais contre des Etats étrangers et leurs biens.

Question 3

Si un tel cas se présentait on peut présumer que la juridiction saisie suivrait la jurisprudence française, puisque les textes relatifs à la procédure et aux voies d'exécution sont hérités de la loi française. Cette jurisprudence reconnaît l'immunité de principe des Etats étrangers et ne permet pas la saisie de leurs biens faisant partie du domaine public ou affectés à un usage diplomatique.

Question 4

Le pouvoir exécutif étant responsable de la négociation des traités et conventions d'ordre international peut dans le cadre de ces traités définir ou délimiter la portée de l'application du principe de l'immunité des Etats. Mais ces traités et conventions ne sont applicables que dans la mesure où ils sont ratifiés par une loi votée par l'Assemblée nationale (article 42 de la Constitution).

A défaut de loi nationale relative à l'immunité juridictionnelle des Etats étrangers, celle-ci peut, dans le cadre de conventions bilatérales ou multilatérales, être subordonnée à une condition de réciprocité.

Dans la mesure où le principe de réciprocité est l'une des bases de la coutume internationale on peut présumer que les Tribunaux togolais pourraient l'appliquer à l'endroit d'un Etat étranger qui refuserait au Togo l'immunité dans un différend du même ordre que celui en cause.

Question 6

La jurisprudence française qui pourrait servir de référence aux Tribunaux togolais distingue entre les biens du domaine public qui sont insaisissables et ceux du domaine privé qui ne bénéficient pas de privilège particulier. On peut noter que cette distinction s'applique en droit interne. L'article 19 de l'Ordonnance n° 12 du 6 février 1979 définit comme inaliénable, imprescriptible et insaisissable le domaine public. Cette disposition n'est pas reprise dans les chapitres consacrés au domaine privé et à la réserve foncière nationale.

Question 7

(1) On peut présumer qu'un Etat étranger partie à un contrat de droit privé — prêt, vente, caution, bail, etc ... — pour la gestion de son domaine privé pourrait être

traité comme une partie ordinaire par la juridiction togolaise compétente en vertu d'une clause du contrat ou par application des règles ordinaires de compétence.

Par contre les engagements pris en tant que puissance publique, tels que la garantie d'emprunts publics, l'assistance technique d'Etat, resteraient en dehors du champ de compétence de la juridiction togolaise de droit commun. Dans ces cas, le plus souvent, la convention précise le mode de règlement du contentieux par un recours à la conciliation et à l'arbitrage.

(2) Dans un différend relatif à un contrat d'achat de marchandises on peut penser que la juridiction togolaise reconnaîtrait l'immunité de l'Etat étranger, partie au contrat, qui justifierait l'avoir conclu dans l'exercice d'une fonction publique ou du droit de souveraineté.

(3) Dans un différend relatif à l'inexécution par un Etat étranger d'un contrat de vente, on peut présumer qu'à défaut de clause attributive de juridiction la juridiction togolaise accorderait l'immunité à l'Etat vendeur qui justifierait sa conduite par l'intérêt public, l'exercice de sa souveraineté. C'est ainsi que l'embargo mis sur des ventes pour des raisons politiques serait un motif reconnu d'immunité.

(4) La transaction commerciale, où un Etat étranger est partie, est régie par le droit commercial. La convention précise normalement la procédure à suivre en cas de contentieux, arbitrage ou renvoi à la juridiction de droit commun. A défaut de clause spéciale, le différend doit être soumis au tribunal compétent selon les règles ordinaires de procédure. Mais la difficulté subsistera pour l'exécution de la condamnation qui ne pourra être poursuivie que contre les biens du domaine privé et, s'ils sont situés hors du Togo, avec *l'exequatur* du juge du lieu où ils se trouvent.

Question 8

Les activités sans caractère public d'un Etat étranger sur le territoire togolais sont normalement soumises aux charges fiscales et sociales ordinaires sauf convention d'exonération, laquelle peut être subordonnée au principe de réciprocité.

Question 9

Les Tribunaux togolais ne sont pas fondés — sauf convention particulière — à exercer leur juridiction sur toutes les activités à caractère public auxquelles se livrent les Etats étrangers.

Question 10

A défaut de texte législatif et de pratique jurisprudentielle il n'est pas possible de dire comment pourrait être levée l'immunité juridictionnelle d'un Etat étranger, en dehors du cas où celui-ci y renoncerait volontairement. Par application de principe de réciprocité on peut penser que si le Togo était attaqué en justice par un Etat étranger il s'autoriserait à former une demande reconventionnelle contre cet Etat.

Question 11

Il n'y a pas de texte précisant les exceptions ou limitations touchant l'immunité juridictionnelle des Etats étrangers ou de leurs biens. Si des mesures administratives étaient prises contre les biens d'un Etat étranger par le Gouvernement togolais, la juridiction administrative togolaise leur reconnaîtrait le caractère d'actes de gouvernement exclusif de toute appréciation par le juge et donc de tout recours en annulation ou en réparation.

Question 12

Il n'y a pas d'exemple d'angarie pratiquée par le Togo. Le trafic maritime togolais est réparti par suite d'accords avec des conférences maritimes, selon un partage fixé entre l'armement togolais, les armements liés par les accords de conférence et les armements tiers.

Question 13

La propriété industrielle est reconnue au Togo dans le cadre de l'Organisation africaine de la propriété intellectuelle, créée par l'accord de Lomé du 24 février 1978.

Cet accord ne prévoit pas de traitement spécial en matière de procédure ou sur le fond pour le cas où un Etat étranger dépose une demande de brevet.

Les licences, permis ou exemptions délivrés par les autorités administratives distinguent souvent la procédure à suivre selon qu'elles concernent des personnes physiques ou des personnes morales mais il n'y a pas de dispositions spéciales aux Etats étrangers.

Question 14

Si un Etat étranger possède ou se voit léguer des biens, meubles ou immeubles au Togo, cet Etat est soumis pour la justification du titre de propriété au mode de preuve défini par la loi togolaise. Mais si l'immeuble ou les meubles sont affectés à un usage diplomatique ou assimilé, ils bénéficient de l'exterritorialité et sont insaisissables.

Question 15

En matière successorale, la loi togolaise régit la forme des testaments et les procédures d'ouverture de succession. Mais la vocation successorale des héritiers relève du statut personnel du défunt, lequel dépend de sa nationalité. La loi togolaise ne connaît pas d'autres limites au droit de disposer du testateur que la réserve des proches héritiers sur une part de la succession.

Un Etat étranger peut donc bénéficier d'une succession ouverte au Togo soit en vertu d'un legs, soit par l'effet de la loi successorale du défunt.

Question 16

Les biens d'un Etat étranger affectés à l'exercice de sa souveraineté bénéficient de l'immunité. Une saisie conservatoire ne serait possible que sur des biens du domaine privé de l'Etat étranger situés au Togo, ou encore sur ceux situés à l'étranger avec *l'exequatur* du juge du lieu de situation de ces biens.

Question 17

La même distinction entre les biens du domaine public et ceux du domaine privé s'applique pour les procédures de saisie-exécution.

Question 18

Aucun texte n'accorde au Togo de privilèges en matière de procédure aux Etats étrangers parties à une action judiciaire.

Question 19

La caution *judicatum solvi* est exigible de tout étranger saisissant la justice togo-

laise, sous réserve des dispenses et facilités prévues dans les conventions internationales ou les traités bilatéraux. Il n'y a pas de règles propres aux Etats étrangers engageant une procédure de droit privé.

Question 20

La République togolaise n'a pas eu jusqu'ici l'occasion d'invoquer l'immunité juridictionnelle devant des tribunaux étrangers. Mais si le cas se présentait on peut penser qu'elle invoquerait ce principe puisqu'elle le reconnaît dans son propre système juridique.

On peut souligner à cet égard que la République togolaise a récemment déclaré reconnaître la compétence générale de la Cour internationale de Justice pour conaî tre de tout différend qui l'opposerait à un autre Etat reconnaissant lui-même cette compétence soit à titre général soit pour le règlement de ce différend particulier.

Mais cette Cour n'a pas compétence pour statuer sur les différends entre un Etat et une personne de droit privé. C'est pourquoi le gouvernement peut user de ses bons offices auprès d'un Etat étranger pour favoriser la solution d'un litige opposant cet Etat à un ressortissant togolais.

A défaut de conciliation la juridiction togolaise sera compétente dans tous les cas où l'Etat en cause n'aura pas agi dans l'exercice de sa souveraineté, selon des diverses distinctions précisées dans la présente réponse au questionnaire du Secrétaire général des Nations Unies.

Les réponses reçues permettront, si elles sont suffisamment convergentes, de préparer une convention internationale définissant les limites de l'immunité juridictionnelle des Etats et donnant compétence à la Cour internationale de Justice pour règler les différends entre personnes de droit privé et Etats agissant dans l'exercice de leur souveraineté. Le précédent de la Cour de justice des Communautés européennes pourrait servir de référence pour cette étude.

U. TRINIDAD AND TOBAGO

Question 1

The common law of the Republic of Trinidad and Tobago provides specifically for jurisdictional immunities for foreign States and their property and generally for non-exercise of jurisdiction over foreign States and their property without their consent. A court seized of any action attempting to implead a foreign sovereign or State would apply the rules of customary international law dealing with the subject.

Question 2

In theory (since in the circumstances all the related matters have not been brought before the courts) courts in Trinidad and Tobago will accord jurisdictional immunities to foreign States and their property. In the event that a court is seized of a matter involving jurisdictional immunities, it is to be expected that a court will base its decisions on international law, the applicable principle of international law being that no independent foreign sovereign State is answerable to another State's jurisdiction. Or, to put it another way, a State is immune from the exercise by another State of jurisdiction to enforce rules of law against it.

Question 3

In general, it can be stated that the courts of the Republic of Trinidad and Tobago can be expected to follow the common law pattern and adhere to a doctrine of absolute immunity particularly in relation to *in personam* actions.

Question 4

The role of the Executive branch of the Government of Trinidad and Tobago in the matters raised at Question 4 is essentially to advise the courts of all requests by foreign governments for the grant of immunity from suit and of the Executive's action thereon.

Question 5

The principle of reciprocity is applicable in matters relating to jurisdictional immunities of States and their property.

Question 6

Since it can be expected that the courts of Trinidad and Tobago with their essential common law heritage are adherents to the doctrine of absolute immunities in so far as jurisdictional immunities of foreign States and their property are concerned, it is evident that no distinction can be made between the Public Acts and Non-public Acts of foreign States. However, due regard may be given to recent decisions of other common law jurisdictions whereby the distinction has been made between *actus jure imperii* and *actus jure gestionis*.

Question 7

Question No. 7 of the questionnaire in the light of the answer given on Question 6 does not apply.

Question 8

It can be stated that while exempt from taxation in Trinidad and Tobago per se, a foreign State would be required to pay for services rendered to it by agencies of the host State.

Question 9

Courts of Trinidad and Tobago are entitled to entertain jurisdiction over any public acts of foreign States on the legal ground of consent of the foreign sovereign. When jurisdiction is exercised in such cases, it is in effect an application of the doctrine of State immunity, albeit an exception, and is regarded as such by the courts. The courts of Trinidad and Tobago will not implead a foreign sovereign, that is, they will not make him a party to the action against his will. They will neither seek to recover specific property or damages nor seize or detain property over which he exercises control or which he specifically claims. But before that stage is reached the courts have the inherent power to entertain jurisdiction over a suit involving the foreign State. In practice, advice from the Executive would suffice to invoke jurisdictional immunity.

Question 10

A Trinidad and Tobago court can only exercise jurisdiction over a foreign sovereign if he waives the immunity from suit to which he is entitled. The basic principle is clear enough: if a foreign sovereign comes to the court as plaintiff, or appears without protest as defendant, in an action, he has submitted to the jurisdiction with

respect to those proceedings and to all matters incidental to them. However the immunities must first be claimed by the sovereign or drawn to the court's attention by advice of the Executive. It is clear, however, that the submission must be a genuine act of submission. If the foreign sovereign or his agent raises no objection at the outset of a suit commenced against him, it is still open to the sovereign to plead his immunity at a later stage, provided he can show that he had not been aware of the right of immunity he was foregoing by entering a defence to the claim, or by giving security for costs, or other similar act, or that his agent had acted without his knowledge.

On the other hand, once an action has become *res judicata*, it is not open to the unsuccessful party to obtain an injunction to prevent the foreign sovereign enforcing the court's decision, even if the issues concern the subject matter of the previous litigation: this is a new action, and the proceedings must be stayed if the sovereign pleads his immunity. Similarly, even if a foreign sovereign has waived his immunity and a decision has been given against him, it is not possible for the successful plaintiff to proceed to execute the judgement against the sovereign without his consent.

Question 11

The exceptions or limitations provided by the common law of Trinidad and Tobago and those recognized by Governmental practice in Trinidad and Tobago with respect to jurisdictional immunities of foreign States and their property relate to:—

(i) actions relating to land within the jurisdiction (e.g., actions to recover rent from mortgage interest);

(ii) actions by a local beneficiary relating to a trust fund within the jurisdiction.

These recognized exceptions derive support from the special treatment accorded to land by international law as being governed by the *lex situs*. Under Trinidad and Tobago law, as a result of the theory of the independence of sovereign States and the comity of nations, one State should decline to exercise jurisdiction over another State. As the immunity is an immunity from process, it matters not whether the sovereign's property is a warship or a ship employed in commercial service, as the proceedings *in rem*, if allowed to continue, will oblige the sovereign to appear to protect his property. In other words, it should not matter for what purpose the property was employed or even if the foreign sovereign owned the property, as long as he had some interest in it which required protection. However, due cognizance by the Trinidad and Tobago courts may be made of decisions from common law jurisdictions where it has been decided that the commercial activities of a State are subject to the jurisdiction of another State.

Question 12

Under the application of the theory of absolute immunity, State-owned commercial vessels are generally accorded the same status as other State-owned property.

Question 13

If a foreign State applies to an administrative authority of Trinidad and Tobago for a patent, a licence, a permit, an exemption, or any other administrative action, it would most likely be treated procedurally or substantially like any other application. It is only in the event that diplomatic overtures are made on behalf of the foreign State, that it would receive special treatment on the procedure as distinct from on the substance.

Question 14

With respect to immovable property, it is generally admitted that actions relating to land within the jurisdiction of Trinidad and Tobago are subject to Trinidad and Tobago's territorial jurisdiction in respect of title to that property or other property rights. This recognized exception from the doctrine of absolute sovereign immunity as applies in Trinidad and Tobago derives support from the special treatment accorded land by international law as being governed by the *lex situs*.

With respect to movable property situated in Trinidad and Tobago and owned or succeeded to by the foreign State, the following principles apply:— First, where the foreign State is the admitted owner of the movable property which is the subject matter of the suit, its immunity from jurisdiction is unlimited. Secondly, where the foreign State though not owner is in *de facto* possession of the subject matter through its own servants, the immunity is unlimited. Thirdly, the absolute immunity of a foreign State from the jurisdiction of Trinidad and Tobago courts applies without restriction where the sovereign, though neither owner nor in *de facto* possession, is in control authoritatively. Fourthly, the immunity is not restricted in respect of chattels to which a foreign State has an immediate right of possession, as, for example, where goods are in *de facto* possession of its bailee. Finally, the doctrine of immunity may equally well be invoked where the subject matter of the suit is a *chose in action*. To hold otherwise would produce the anomalous result that if a bank chattels as bailee for a foreign State and is also indebted to the same State on current action, the doctrine will apply in the former but not in the latter case.

Question 15

A foreign State can inherit or become a legatee or a beneficiary in a testate or non-testate succession. In such case voluntary submission by the foreign State to the jurisdiction of Trinidad and Tobago courts is not essential to a meaningful involvement in the judicial process. For, in such a case, the competent court in Trinidad and Tobago would regard the administration of the estate as its domestic responsibility and would be prepared to determine the right of the beneficiaries even though these may possibly or certainly include a foreign sovereign.

Question 16

Under the common law of Trinidad and Tobago, the property of a foreign sovereign enjoys immunity from attachment and other provisional or interim measures prior to an executory judicial decision. No distinction is made on the nature or the use of property involved.

Question 17

Similarly, the property of a foreign State enjoys immunity from distraint and other forcible measures in aid of execution of a judicial decision. Again, no distinction is made based on the nature or on the use of the property involved.

Question 18

There are no procedural privileges accorded the foreign State in the event of its involvement in a judicial process.

Question 19

Foreign States are not exempted from costs or security for costs in the event of participation in a judicial process.

Question 20

Courts in Trinidad and Tobago might be prepared to grant jurisdictional immunities to foreign States to the same extent to which Trinidad and Tobago is likely to claim immunities from foreign jurisdictions.

V. TUNISIA

Question 1

Le Code de procédure civile et commerciale (CPCC) tunisien n'a pas prévu d'immunité juridictionnelle au profit des Etats étrangers. Il n'y a pas d'article expressément réservé aux Etats étrangers et à leurs immunités.

Cependant l'article 2 Al 3 du CPCC prévoit le cas des étrangers résidant hors du territoire tunisien contre qui une action est intentée devant une juridiction tunisienne. Ledit article prévoit qu' "elles (les juridictions tunisiennes) ne connaissent des actions eontre un étranger résidant hors du territoire tunisien que dans les cas ci-après:

Si cet étranger accepte d'être jugé par elles et que l'action ne porte pas sur un immeuble situé à l'étranger".

Cet article peut-il être appliqué aux Etats étrangers contre lesquels une action en justice est intentée ? Les tribunaux tunisiens n'ont pas encore eu à se prononcer sur ce problème.

Questions 2 et 3

Il n'y a encore en aucun cas de jurisprudence relatif à l'immunité juridictionnelle des Etats et de leurs biens du fait qu'aucun litige impliquant un Etat étranger n'a été porté devant les tribunaux tunisiens.

Question 4

Aucun cas pratique ne s'étant encore posé, le Gouvernement tunisien n'a pas encore eu à se prononcer sur ce problème et à définir la portée de l'application du principe de l'immunité des Etats.

Question 5

Il est difficile de préjuger la position des tribunaux en matière de réciprocité vu qu'il n'y a pas de précédents. Mais on peut penser que nos tribunaux appliqueraient, par extension, le principe prévu par l'article 2 CPCC aux Etats étrangers. Cet article dispose qu' "elles (les juridictions tunisiennes) ne connaissent des actions contre un étranger résidant hors du territoire tunisien que (. . .):

7. Dans tous les cas où les tribunaux du pays de cet étranger se déclarent compétents pour statuer sur les actions dirigées contre des Tunisiens, et ce à titre de réciprocité".

Questions 6 et 7

Voir la réponse à la question n° 2.

Question 8

En matière d'imposition, le critère principal est la nature de l'activité en ques-

tion. S'il s'agit d'une activité à but lucratif, qu'elle soit exercée par un Etat étranger ou par un organisme privé étranger, elle est assujettie à tous les impôts prévus par notre législation et applicables au type d'activité en question.

Question 9

Voir la réponse à la question n° 5.

Question 10

Comme il a été dit plus haut, il n'y a pas encore en Tunisie de législation particulière sur l'immunité juridictionnelle des Etats, le CPCC ne prévoyant pas expressément le cas d'une action intentée contre un Etat étranger. L'article 227 du CPCC est censé s'appliquer aux demandes reconventionnelles formées à l'encontre d'Etats étrangers en tant que parties éventuelles à un litige porté devant les tribunaux tunisiens.

Question 11

Voir les réponses aux questions n° 1 et 2.

Question 12

Le Code de commerce maritime parle de "navires étrangers" sans faire la distinction entre navires étrangers appartenant à un Etat étranger et ceux n'appartenant pas à un Etat étranger. On peut donc supposer qu'en matière commerciale les navires appartenant à des Etats étrangers sont soumis au même régime juridique applicable aux autres navires étrangers.

Question 13

Après enquête auprès des services compétents du Ministère de l'économie nationale, il ressort que les Etats étrangers ou leurs organismes dépendants qui formulent des demandes de brevet ou autres sont traités sur le plan de la procédure et du fond comme n'importe quel autre requérant. Ils font l'objet toutefois, sur le plan de la procédure, d'une plus grande célérité et d'une courtoisie due à leur statut.

Question 14

La réponse à cette question est donnée par le CPCC dans son article 2 qui prévoit qu' "elles (les juridictions tunisiennes) ne connaissent des actions contre un étranger résidant hors du territoire tunisien que (. . .):

(1) Si cet étranger accepte d'être jugé par elles et que l'action ne porte pas sur un immeuble situé à l'étranger.

(2) (. . .).

(3) Si l'action porte sur des immeubles sis en Tunisie ou sur des meubles s'y trouvant".

Question 15

En ce qui concerne la succession testamentaire, l'article 175 du CSP peut s'appliquer puisqu'il prévoit que "le testament fait en faveur d'un étranger est valable sous réserve de réciprocité". On peut donc penser qu'un Etat étranger peut être héritier testamentaire sur le territoire tunisien à condition qu'il accepte que l'Etat tunisien puisse être héritier testamentaire sur son territoire.

En ce qui concerne la succession *ab intestat*, si un étranger résident en Tunisie décède sans laisser d'héritiers, c'est en principe la loi nationale du décédé qui

s'applique à sa succession. Si la loi nationale de eet étranger prévoit qu'en cas d'absence d'héritiers c'est l'Etat qui hérite, on peut penser que dans ces conditions l'Etat étranger peut être héritier. Cependant, dans ce cas, il faut distinguer entre le cas où la succession porte sur des biens immeubles ou des biens meubles. Dans le premier cas, l'Etat successeur doit suivre la procédure prévue par la loi n° 59-31 du 28 février 1959 relative aux opérations immobilières, dont l'article premier prévoit que, "pour être valable, toute acquisition à titre onéreux ou gratuit, par une puissance étrangère, portant sur des immeubles ou droits immobiliers, situés en Tunisie, doit être autorisée par le Secrétaire d'Etat ou la présidence, après avis du Secrétaire d'Etat aux affaires étrangères".

Questions 16 et 17

Notre législation ne prévoit pas d'immunités en dehors de celles accordées par les conventions que la Tunisie a signées ou pourra signer.

Questions 18 et 19

Les règles de procédure étant déclarées d'ordre public par la loi, des privilèges ne peuvent être accordés que si la loi le prévoit ou si une convention internationale bilatérale ou multilatérale a été conclue et ratifiée par une loi.

Question 20

Bien que le cas ne se soit pas encore présenté, on peut penser que notre pays appliquera la règle de la réciprocité dans ses relations avec d'autres pays sur la base du principe édicté par l'article 2 du CPCC qui prévoit qu' "elles (les juridictions tunisiennes) ne connaissent des actions contre un étranger résidant hors du territoire tunisien que (...):

7. Dans tous les cas où les tribunaux du pays de cet étranger se déclarent compétents pour statuer sur les actions dirigées contre des tunisiens, et ce à titre de réciprocité."

W. UNION OF SOVIET SOCIALIST REPUBLICS

Question 1

In the Union of Soviet Socialist Republics there are laws providing for non-exercise of jurisdiction over foreign States and their property.

The basic rule on this question is contained in article 61 of the Fundamentals of Civil Procedure of the Union of Soviet Socialist Republics and the Union Republics, approved by an Act of the USSR of 8 December 1961 ("*Vedomosti Verkhovnogo Soveta SSSR*", 1961, No. 50, p. 526).

The first part of article 61 of the Fundamentals provides as follows:

> "Bringing an action against a foreign State, securing collection of a claim and attachment of or execution upon a foreign State's property in the USSR may be permitted only with the consent of the competent authorities of the State concerned".

A similar rule is contained in the Codes of Civil Procedure of all the Union Republics which form part of the Union of Soviet Socialist Republics.

Question 2

On the basis of the provisions of the Act referred to in paragraph 1[17] above, Soviet courts accord jurisdictional immunity to foreign States and their property in conformity with the principle of sovereignty and of sovereign equality of States which is universally recognized in international law and enshrined in the Charter of the United Nations.

Question 3

In the Soviet Union, the principle of State immunity is regarded as absolute.

Question 4

Section 3 of article 61 of the Fundamentals of Civil Procedure of the Union of Soviet Socialist Republics and of the Union Republics provides that: "Where the same jurisdictional immunity as that which, under the present article, is accorded to foreign States, their property or their representatives in the USSR is not accorded in a foreign State to the Soviet State, its property or its representatives, the Council of Ministers of the USSR or another competent authority may prescribe the application of retaliatory measures in respect of that State, its property or its representatives". The civil procedure codes of the Union Republics contain a similar rule.

Question 5

The provisions of Soviet legislation in force concerning the immunity of foreign States and their property are formulated without reference to the principle of reciprocity.

Questions 6 and 7

Soviet legislation does not draw any distinction between "public acts" and "non-public acts" of foreign States.

Question 8

If activities of a legal person belonging wholly or partly to a foreign State are conducted in the territory of the USSR, the rules of the Decree on income tax payable by foreign legal and natural persons dated 12 May 1978 ("*Vedomosti Verkhovnogo Soveta SSSR*", 1978, No. 20, p. 313) are extended to that person.

In such cases the claim for the payment of taxes is not presented to the foreign State but to the legal persons concerned, including the representatives of those legal persons in the territory of the USSR.

A foreign legal person is a company, firm, corporation or any other organization established according to the laws and regulations of a foreign State.

Under article 7 of the Decree of 12 May 1978, with a view to the elimination of double taxation or to mutual exemption from taxes and levies, their collection from foreign legal and natural persons may be discontinued or limited in accordance with agreements concluded by the USSR with foreign States. The collection of taxes and levies may also be discontinued or limited on a reciprocal basis in cases where similar measures are applied in respect of Soviet legal and natural persons in the foreign State concerned.

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[17] Paragraph 1 refers to the reply to question 1.

Question 9

By virtue of the legislation referred to in paragraph 1, Soviet courts are empowered, with the consent of the competent authorities of the foreign State, to examine an action brought against that State; this exception, however, does not mean that the principle of State immunity has been repudiated.

Question 10

There are no special rules in Soviet jurisdiction governing the matters listed in paragraph 10.

Question 11

Neither Soviet legislation in force nor judicial practice provides for exceptions or limitations with respect to jurisdictional immunities of foreign States and their property.

Question 12

Ships owned by a foreign State and employed in commercial service fall under the legislative provisions referred to in paragraph 1, and consequently enjoy immunity. The Mercantile Shipping Code of the USSR (article 77) explicitly provides as follows: "Ships owned by a foreign State are not subject to distraint in connexion with property claims, except in cases covered by article 61 of the Fundamentals of Civil Procedure of the USSR and the Union Republics ("*Vedomosti Verkhovnogo Soveta SSSR*", 1968, No. 39, p. 351).

Question 13

Soviet legislation does not provide for any special treatment, procedurally or substantively, of a foreign State's application for a patent, licence, permit, etc.

Question 14

If a foreign State acquires or succeeds to property, the general legal rules referred to in paragraph 1 apply with regard to territorial jurisdiction in respect of title to that property or other property rights.

Question 15

A foreign State can inherit or become a legatee or a beneficiary in a testate or intestate succession (according to the law); these actions of the State do not affect its immunity status in accordance with the legislative provisions indicated in paragraph 1.

Questions 16 and 17

Under the laws indicated in paragraph 1, a foreign State enjoys immunity from attachment or distraint in respect of property in the USSR. No distinction based on the nature or on the use of the property involved is provided for by law.

Question 18

Soviet law does not accord a foreign State any procedural privileges in the event of its voluntarily consenting to involvement in a judicial process.

Question 19

Soviet legislation does not contain any special rules concerning the exemption of foreign States from judicial costs. So far as security for costs is concerned, foreigners are not required under Soviet law to deposit security for judicial costs.

Question 20

The replies are in paragraphs 3 and 5.

The above replies do not relate to any provisions of international agreements concluded by the USSR which may establish special rules.

X. UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Question 1

Please refer to paragraphs 3 and 4 of Sir Ian Sinclair's letter of 3 July 1979 and to the legislative materials transmitted under cover of that letter.

[Note by the Secretariat. Paragraphs 3 and 4 of Sir Ian Sinclair's letter are as follows]:

"3. Special United Kingdom legislation was required to bring United Kingdom law into conformity with the obligations to be assumed under these two Conventions. This legislation, the State Immunity Act 1978, came into force for the United Kingdom on 22 November 1978, and as regards other territories to which the Conventions have been extended, on 2 May 1979. I enclose copies of the State Immunity Act 1978 (Commencement) Order 1978, and of the State Immunity (Overseas Territories) Order 1979. St. Helena, to which both the Conventions have been applied, enacted its own legislation and was therefore not covered by the State Immunity (Overseas Territories) Order 1979. Two other Orders in Council have been made under the State Immunity Act. The State Immunity (Merchant Shipping) (Union of Soviet Socialist Republics) Order 1978 was required to give effect to the provisions of the Protocol to the Treaty on Merchant Navigation between the United Kingdom and the Soviet Union, signed in Moscow on 1 March 1974. The State Immunity (Federal States) Order 1979 was required because Austria, which is a party to the European Convention on State Immunity has, in accordance with Article 28 of that Convention, notified her constituent territories as being entitled to invoke the provisions of the Convention applicable to Contracting States.

"4. When the State Immunity Bill was before the United Kingdom Parliament copies of it were sent to all diplomatic missions in London on two occasions. The first version was a print of the State Immunity Bill as it was introduced in the House of Lords on 13 December 1977. This was accompanied by a circular letter of 9 January 1978 which explained the purpose of the legislation, made clear that the Bill would also place on a statutory basis the privileges and immunities enjoyed by heads of State in their personal capacity, and offered arrangements to Federal States under which their constituent territories might be accorded sovereign immunity in the United Kingdom. The note explained that the United Kingdom intended to apply the provisions of the Bill to all sovereign States in the belief that the provisions of the European Convention reflected with sufficient accuracy general State practice in the field of sovereign immunity. As a result of debates in the House of Lords, the Bill underwent considerable changes before being introduced into the House of Commons on 4 April 1978. The Bill as it was introduced into the House of Commons was circulated

again to diplomatic missions on 12 May 1978. The most significant changes made to the Bill as a result of the debates in the House of Lords were the following:

"(1) the provision dealing with commercial transactions and contractual obligations to be performed in the United Kingdom (now sect. 3 of the Act) was extended; and

"(2) provision was made permitting, in certain cases and subject to certain qualifications, execution in respect of property for the time being in use of intended for use for commerical purposes.

No State which was sent the legislation in draft offered substantive criticism of its terms."

Question 2

The courts of the United Kingdom have traditionally accorded very wide jurisdictional immunities to foreign States and their property. The relevance of international law has been affirmed in many cases, from *The Parlement Belge* (1880) 5 P.D. 197 (per Brett L J at p. 205), to *The Cristina* [1938] A.C. 485 (per Lord Wright at p. 502) and to the recent judgment of the Court of Appeal in *I Congreso del Partido* [1980] 1 Lloyds Rep. 23 (per Lord Denning at p. 29). As the rules enunciated in earlier United Kingdom cases had been stated to be in conformity with international law, it came in more recent cases to be regarded as proper to rely on these cases as precedents. The development of a growing international trend towards the application of the restrictive rule of immunity accordingly entailed for a period some divergence between United Kingdom case-law and that growing trend. In the *Philippine Admiral*, the Privy Council indicated that the rule of absolute immunity had been applied more widely in respect of actions *in rem* than it need have been, as a matter of English law; and in the case of *Trendtex Trading Corporation Ltd v. Central Bank of Nigeria* (following an earlier diseussion of the general issue in the case of *Thai-Europe Tapioca Service Ltd v. Government of Pakistan, Ministry of Food and Agriculture*) the question arose as to whether the courts continued to be bound by earlier precedents which could be shown to be no longer in accord with international law. That this remains a controversial issue can be seen from studying the separate judgments in the Court of Appeal in the *Trendtex* case.

In seeking to identify contemporary international law on other aspects of the law relating to the jurisdictional immunities of States and their property, the United Kingdom courts have in recent years shown a willingness to pay close regard to the practice and decisions in other jurisdictions. In this context, it may be noted that, in the case of *I Congreso del Partido*, Mr. Justice Goff cited cases decided by the courts in Sweden, the Federal Republic of Germany, Italy and the United States of America; and, referring to affidavit evidence put before him by a number of distinguished foreign lawyers, stated:

"Indeed, the evidence before me reveals only too clearly the isolated position which was until very recently occupied by this country in adhering to the absolute doctrine of sovereign immunity in the case of actions *in personam*": [1978] Q.B. 500, at p. 529.

The State Immunity Act 1978 entered into force on 22 November 1978, but the statutory rules therein set out are only applied automatically by the courts in relation

to matters that occurred subsequent to that date. Sections 23(3) and (4) of the Act provide:

> "(3) Subject to subsection (4) below, Parts I and II of this Act do not apply to proceedings in respect of matters that occurred before the date of the coming into force of this Act and, in particular:
>
> "(*a*) scctions 2(2) and 13(3) do not apply to any prior agreement, and
>
> "(*b*) sections 3, 4 and 9 do not apply to any transaction, contract or arbitration agreement,
>
> entered into before that date.
>
> "(4) Section 12 above applies to any proceedings instituted after the coming into force of this Act."

The United Kingdom Government made clear during the passage of the State Immunity Act that it was intended to reflect modern international law, and its provisions will therefore have a persuasive effect even in cases where it is not directly binding on the courts. Thus Counsel for both parties relied heavily on its provisions during the conduct of the case of *I Congreso del Partido*. But the proceedings and judgment in the case of *Uganda Holdings v. Government of Uganda* show that individual courts may still, during an interim period where the facts antedate the entry into force of the State Immunity Act, have regard to the previous rules applied in United Kingdom cases.

Question 3

The main trend of the judicial practice of United Kingdom courts over the last 25 years has been a gradual shifting of the courts away from their previous attachment to the doctrine of absolute immunity, and a greater readiness to deny immunity to separate entities associated with or subservient to but not forming part of the State itself. This trend first became apparent in the case of *Baccus S.R.L. v. Servicio Nacional del Trigo* [1957] 1 Q.B. 438; International Law Reports (1956), p. 160. In this case the Court of Appeal by a majority of 2 to 1 held that the defendants who had separate legal personality according to Spanish law but claimed to be a Department of the Spanish Ministry of Agriculture were entitled to State immunity because their functions were those of a government department. Singleton L J however would have denied the claim to immunity on account of the separate legal personality of the defendants. This continued emphasis on the *status* of the entity as being determinative of whether immunity should be granted was paralleled by a growing tendency to query whether it was correct to apply the rule of absolute immunity in respect of all transactions and disputes. Thus, Singleton L J, in the *Baccus* case, stated:

> "A State may create many such trading entities and if they act in the ordinary course it ought not to be open to the State to say they were not authorized so to do. Otherwise trading and business relationships would become impossible."

In the case of *Rahimtoola v. Nizam of Hyderabad* [1958] A.C. 379; *International Law Reports* (1957), p. 157, Lord Denning challenged the basis upon which claims to immunity had hitherto been decided by the United Kingdom courts and called for a new test which would have greater regard to principles then being applied in either jurisdiction and would depend essentially on the nature of the dispute. He argued:

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

The majority of the House of Lords however did not at the time endorse this approach. In *Thai-Europe Tapioca Service Ltd v. Government of Pakistan, Ministry of Food and Agriculture*, in 1975, Lord Denning, again unsupported by his colleagues in the Court of Appeal, expressed readiness to accept into English law a number of exceptions to the rule of absolute immunity which were coming to be recognized in other jurisdictions. Lord Denning listed as exceptions to the rule of absolute immunity actions in respect of land in England, in respect of trust funds in England, in respect of debts incurred in England for services to property of the foreign State in England and in respect of commercial transactions where the dispute is properly within the territorial jurisdiction of English courts.

In the same year, in the case of the *Philippine Admiral*, the Privy Council conducted a radical examination of the doctrine of absolute immunity and the English case-law on the matter over the previous century and refused to allow immunity in respect of actions *in rem* brought against State-owned vessels engaged in commercial activities. Lord Cross in his judgment pointed out that "the trend of opinion in the world outside the Commonwealth since the last war has been increasingly against the application of the doctrine of sovereign immunity to ordinary trading transactions". Soon afterwards in 1977, the Court of Appeal in the case of *Trendtex Trading Corporation Limited v. The Central Bank of Nigeria* held unanimously that the Central Bank was not identical with the Government of Nigeria, and by a majority of two to one that the doctrine of sovereign immunity no longer applied to ordinary trading transactions and that the restrictive doctrine of immunity should be applied to actions *in personam* (with which that case was concerned) as well as to actions *in rem*. This case was however not taken to the House of Lords. In the following year the State Immunity Act became law, but as is illustrated by the case of *Uganda Company (Holdings) Ltd v. Government of Uganda*, its rules, which incorporate the restrictive theory of sovereign immunity and are based on the European Convention on State Immunity, are not as such applicable to claims arising from facts prior to the entry into force of the Act. There have, as yet, been no reported judicial decisions on the State Immunity Act.

It will accordingly be seen that the trend of judicial decisions in the United Kingdom indicates a steady movement away from the old doctrine of absolute immunity.

Question 4

The role of the Executive branch of the United Kingdom Government in matters involving claims to jurisdictional immunities of foreign States and their property is confined to responding to requests from the courts for certificates by a Secretary of State (normally the Secretary of State for Foreign and Commonwealth Affairs). These certificates are, in accordance with the constitutional practice of the United

Kingdom, limited to matters which are peculiarly within the knowledge of the Secretary of State. A certificate having this character has traditionally been regarded by the courts in the context of State immunities (as in other contexts) as binding on them, although it will still be for the courts to draw the appropriate legal consequences (the executive taking no part in the definition or delimitation of the scope of jurisdictional immunity in any particular case). The traditional practice is now codified in section 21 of the State Immunity Act 1978 which sets out the matters on which a certificate by or on behalf of the Secretary of State is to be treated as conclusive evidence, namely:

(*a*) whether any country is a State for the purposes of Part I of this Act, whether any territory is a constituent territory of a federal State for those purposes or as to the person or persons to be regarded for those purposes as the head or government of a State;

(*b*) whether a State is a party to the Brussels Convention mentioned in Part I of this Act;

(*c*) whether a State is a party to the European Convention on State Immunity, whether it has made a declaration under Article 24 of that Convention or as to the territories in respect of which the United Kingdom or any other State is a party;

(*d*) whether, and if so when, a document has been served or received as mentioned in section 12(1) or (5) above.

It will be noted that the question whether a given entity is to be regarded as forming part of a sovereign State or as constituting a "separate entity" with much more limited immunity is not one covered by the terms of section 21. This would therefore normally be regarded as a question of foreign law in United Kingdom courts.

Question 5

In general, the principle of reciprocity is not of much consequence in the application by United Kingdom courts of the rules of State immunity. United Kingdom courts do not appear to have attached any practical weight to the question of whether the State being sued in legal proceedings would itself give immunity to the United Kingdom if a similar action were to be brought in the courts of its country. In the *Dollfus Mieg Case* ([1950] 1 All E.R. 747), however, Lord Justice Somervall suggested in the Court of Appeal that "where a foreign government seeks to stay proceedings, the court should be satisfied by evidence that the law of that country grants immunity on the basis that is being sought here." But it is fair to say that, in the House of Lords, Lord Porter cxpressly dissociated from the suggestion that reciprocity might be a relevant factor:

> "It was suggested that immunity would only be granted where the country claiming it, in itself, granted reciprocal immunity to other nations. I can find no authority for this proposition, and in any case it was not taken either before Jenkins J. or in the Court of Appeal, and no material of fact has therefore been presented to your Lordships to enable them to deal with the argument or to ascertain whether the two Governments concerned grant reciprocal immunity or not. In my view, the argument in any case is not established. The question is what is the law of nations by which civilized nations in general are bound, not how two individual nations may treat one another.": [1952] A.C. 582, at p. 613.

While reciprocity has not generally been regarded as an appropriate criterion in international law, the State Immunity Act 1978 pays some regard to reciprocity in that seetion 15 enables Orders in Council to be made restricting immunities and privileges where a lower degree of immunity is accorded by the law of the relevant State, or increasing them if such action is required to give effect to a treaty or other international agreement to which that State and the United Kingdom are parties. The powers in section 15 have been used to give effect to provisions of the Protocol to the Treaty on Merchant Navigation between the United Kingdom and the Soviet Union, signed at London on 3 April 1968. A copy of the State Immunity (Merchant Shipping) (Union of Soviet Socialist Republics) Order 1978 was enclosed with [our] earlier letter. No Order in Council has yet been made with the purpose of restricting the immunities accorded to any foreign State.

Question 6

The State Immunity Act does not distinguish between "public acts" and "non-public acts" in those terms. It does however distinguish between acts which are performed in the exercise of sovereign authority and other acts not so performed. Sections 3-8 set out detailed descriptions of categories of cases in which States will not be accorded immunity, and these cases may collectively be described as involving acts not performed in the exercise of sovereign authority (i.e. acts *iure gestionis*). Section 10 makes provision in regard to ships which is intended to give effect to the distinction between using a ship for purposes related to sovereign authority and for commercial purposes—a distinction set out in the Brussels Convention of 1926 to which this section gives effect. Section 3 of the State Immunity Act defines the term "commercial transaction" which has given difficulty to the courts in many jurisdictions who have attempted to draw a distinction between commercial activities and activities in the exercise of sovereign authority. In this definition, two categories of transaction—contracts for the supply of goods or services and loans or other transactions for the provision of finance (together with related guarantees and indemnities) are expressly characterized as being commercial transactions. As regards other transactions or activities—if these are of a commercial, industrial, financial, professional or other similar character—the courts are required to characterize them as commercial transactions not entitled to immunity unless the State is engaged in the activity "in the exercise of sovereign authority".

An account has already been given in the reply to Question (3) of the two important recent cases—the *Philippine Admiral* and *Trendtex Trading Corporation v. Central Bank of Nigeria*—in which the Privy Council and Court of Appeal have incorporated into English case-law the broad distinction between acts *iure imperii* and *iure gestionis*, denying immunity as regards the latter both for actions *in rem* and actions *in personam*.

Question 7

(*a*) The types of acts of foreign States not covered by immunities are set out in sections 3-11 of the State Immunity Act.

Some of these exceptions to immunity could be regarded as having been already accepted in earlier judicial decisions—in particular section 3 reflects the decision of the Court of Appeal in the case of *Trendtex Trading Corporation v. Central Bank of Nigeria*, section 6 reflects the earlier decision in the case of *Larivière v. Morgan* ((1849) 2 House of Lords cases 1) and section 10 reflects the decision of the Privy Council in the case of the *Philippine Admiral*.

(*b*) There is no recent decided case in United Kingdom courts turning precisely on this point. But where the case comes within the State Immunity Act, the courts would not grant immunity to a foreign State in a dispute relating to a contract for the purchase of goods, whether or not the ultimate object of the contract was for a public purpose or the contract was concluded in the exercise of a "public" or "sovereign" function. The commercial transactions in respect of which immunity will no longer be granted under the Act include "any contract for the supply of goods or services" (section 3(3)(a)).

(*c*) The answer to this question cannot be now regarded as clear, since the recent case in which this question was a crucial issue, *I Congreso del Partido*, is expected to be heard on appeal by the House of Lords. It will be seen from a study of the two judgments delivered in the Court of Appeal by Lord Denning and by Waller L J, that although both judges agreed that regard must be paid to the nature of the act or dispute in question, they differed in applying this approach to a case in which a breach of a commercial contract occurred for political reasons. On the one hand Waller L J said:

> "In my opinion in this case it was the act of the government of the Republic of Cuba which prevented these cargoes from being delivered. I do not think it is possible to say that the act was clearly commercial in its nature. It was not like the *Empire of Iran* a mere refusal to foot the bill for the work done. It was not like the case of *Trendtex Trading Corporation v. Central Bank of Nigeria* (1977) I Queen's Bench 529, where there was a cancellation of contracts because too much had been ordered. No suggestion has been made that it was in the commercial interests of the Republic of Cuba to cease trading with Chile. On the contrary, it was a political decision, a foreign policy decision which bore no relation to commercial interests. The dispute would bring into question "Legislative or international transactions of a foreign government, or the policy of its executive" (see per Lord Denning in *Rahimtoola* (1958) Appeal Cases 422). I am of opinion therefore that subject to certain subsidiary points with which I must deal the Republic of Cuba is entitled to claim sovereign immunity in these two cases."

On the other hand, Lord Denning said:

> "Such an act—a plain repudiation of a contract—cannot be regarded as an act of such a nature as to give rise to sovereign immunity. It matters not what was the purpose of the repudiation. . . . It was in fact done out of anger at the coup d'état in Chile and out of hostility to the new régime. That motive cannot alter the nature of the act. Nor can it give sovereign immunity where otherwise there would be none. It is the nature of the act that matters, not the motive behind it."

Lord Denning thought that there could be no immunity for acts of a government motivated by public interest when those acts came not "out of the blue" but in the context of an existing contract of sale.

(*d*) The State Immunity Act does not in terms direct the courts to have regard to the nature of a transaction rather than to the ulterior motive underlying it; but the exceptions to immunity which are set out in sections 3 to 11 of the Act are so formulated as to require that attention be directed to the objective nature of particular transactions and not to their purpose. This is particularly true of the definition of "commercial transaction" in section 3(3) of the Act.

The Act does not deal expressly with the question of the nature or motive of a *breach* of contract, an issue which has been examined in the *I Congreso del Partido* case, and which is expected to be determined by the House of Lords on appeal.

Question 8

The question of proceedings to enforce liability for some forms of taxation is dealt with in section 11 of the State Immunity Act, which provides that a State is not immune as respects proceedings relating to its liability for value added tax, any duty of customs or excise, or any agricultural levy or rates in respect of premises occupied by it for commercial purposes. Proceedings regarding possible liability for any other form of tax are expressly excluded by section 16(5) of the Act from its provisions dealing with immunity from jurisdiction, but a State would generally be regarded at present as immune from such proceedings under United Kingdom common law. Proceedings in regard to taxation claims are excluded from the European Convention on State Immunity.

For the most part liability for the taxes listed in section 11 would be incurred by a State only in the course of commercial activities. Taxation in connexion with the diplomatic or consular activities is, of course, dealt with separately under the legislation giving effect to the Vienna Convention on Diplomatic and Consular Relations.

The State Immunity Act does not deal with the question of substantive liability to taxation, and there has been no recent legislation on this question. The United Kingdom has found it difficult to deduce from detailed examination of the practice of other States in the field of taxation of foreign sovereigns any very clear rules or principles in this area. The practical position in the United Kingdom in regard to taxation of commercial activities of foreign States in the United Kingdom is as follows: Foreign States enjoy at present complete immunity from UK taxation on income and capital although companies (even if wholly owned by foreign States) whose shares they own would still be liable in principle to normal corporation tax. If however the assets of the company wholly owned by a foreign State were to be transferred to the direct beneficial ownership of that Government, the income arising from the assets would be free both of corporation tax and income tax. Specific legislation (Finance Act, 1972 section 98(4)) gives foreign States a dividend tax credit on equity shares in United Kingdom companies. On the other hand, foreign States are treated as liable to VAT and customs duties (apart from diplomatic or consular purchases or imports). With the exception of diplomatic or consular property, for which special arrangements are made, property occupied by foreign States for commercial purposes is treated as liable for rates and only in a few cases where there was some claim to diplomatic or consular privilege has there been any question of non-payment of rates or claims for exemption.

Question 9

As has been explained, the distinction in United Kingdom law between acts where immunity will be granted and acts where it will not does not turn precisely on whether the acts are public or non-public. To the extent that the term "public acts" may be identified with acts *iure imperii,* United Kingdom courts are entitled to exercise jurisdiction where a dispute involves such acts only on the basis of a waiver of immunity or a voluntary submission to the jurisdiction. It is not thought that there is any substantive difference so far as consequences for immunity are concerned between the terms "waiver" and "submission to the jurisdiction". The rules in regard to submission to the jurisdiction are set out in detail in section 2 of the State Immu-

nity Act. With one exception these rules reflect the previous law as it emerges from decided cases. The exception concerns the rule in section 2(2) that a State may submit to the jurisdiction by a prior written agreement. It was clear from earlier decided cases: *Mighell v. Sultan of Johore* [1894] 1 Q.B. 149, *Duff Development Co. v. Kelantan Government* [1924] A.C. 797 and *Kahan v. Pakistan Federation* [1951] 2 K.B. 1003, that waiver to be effective had to take place "before the court", that is in respect of proceedings actually begun. Section 2(2) has altered this rule but, by virtue of section 23(3), section 2(2) will not apply to any agreement concluded before 22 November 1978 (the date of entry into force of the State Immunity Act).

The exercise of jurisdiction on the basis of a waiver or submission by a foreign State is not regarded by United Kingdom courts as in any way inconsistent with the doctrine of State immunity.

Question 10

(*a*) and (*b*) The rules in force have been set out in the answer to Question (9).

(*c*) The rules in the United Kingdom in regard to counter-claims are set out in section 2(6) of the State Immunity Act. The question of counter-claims has been examined by United Kingdom courts chiefly in the context of diplomatic rather than sovereign immunity, but it is thought that the approach in section 2(6) would even in the absence of the Act have been followed by the courts.

Question 11

It is thought that sufficient material on exceptions or limitations to jurisdictional immunities of foreign States and their property in the United Kingdom has already been set out, particularly in the answers to Questions (3) and (6).

Question 12

The rules applied by United Kingdom courts to ships owned or operated by a foreign State and employed in commercial service have been developed in a series of cases to which reference has already been made. Most significant of the recent decisions which have examined the status of State-owned or operated ships in commercial service are the *Philippine Admiral* and *I Congreso del Partido*. Section 10 of the State Immunity Act now embodies statutory rules in relation to ships, these rules denying immunity to a State, as regards both actions *in rem* and actions *in personam*, if at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes. The primary objective of the rules set out in section 10 was to enable the United Kingdom to ratify the Brussels Convention of 1926 for the Unification of Certain Rules concerning the Immunity of State-owned Ships. The United Kingdom ratification of the Convention however, as the enclosure to Sir Ian Sinclair's letter of 3 July, 1979, makes clear, was accompanied by certain minor reservations, whose essential purpose was either to simplify the structure of section 10 of the State Immunity Act or to take into account its rather complicated inter-relation with the European Convention on State Immunity.

Question 13

If a foreign State applied to the appropriate authorities in the United Kingdom for a patent, licence, permit, or exemption or any other administrative action (for example, planning permission in respect of alterations to buildings) it would normally be treated, as regards procedure or substance, like any other applicant. But the nature of the permission being sought would clearly be relevant. Special regard might

have to be paid to the status of the applicant as a foreign State or to particular treaty obligations owed to it—for example, a foreign embassy would be given assistance in finding diplomatic accommodation because of Article 21 of the Vienna Convention on Diplomatic Relations. Such assistance would not be given to other private persons.

Question 14

Section 6 of the State Immunity Act provides that a State is not immune as respects proceedings relating to title to immovable property in the United Kingdom, as well as other proceedings relating to immovable property; but, by virtue of section 16(1) of the Act, a State would still be entitled to assert immunity in proceedings concerning its title to or its possession of property used for the purposes of a diplomatic mission. There are in addition in section 6 exceptions to immunity in respect of proceedings relating to any interest of the State in movable or immovable property, being an interest arising by way of succession, gift or *bona vacantia*. The fact that a State has or claims an interest in any property moreover does not preclude a court from exercising its ordinary jurisdiction on a succession matter. Foreign States could also be subject to the jurisdiction of United Kingdom courts in regard to other rights or claims to movable property if the action fell within other exceptions to immunity set out in the Act (for example, section 3, section 7, section 8 or section 10).

The principles set out in section 6 of the Act reflect to some extent principles which may be derived from earlier English cases (for example, *Larivière v. Morgan*, and Lord Denning's judgment in *Thai-Europe Tapioca Service Ltd v. Government of Pakistan*).

Question 15

A foreign State may inherit or become a legatee or a beneficiary in a testate or intestate succession. Because of the provisions explained in the answer to question (14) a voluntary submission is not, in fact, essential to enable the courts to settle legal questions which may arise in such a case.

Question 16

In the case of *Trendtex Trading Corporation v. Central Bank of Nigeria*, the court permitted the property of the Nigerian State to be made the subject of a "Mareva" injunction. Under the Mareva injunction procedure a defendant oridinarily resident and domiciled outside the jurisdiction may be enjoined from moving assets out of the jurisdiction of English courts where there is a good arguable case against him and some possibility that because he does not have a permanent business presence in this country, funds might not be available to meet any ultimate judgment. It is possible that in a case where the facts preceded the entry into force of the State Immunity Act, the courts might follow this precedent (as has already occurred) and grant such an injunction. But future practice must be regarded as uncertain.

The position was altered in section 13 of the State Immunity Act as regards cases not excluded from the operation of the Act by section 23(3). Section 13(2)(a) provides that, subject to the possibility of the court awarding interim attachment by consent, "relief shall not be given against a State by way of injunction". The generality of this provision would exclude the possibility of a court attaching assets of a foreign State defendant pending proceedings.

The Mareva injunction is a relatively recent remedy, and, except in the case of

ships, attachment of property has been relatively rare in English courts. There has not therefore been consideration in earlier case-law of whether the nature or use of property should be relevant in considering whether to allow attachment. The State Immunity Act does not distinguish in this context in regard to the nature or use of property involved.

Question 17

Prior to the State Immunity Act, there was no case in which the United Kingdom courts permitted forcible execution of a judicial decision against a foreign State. The cases clearly established that immunity from execution must be regarded as distinct from immunity from jurisdiction, so that even where a waiver was granted in respect of proceedings, a separate waiver would be required before execution could take place.

Section 13 of the State Immunity Act has however altered the previous position so that in cases within the Act execution against property in use or intended for use for commercial purposes is permitted with certain safeguards, exception being made for the property of States party to the European Convention on State Immunity. The detailed rules are set out in section 13(2), (3) and (4). A distinction is drawn in regard to the nature of the property in that only property which is for the time being in use or intended for use for commercial purposes may be subjected to any process for the enforcement of a judgment or arbitration award.

It should also be noted that section 14(4) provides that property of a State's Central Bank or other monetary authority shall not for the purposes of section 13(4) be regarded as in use or intended for use for commercial purposes. The effect of section 14(4) is that assets of a foreign State Central Bank or other monetary authority, whether or not the bank or authority is a separate entity from the State, are absolutely protected from any form of attachment or execution.

Question 18

The procedural privileges accorded to a foreign State against which proceedings are instituted in the United Kingdom are set out in section 12 of the State Immunity Act. This section applies to any proceedings instituted after the coming into force of the Act (section 23(4)).

Question 19

There are no special provisions in United Kingdom law in regard to costs or security for costs for a foreign State in the event of its participation in a judicial process.

Question 20

In deciding whether to invoke jurisdictional immunities before foreign courts, the United Kingdom, at least in recent years, has tended to have regard to the domestic law of the State concerned in the matter of State immunity (unless this was thought to be inconsistent with general international law) rather than to the position as it would be if proceedings against that State were instituted in the United Kingdom.

United Kingdom courts will not in giving effect to the rules of State immunity pay any regard to the extent to which the UK claims immunity from the jurisdiction of foreign courts.

Y. UNITED STATES OF AMERICA

Question 1

Yes, see attached copy of the Foreign Sovereign Immunities Act of 1976 (the "FSI Act") (Public Law 94-583; 90 Stat. 2891; 28 U.S.C. 1330, 1332, 1602-1611, 1391, 1441) as well as implementing regulations, entitled "Service on Foreign State," part 93 of subpart J of Title 22 of the code of Federal Regulations.

Question 2

Yes, U.S. courts accord jurisdictional immunities to foreign States and their property based on the provisions of the enclosed FSI Act (Tab 1), which codified the so-called "restrictive" principle of sovereign immunity as presently recognized in international law. Section 1602 of the Act in part describes this principle of international law. Sections 1603-1607 and 1609-1611 define the general jurisdictional immunity of foreign States as well as exceptions and other qualifications with respect to attachment, execution, and other matters.

Question 3

The main thrust of the FSI Act is to adopt the restrictive doctrine of sovereign immunity. Foreign States are not immune from the jurisdiction of U.S. courts with respect to defined types of commercial activity carried on in the United States, rights in certain types of commercial property located in the United States, certain suits in which money damages are sought for property losses or personal injury or death arising out of a tortious act or omission occurring in the United States, suits in admiralty based on the commercial activity of a foreign State, and in certain other instances (see Section 1605 of the Act). Furthermore, the property of a foreign State is subject to attachment and execution in some instances in connection with commercial activities. (See Sections 1610 and 1611 of the Act.)

Question 4

Since the passage of the FSI Act in 1976, the Executive Branch has only a limited role in sovereign immunity cases. The Executive Branch appears in those suits in which the Constitutionality of the FSI Act or any part thereof is challenged. The Executive Branch may appear as *amicus curiae* in cases of significant interest to the Government. If a court should misconstrue the new statute, the Executive Branch may well have an interest in making its views on the legal issues known to an appellate court.

Question 5

The FSI Act does not apply the principle of reciprocity to matters relating to the jurisdictional immunities of States and their property. The only U.S. statute that contains a provision applying the principle of reciprocity concerns application by foreign States for copyrights. See the answer to Question 13 below.

Question 6

The FSI Act makes a distinction between "public" and "non-public" acts of foreign States. The Act "restricts" the immunity of a foreign State to suits involving its public acts (*jure imperii*). Such immunity does not extend to suits based on the commercial or private acts (*jure gestionis*) of a foreign State. See Section 1605 for the general exceptions to the jurisdictional immunity of a foreign State. Among the

activities of a foreign State which would be included within the definition of commercial activity and thus "non-public" acts would bc a foreign government's sale of a service or a product, its leasing of property, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation. Private acts of a foreign State which also would not be immune include inheriting or receiving as a gift property located in the United States as well as being liable for noncommercial torts.

Question 7

(*a*) No, jurisdictional immunities cannot be successfully invoked before U.S. courts in connection with "non-public" acts of foreign States unless a foreign State could claim such an immunity by virtue of a stipulation in an international agreement. See Sections 1604 and 1605 of the FSI Act.

The types of "non-public" acts of foreign States not covered by immunities as specified in Seetion 1605 include commercial activity with certain types of contacts with the United States; rights in property taken in violation of international law; rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States; noncommercial torts; and suits in admiralty based on a commercial activity.

(*b*) No. Section 1603(d) of the FSI Act provides that the commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose. In *United Euram v. Union of Soviet Socialist Republics*, 461 F. Supp. 609 at 611 (1978), a U.S. district court, after quoting Section 1603(d), emphasized that the "purpose of an activity—here, allegedly, to promote the goals of the cultural exchange agreement—is irrelevant in determining its commercial character."

(*c*) No. In some circumstances, the foreign government might plead as a defense the U.S. Act of State doctrine, which "precludes the courts of this country [the United States] from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401. (1964) The doctrine applies to "acts done within their own States, in the exercise of governmental authority...." *Underhill v. Hernandez*, 168 U.S. 250, 252. (1897) *However, the Act of State doctrine does not extend "to acts committed by foreign sovereigns in the course of their purely commercial operations." Dunhill of London, Inc. v. The Republic of Cuba*. 425 U.S. 682, 706 (1976) (Plurality opinion; emphasis added).

(*d*) The nature of the transaction is decisive of the question of State immunity. See Section 1603(d) of the FSI Act. However, in addition to acts falling within the Act of State doctrine described in the answer to Question 7(*c*) above, certain types of regulation by foreign States of commercial activity will be considered under Section 1604 as public in character and a dispute concerning a commercial transaction may be dismissed by a U.S. court on the basis of the general sovereign immunity provided for governmental activity in Section 1604. For example, in *International Association of Machinists v. Organization of Petroleum Exporting Countries*, (OPEC), 477 F. Supp. 553, 565-69 (C.D. Cal. 1979), a U.S. federal court held that the regulation of oil pricing by OPEC members was a public, not commercial, activity; the court dismissed the plaintiff's complaint alleging price setting in violation of U.S. antitrust laws.

Question 8

Section 892 of Title 26 of the U.S. Code (the Internal Revenue Code) provides in general that income from sources within the United States received by a foreign government is not included in gross income for the purposes of the Internal Revenue Code and is exempt from taxation. This section reads as follows:

> "The income of foreign governments or international organizations received from investments in the United States in stocks, bonds, or other domestic securities, owned by such foreign governments or by international organizations, or from interest on deposits in banks in the United States of moneys belonging to such foreign governments or international organizations, or from any other source within the United States, shall not be included in gross income and shall be exempt from taxation under this subtitle."

On August 15, 1978, the Commissioner of Internal Revenue proposed regulations relating to the taxation of income of foreign governments. These regulations, which have not yet been adopted, would not exempt a foreign government from taxation for the following types of income: (1) income derived by a foreign sovereign from commereial activities in the United States; (2) income derived by an organization created by a foreign sovereign that does not qualify as a controlled entity (an organization wholly owned by a foreign sovereign which, *inter alia*, does not engage in the United States in commercial activities on more than a de minimis basis); (3) income derived by a controlled entity from commercial activities in the United States even though on a de mirnimis basis.

A copy of the proposed regulations [is reproduced] in 43 *Federal Register* 36111-36114.[18]

Question 9

Except as otherwise provided in an international agreement, a foreign State is immune from the jurisdiction of U.S. courts except as provided in Sections 1605, 1606, and 1607. The exceptions contained in Sections 1605 through 1607 deal also with waivers of immunity (Section 1605(a)(1)) and counterclaims in any action brought by a foreign State or in which a foreign State intervenes (Section 1607). Thus, a U.S. court has jurisdiction over the public acts of foreign States in instanees in which they have waived their immunity or they have brought or intervened in an action.

Question 10

(*a*) Section 1605(a)(1) of the FSI Act provides that a foreign State shall not be immune from the jurisdiction of U.S. courts in any case in which the foreign State has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign State may purport to effect except in accordance with the terms of the waiver. Though the FSI Act does not define the phrase "implicit waiver", examples of an implicit waiver would include cases in which the foreign State has agreed to arbitration with respect to the matter in question, where a foreign State has agreed that the law of a particular country should govern a contract, or where a foreign State has filed a pleading on the merits. The

[18] See Part I.

notwithstanding clause is designed to exclude a withdrawal of the waiver both after and before a dispute arises except in accordance with the terms of the original waiver.

Section 1604 of the FSI Act makes clear that international agreements regulating the subject of sovereign immunity take precedence over the general rules of sovereign immunity provided for in the FSI Act. For example there are eleven such treaties of friendship, commerce, and navigation concluded by the United States waiving the immunity of publicly owned and controlled enterprises of the contracting parties and subjecting such enterprises to suit, taxation and execution of judgment. These treaties are entered into with Nicaragua, Art. XVIII, 9 U.S.T. 449 (1956); Korea, Art. XVIII, 8 U.S.T. 2217 (1956); Netherlands, Art. XVIII, 8 U.S.T. 2043 (1956); Federal Republic of Germany, Art. XVIII, 7 U.S.T. 1839 (1954); Japan, Art. XVIII, 4 U.S.T. 2063 (1953); Denmark, Art. XVIII, 12 U.S.T. 908 (1951); Greece, Art. XIV, 5 U.S.T. 1829 (1951); Israel, Art. XVIII, 5 U.S.T. 550 (1951); Ireland, Art. XV, 1 U.S.T. 785 (1950); Italy, Art. XXIV, 63 Stat. 2255, T.I.A.S. 1965 (1948).

(*b*) A foreign State may voluntarily submit to the jurisdiction of a U.S. court through a waiver pursuant to Section 1605(a)(1) of the FSI Act or by initiating or intervening in an action in a U.S. court.

(*c*) With respect to any counterclaim, Section 1607 of the FSI Act denies immunity to a foreign State which brings or intervenes in an action in three situations. First, immunity would be denied as to any counterclaim for which the foreign State would not be entitled to immunity under the general exceptions to immunity set forth in Section 1605 (e.g., waiver, commercial activity), if the counterclaim had been brought as a direct claim in a separate action against the foreign State. This provision is based upon Article I of the European Convention on State Immunity. Second, even if a foreign State would otherwise be entitled to immunity under Sections 1604-1606, it would not be immune from a counterclaim "arising out of the transaction or occurrence that is the subject matter of the claim of the foreign State." Third, notwithstanding that the foreign State may be immune in these first two situations, the foreign State nevertheless would not be immune from a setoff.

Question 11

Section 1604 of the FSI Act subjects the immunity of foreign States to "existing" treaties to which the United States was a party at the time of the enactment of the FSI Act and any future treaties. The FSI Act would thus not alter the rights or duties of the United States under the NATO Status of Forces agreement or similar agreements with other countries; nor would it alter the provisions of commercial agreements to which the United States is a party, e.g., treaties of friendship, commerce, and navigation and bilateral air transport agreements calling for exclusive non-judicial remedies through arbitration or other procedures for the settlement of disputes. Section 1605(a) of the FSI Act sets forth the general circumstances in which a claim of sovereign immunity by a foreign State, political subdivision, agency or instrumentality of a foreign State would not be recognized in a U.S. court. These exceptions include any case where (1) the foreign State has waived its immunity, (2) the foreign State has commercial activities with a nexus with the United States, (3) rights in property taken in violation of international law are in issue in certain instances involving a foreign State or agency or instrumentality of a foreign State, (4) rights in immovable, inherited, and gift property are concerned, (5) non-

commercial torts occurring in the United States might give rise to money damages. Section 1605(b) provides further limitations on the jurisdictional immunities of foreign States with respect to maritime liens.

The FSI Act further provides in Section 1606 that a foreign State shall be liable in the same manner and to the same extent, i.e., actual or compensatory damages, as a private individual under like circumstances; but a foreign State except for an agency or instrumentality thereof shall not be liable for punitive damages.

For additional information concerning the exceptions and limitations to immunity of foreign States with respect to counterclaims, see the answer to Question 10(c).

Question 12

See Section 1605(b) of the Act, which denies immunity to a foreign State in cases where (i) a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of that foreign State, (ii) the maritime lien is based upon a commercial activity of the foreign State, and (iii) the specified notice of service of process provisions concerning a suit in admiralty have been observed. The purpose of this section is to permit a plaintiff to bring suit in a U.S. district court with respect to a cause of action arising out of a maritime lien involving a vessel or cargo of a foreign sovereign without arresting the vessel by instituting an in personam action against the foreign State in a manner analogous to bringing such a suit against the United States. The special admiralty service of notice provisions are designed to avoid arrests of vessels or cargo of the foreign State.

Section 1605(b) would not preclude a suit in accordance with other provisions of the Act such as pursuant to the commercial activity exception to immunity in Section 1605(a)(2).

Question 13

A foreign State would be treated substantially in the same fashion as any other applicant, but it would receive special procedural treatment in some instances.

With respect to patents, the United States requires that the person responsible for an invention submit an application to receive a patent. If a U.S. Government officer makes an invention while working in a U.S. Government office the officer must submit an application for a patent and then assign any rights deriving therefrom to the U.S. Government. In like fashion, if a foreign government wishes to patent an invention, the person responsible for the patent must apply for the patent and then assign any rights deriving therefrom to the foreign government pursuant to Section 261 of Title 35 of the U.S. Code, which reads in part as follows:

> "A certificate of acknowledgement under the hand and official seal, ... in a foreign country, of a diplomatic or consular officer of the United States or an officer authorized to administer oaths whose authority is proved by a certificate of a diplomatic or consular officer of the United States, shall be prima facie evidence of the execution of an assignment, grant or conveyance of a patent or application for patent."

With regard to copyrights, the United States protects literary, musical, dramatic, and other works published by a "sovereign authority of a foreign nation that is a party to a copyright treaty to which the United States is also a party." Section

104(b)(1) of Title 17, Appendix, of the U.S. Code. In the absence of a treaty, the United States provides protection on the basis of reciprocity pursuant to this Section 104(b)(4) of the U.S. Code, which reads as follows:

> "The works specified ... are subject to protection if:
>
> "(4) the work comes within the scope of a Presidential proclamation. Whenever the President finds that a particular foreign nation extends, to works by authors who are nationals or domiciliaries of the United States or to works that are first published in the United States, copyright protection on substantially the same basis as that on which the foreign nation extends protection to works of its own nationals and domiciliaries and works first published in that nation, the President may by proclamation extend protection under this title to works of which one or more of the authors is, on the date of first publication, a national, domiciliary, or sovereign authority of that nation, or which was first published in that nation. The President may revise, suspend, or revoke any such proclamation or impose any conditions or limitations on protection under a proclamation."

In other respects, applications by foreign States for copyrights are treated in the same manner as an application by an individual.

There is no other U.S. federal legislation dealing with how U.S. Government administrative authorities should treat an application by a foreign State for a license, permit, exemption or other administrative action.

The U.S. Department of State is unaware of any legislation by States of the United States which would cause foreign States to be treated in a different fashion than other applicants who seek licenses, permits, or similar administrative action.

Question 14

Section 1605(a)(4) of the FSI Act provides that a foreign State shall not be immune from the jurisdiction of U.S. courts in any case in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue. Under this section, a foreign State would not be immune from an action in a U.S. court to adjudicate questions of ownership, rent servitudes, and similar matters, though a foreign State's possession of diplomatic and consular premises would not be disturbed.

Question 15

Yes, a foreign State can inherit or become a legatee or a beneficiary in a testate succession. In an intestate succession, the State of the United States, not a foreign State, would take any property in question. No. A voluntary submission is not essential to a meaningful involvement in the judicial process.

The pertinent portions of Section 1605(a)(4), which govern litigation concerning such transactions of foreign States, provide that a foreign State shall not be immune from the jurisdiction of U.S. courts in any case in which rights in property in the United States acquired by succession or gift are in issue. The reason that immunity is not granted with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary is that the foreign State in claiming rights in a decedent's estate claims the same right which is enjoyed by private persons.

Question 16

Prior to an executory judicial decision, the property of a foreign State enjoys immunity from attachment and like measures unless there has been a waiver.

Section 1610(d) of the FSI Act provides that a foreign State, including a political subdivision of a foreign State or an agency, or an instrumentality of a foreign State, shall not be immune from attachment prior to the entry of judgment in any action brought in a U.S. court or prior to the elapse of a reasonable period of time following the entry of judgment if the foreign State has explicitly waived its immunity from attachment prior to judgment and if the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign State.

The FSI Act makes no distinction based on the nature or on the use of property involved with respect to attachment and other provisional or interim measures prior to an executory judicial decision.

Question 17

Section 1609 of the FSI Act provides a foreign State with immunity from attachment, arrest, and execution subject to the exceptions created in certain treaties or the exceptions provided in Section 1610. The exceptions created by treaty are found in the Geneva Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958 (15 UST 1606), which recognizes the liability to execution under appropriate circumstances of State-owned vessels used in commercial service as well as in the treaties described in the answer to Question 10(*a*). Section 1610 provides that the property of a foreign State, political subdivision, agency or instrumentality of a foreign State used for commercial activity in the United States shall not be immune from attachment in aid of execution or from execution upon a judgment entered by a U.S. court in any of the following circumstances: (1) explicit and implicit waivers; (2) property used by a foreign State for a commercial activity in the United States, provided that the commercial activity gave rise to the claim upon which the judgment is based; (3) property of a foreign State which is used for a commercial activity in the United States and which has been taken in violation of international law or has been exchanged for property taken in violation of international law; (4) property of a foreign State which is used for a commercial activity in the United States and is either acquired by succession or gift or is immovable, except diplomatic and consular missions and the residences of the chiefs of such missions; (5) obligations owed to a foreign State under a policy of liability insurance.

Section 1610(b) provides for execution against the property of agencies or instrumentalities of a foreign State in additional circumstances to those provided in Section 1610(a). If an agency or instrumentality is engaged in a commercial activity in the United States, the plaintiff may obtain an attachment in aid of execution or execution against *any* property, commercial or noncommercial, of the agency or instrumentality, but only in the following two circumstances: (1) where the agency or instrumentality has waived its immunity from execution against its property; (2) property of an agency or instrumentality engaged in a commercial activity in the United States in order to satisfy a judgment relating to a claim for which the agency or instrumentality is not immune by virtue of Section 1605(a)(2), (3), or (5), or 1605(b).

Section 1611(a) provides that, notwithstanding the exceptions to the immunity

from attachment or execution contained in Section 1610, the property held by designated international organizations shall not be subject to attachmcnt or any other judicial process impeding the disbursement of funds to a foreign State. Section 1611(b) provides that, notwithstanding the exceptions in Section 1610, the property of a foreign State shall be immune from attachment and execution if the property is that of a foreign central bank held for its own account (unless the bank or parent foreign government has waived immunity) or if the property is or is intended to be used in connection with a military activity and is either of a military character or is under the control of a military authority or dcfense agency.

Question 18

Section 1330 of the FSI Act provides that U.S. federal district courts shall have original jurisdiction "of any nonjury civil action against a foreign state". This provision, which does not permit a jury trial in any case involving a foreign State, creates a privilege for foreign States not available to other private party defendants in the United States.

Section 1608(a)(4) of the FSI Act provides that a foreign State shall receive through diplomatic channels notice of service of process from a U.S. court if notice cannot be accomplished by special arrangemcnt, international convention, or by mail with a signed receipt.

Section 1608(d) provides that in any action brought in a U.S. court, a foreign State, political subdivision thereof or any agency or instrumentality of a foreign State serve an answer or other responsive pleading within 60 days, not 30 days as is provided for other defendants.

Section 1608(e) provides that "No judgment by default shall be entered" by a U.S. court against a foreign State, a political subdivision thereof, or an agency or instrumentality of a foreign State, "unless the claimant establishes his claim or right of relief by evidence satisfactory to the court." Judgments may be entered against other defendants in U.S. courts without the plaintiff satisfying the judge that there is a valid cause of action.

Subsection 1610(c) requires the intervention of courts before an attachment in aid of execution or execution can be had. These provisions accord a foreign State a procedural privilege in those jurisdictions of the United States where attachment and execution to satisfy a judgment may be had without a court order simply by making application to a clerk or a local sheriff.

Subsection 1610(d) permits attachment prior to judgment only if the foreign State has waived its immunity from such attachment and if the purpose of the attachment is to secure satisfaction of a judgment, not to secure jurisdiction. The property of other parties is generally subject to the possibility of pre-judgment attachment and attachment to secure jurisdiction.

Section 1441(d) of the FSI Act permits a foreign State to remove any civil action brought in a State court "to the district court of the United States for the district and division embracing the place where such action is pending". This section also provides that "upon removal the action shall be tried by the court without a jury." A private party has a more circumscribed right of removal.

Question 19

No.

Question 20

No, the United States is not inclined to invoke jurisdictional immunities before foreign courts, where, in like circumstances, none would be accorded to foreign States by U.S. courts. This policy dates from the early 1970's when the U.S. Government adopted the policy of not pleading sovereign immunity abroad in instances where, under the restrictive principle of sovereign immunity, the U.S. Government would not recognize a foreign State's immunity in the United States.

U.S. courts in applying the Foreign Sovereign Immunity Act of 1976 do not grant jurisdictional immunities to foreign States on the basis of the extent to which the United States is likely to claim immunities from foreign jurisdiction.

Z. VENEZUELA

Question 1

There are no laws or regulations in our State which provide specifically for jurisdictional immunities for foreign States and their property, nor are there laws or regulations which provide for non-exercise of jurisdiction over foreign States and their property without their consent.

Question 2

Under our internal law, Venezuelan courts do not have the authority to deal with lawsuits against foreign States and their property. This is in accordance with the principles of international law upheld by Venezuela. As a result, no Venezuelan court has adopted a decision exempting a foreign State and its property from jurisdiction.

Question 3

In Venezuela, the courts have not established judicial practice in regard to the jurisdictional immunity of foreign States and their property, so we cannot point to a main trend in such judicial practice. Venezuelan courts are bound by the very precise powers conferred on them by law to regard as "absolute" the immunity from jurisdiction enjoyed by foreign States and their property.

Question 4

The executive branch has no special role in this regard since, by virtue of the principle contained in article 118 of the Constitution providing for the separation of public powers in Venezuela, Venezuelan courts (the judicial branch) carry out their duties as required.

Question 5

There are two sides to this question: (*a*) a general side, and (*b*) a second side referring specifically to Venezuela.

(*a*) The principle of reciprocity in matters relating to jurisdictional immunities of States and their property *is* applicable and it can be applied either legislatively or diplomatically, in other words through a law or through a treaty.

(*b*) In all cases, such reciprocity would operate on the assumption that a State, like Venezuela, would abandon its "absolute" doctrine in order to establish the "relative" doctrine on a reciprocal basis.

Question 6

We do not make any distinction, as far as jurisdictional immunities of foreign States and their property are concerned, between "public acts" and "non-public acts".

Question 7

Since we answered "no" to question 6, there is no need for us to answer question 7.

Question 8

Under our internal law, all activities carried on by a foreign State in Venezuela are public acts. As a result, any act, including a commercial activity carried on by the diplomatic representation or an institute or official agency of the foreign States with the approval of the Venezuelan Government, would enjoy the tax exemptions which States grant one another by virtue of *comitas gentium* and to which individuals are not entitled.

Question 9

For the reasons given above, Venezuelan courts cannot entertain jurisdiction over the public acts of foreign States.

Question 10

Since the principle of the "absolute" doctrine is in force in Venezuela, none of these rules exists in Venezulean law to justify the authority of Venezuela's courts to deal with lawsuits against foreign States.

Question 11

There are no exceptions or limitations under our internal law to the general principle of the jurisdictional immunity of foreign States and their property. As a result, no such exceptions or limitations are provided for in our laws and regulations or by judicial or government practice.

Question 12

The legal status of ships owned or operated by a foreign State and employed in commercial service is that accorded to such ships in such circumstances under the principles of international law: merchant ships. This accords with the Brussels Convention of 10 April 1926 on the Immunity of State-owned ships which, on this point, constitutes a legislative treaty.

Question 13

Our internal law does not provide for foreign States to apply for patents, licenses or permits since our Industrial Property Law provides only for private individuals, whether Venezuelan or aliens, to apply for patents. As a result, any action in this connexion would be possible only if there was a bilateral or multilateral treaty or convention which authorized it.

Question 14

A foreign State cannot succeed to property or own it by such title in Venezuela since succession is provided only for private individuals, whether nationals or aliens, whom the law recognizes as eligible to succeed. The only way that a foreign State can acquire an immovable property in Venezuela is in accordance with article 8, second paragraph, of our Consititution which provides:

"Foreign States may acquire, within a specified area, under guarantees of reciprocity and with limitations established by law, only real property that is necessary for the seat of their diplomatic and consular representation. The acquisition of real property by international organizations may be authorized only in accordance with conditions and restrictions established by law. In all these cases sovereignty over the land is retained."

It is thus clear that the foreign State can only acquire by construction or purchase the immovable property necessary for the seat of its diplomatic or consular representation. This is what Venezuela has done recently, on a reciprocal basis, in purchases of immovable property in London, Bogota, Buenos Aires and other capitals for its Embassies.

Question 15

A foreign State cannot inherit or become a legatee or a beneficiary in a testate or intestate succession, since it is not one of the persons which Venezuelan law recognizes as entitled to succeed as provided in the Civil Code. The beneficiary or legatee State would be in the same situation, in view of the provisions described in our answer to the previous question.

Question 16

There are no laws or regulations in Venezuela which provide for the judicial case described in this question. Under general or customary international law, the foreign State's representation or the latter's property enjoy the jurisidictional immunities already granted by Venezuela to diplomatic officials, in accordance with laws and conventions such as the Law of the Immunities and Privileges of Foreign diplomatic Officials, 1945, and the Vienna Convention on Diplomatic Relations, 1961, both of which are in force in Venezuela.

Question 17

This question is already covered by our answer to the previous question, since that question referred to preventive judicial measures and this one refers to definitive judicial measures.

Question 18

No procedural privileges are accorded to foreign States under our laws since, as we already explained above, a foreign State cannot be involved in judicial proceedings in Venezuela.

Question 19

This question is related to the previous question and our answer to that question therefore also applies here.

Question 20

It is only logical that Venezuela, which in accordance with its internal law and the principles of international law upholds the "absolute" doctrine in the matter of the jurisdictional immunities of foreign States and their property, should invoke such immunities itself were a foreign court to deal with a case against a Venezuelan institute or government agency in which the Venezuelan State was involved on a secondary basis or by association. Pending the codification of international law in this connexion, such matters will hve to be regulated on the basis of reciprocity which, as

we know, is not a legal principle but nonetheless serves to show the direction which multilateral international rules should take.

AA. YUGOSLAVIA

Question 1

The question of jurisdictional immunities for foreign States and their property is regulated, in principle, by Article 26 of the Law on Litigious Procedure (*Official Gazette of the SFRY*, No. 4 of 14 January 1977). This article stipulates the right of jurisdictional immunities for foreign States and international organizations in such a way that applicable in this respect are "the provisions of international law"; however, *in case of doubt as to the existence and the extent of immunity explanations are provided by the Federal Organ for the Administration of Justice*.

For the immunity of the property of a foreign State, of importance is the provision of Article 13 of the Law on Executive Procedure (*Official Gazette of the SFRY*, No. 20/78). This Article contains a provision whereby the property of a foreign State is not subject to the execution nor attachment, without the prior consent of the Federal Organ for the Administration of Justice, except in case that a foreign State has explicitly agreed to the execution, that is, attachment. Note should be taken of the fact that this provision relating to the executive procedure has been taken over from the previous Decree on the Procedure Applicable to the Execution of the Property of a Foreign State in Yugoslavia (*Official Gazette of the FPRY*, No. 32/52).

The aforementioned regulations do not, therefore, contain the rules and criterion when to recognize the "judicial" and "executive" immunity for a foreign State; instead reference is made to provisions of international law.

As regards the immunity of foreign States from the administrative procedure see the replies to question 13.

Question 2

Regulations mentioned in answer 1 oblige the courts in the SFRY to, in principle, recognize the immunity for foreign States and their property in conformity with the provisions of international law. The lack of court practice, especially of the in-depth study and analysis of this practice, makes impossible the reaching of meaningful conclusions on court practicc. There were only individual court cases, namely, those involving Embassies in Belgrade in connection with disputes about business and office premises, etc. Since court action was initiated by a foreign State, the respective foreign State thereby waived the jurisdictional immunity by bringing action in the court on a specific matter.

Question 3

It is difficult to speak of the trends of the judicial practice on the basis of reasons enumerated under Ad. 2. However, the theory indicates that it is necessary to proceed from the "functional" jurisdictional immunities, so that in each specific case it is necessary to establish in what capacity does a State as a legal person appear as a participant in legal relationships. Jurisdictional immunity would be recognized only then if it is possible to establish from the circumstances of a case that a foreign State acted as a bearer of the sovereignty and public authority (*acta jure imperii*).

Question 4

The answer to this question is contained in the text on legal regulations (see Annex[19]) which entrust the Federal Secretariat for the Administration of Justice and Organization of Federal Administration, as a representative of the executive authority, with specific authorizations regarding the establishment of the extent and limits of the application of the immunities of foreign States. Therefore, the role of the executive authority can be significant.

Question 5

Even though the modest court practice does not offer possibility for an answer which would be based on judicature, it is believed that it does not constitute a presumption for the recognition of reciprocal jurisdictional immunity, in spite of the fact that literature defends this element as important for the existence of this right. Instead a retortion could be expected, in conformity with the principles of international law, in case that other States fail to respect the immunity of the SFR of Yugoslavia and of its property.

Question 6

The laws neither specifically, nor in principle, make any distinction between the jurisdictional immunity of foreign States and their property, whether these concern "public acts" or "non-public acts" of foreign States. This means that a public act of a foreign State could not in all instances imply also the recognition of the jurisdictional immunity in case of a legal act which, in its intent and character, constituted exclusively a property-legal relationship. However, if an inference could be drawn from a public act that a foreign State acted in the function of a bearer of public authority, that is, sovereignty, then this would in principle constitute a basis for the recognition of jurisdictional immunity. However, it can be deduced from the text of the former Decree on Procedure for the execution of property of foreign States in Yugoslavia, which was in force from 1952 to 1978, that the immunity from the execution would in no way apply to purely property relationship of State economic enterprises in case of claims, that is, disputes relating to the operation of such enterprises. This points to the conclusion that jurisdictional immunity would be limited only to those relationships concerning public acts and interests of foreign States which are linked to the attributes of that State as a bearer of sovereignty and public authority.

Question 7

The answer to this question is partially contained in the reply to the preceding question.

Under sub-paragraph (*a*), it is not possible to provide an explicit answer to this question in view of the absence of the practice and elaborate theoretical analysis of this subject-matter.

Under sub-paragraph (*b*), an answer could be given to the effect that if the analysis of a factual state of each concrete case, above all the content and the purpose of a contract of purchase of goods, could prove that the contract was concluded for the purpose of exercising a public function, in that case a foreign State would be accorded jurisdictional immunity.

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[19] See Part I.

Under sub-paragraph (*c*), although there is no court practice, a foreign State would be granted immunity in case of a breach of contract of sale if it was established that the State was motivated by justified public interests.

Under sub-paragraph (*d*), it can be said that the nature of commercial transaction, as well as of other contracts of purchase of goods, would not in itself be decisive of the question of State immunity. In this case also the actual motives of a commercial transaction, that is, reasons, the nature and objectives of that legal transaction, would be decisive for the decision whether there exists jurisdictional immunity or not.

Question 8

Foreign legal persons, including foreign States, are not exempt from the payment of taxes, duties or other levies, unless an international agreement stipulates otherwise.

Question 9

Court practice entertains the possibility whereby a foreign State can waive jurisdictional immunity. Thereby, and only in a concrete case, would such an immunity be voluntarily suspended. Since it is believed that jurisdictional immunity constitutes a specific privilege of a foreign State, it can, therefore, proceeding from its own interests, waive such a privilege. In literature quoted is a decision of the Supreme Court of Serbia (GŽ-3643/66) in which a position was taken to the effect that in a dispute, arising in connection with the execution requested by a foreign State, from a Court of General Competence, such a State could no longer in the same dispute raise the question of jurisdictional immunity, since, in the specific case, it has waived jurisdictional immunity. However, courts, in principle, do not have the right to exercise court competences in connection with the examining of public acts of a foreign State.

Question 10

The regulations of the SFR of Yugoslavia do not contain explicit provisions on the waiver of jurisdictional immunities of foreign States, nor on a voluntary submission by foreign States. However, the answer given under Ad. 9 would be applicable in principle.

Question 11

In the SFR of Yugoslavia there do not exist provisions excluding or restricting the immunity of foreign States, but—as already stated—[they] invoke "the provisions of international law", while the execution or attachment of property of a foreign State cannot be effected without the consent of a competent federal organ of the executive authority. Here, understandably, account should be taken of provisions of a number of international conventions which prohibit the execution of specific type of property of a foreign State or property serving for specific purposes.[20]

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[20] See: The Vienna Convention on Diplomatic Relations, Article 22, paragraph 3, Article 24 and Article 27, paragraph 3.

The Vienna Convention on Consular Relations, Article 33, Article 35, paragraphs 2 and 3, Article 61.

The Convention on Special Missions, Article 25, paragraph 3, Article 26, Article 28, paragraphs 2 and 4.

Question 12

Vessels used for commercial purposes which are the property of a foreign State or a State acting as the operator of the vessel, enjoy the same status as private commercial vessels. Special status is accorded to vesscls used for public purposes—vessels of customs, sanitary (health) and similar control and, of course, war vesscls. In accordance with Article 869 of the Law on Maritime and Inland Navigation of 1977, foreign and Yugoslav war vessels as well as public and sanitary vessels of identical status cannot be the subject of execution or attachment.

Question 13

A State's request addressed to administrative organs for patent, licence, permit or any other administrative measure would be considered, procedurally or substantively, as if it were the request of some other applicant. If such request had specific attributes of public interest, a foreign State would communicate with the Federal Secretariat for Foreign Affairs, whereby the procedure would be much shorter.

According to Article 26 of the Law on General Administrative Procedure (*Official Gazette of the SFRY*, No. 32/78) regarding the competence of national organs in matters in which a foreign State is a party "provisions of international law, recognized by the Socialist Federal Republic of Yugoslavia will apply." In case of any doubt arising with regard to the existence and extent of the right to immunity, explanation will be providcd by the Federal Secretariat for Foreign Affairs (not the Federal Secretariat for the Administration of Justicc and Organization of Federal Administration which provide an "explanation" in cases of court proceedings).

Question 14

A foreign State is bound to respect the territorial juridical competence with regard to title to that property, particularly in cases of immovable property or ownership rights pertaining to such property.

Question 15

According to the legal system of the SFRY, a foreign State may inherit and become a legatee and a beneficiary of the property on the basis of a testate inheritance. In this regard the principle of reciprocity is applied.

Question 16

The property of a foreign State enjoys immunity of judicial procedure and other temporary measures unless special and prior consent of a federal administrative or-

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The Vienna Convention on the representation of States in their relations with international organizations of universal character Article 23, paragraph 3, Article 25, Article 27, paragraphs 2 and 3, Article 55, Article 57, paragraphs 2 and 4.

The latter Convention does not contain a provision—analogous to other three mentioned Conventions—whereby the premises of delegations, furnishings and other property of a delegation, including means of transport of a delegation, enjoy immunity from search, requisition, confiscation and measures of execution, which it seems is accidental. For example, the draft of the United Nations International Law Commission contained these immunities for the delegations participating in conferences and in international organizations (Article 54 of the draft); however, during the Diplomatic Conference in Vienna in 1975, this provision did not receive the two-thirds majority in the Plenary. Consequently, it was dropped from the text, although none of the delegations wished this to happen. In view of all these circumstances, it is to be assumed that the inviolability of the premises of the delegations and of the property therein falls under the rule of a customary international law.

gan competent for judicial affairs is obtained. An exception is a situation when a foreign State has explicitly agreed to the execution or attachment in a specific case or has explicitly waived immunity. Of particular importance is that aforementioned measures, prior to passing an executive judicial decision, can be effected only on the basis of a decision of national court, and not during the procedure of recognizing the validity of the decision of a foreign organ.

Question 17

The execution of property of a foreign State can be effected only on the basis of a consent of the organs of executive authority, i.e., the Federal Secretariat for Administration of Justice and Organization of Federal Administration, except when a foreign State has agreed to the execution (see Annex, the text of Article 13 of the Law on Executive Procedure[21]).

Question 18

There are no regulations according to which a foreign State would, in case that it is on any grounds involved in a procedure before a Yugoslav court, enjoy procedural privileges, but in practice, attention [might] be paid to the fact that a foreign State is a litigant *sui generis* (for example, the serving of judicial writs through diplomatic channels and the like).

Question 19

A foreign State is exempt from costs or security for costs in thc event of participation in a judicial process only on the basis of an international agreement or law.

Question 20

It is normal to expect that Yugoslavia would invoke jurisdictional immunities, in principle, to the same extent to which the Yugoslav courts recognize jurisdictional immunities of foreign States. However, in this case, the principle of non-discrimination is more important than the principle of reciprocity. In other words, in principle, all States would enjoy the same treatment before the Yugoslav courts.

[21] See Part I.