

United Nations Legislative Series

MATERIALS
ON JURISDICTIONAL IMMUNITIES
OF STATES AND THEIR PROPERTY



Série législative des Nations Unies

DOCUMENTATION CONCERNANT
LES IMMUNITÉS JURIDICTIONNELLES
DES ÉTATS ET DE LEURS BIENS

UNITED NATIONS

New York, 1982

NATIONS UNIES

ST/LEG/SER.B/20

UNITED NATIONS PUBLICATION

Sales No. E/F.81.V.10

PUBLICATION DES NATIONS UNIES

Numéro de vente: E/F.81.V.10

03200

TABLE OF CONTENTS
TABLE DES MATIÈRES

	<i>Page</i>
INTRODUCTION	xiii
Part I. National legislation Première partie. Législation nationale	
A. ARGENTINA	
The Argentine Constitution	3
B. AUSTRIA	
1. Austrian declaration in accordance with article 28, paragraph 2, of the European Convention on State Immunity	5
2. Federal Act of 3 May 1974 on the exercise of jurisdiction in accordance with article 21 of the European Convention on State Immunity	5
3. Declaration by the Republic of Austria in accordance with article 21, paragraph 4, of the European Convention on State Immunity	5
4. Repertory of precedents, No. 28	6
C. BYELORUSSIAN SOVIET SOCIALIST REPUBLIC	
Article 395 of the Code of Civil Procedure of the Byelorussian Soviet Socialist Republic	6
D. CANADA	
Canadian Bill on "State Immunity Act" (1981)	7
E. CHILE	
Analysis of legislative principles	12
F. COLOMBIA	
Code of Civil Procedure	13
G. CZECHOSLOVAKIA	
Section 47 of the Act concerning Private International Law and the Rules of Procedure relating thereto	14
H. GERMAN DEMOCRATIC REPUBLIC	
1. Civil Code of the German Democratic Republic of 19 June 1975 ..	15
2. Civil Procedure Code of 19 June 1975	
(a) Recognition of Decisions	15
(b) Declaration of Enforceability	16
I. HUNGARY	
1. Law-Decree No. 13 of 1979 on Private International Law	
(a) State as subject of Law	17
(b) Exclusive jurisdiction	17
(c) Precluded jurisdiction	17
2. Law-Decree No. 7 of 1973 of the Presidential Council of the Hungarian People's Republic on Procedure in Matters of Diplomatic Immunities and other Exemptions	18

	<i>Page</i>
J. NORWAY	
National Legislation of 17 March 1939	19
K. PAKISTAN	
State Immunity Ordinance, 1981	20
L. ROMANIA	
Décret No. 443 du 20 novembre 1972 concernant la navigation civile ..	27
M. SINGAPORE	
State Immunity Act 1979	28
N. SOUTH AFRICA	
Foreign Sovereign Immunity Act (1981)	34
O. UNION OF SOVIET SOCIALIST REPUBLICS	
Article 61 of the Fundamentals of Civil Procedure of the USSR and the Union Republics	40
P. UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND	
1. State Immunity Act 1978	41
2. The State Immunity (Merchant Shipping) (Union of Soviet Socialist Republics) Order 1978	51
3. International Immunities and Privileges. The State Immunity Act 1978 (Commencement) Order 1978	52
4. International Immunities and Privileges. The State Immunity (Fed- eral States) Order 1979	52
5. International Immunities and Privileges. The State Immunity (Over- seas Territories) Order 1979	53
Q. UNITED STATES OF AMERICA	
1. The Foreign Sovereign Immunities Act of 1976, Public Law 94-583, 90 Stat. 2891	55
2. Income of Foreign Governments (Department of the Treasury)	63
R. YUGOSLAVIA	
1. Excerpt from the law on litigious procedure	69
2. Excerpt from the law on executive procedure	69
3. Excerpt from the law on the general administrative procedure	69
4. Excerpt from the law on maritime and inland navigation	70

Part II. Official records and correspondence

Deuxième partie. Actes officiels et correspondance

A. ARGENTINA	
Analysis of the relevant Argentine national legislation and the decisions of national courts regarding jurisdictional immunities of States and their property transmitted by that Government to the Secretariat on 8 May 1979	73
B. BARBADOS	
Letter concerning the topic of jurisdictional immunities of States and their property transmitted by the Government of Barbados to the Secre- tariat on 16 July 1979	74
C. CANADA	
1. Reply by the Secretary of State for External Affairs to a request by the Ambassador of Government X regarding the granting of sover- eign immunity for the aircraft carrying the President of X	75

	<i>Page</i>
2. Government memorandum concerning the issue of sovereign immunity in relation to a case in the United States District Court	75
D. COLOMBIA	
1. Letter regarding the topic of jurisdictional immunities of States and their property transmitted by the Government of Colombia to the Secretariat on 16 July 1979	78
2. Note O/J 767/86 of 24 August 1964, addressed to the Ambassador of Colombia in Bonn	79
E. CZECHOSLOVAKIA	
Analysis of the topic of jurisdictional immunities of States and their property submitted by the Government of Czechoslovakia to the Secretariat on 20 July 1979	82
F. DENMARK	
Letter concerning the topic of jurisdictional immunities of States and their property transmitted by the Government of Denmark to the Secretariat on 16 November 1981	83
G. FINLAND	
Letter concerning the topic of jurisdictional immunities of States and their property transmitted by the Government of Finland to the Secretariat on 11 June 1979	84
H. GERMAN DEMOCRATIC REPUBLIC	
Letter concerning the basic position of the German Democratic Republic on the topic of jurisdictional immunities of States and their property transmitted by that Government to the Secretariat on 7 April 1981	84
I. GERMANY, FEDERAL REPUBLIC OF	
1. Circular note transmitted by the Government of the Federal Republic of Germany to foreign Embassies in Bonn on 20 December 1973 (transmitted to the Secretariat by that Government)	86
2. Note from the Chargé d'Affaires of the Permanent Mission of the Federal Republic of Germany to the Secretariat on 7 August 1979 ..	88
J. GREECE	
Letter concerning the topic of jurisdictional immunities of States and their property transmitted by the Government of Greece to the Secretariat on 14 August 1981	89
K. NORWAY	
Letter concerning the topic of jurisdictional immunities of States and their property transmitted by the Government of Norway to the Secretariat on 26 July 1979	90
L. POLAND	
Analysis of Polish domestic legislation and decisions of national tribunals regarding jurisdictional immunities of States and their property, transmitted by that Government to the Secretariat on 17 July 1979	90
M. SURINAME	
Letter concerning the topic of jurisdictional immunities of States and their property transmitted by the Government of Suriname to the Secretariat on 20 July 1981	91
N. UNION OF SOVIET SOCIALIST REPUBLICS	
Extract from note no. 36 of 11 July 1977 from the Embassy of the Union	

	<i>Page</i>
of Soviet Socialist Republics in the United States of America to the State Department of the United States of America (transmitted by the USSR Government to the Secretariat)	92
O. UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND	
1. Letter from the United Kingdom's Permanent Representative to the Council of Europe addressed to the Council of Europe regarding the ratification of European Convention on State Immunity (transmitted by that Government to the Secretariat)	93
2. Note from the United Kingdom's Ambassador in Brussels, addressed to the Belgian Minister for Foreign Affairs to accompany UK Instrument of Ratification of the International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships, 1926 8c Protocol, thereto	94
3. Instruments of Ratification of the International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships, 1926 8c Protocol, thereto	95
4. Letter concerning the topic of jurisdictional immunities of States and their property submitted by the United Kingdom Government to the Secretariat on 3 July 1979	96
P. UNITED STATES OF AMERICA	
1. Legislative history of Foreign Sovereign Immunities Act of 1976; House Report No. 94-1487	98
2. Text of letter to the Attorney General from Department of State legal adviser on 2 November 1976	126

Part III. Treaty provisions

Troisième partie. Dispositions conventionnelles de traités

A. BILATERAL TREATIES	
1. Treaties of friendship, commerce and navigation between non-socialist countries	
(a) United States of America and Denmark of 1951	131
(b) United States of America and Federal Republic of Germany of 1954	131
(c) United States of America and Greece of 1951	131
(d) United States of America and Korea of 1956	132
(e) United States of America and Iran of 1955	132
(f) United States of America and Ireland of 1950	132
(g) United States of America and Israel of 1951	133
(h) United States of America and Italy of 1948	133
(i) United States of America and Japan of 1953	133
(j) United States of America and the Netherlands of 1956	134
(k) United States of America and Nicaragua of 1956	134
2. Treaties on trade and navigation between Socialist Countries	
(a) Union of Soviet Socialist Republics and Albania of 1958	134
(b) Union of Soviet Socialist Republics and Bulgaria of 1948	135
(c) Union of Soviet Socialist Republics and China of 1958	135

	<i>Page</i>
(d) Union of Soviet Socialist Republics and Czechoslovakia of 1947	136
(e) Union of Soviet Socialist Republics and Czechoslovakia of 1973	136
(f) Union of Soviet Socialist Republics and German Democratic Republic of 1957	137
(g) Union of Soviet Socialist Republics and Hungary of 1947	137
(h) Union of Soviet Socialist Republics and Democratic Republic of Korea of 1960	138
(i) Union of Soviet Socialist Republics and Mongolia of 1957 ...	138
(j) Union of Soviet Socialist Republics and Romania of 1947	139
(k) Union of Soviet Socialist Republics and Democratic Republic of Viet-nam of 1958	139
3. Treaties between Socialist Countries and developed countries	
(a) Union of Soviet Socialist Republics and Austria of 1955	140
(b) Union of Soviet Socialist Republics and Denmark of 1946 ...	140
(c) Union of Soviet Socialist Republics and Finland of 1947	141
(d) Union of Soviet Socialist Republics and France of 1951	141
(e) Union of Soviet Socialist Republics and Germany, Federal Republic of, of 1958	142
(f) Union of Soviet Socialist Republics and Italy of 1948	143
(g) Union of Soviet Socialist Republics and Japan of 1957	143
(h) Union of Soviet Socialist Republics and the Netherlands of 1971	144
(i) Union of Soviet Socialist Republics and Switzerland of 1948 ...	144
4. Treaties between Socialist Countries and developing countries	
(a) Union of Soviet Socialist Republics and Bolivia of 1970	145
(b) Union of Soviet Socialist Republics and Brazil of 1963	145
(c) Union of Soviet Socialist Republics and Costa Rica of 1970 ..	146
(d) Union of Soviet Socialist Republics and Egypt of 1956	147
(e) Union of Soviet Socialist Republics and Ghana of 1961	147
(f) Union of Soviet Socialist Republics and India of 1953	148
(g) Union of Soviet Socialist Republics and Iraq of 1958	148
(h) Union of Soviet Socialist Republics and Singapore of 1966 ...	149
(i) Union of Soviet Socialist Republics and Togo of 1961	149
(j) Union of Soviet Socialist Republics and Yemen of 1963	150
B. MULTILATERAL TREATIES	
1. Bustamante Code, Code of Private International Law	150
2. Convention on the Recognition and Enforcement of Foreign Arbitral Awards	151
3. Convention on the Execution of Foreign Arbitral Awards	153
4. Convention on the High Seas	155
5. Convention on the Settlement of Investment Disputes between States and Nationals of other States	155
6. Convention on the Territorial Sea and the Contiguous Zone	156
7. European Convention on State Immunity and Additional Protocol ..	156
8. International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels	173

	Page
9. International Convention on Civil Liability for Oil Pollution Damage	176
10. Protocol on Arbitration Clauses	176
11. Treaty on International Commercial Navigation Law	177

Part IV. Decisions of domestic tribunals
Quatrième partie. Jugements des tribunaux nationaux

A. AUSTRALIA	
<i>Grunfeld and Another v. United States of America and Others</i> . Decision by the Supreme Court on 26 April 1968	181
B. AUSTRIA	
1. Decision by the Supreme Court on 10 May 1950. <i>X v. the Government of Czechoslovakia</i>	183
2. Decision by the Supreme Court on 10 February 1961. <i>X v. the Government of the United States</i>	203
3. Decision by the Supreme Court on 14 February 1963. <i>X v. the Government of the Federal Republic of Germany</i>	207
C. BELGIUM	
1. Decision by the Court of Appeal of Leopoldville on 29 May 1956. <i>De Decker v. United States of America</i>	209
2. Decision by the Court of Appeal of Brussels of 4 December 1963. <i>Société Anonyme "Dhellemes et Masurel" v. Banque Centrale de la République de Turquie</i>	210
D. BURMA	
1. <i>U Kyaw Din v. The British Government</i> . Decision by the High Court of Rangoon on 14 July 1948	214
2. <i>U Zeya v. The British Secretary of State for War</i> . Decision by the High Court of Rangoon on 2 February 1949	215
3. <i>Kovtunenko v. U Law Yone</i> . Decision by the Supreme Court on 1 March 1960	217
E. CANADA	
1. <i>Fraser-Brace et al. v. Saint John County et al.</i> Decision by the Supreme Court of New Brunswick on 17 August 1956	221
2. <i>Fraser-Brace Overseas Corporation et al. v. Municipality of the City and County of Saint John et al.</i> Decision by the Supreme Court of New Brunswick (Appeal Division) on 9 May 1957	226
3. <i>Municipality of the City and County of Saint John, Logan and Clayton v. Fraser-Brace Overseas Corporation et al.</i> Decision by the Supreme Court on 1 April 1958	232
4. <i>Flota Marítima Browning de Cuba S.A. v. The Steamship Canadian Conqueror et al. and The Republic of Cuba</i> . Decision by the Supreme Court on 11 June 1962	241
5. <i>Chateau-Gai Wines Ltd. v. Le Gouvernement de la République française</i> . Decision by Exchequer Court on 11 April 1967	245
6. <i>Government of the Democratic Republic of the Congo v. Venne</i> . Decision by the Supreme Court of Canada in 1971	248
7. <i>Smith v. Canadian Javelin Ltd.</i> Decision by the High Court of Ontario in 1976	249

	Page
F. CHILE	
1. Decision by the Supreme Court on 22 October 1968. <i>X v. the Embassy of Yugoslavia</i>	250
2. Decision by the Supreme Court on 3 September 1969. <i>X v. the Government of China</i>	250
3. Decision by the Supreme Court on 10 December 1969. <i>X v. the Government of Bolivia</i>	250
4. Decision by the Supreme Court on 2 June 1975. <i>X v. the Government of Cuba</i>	251
G. CHINA	
<i>Rizaëff Frères v. the Soviet Mercantile Fleet</i> . Decision by the Provisional Court of Shanghai (Civil Division) on 30 September 1927	251
H. CZECHOSLOVAKIA	
<i>In re Produkt, Ex parte Federal People's Republic of Yugoslavia</i> . Decision by the Regional Court in Prague on 16 December 1955	252
I. FRANCE	
1. Décision du Tribunal Civil de la Seine en date du 30 janvier 1956. <i>Salabert c. Gouvernement des États-Unis d'Amérique du Nord</i>	253
2. Décision de la Cour d'appel de Paris en date du 16 mars 1960. <i>Société immobilière des Cités Fleuries Lafayette c. États-Unis d'Amérique</i>	255
3. Décision de la Cour de Cassation (Civil Chambre) en date du 19 décembre 1961. <i>Gugenheim c. Etat du Viet-Nam</i>	257
4. Décision de la Cour de Cassation en date du 19 décembre 1961. <i>Soc. Bauer-Marchal et Cie c. Min. des finances de l'Etat turc</i>	258
5. Décision de la Cour d'appel de Paris en date du 7 février 1962. <i>United States of America (Director of the United States Foreign Service) v. Perignon and others</i>	258
6. Décision de la Cour d'appel de Rouen en date du 10 février 1965. <i>Société Bauer-Marchal et Cie c. Gouvernement turc</i>	260
7. Décision de la Cour d'appel de Paris en date du 22 février 1966. <i>Chaussois c. La Tabacoop de Bône</i>	262
8. Décision de la Cour de Cassation en date du 25 février 1969. <i>Administration des Chemins de fer du Gouvernement Iranien c. Société Levant Express Transport</i>	264
9. Décision du Tribunal de Grande Instance de Paris en date du 16 janvier 1969. <i>Neger c. Gouvernement du Land de Hesse</i>	266
10. Décision du Tribunal de Grande Instance de Paris en date du 14 mai 1970. <i>Etat Espagnol c. Société Anonyme de l'Hôtel George V</i>	267
J. GERMANY, FEDERAL REPUBLIC OF	
1. Decision by the Federal Constitutional Court on 30 October 1962. <i>X v. Yugoslavia</i>	272
2. Decision by the Federal Constitutional Court on 30 April 1963. <i>X v. Empire of</i>	282
3. Decision by the District Court of Frankfurt on 2 December 1975. <i>Non-resident Petitioner v. Central Bank of Nigeria</i>	290
4. Decision by the Land High Court of Frankfurt on 30 June 1977. <i>X v. Spanish Government Tourist Bureau</i>	294

	Page
5. Decision by the Federal Constitutional Court on 13 December 1977. <i>X v. Republic of Philippines</i>	297
6. Decision by the Federal Court of Justice on 26 September 1978. <i>X v. The Head of Scotland Yard</i>	321
K. ITALY	
1. Decision by the Court of Cassation on 14 August 1953. <i>Borga v. Russian Trade Delegation</i>	325
2. Decision by the Tribunal of Rome on 30 January 1955. <i>La Mercantile v. Kingdom of Greece</i>	329
3. Decision by the Court of Cassation on 24 May 1956. <i>Hungarian People's Republic et al. v. Onori</i>	331
4. Decision by the Court of Cassation on 17 October 1956. <i>Paver v. Hungarian People's Republic</i>	333
5. Decision by the Court of Cassation on 14 July 1960. <i>Hungarian Pa-pal Institute v. Hungarian Institute (Academy)</i>	335
L. JAPAN	
1. Decision by the Supreme Court on 28 December 1928. <i>Matsuyama et al. v. Republic of China</i>	338
2. Decision by the District Court of Tokyo on 9 June 1954. <i>Limbin Hteik Tin Lat v. Union of Burma</i>	339
3. Decision by the District Court of Tokyo on 23 December 1955. <i>Re-public of China v. Chuka Newspaper Co., Ltd., et al.</i>	340
M. MADAGASCAR	
1. Decision by the Court of Appeal on 27 January 1965. <i>Mahe v. Agent Judiciary du trésor français</i>	342
2. Decision by the Supreme Court on 12 May 1965. <i>Ramiandrisoa v. The French State</i>	343
N. NETHERLANDS	
1. Decision by the Court of Appeal of The Hague on 28 November 1968. <i>N.V. Cabolent v. National Iranian Oil Company</i>	344
2. Decision by the Supreme Court on 26 October 1973. <i>Société Euro-péenne d'Études et d'Entreprises en liquidité volontaire (SEEE) v. Socialist Federal Republic of Yugoslavia</i>	355
O. PHILIPPINES	
1. <i>Syquia v. Almeda Lopez</i> . Decision by the Supreme Court on 17 Au-gust 1949	360
2. <i>Philippine Alien Property Administration v. Castelo</i> . Decision by the Supreme Court on 30 July 1951	364
3. <i>Parreño v. McGranery</i> . Decision by the Supreme Court on 12 March 1953	367
4. <i>Johnson v. Turner, et al.</i> Decision by the Supreme Court on 26 April 1954	368
5. <i>Baer v. Tizon</i> . Decision by the Supreme Court on 3 May 1974	370
P. SOUTH AFRICA	
1. <i>Lendlease Finance (Pty) Ltd. v. Corporacion de Mercadeo Agri-cola and Others</i> . Decision by the Appellate Division of the Supreme Court on 24 May 1976	373

	Page
2. <i>Inter-Science Research and Development Services (Pty) Ltd. v. Republica Popular de Moçambique</i> . Decision by the Transvaal Provincial Division on 14 November 1979	405
3. <i>Kaffraria Property Co. (Pty) Ltd. v. Government of the Republic of Zambia</i> . Decision by the Eastern Cape Division of the Supreme Court on 4 February 1980	419
Q. SWEDEN	
Decision by the Supreme Court on 1 March 1957. <i>Beckman v. Chinese People's Republic</i>	426
R. SWITZERLAND	
1. Décision du Tribunal fédéral en date du 22 juin 1966. <i>République italienne, Ministère italien des transports et chemins de fer d'Etat italiens c. Beta Holding S.A. et Autorité de séquestre de Bâle-ville</i> .	427
2. Décision du Tribunal supérieur de Zurich en date du 27 mars 1973. <i>X c. République du Ghana</i>	434
3. Décision du Tribunal fédéral en date du 14 novembre 1978. <i>Banque centrale de la République de Turquie c. Weston compagnie de finance et d'investissement S.A. et juge unique (procédure sommaire) du Tribunal de district de Zurich</i>	435
S. UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND	
1. <i>The Uganda Company (Holdings) Limited v. the Government of Uganda</i> . Decision by the High Court of Justice, Queen's Bench Division, on 11 December 1978	441
2. <i>Hispano Americana Mercantil S.A. v. Central Bank of Nigeria</i> . Decision by the Court of Appeal on 25 April 1979	449
3. <i>The I Congreso del Partido</i> . Decision by the Court of Appeal on 12 July 1979	453
T. UNITED STATES OF AMERICA	
1. <i>Yessenin-Volpin v. Novosti Press Agency</i> . Decision by the District Court, S.D. New York on 23 January 1978	468
2. <i>Iptrade International v. Federal Republic of Nigeria</i> . Decision by the District Court, District of Columbia on 25 September 1978	475
3. <i>Carey v. National Oil Corporation</i> . Decision by the Court of Appeals, Second Circuit on 24 January 1979	477
4. <i>Behring International v. Imperial Iranian Air Force</i> . Decision by the District Court, D. New Jersey, on 24 July 1979	479
5. <i>Behring International v. Imperial Iranian Air Force</i> . Decision by the District Court, D. New Jersey, on 13 August 1979	492
6. <i>International Association of Machinists and Aerospace Workers v. The Organization of the Petroleum Exporting Countries</i> . Decision by the District Court, C.D. California on 18 September 1979	503
7. <i>Maritime International Nominees Establishment v. The Republic of Guinea</i> . Decision by the District Court, District of Columbia on 12 January 1981	524
8. <i>Texas Trading and Milling Corp. v. Federal Republic of Nigeria and Central Bank of Nigeria</i> [Decor by Nikkei International, Inc.; Chenax Majesty, Inc.; and East Europe Import-Export, Inc. were	

	<i>Page</i>
plaintiffs-Appellant-Cross-Appellee]. Decision by the Court of Appeals for the Second Circuit, on 16 April 1981	527
9. <i>Verlinden B.V. v. Central Bank of Nigeria</i> . Decision by the Court of Appeals for the Second Circuit, on 16 April 1981	543

Part V. Replies to the Questionnaire
Cinquième partie. Réponses au questionnaire

QUESTIONNAIRE ON THE TOPIC "JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY"	557
QUESTIONNAIRE RELATIF À "L'IMMUNITÉ JURIDICTIONNELLE DES ÉTATS ET DE LEURS BIENS"	559
A. Brazil	562
B. Czechoslovakia	564
C. Ecuador	567
D. Egypt	569
E. Germany, Federal Republic of	571
F. Hungary	575
G. Kenya	577
H. Lebanon	578
I. Madagascar	581
J. Mexico	584
K. Netherlands	587
L. Norway	589
M. Portugal	592
N. Romania	594
O. Senegal	596
P. Spain	598
Q. Sudan	601
R. Sweden	602
S. Syrian Arab Republic	604
T. Togo	607
U. Trinidad and Tobago	610
V. Tunisia	614
W. Union of Soviet Socialist Republics	616
X. United Kingdom of Great Britain and Northern Ireland	619
Y. United States of America	630
Z. Venezuela	638
AA. Yugoslavia	641
SUBJECT INDEX	649

INTRODUCTION

The present volume of the *United Nations Legislative Series*, entitled “*Materials on Jurisdictional Immunities of States and their Property*”, has been prepared by the Codification Division of the Office of Legal Affairs in connexion with the work which has been carried out by the International Law Commission on the topic pursuant to General Assembly resolution 32/151 (para. 7) of 19 December 1977 and its subsequent decisions relevant to that topic.

It should be noted that from the beginning of the work on the subject the International Law Commission has acknowledged the importance and significance of studying relevant national legislation, decisions of national tribunals, diplomatic and other official correspondence as well as treaty provisions in order to be able to meaningfully carry out its work of codification and progressive development of international law in that area. The Commission had emphasized that relevant materials on State practice should be consulted as widely as possible including the practice of Socialist countries and developing countries,¹ that States knew best their own practice, wants and needs in the sphere of immunities in respect of their activities,² and that the views and comments of Governments could provide an “appropriate indication of the direction in which the codification and progressive development of the international law of State immunities should proceed”.²

Accordingly, at the request of the Commission the Legal Counsel of the United Nations circulated on 18 January 1979 a letter to Member States inviting them to submit relevant material on the topic, including national legislation, decisions of national tribunals and diplomatic and other official correspondence. By letter of the Legal Counsel of 20 October 1979, Member States were requested to reply to a questionnaire on the topic “Jurisdictional immunities of States and their property” prepared by the Commission’s Special Rapporteur on the topic in co-operation with the Secretariat. The above requests were renewed by the letter of the Legal Counsel of 3 October 1980.

On 7 May 1981 the Legal Counsel addressed to Member States a letter specifically dealing with the preparation of the present volume of the *Legislative Series*. It was indicated in that letter that by providing the Secretariat with the relevant legislation, decisions of national tribunals, official records and correspondence, treaty provisions, as well as statements of their policy and their views on the topic. “Member States would participate in the process of codification and progressive development of international law and would make known to the Commission and its Special Rapporteur their policies and interests which are to be taken into consideration in the work on this topic”.

¹ *Yearbook of the International Law Commission, 1979*, vol. II (Part Two), p. 186, para. 179.

² *Ibid.*, para. 183.

It is hoped that publication of the present volume would be of timely assistance to the International Law Commission and its Special Rapporteur in their study and consideration of the topic, to the General Assembly and Member States in their monitoring and reviewing the United Nations work on the topic; and it will make the materials contained therein accessible for other practical use by those concerned, and for research and teaching in the area covered by the volume.

Materials compiled in this volume have been received from Governments in response to the above requests; the bulk of the material, particularly that on judicial decisions and relevant treaty provisions, has been produced as a result of research done by the Codification Division. As a whole material appearing in the volume is organized in five parts, as follows: part I, "National legislation"; part II, "Official records and correspondence"; part III, "Treaty provisions"; part IV, "Decisions of domestic tribunals"; and part V, "Replies to the questionnaire". With the exception of part III, materials under each part are presented in the alphabetical order of the names of States in English. Part III of the volume, "Treaty provisions", is presented under two different headings, for bilateral treaties and for multilateral treaties. Material transmitted to the Secretariat by Member States in addition to that appearing in document A/CN.4/343 and Add. 1-4 of the International Law Commission is also included in the present volume.

The inclusion of the material obtained through research carried out by the Codification Division was made on the basis of its relevance to the topic of jurisdictional immunity of States and their property, and of their accessibility to the United Nations Secretariat. The fact that a given text has been included in the present volume does not imply any judgement as to the status of the text concerned on the part of the Secretariat.

As in the case of other volumes of the *United Nations Legislative Series*, texts in English or French have been reproduced in their original version. Texts in other languages have been translated into English or French.

INTRODUCTION

Le présent volume de la *Série législative des Nations Unies*, intitulé "Documentation concernant les immunités juridictionnelles des États et de leurs biens", a été établi par la Division de la codification du Service juridique eu égard aux travaux que la Commission du droit international a entrepris sur ce sujet en application de la résolution 32/151 (par. 7) de l'Assemblée générale en date du 19 décembre 1977 et des décisions ultérieures de l'Assemblée concernant cette question.

Il convient de noter que depuis le début de ses travaux sur ce sujet la Commission du droit international a considéré que, pour pouvoir valablement mener à bien ses travaux de codification et de développement progressif du droit international dans ce domaine, il était essentiel d'examiner les législations nationales, les décisions des tribunaux nationaux, la correspondance diplomatique et officielle ainsi que les dispositions conventionnelles en la matière. La Commission a souligné qu'il fallait consulter aussi largement que possible les documents pertinents relatifs à la pratique des

États, notamment à la pratique des pays socialistes et des pays en développement¹, que ce que les États connaissent le mieux, c'était leur propre pratique et leurs propres besoins en matière d'immunités eu égard à leurs activités², et que les vues et les observations des gouvernements pourraient fournir "des indications utiles quant à la voie dans laquelle devaient s'engager la codification et le développement progressif du droit international des immunités des États"².

A la demande de la Commission, le Conseiller juridique de l'Organisation des Nations Unies a donc adressé le 18 janvier 1979 aux États Membres une lettre circulaire les invitant à présenter une documentation sur ce sujet, y compris le texte ou des extraits de lois nationales, de décisions des tribunaux nationaux et de correspondance diplomatique et officielle. Dans une lettre du 2 octobre 1979, le Conseiller juridique a demandé aux États Membres de répondre à un questionnaire sur le sujet des "immunités juridictionnelles des États et de leurs biens", élaboré par le Rapporteur spécial de la Commission sur cette question en collaboration avec le Secrétariat. Ces demandes ont été renouvelées par le Conseiller juridique dans une lettre datée du 3 octobre 1980.

Le 7 mai 1981, le Conseiller juridique a adressé aux États Membres une lettre concernant spécifiquement la préparation du présent volume de la *Série législative*. Il indiquait dans cette lettre que, en fournissant au Secrétariat le texte des lois, décisions des tribunaux nationaux, documents et correspondance officiels et dispositions conventionnelles pertinents ainsi que des déclarations sur leur politique en la matière et leurs opinions sur le sujet, "les États Membres participeraient au processus de codification et de développement progressif du droit international et feraient connaître à la Commission et à son Rapporteur spécial leur politique et leurs préoccupations dont la Commission tiendra compte au cours de ses travaux sur ce sujet".

On espère que la publication du présent volume viendra opportunément aider la Commission du droit international et son Rapporteur spécial dans leur étude et leur examen du sujet, permettra à l'Assemblée générale et aux États Membres de mieux suivre et de mieux étudier les travaux de l'Organisation des Nations Unies en la matière, et donnera la possibilité à tous les intéressés d'avoir accès aux documents rassemblés dans le présent volume pour d'autres usages pratiques, ainsi qu'aux fins de la recherche et de l'enseignement dans le domaine considéré.

La documentation rassemblée dans le présent volume a été reçue des gouvernements en réponse aux demandes susmentionnées; la plus grande partie des documents, en particulier ceux relatifs aux décisions judiciaires et aux dispositions conventionnelles pertinentes, a été réunie dans le cadre des travaux de recherche de la Division de la codification. D'une manière générale, la documentation présentée ici a été divisée en cinq parties, à savoir : première partie, "Législations nationales"; deuxième partie, "Documents et correspondance officiels"; troisième partie, "Dispositions conventionnelles"; quatrième partie, "Décisions des tribunaux nationaux"; et cinquième partie, "Réponses au questionnaire". A l'exception de la documentation faisant l'objet de la troisième partie, les documents ont été reproduits dans chaque partie dans l'ordre alphabétique anglais des noms des États correspondants. Dans

¹ *Annuaire de la Commission du droit international, 1979*, vol. II (deuxième partie), p. 211, par. 179.

² *Ibid.*, par. 183.

la troisième partie, "Dispositions conventionnelles", la documentation a été présentée sous deux rubriques distinctes, selon qu'il s'agit de traités bilatéraux ou de traités multilatéraux. La documentation fournie au Secrétariat par les États Membres en dehors de celle qui figure dans le document A/CN.4/343 et Add. 1 à 4 de la Commission du droit international a également été insérée dans le présent volume.

La documentation réunie dans le cadre des travaux de recherche de la Division de la codification a été retenue dans la mesure où elle intéresse le sujet des immunités juridictionnelles des États et de leurs biens, pour autant que le Secrétariat a pu y avoir accès. Le fait qu'un texte donné ait été inséré dans le présent volume n'implique, de la part du Secrétariat, aucune prise de position quant à la qualité du texte en question.

Comme dans les autres volumes de la *Série législative des Nations Unies*, les textes anglais ou français ont été reproduits dans leur version originale. Les textes en d'autres langues ont été traduits en anglais ou en français.

Part I
NATIONAL LEGISLATION

Première partie
LÉGISLATION NATIONALE

A. ARGENTINA¹

THE ARGENTINE CONSTITUTION

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

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

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

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

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

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

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

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

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

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

Criminal cases concerning ambassadors, ministers or foreign diplomatic agents; members of legations, the members of their families, or their domestic staff, in the manner and in the cases in which a court of justice may proceed in accordance with international law.

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

¹ Transmitted to the Secretariat by that Government.

Publication: *Boletín Oficial* 28-12-77.

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

. . .

Article 24. The Supreme Court of Justice shall have:

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

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

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

- (a) Physical persons domiciled in the country for two (2) years or more prior to the lodging of the complaint, regardless of nationality;
- (b) Juridical persons under Argentine public law;
- (c) All other juridical persons incorporated and domiciled in Argentina;
- (d) Firms and associations without juridical personality, if all their members have the status described in subparagraph (a). Cases concerning foreign ambassadors or ministers plenipotentiary are those which directly affect such persons by virtue of the fact that their rights are under discussion or because their liability is involved, as well as those which similarly affect the members of their families, or the staff of the embassy or legation having diplomatic status.

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

B. AUSTRIA²

1. AUSTRIAN DECLARATION IN ACCORDANCE WITH ARTICLE 28, PARAGRAPH 2, OF THE EUROPEAN CONVENTION ON STATE IMMUNITY

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

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

2. FEDERAL ACT OF 3 MAY 1974 ON THE EXERCISE OF JURISDICTION IN ACCORDANCE WITH ARTICLE 21 OF THE EUROPEAN CONVENTION ON STATE IMMUNITY

The National Council has decided that:

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

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

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

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

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

3. DECLARATION BY THE REPUBLIC OF AUSTRIA IN ACCORDANCE WITH ARTICLE 21, PARAGRAPH 4, OF THE EUROPEAN CONVENTION ON STATE IMMUNITY (BGBl. No. 432/1976)

“In compliance with paragraph 4 of article 21 of the European Convention on State Immunity, the Republic of Austria declares that it designates the Vienna Regional Civil Court (*Landesgericht für Zivilrechtssachen Wien*) as solely competent

² Transmitted to the Secretariat by that Government.

to determine whether the Republic of Austria shall give effect, in accordance with article 20 of the above-mentioned Convention, to any judgement given by a court of another Contracting State.”

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

4. REPERTORY OF PRECEDENTS, No. 28

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

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

3.³ No recognition of the expropriation of German trademark rights through war measures taken by Czechoslovakia.

C. BYELORUSSIAN SOVIET SOCIALIST REPUBLIC

ARTICLE 395 OF THE CODE OF CIVIL PROCEDURE OF THE BYELORUSSIAN SOVIET SOCIALIST REPUBLIC

Prosecution of a foreign State and sequestration or attachment of the property of a foreign State located in the USSR are permissible only with the consent of the competent bodies of the State concerned.

Diplomatic representatives of foreign States accredited to the USSR and other persons mentioned in the relevant laws and international agreements shall be subject to the jurisdiction of Soviet civil courts only within the limits established by international legal norms or agreements with the States concerned.

In accordance with article 61 of the Principles of Civil Procedure of the Union of Soviet Socialist Republics and of the Union Republics, whenever, in a foreign State, the Soviet State, its property or the representatives of the Soviet State are not given the same jurisdictional immunity which, under that article, is accorded to foreign States, their property or representatives of foreign States in the USSR, the Council of Ministers of the USSR or another authorized body may prescribe retaliatory measures against that State, its property or a representative of that state.

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

D. CANADA

CANADIAN BILL ON "STATE IMMUNITY ACT" (1981)⁴

Short title

1. This Act may be cited as the *State Immunity Act*.

Interpretation

2. In this Act,

"agency of a foreign state" means any legal entity that is an organ of the foreign state but that is separate from the foreign state;

"commercial activity" means any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character;

"foreign state" includes

(a) any sovereign or other head of the foreign state or of any political subdivision of the foreign state while acting as such in a public capacity,

(b) any government of the foreign state or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state, and

(c) Any political subdivision of the foreign state;

"political subdivision" means a political subdivision of a foreign state that is a federal state.

State immunity

3. (1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.

(2) In any proceedings before a court, the court shall give effect to the immunity conferred on a foreign state by subsection (1) notwithstanding that the state has failed to take any step in the proceedings.

4. (1) A foreign state is not immune from the jurisdiction of a court if the state waives the immunity conferred by subsection 3(1) by submitting to the jurisdiction of the court in accordance with subsection (2) or (4).

(2) In any proceedings before a court, a foreign state submits to the jurisdiction of the court where it

(a) explicitly submits to the jurisdiction of the court by written agreement or otherwise either before or after the proceedings commence;

(b) initiates the proceedings in the court; or

(c) intervenes or takes any step in the proceedings before the court.

(3) Paragraph (2)(c) does not apply to

(a) any intervention or step taken by a foreign state in proceedings before a court for the purpose of claiming immunity from the jurisdiction of the court; or

⁴ The Senate of Canada, Bill S-19. Not yet adopted by the Canadian Parliament.

(b) any step taken by a foreign state in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained before the step was taken and immunity is claimed as soon as reasonably practicable after they are ascertained.

(4) A foreign state that initiates proceedings in a court or that intervenes or takes any step in proceedings before a court, other than for the purpose of claiming immunity from the jurisdiction of the court, submits to the jurisdiction of the court in respect of any third party proceedings that arise, or counter-claim that arises, out of the subject-matter of the proceedings initiated by the state or in which the state has so intervened or taken a step.

(5) Where, in any proceedings before a court, a foreign state submits to the jurisdiction of the court in accordance with subsection (2) or (4), such submission is deemed to be a submission by the state to the jurisdiction of such one or more courts by which those proceedings may, in whole or in part, subsequently be considered on appeal or in the exercise of supervisory jurisdiction.

5. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state.

6. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to

- (a) any death or personal injury, or
- (b) any damage to or loss of property that occurs in Canada.

7. (1) A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to

- (a) an action *in rem* against a ship owned or operated by the state, or
- (b) an action *in personam* for enforcing a claim in connection with such a ship,

if, at the time the claim arose or the proceedings were commenced, the ship was being used or was intended for use in a commercial activity.

(2) A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to

- (a) an action *in rem* against any cargo owned by the state if, at the time the claim arose or the proceedings were commenced, the cargo and the ship carrying the cargo were being used or were intended for use in a commercial activity; or
- (b) an action *in personam* for enforcing a claim in connection with such cargo if, at the time the claim arose or the proceedings were commenced, the ship carrying the cargo was being used or was intended for use in a commercial activity.

(3) For the purposes of subsections (1) and (2), a ship or cargo owned by a foreign state includes any ship or cargo in the possession or control of the state and any ship or cargo in which the state claims an interest.

8. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to an interest of the state in property that arises by way of succession, gift or *bona vacantia*.

Procedure and relief

9. (1) Service of an originating document on a foreign state, other than on an agency of the foreign state, may be made

(a) in any manner agreed on by the state;

(b) in accordance with any international Convention to which the state is a party; or

(c) in the manner provided in subsection (2).

(2) For the purposes of paragraph (1)(c), anyone wishing to serve an originating document on a foreign state may deliver a copy of the document, in person or by registered mail, to the Under-Secretary of State for External Affairs or a person designated by him for the purpose, who shall transmit it to the foreign state.

(3) Service of an originating document on an agency of a foreign state may be made

(a) in any manner agreed on by the agency;

(b) in accordance with any international Convention applicable to the agency; or

(c) in accordance with any applicable rules of court.

(4) Where service on an agency of a foreign state cannot be made under subsection (3), a court may, by order, direct how service is to be made.

(5) Where service of an originating document is made in the manner provided in subsection (2), service of the document shall be deemed to have been made on the day that the Under-Secretary of State for External Affairs or a person designated by him pursuant to subsection (2) certifies to the relevant court that the copy of the document has been transmitted to the foreign state.

(6) Where, in any proceedings in a court, service of an originating document has been made on a foreign state in accordance with subsection (1), (3) or (4) and the state has failed to take, within the time limited therefor by the rules of the court or otherwise by law, the initial step required of a defendant or respondent in such proceedings in that court, no further step toward judgment may be taken in the proceedings except after the expiration of at least sixty days following the date of service of the originating document.

(7) Where judgment is signed against a foreign state in any proceedings in which the state has failed to take the initial step referred to in subsection (6), a certified copy of the judgment shall be served on the foreign state

(a) where service of the document that originated the proceedings was made on an agency of the foreign state, in such manner as is ordered by the court; or

(b) in any other case, in the manner specified in paragraph (1)(c) as though the judgment were an originating document.

(8) Where, by reason of subsection (7), a certified copy of a judgment is required to be served in the manner specified in paragraph (1)(c), subsections (2) and (5) apply with such modifications as the circumstances require.

(9) A foreign state may, within sixty days after service on it of a certified copy of a judgment pursuant to subsection (7), apply to have the judgment set aside.

10. (1) Subject to subsection (3), no relief by way of an injunction, specific performance or the recovery of land or other property may be granted against a foreign state unless the state consents in writing to such relief and, where the state so consents, the relief granted shall not be greater than that consented to by the state.

(2) Submission by a foreign state to the jurisdiction of a court is not consent for the purposes of subsection (1).

(3) This section does not apply to an agency of a foreign state.

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

(a) the state has, either explicitly or by implication, waived its immunity from attachment, execution, arrest, detention, seizure or forfeiture, unless the foreign state has withdrawn the waiver of immunity in accordance with any term thereof that permits such withdrawal;

(b) the property is used or is intended for a commercial activity; or

(c) the execution relates to a judgment establishing rights in property that has been acquired by succession or gift or in immovable property located in Canada.

(2) Subject to subsection (3), property of an agency of a foreign state is not immune from attachment and execution and, in the case of an action *in rem*, from arrest, detention, seizure and forfeiture if the agency is not otherwise immune from the jurisdiction of a court by virtue of this Act.

(3) Property of a foreign state

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

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

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

(4) Subject to subsection (5), property of a foreign central bank or monetary authority that is held for its own account is immune from attachment and execution.

(5) The immunity conferred on property of a foreign central bank or monetary authority by subsection (4) does not apply where the bank, authority or its parent foreign government has explicitly waived the immunity, unless the bank, authority or government has withdrawn the waiver of immunity in accordance with any term thereof that permits such withdrawal.

12. (1) No penalty or fine may be imposed by a court against a foreign state for any failure or refusal by the state to produce any document or other information in the course of proceedings before the court.

(2) Subsection (1) does not apply to an agency of a foreign state.

General

13. (1) A certificate issued by the Secretary of State for External Affairs, or on his behalf by a person authorized by him, with respect to any of the following questions, namely,

- (a) whether a country is a foreign state for the purposes of this Act,
 - (b) whether a particular area or territory of a foreign state is a political subdivision of that state, or
 - (c) whether a person or persons are to be regarded as the head or government of a foreign state or of a political subdivision of the foreign state,
- is admissible in evidence as conclusive proof of any matter stated in the certificate with respect to that question, without proof of the signature of the Secretary of State for External Affairs or other person or of that other person's authorization by the Secretary of State for External Affairs.

(2) A certificate issued by the Under-Secretary of State for External Affairs, or on his behalf by a person designated by him pursuant to subsection 9(2), with respect to service of an originating or other document on a foreign state in accordance with that subsection is admissible in evidence as conclusive proof of any matter stated in the certificate with respect to such service, without proof of the signature of the Under-Secretary of State for External Affairs or other person or of that other person's authorization by the Under-Secretary of State for External Affairs.

14. The Governor in Council may, on the recommendation of the Secretary of State for External Affairs, by order restrict or extend any immunity or privileges under this Act in relation to a foreign state as follows:

- (a) restrict the immunity or privileges where, in the opinion of the Governor in Council, the immunity or privileges exceed those accorded by the law of that state; and
- (b) extend the immunity or privileges where, in the opinion of the Governor in Council, the immunity or privileges are less than those required by any treaty, convention or other international agreement to which that state and Canada are parties.

15. Where, in any proceeding or other matter to which a provision of this Act and a provision of the *Visiting Forces Act* or the *Diplomatic and Consular Privileges and Immunities Act* apply, there is a conflict between such provisions, the provision of this Act ceases to apply in such proceeding or other matter to the extent of the conflict.

16. Except to the extent required to give effect to this Act, nothing in this Act shall be construed or applied so as to negate or affect any rules of a court, including rules of a court relating to service of a document out of the jurisdiction of the court.

17. This Act does not apply to criminal proceedings or proceedings in the nature of criminal proceedings.

Commencement

18. This Act or any provision thereof shall come into force on a day or days to be fixed by proclamation.

E. CHILE⁵

ANALYSIS OF LEGISLATIVE PRINCIPLES

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

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

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

a.2. The Chilean State also observes the principles set out in the Charter of the Organization of American States, among which are the following: Article 3. "(b) International order consists essentially of respect for the personality, sovereignty, and independence of States, and the faithful fulfillment of obligations derived from treaties and other sources of international law".

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

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

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

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

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

⁵ Analysis of relevant legislative principles in Chile regarding the jurisdictional immunities of States and their property was transmitted by that Government to the Secretariat.

Article 335, on the other hand, stipulates that: "If the foreign contracting State or its head has acted as an individual or private person, the 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".

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

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

In article 22, the aforementioned Convention provides that:

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

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

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

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

F. COLOMBIA⁶

CODE OF CIVIL PROCEDURE

Article 336. Execution against public entities. Execution shall not be levied against the nation. Where the penalties referred to in article 335 were imposed on a department, intendancy, commissariat or municipality, the entity in question shall be allowed six months for payment; in the meantime, execution shall not be levied against it and the period specified in the said article shall not apply.

The period of six months specified in the preceding paragraph shall be reckoned from the date of the final judgement or order for restitution *in genere*; where, however, an appeal was lodged against the judgement or order, it shall begin to run from

⁶ Transmitted to the Secretariat by that Government.

the date of the final judgement of the higher court ordering compliance with the said judgement or order.

Judgements and awards

Article 693. Effects of foreign judgements. Judgements rendered and other court orders of a similar nature made in a foreign country in adversary or non-contentious proceedings shall have in Colombia the force accorded to them under existing treaties with that country or, in the absence of such treaties, the force which judgements rendered in Colombia are recognized as having in that country.

The provisions of the preceding paragraph shall apply to arbitral awards made abroad.

Article 694. Requirements. In order for the foreign judgement or award to have effect in Colombia, it must meet the following requirements:

1. That it does not relate to real rights in property which was in Colombian territory at the time of institution of the proceedings in which the judgement was rendered;
2. That it does not conflict with Colombian laws or other provisions of public policy, other than procedural provisions;
3. That it is a final judgement in accordance with the law of the country of origin and is submitted in the form of a duly authenticated and legalized copy;
4. That the subject-matter of the judgement is not within the exclusive competence of the Colombian courts;
5. That there are in Colombia no pending proceedings or enforceable judgements of Colombian courts on the same subject-matter;
6. That, if the judgement was rendered in adversary proceedings, the requirement that the defendant shall be duly summoned and given a hearing was fulfilled in accordance with the law of the country of origin; the foregoing shall be presumed on the basis of the final judgement;
7. The requirement of an *exequatur* must be fulfilled.

G. CZECHOSLOVAKIA⁷

SECTION 47 OF THE ACT CONCERNING PRIVATE INTERNATIONAL LAW AND THE RULES OF PROCEDURE RELATING THERETO

Section 47. Exclusion from the jurisdiction of Czechoslovak courts and notarial offices

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

⁷ Transmitted to the Secretariat by that Government.

(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.

H. GERMAN DEMOCRATIC REPUBLIC⁸

1. CIVIL CODE OF THE GERMAN DEMOCRATIC REPUBLIC OF 19 JUNE 1975

"Article 20

"Protection of the Socialist Property

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

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

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

2. CIVIL PROCEDURE CODE OF 19 JUNE 1975

(a) *Recognition of Decisions*

Article 193

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

⁸ Transmitted to the Secretariat by that Government.

(2) Recognition is excluded if

1. the provisions on the exclusive jurisdiction of the courts of the German Democratic Republic have not been observed;
2. the jurisdiction of the court of another State has been established in contradiction to an agreement, valid under the law of the German Democratic Republic, conferring jurisdiction to a court or an arbitration;
3. the losing party has not been heard by the court because of lacking service or other breaches of procedural rules;
4. a final decision by a court of the German Democratic Republic exists on the same claim between the same parties;
5. the decision contradicts the basic principles of the political and legal system of the German Democratic Republic or might impair its sovereignty, security or other material interests.

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

(b) *Declaration of Enforceability**Article 195*

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

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

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

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

Article 196

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

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

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

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

Article 197

Decisions on costs and orders determining costs which have been issued on the basis of a decision to be recognized according to article 193, may be declared en-

forceable even if they have been issued outside the verdict. To proceedings on the motion for a declaration of enforceability apply articles 195 and 196.

Article 198

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

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

I. HUNGARY⁹

1. LAW-DECREE NO. 13 OF 1979 ON PRIVATE INTERNATIONAL LAW

(a) *State as subject of Law* (Section 17)

Section 17. (1) The legal relations of the Hungarian State covered by this Law-Decree shall be subject to Hungarian Law, except where

- (a) the State has expressly consented to the application of foreign law; or
- (b) the legal relations concern real property located in a foreign country, owned or intended to be acquired by the State, or
- (c) the legal relations concern participation in an economic organization in which there is a foreign interest.

(2) Paragraph (1) shall apply to foreign States only in case of reciprocity.

(b) *Exclusive jurisdiction*

Section 55. A Hungarian court of law or other public authority shall have exclusive jurisdiction in the case of . . . d/ an action against the Hungarian State, an organ of the State or an administrative body.

(c) *Precluded jurisdiction*

Section 56. Unless otherwise provided for in this Law-Decree, the jurisdiction of a Hungarian law-court or other public authority shall be precluded in the case of:

- (a) an action against a foreign State, or a foreign executive or administrative body;
- (b) an action against a foreign citizen acting in Hungary as a diplomatic agent or enjoying immunity from jurisdiction for any other reason where, by virtue of an international agreement or of reciprocity, no proceedings can be instituted against such person in Hungary;
- (c) an action relating to the granting, extending and termination of protection to industrial property in a foreign country;
- (d) matters in which the jurisdiction of a Hungarian court of law or other public authority is precluded by a separate provision of law.

⁹ Transmitted to the Secretariat by that Government.

Section 57. (1) Proceedings against a foreign State, executive or administrative body, or against a foreign citizen acting in Hungary as a diplomatic agent or entitled to immunity from jurisdiction for any other reason may be instituted before a Hungarian court of law or other public authority, provided that the foreign State concerned has expressly waived the right to immunity.

(2) In case of a waiver of immunity the jurisdiction of the Hungarian court of law or other authority shall also extend to a counter-claim arising out of the same legal relation.

(3) A judgement given against a foreign party in such proceedings shall be enforceable only if the foreign State has also expressly waived the right to immunity from enforcement.

2. LAW-DECREE NO. 7 OF 1973 OF THE PRESIDENTIAL COUNCIL OF THE HUNGARIAN PEOPLE'S REPUBLIC ON PROCEDURE IN MATTERS OF DIPLOMATIC IMMUNITIES AND OTHER EXEMPTIONS

The Hungarian People's Republic accords immunities to foreign States and grants privileges and immunities to their diplomatic and other representatives in accordance with international law. International organizations and certain categories of their personnel likewise enjoy privileges and immunities. The purpose of privileges and immunities granted to individuals is not to accord them personal advantages but to provide for them as representatives of States or as persons otherwise acting on behalf of States facilities in the successful accomplishment of their mission and for international organizations in the smooth performance of their activities. The grant of privileges and immunities to persons entitled thereto shall not affect their obligation to observe the laws and regulations of the Hungarian People's Republic, and such persons shall be subject to the jurisdiction of their own State in respect of responsibility for violations of Hungarian legislation.

With a view to the uniform regulation of proceedings before the court or other authority in matters affecting foreign States, their diplomatic or other representatives, as well as international organizations and their personnel, the Presidential Council of the Hungarian People's Republic hereby issues the following Law-Decree:

Article 1. (1) Proceedings before the court or other authority shall be governed by this Law-Decree where:

- (a) a foreign State is involved in a civil or administrative action;
- (b) there is evidence that the person who is a party to a civil or administrative proceeding or is involved as defendant or a private prosecutor in a criminal case is entitled to diplomatic immunities or other exemptions under international law.

(2) This Law-Decree shall also be applicable to proceedings in labour disputes.

Article 2. (1) The court or other authority acting in cases referred to in Article 1 shall *ex officio* suspend the proceedings at any stage.

(2) The proceedings shall also be suspended by the court on the action of the Minister of Justice and by another authority on the action of its supervising body (hereinafter referred to jointly as the supervising body).

(3) The court or other authority shall notify the suspension of proceedings to the supervising body.

Article 3. (1) Without suspending the proceedings, the court or other authority shall notify the supervising body of its intention to take, during the proceedings, any measure or decision affecting a person referred to in Article 1 and involved in the case in a capacity other than that specified therein (e.g., witness).

(2) The court or other authority shall not take the measure or decision mentioned in para. (1) until the supervising body has communicated its views on the matter.

Article 4. If the person referred to in Article 1 is a private party to a criminal proceeding, the enforcement of civil-law claims shall be governed by Article 2.

Article 5. (1) On the basis of notification by the court or other authority the question of immunity shall be decided by the supervising body in concurrence with the Minister for Foreign Affairs, such decision to be binding on the court or other authority.

(2) If the supervising body has stated the existence of immunity, the court or other authority shall apply the provisions relating to the absence of jurisdiction in the case of Articles 1 and 4 and shall take no measure or decision in respect of the person mentioned in Article 3.

Article 6. (1) This Law-Decree shall enter into force on the day of its promulgation and its provisions shall also be applicable to pending cases.

(2) Act XVIII of 1937 on the Rules of Procedure concerning Extraterritoriality and Personal Immunity shall be superseded by this Law-Decree.

J. NORWAY

NATIONAL LEGISLATION OF 17 MARCH 1939¹⁰

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

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

- (1) Men of war and other vessels which a foreign government owns or uses when at the time the claim arose they were used exclusively for government purposes of a public nature.
- (2) Cargo which belongs to a foreign government and is carried by a vessel as mentioned under 1.

¹⁰ The Royal Ministry of Foreign Affairs, *Compilation of Norwegian Laws, Etc.*, 1814-1953.

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

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

- (1) Men of war and other vessels which are owned by or used by a foreign government or chartered by them exclusively on time or for a voyage, when the vessel is used exclusively for government purposes of a public nature.
- (2) Cargo which belongs to a foreign government and is carried in vessels as mentioned under 1 or by merchantmen for government purposes of a public nature.

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

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

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

K. PAKISTAN

STATE IMMUNITY ORDINANCE, 1981

Whereas it is expedient to amend and consolidate the law relating to the immunity of States from the jurisdiction of courts;

And whereas the President is satisfied that circumstances exist which render it necessary to take immediate action;

Now, therefore, in pursuance of the Proclamation of the fifth day of July, 1977, read with the Laws (Continuance in Force) Order, 1977 (C.M.L.A. Order No. 1 of 1977), and in exercise of all powers enabling him in that behalf, the President is pleased to make and promulgate the following Ordinance:

1. *Short title, extend and commencement.* (1) This Ordinance may be called the State Immunity Ordinance, 1981.

(2) It extends to the whole of Pakistan.

(3) It shall come into force at once.

2. *Interpretation.* In this Ordinance, "court" includes any tribunal or body exercising judicial functions.

Immunity from jurisdiction

3. *General immunity from jurisdiction.* (1) A State is immune from the jurisdiction of the courts of Pakistan except as hereinafter provided.

(2) A court shall give effect to the immunity conferred by subsection (1) even if the State does not appear in the proceedings in question.

Exceptions from immunity

4. *Submission to jurisdiction.* (1) A State is not immune as respects proceedings in respect of which it has submitted to jurisdiction.

(2) A State may submit to jurisdiction after the dispute giving rise to the proceedings has arisen or by a prior agreement; but a provision in any agreement that it is to be governed by the law of Pakistan shall not be deemed to be a submission.

Explanation. In this subsection and in subsection (3) of section 14, "agreement" includes a treaty, convention or other international agreement.

(3) A State shall be deemed to have submitted:

- (a) if it has instituted the proceedings; or
- (b) subject to subsection (4) it has intervened or taken any step in the proceedings.

(4) Clause (b) of subsection (3) does not apply:

- (a) to intervention or any step taken for the purpose only of:
 - (i) claiming immunity; or
 - (ii) asserting an interest in property in circumstances such that the State would have been entitled to immunity if the proceedings had been brought against it; or
- (b) to any step taken by the State in ignorance of the facts entitling it to immunity if those facts could not reasonably have been ascertained and immunity is claimed as soon as reasonably practicable.

(5) A submission in respect of any proceedings extends to any appeal but not to any counter claim unless it arises out of the same legal relationship or facts as the claim.

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

5. *Commercial transactions and contracts to be performed in Pakistan.*

(1) A State is not immune as respects proceedings relating to:

- (a) a commercial transaction entered into by the State; or
- (b) an obligation of the State which by virtue of a contract, which may or may not be a commercial transaction, falls to be performed wholly or partly in Pakistan.

(2) Subsection (1) does not apply to a contract of employment between a State and an individual or if the parties to the dispute are States or have otherwise agreed in writing; and clause (b) of that subsection does not apply if the contract, not being a commercial transaction, was made in the territory of the State concerned and the obligation in question is governed by its administrative law.

(3) In this section "commercial transaction" means:

- (a) any contract for the supply of goods or services;
- (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and
- (c) any other transaction or activity, whether of a commercial, industrial, financial, professional or other similar character, into which a State enters or in which it engages otherwise than in the exercise of its sovereign authority.

6. *Contracts of employment.* (1) A State is not immune as respects proceedings relating to a contract of employment between a State and an individual where the contract was made, or the work is to be wholly or partly performed, in Pakistan.

Explanation. In this subsection, "proceedings relating to a contract of employment" includes proceedings between the parties to such a contract in respect of any statutory rights or duties to which they are entitled or subject as employer or employee.

(2) Subject to subsections (3) and (4), subsection (1) does not apply if:

- (a) at the time when the proceedings are brought the individual is a national of the State concerned; or
- (b) at the time when the contract was made the individual was neither a citizen of Pakistan nor habitually resident in Pakistan; or
- (c) the parties to the contract have otherwise agreed in writing.

(3) Where the work is for an office, agency or establishment maintained by the State in Pakistan for commercial purposes, clauses (a) and (b) of subsection (2) do not exclude the application of subsection (1) unless the individual was, at the time when the contract was made, habitually resident in that State.

(4) Clause (c) of subsection (2) does not exclude the application of subsection (1) where the law of Pakistan requires the proceedings to be brought before a court in Pakistan.

7. *Ownership, possession and use of property.* (1) A State is not immune as respects proceedings relating to:

- (a) any interest of the State in, or its possession or use of, immovable property in Pakistan; or
- (b) any obligation of the State arising out of its interest in, or its possession or use of, any such property.

(2) A State is not immune as respects 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*.

(3) The fact that a State has or claims an interest in any property shall not preclude any court from exercising in respect of such property any jurisdiction relating to the estates of deceased persons or persons of unsound mind or to insolvency, the winding up of companies or the administration of trusts.

(4) A court may entertain proceedings against a person other than a State notwithstanding that the proceedings relate to property:

- (a) which is in the possession of a State; or
- (b) in which a State claims an interest,

if the State would not have been immune had the proceedings been brought against it or, in a case referred to in clause (b), if the claim is neither admitted nor supported by *prima facie* evidence.

8. *Patents, trade marks, etc.* A State is not immune as respects proceedings relating to:

- (a) any patent, trade mark, design or plant breeders' rights belonging to the State which are registered or protected in Pakistan or for which the State has applied in Pakistan;
- (b) an alleged infringement by the State in Pakistan of any patent, trade mark, design, plant breeders' rights or copyright; or
- (c) the right to use a trade or business name in Pakistan.

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

- (a) has members other than States; and
- (b) is incorporated or constituted under the law of Pakistan or is controlled from, or has its principal place of business in, Pakistan,

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

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

10. *Arbitrations.* (1) Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of Pakistan which relate to the arbitration.

(2) Subsection (1) has effect subject to the provisions of the arbitration agreement and does not apply to an arbitration agreement between States.

11. *Ships used for commercial purposes.* (1) The succeeding provisions of this section apply to:

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

(2) A State is not immune as respects:

- (a) an action in rem against a ship belonging to it; or
- (b) an action in personam for enforcing a claim in connection with such a ship;

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

(3) Where an action in rem is brought against a ship belonging to a State for enforcing a claim in connection with another ship belonging to that State clause (a)

of subsection (2) does not apply as respects the first-mentioned ship unless, at the time when the cause of action relating to the other ship arose, both ships were in use or intended for use for commercial purposes.

(4) A State is not immune as respects:

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

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

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

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

Explanation. In this section, "Brussels Convention" means the International Convention for the Unification of Certain Rules Concerning the Immunity of State-owned Ships signed in Brussels on the tenth day of April, 1926, and "ship" includes hovercraft.

12. *Value added tax, customs-duties, etc.* A State is not immune as respects proceedings relating to its liability for:

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

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

Procedure

13. *Service of process and judgment in default of appearance.* (1) Any notice or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Ministry of Foreign Affairs of Pakistan to the Ministry of Foreign Affairs of the State and service shall be deemed to have been effected when the notice or document is received at the latter Ministry.

(2) Any proceedings in court shall not commence earlier than two months after the date on which the notice or document is received as aforesaid.

(3) A State which appears in proceedings cannot thereafter object that subsection (1) has not been complied with as respects those proceedings.

(4) No judgment in default of appearance shall be given against a State except on proof that subsection (1) has been complied with and that the time for the commencement of proceedings specified in subsection (2) has elapsed.

(5) A copy of any judgment given against a State in default of appearance shall be transmitted through the Ministry of Foreign Affairs of Pakistan to the Ministry of Foreign Affairs of the State and the time for applying to have the judgment set aside shall begin to run two months after the date on which the copy of the judgment is received at the latter Ministry.

(6) Subsection (1) does not prevent the service of a notice or other document in any manner to which the State has agreed and subsections (2) and (4) do not apply where service is effected in any manner.

(7) The preceding provisions of this section shall not be construed as applying to proceedings against a State by way of a counter-claim or to an action in rem.

14. *Other procedural privileges.* (1) No penalty by way of committal to prison or fine shall be imposed in respect of any failure or refusal by or on behalf of a State to disclose or produce any document or information for the purposes of proceedings to which it is a party.

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

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

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

(3) Subsection (2) does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent, which may be contained in a prior agreement, may be expressed so as to apply to a limited extent or generally:

Provided that a provision merely submitting to the jurisdiction of the courts shall not be deemed to be a consent for the purposes of this subsection.

(4) The head of a State's diplomatic mission in Pakistan; or the person for the time being performing his functions, shall be deemed to have authority to give on behalf of the State any such consent as is mentioned in subsection (3) and, for the purposes of clause (b) of subsection (2), his certificate that any property is not in use or intended for use by or on behalf of the State for commercial purposes shall be accepted as sufficient evidence of that fact unless the contrary is proved.

Supplementary provisions

15. *States entitled to immunities and privileges.* (1) The immunities and privileges conferred by this Act apply to any foreign State; and references to State include references to:

- (a) the sovereign or other head of that State in his public capacity;
- (b) the government of that State; and
- (c) any department of that government,

but not to any entity, hereinafter referred to as a "separate entity", which is distinct from the executive organs of the government of the State and capable of suing or being sued.

(2) A separate entity is immune from the jurisdiction of the courts of Pakistan if, and only if:

- (a) the proceedings relate to anything done by it in the exercise of sovereign authority; and
- (b) the circumstances are such that a State would have been so immune.

(3) If a separate entity, not being a State's central bank or other monetary authority, submits to the jurisdiction in respect of proceedings in the case of which it is entitled to immunity by virtue of subsection (2) of this section, the provisions of subsections (1) to (3) of section 14 shall apply to it in respect of those proceedings as if references to a State were references to that entity.

(4) Property of a State's central bank or other monetary authority shall not be regarded for the purposes of subsection (3) of section 14 as in use or intended for use for commercial purposes; and where any such bank or authority is a separate entity subsections (1) and (2) of that section shall apply to it as if references to a State were references to the bank or authority.

(5) Section 13 applies to proceedings against the constituent territories of a federal State; and the Federal Government may, by notification in the official Gazette, provide for the other provisions of this Ordinance to apply to any such constituent territory specified in the notification as they apply to a State.

(6) Where the provisions of this Ordinance do not apply to a constituent territory by virtue of a notification under subsection (5), the provisions of subsections (2) and (3) shall apply to it as if it were a separate entity.

16. *Restriction and extension of immunities and privileges.* (1) If it appears to the Federal Government that the immunities and privileges conferred by this Ordinance in relation to any State:

(a) exceed those accorded by the law of that State in relation to Pakistan; or

(b) are less than those required by an treaty, conventional or other international agreement to which that State and Pakistan are parties,

the Federal Government may, by notification in the official Gazette, provide for restricting or, as the case may be, extending those immunities and privileges to such extent as it may deem fit.

17. *Savings, etc.* (1) This Ordinance does not affect any immunity or privilege conferred by the Diplomatic and Consular Privileges Act, 1972 (IX of 1972); and

(a) section 6 does not apply to proceedings concerning the employment of the members of a mission within the meaning of the Convention set out in the First Schedule to the said Act of 1972 or of the members of a consular post within the meaning of the Convention set out in the Second Schedule to that Act;

(b) subsection (1) of section 7 does not apply to proceedings concerning a State's title to, or its possession of, property used for the purposes of a diplomatic mission.

(2) This Ordinance does not apply to:

(a) proceedings relating to anything done by or in relation to the armed forces of a State while present in Pakistan;

(b) criminal proceedings; or

(c) proceedings relating to taxation other than those mentioned in section 12.

18. *Proof as to certain matters.* A certificate under the hand of a Secretary to the Government of Pakistan shall be conclusive evidence on any question:

(a) whether any country is a State for the purposes of this Ordinance, 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; or

(b) whether, and if so when, a document has been served or received as mentioned in subsection (1) or subsection (5) of section 13.

19. *Repeal.* Sections 86 and 87 of the Code of Civil Procedure, 1908 (Act V of 1908), are hereby repealed.

L. ROMANIA

DÉCRET N° 443 DU 20 NOVEMBRE 1972 CONCERNANT LA NAVIGATION CIVILE
(PUBLIÉ AU "BULLETIN OFFICIEL" DE LA REPUBLIQUE SOCIALISTE DE
ROUMANIE N° 132 DU 23 NOVEMBRE 1972)

...

Article 97. Pour exercer la surveillance et le contrôle de l'ordre de la navigation, les capitaineries des ports ont droit à la visite, à toute heure du jour et de la nuit, à bord de tout navire battant n'importe quel pavillon et se trouvant dans les ports ou en dehors des ports, dans les limites des eaux nationales.

...

Article 100. La capitainerie du port ne délivrera pas les documents de bord ni le permis de départ aux navires qui n'ont pas versé les droits, les éventuelles pénalités ou réparations dont ils sont tenus, conformément aux dispositions légales, à l'égard de la capitainerie du port ou d'autres organes portuaires.

Les navires pourront également être arrêtés dans les ports ou dans les rades, au cas où la capitainerie est saisie de réclamations en forme écrite contre lesdits navires provenant des organes de la municipalité, des organes judiciaires ou du parquet.

Article 101. Le départ des navires du port ou de la rade peut être aussi interdit au cas où la capitainerie du port reçoit des réclamations en forme écrite demandant la rétention du navire pour le non-paiement de la marchandise chargée, pour des prétentions dérivant des avaries communes, avaries, abordages, opérations d'assistance ou de sauvetage, non-paiement des dédommagements ou droits dus, et pour d'autres raisons similaires.

Aux cas prévus au présent article, la rétention du navire prend fin si le propriétaire verse une garantie suffisante par rapport au montant réclamé ou si, dans un délai de 24 heures à partir de la rétention du navire, celle-ci n'est pas confirmée par décision judiciaire instituant la saisie du navire.

...

Article 103. Les dispositions des articles 97, 100 et 101 ne s'appliquent pas à l'égard des navires militaires, ni aux navires battant pavillon étranger utilisés pour des services gouvernementaux.

M. SINGAPORE

STATE IMMUNITY ACT 1979

An Act to make provision with respect to proceedings in Singapore by or against other States, and for purposes connected therewith.

[26 October 1979]

PART I

PRELIMINARY

1. (1) This Act may be cited as the State Immunity Act, 1979.

(2) Subject to subsection (3), Part II does not apply to proceedings in respect of matters that occurred before the commencement of this Act and, in particular:

(a) subsection (2) of section 4 and subsection (3) of section 15 do not apply to any prior agreement; and

(b) sections 5, 6 and 11 do not apply to any transaction, contract or arbitration agreement, entered into before that date.

(3) Section 14 applies to any proceedings instituted after the commencement of this Act.

2. (1) In this Act:

“commercial purposes” means purposes of such transactions or activities as are mentioned in subsection (3) of section 5;

“court” includes any tribunal or body exercising judicial functions;

“ship” includes hovercraft.

(2) In this Act:

(a) references to an agreement in subsection (2) of section 4 and subsection (3) of section 15 include references to a treaty, convention or other international agreement;

(b) references to entry of appearance and judgments in default of appearance include references to any corresponding procedures.

PART II

PROCEEDINGS IN SINGAPORE BY OR AGAINST OTHER STATES

Immunity from jurisdiction

3. (1) A State is immune from the jurisdiction of the courts of Singapore except as provided in the following provisions of this Part.

(2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.

Exceptions from immunity

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

(2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to be governed by the law of Singapore is not to be regarded as a submission.

(3) A State is deemed to have submitted:

(a) if it has instituted the proceedings; or

(b) subject to subsections (4) and (5), if it has intervened or taken any step in the proceedings.

(4) Paragraph (b) of subsection (3) does not apply to intervention or any step taken for the purpose only of:

(a) claiming immunity; or

(b) asserting an interest in property in circumstances such that the State would have been entitled to immunity if the proceedings had been brought against it.

(5) Paragraph (b) of subsection (3) does not apply to any step taken by the State in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained and immunity is claimed as soon as reasonably practicable.

(6) A submission in respect of any proceedings extends to any appeal but not to any counter-claim unless it arises out of the same legal relationship or facts as the claim.

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

5. (1) A State is not immune as respects proceedings relating to:

(a) a commercial transaction entered into by the State;

or

(b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in Singapore,

but this subsection does not apply to a contract of employment between a State and an individual.

(2) This section does not apply if the parties to the dispute are States or have otherwise agreed in writing; and paragraph (b) of subsection (1) does not apply if the contract (not being a commercial transaction) was made in the territory of the State concerned and the obligation in question is governed by its administrative law.

(3) In this section "commercial transaction" means:

(a) any contract for the supply of goods or services;

(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and

(c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority.

6. (1) A State is not immune as respects proceedings relating to a contract of employment between the State and an individual where the contract was made in Singapore or the work is to be wholly or partly performed in Singapore.

(2) Subject to subsections (3) and (4), this section does not apply if:

(a) at the time when the proceedings are brought the individual is a national of the State concerned;

(b) at the time when the contract was made the individual was neither a citizen of Singapore nor habitually resident in Singapore; or

(c) the parties to the contract have otherwise agreed in writing.

(3) Where the work is for an office, agency or establishment maintained by the State in Singapore for commercial purposes, paragraphs (a) and (b) of subsection (2) do not exclude the application of this section unless the individual was, at the time when the contract was made, habitually resident in that State.

(4) Paragraph (c) of subsection (2) does not exclude the application of this section where the law of Singapore requires the proceedings to be brought before a court in Singapore.

(5) In this section "proceedings relating to a contract of employment" includes proceedings between the parties to such a contract in respect of any statutory rights or duties to which they are entitled or subject as employer or employee.

7. A State is not immune as respects proceedings in respect of:

(a) death or personal injury; or

(b) damage to or loss of tangible property,

caused by an act or omission in Singapore.

8. (1) A State is not immune as respects proceedings relating to:

(a) any interest of the State in, or its possession or use of, immovable property in Singapore; or

(b) any obligation of the State arising out of its interest in, or its possession or use of, any such property.

(2) A State is not immune as respects 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*.

(3) The fact that a State has or claims an interest in any property shall not preclude any court from exercising in respect of it any jurisdiction relating to the estates of deceased persons or persons of unsound mind or to insolvency, the winding up of companies or the administration of trusts.

(4) A court may entertain proceedings against a person other than a State notwithstanding that the proceedings relate to property:

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

(b) in which a State claims an interest,

if the State would not have been immune had the proceedings been brought against it or, in a case within paragraph (b), if the claim is neither admitted nor supported by *prima facie* evidence.

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

(a) any patent, trade-mark or design belonging to the State and registered or protected in Singapore or for which the State has applied in Singapore;

(b) an alleged infringement by the State in Singapore of any patent, trade-mark, design or copyright; or

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

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

(a) has members other than States; and

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

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

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

11. (1) Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts in Singapore which relate to the arbitration.

(2) This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States.

12. (1) This section applies to:

(a) Admiralty proceedings; and

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

(2) A State is not immune as respects:

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

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

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

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

(4) A State is not immune as respects:

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

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

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

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

- (a) any customs duty or excise duty; or
- (b) any tax in respect of premises occupied by it for commercial purposes.

Procedure

14. (1) Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Ministry of Foreign Affairs, Singapore, to the Ministry of Foreign Affairs of the State and service shall be deemed to have been effected when the writ or document is received at the Ministry.

(2) Any time for entering an appearance (whether prescribed by rules of court or otherwise) shall begin to run two months after the date on which the writ or document is received as aforesaid.

(3) A State which appears in proceedings cannot thereafter object that subsection (1) has not been complied with in the case of those proceedings.

(4) No judgment in default of appearance shall be given against a State except on proof that subsection (1) has been complied with and that the time for entering an appearance as extended by subsection (2) has expired.

(5) A copy of any judgment given against a State in default of appearance shall be transmitted through the Ministry of Foreign Affairs, Singapore, to the Ministry of Foreign Affairs of that State and any time for applying to have the judgment set aside (whether prescribed by rules of court or otherwise) shall begin to run two months after the date on which the copy of the judgment is received at the Ministry.

(6) Subsection (1) does not prevent the service of a writ or other document in any manner to which the State has agreed and subsections (2) and (4) do not apply where service is effected in any such manner.

(7) This section shall not be construed as applying to proceedings against a State by way of counter-claim or to an action *in rem*; and subsection (1) shall not be construed as affecting any rules of court whereby leave is required for the service of process outside the jurisdiction.

15. (1) No penalty by way of committal or fine shall be imposed in respect of any failure or refusal by or on behalf of a State to disclose or produce any document or other information for the purposes of proceedings to which it is a party.

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

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

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

(3) Subsection (2) does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which

may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.

(4) Paragraph (b) of subsection (2) does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes.

(5) The head of a State's diplomatic mission in Singapore, or the person for the time being performing his functions, shall be deemed to have authority to give on behalf of the State any such consent as is mentioned in subsection (3) and, for the purposes of subsection (4), his certificate to the effect that any property is not in use or intended for use by or on behalf of the State for commercial purposes shall be accepted as sufficient evidence of that fact unless the contrary is proved.

PART III

SUPPLEMENTARY PROVISIONS

16. (1) The immunities and privileges conferred by Part II apply to any foreign or commonwealth State other than Singapore; and references to a State include references to:

- (a) the sovereign or other head of that State in his public capacity;
- (b) the government of that State; and
- (c) any department of that government,

but not to any entity (hereinafter referred to as a separate entity) which is distinct from the executive organs of the government of the State and capable of suing or being sued.

(2) A separate entity is immune from the jurisdiction of the courts in Singapore if, and only if:

- (a) the proceedings relate to anything done by it in the exercise of sovereign authority; and
- (b) the circumstances are such that a State would have been so immune.

(3) If a separate entity (not being a State's central bank or other monetary authority) submits to the jurisdiction in respect of proceedings in the case of which it is entitled to immunity by virtue of subsection (2), subsections (1) to (4) of section 15 shall apply to it in respect of those proceedings as if references to a State were references to that entity.

(4) Property of a State's central bank or other monetary authority shall not be regarded for the purposes of subsection (4) of section 15 as in use or intended for use for commercial purposes; and where any such bank or authority is a separate entity subsections (1) to (3) of that section shall apply to it as if references to a State were references to the bank or authority.

(5) Section 14 applies to proceedings against the constituent territories of a federal State; and the President may by order provide for the other provisions of this Part to apply to any such constituent territory specified in the order as they apply to a State.

(6) Where the provisions of Part II do not apply to a constituent territory by virtue of any such order subsections (2) and (3) shall apply to it as if it were a separate entity.

17. If it appears to the President that the immunities and privileges conferred by Part II in relation to any State:

- (a) exceed those accorded by the law of that State in relation to Singapore; or
- (b) are less than those required by any treaty, convention or other international agreement to which that State and Singapore are parties.

the President may, by order, provide for restricting or, as the case may be, extending those immunities and privileges to such extent as appears to the President to be appropriate.

18. A certificate by or on behalf of the Minister for Foreign Affairs shall be conclusive evidence on any question:

(a) whether any country is a State for the purposes of Part II, 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, and if so when, a document has been served or received as mentioned in subsection (1) or (5) of section 14.

19. (1) Part II does not affect any immunity or privilege applicable in Singapore to diplomatic and consular agents, and subsection (1) of section 8 does not apply to proceedings concerning a State's title to or its possession of property used for the purposes of a diplomatic mission.

(2) Part II does not apply to:

(a) proceedings relating to anything done by or in relation to the armed forces of a State while present in Singapore and, in particular, has effect subject to the Visiting Forces Act;

(b) criminal proceedings; and

(c) proceedings relating to taxation other than those mentioned in section 13.

N. SOUTH AFRICA

FOREIGN SOVEREIGN IMMUNITY ACT (1981)¹¹

Be it enacted by the State President and the House of Assembly of the Republic of South Africa, as follows:

1. (1) In this Act, unless the context otherwise indicates:

(i) "commercial purposes" means purposes of any commercial transaction as defined in section 4 (3);

¹¹ Transmitted to the Secretariat by that Government. The Act came into force on 6 October 1981.

- (ii) “consular post” means a consulate-general, consulate, consular agency, trade office or labour office;
- (iii) “Republic” includes the territorial waters of the Republic, as defined in section 2 of the Territorial Waters Act, 1963 (Act No. 87 of 1963);
- (iv) “separate entity” means an entity referred to in subsection (2) (i).

(2) Any reference in this Act to a foreign state shall in relation to any particular foreign state be construed as including a reference to:

- (a) the head of state of that foreign state, in his capacity as such head of state;
- (b) the government of that foreign state; and
- (c) any department of that government,

but not including a reference to:

- (i) any entity which is distinct from the executive organs of the government of that foreign state and capable of suing or being sued; or
- (ii) any territory forming a constituent part of a federal foreign state.

2. (1) A foreign state shall be immune from the jurisdiction of the courts of the Republic except as provided in this Act or in any proclamation issued thereunder.

(2) A court shall give effect to the immunity conferred by this section even though the foreign state does not appear in the proceedings in question.

(3) The provisions of this Act shall not be construed as subjecting any foreign state to the criminal jurisdiction of the courts of the Republic.

3. (1) A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings in respect of which the foreign state has expressly waived its immunity or is in terms of subsection (3) deemed to have waived its immunity.

(2) Waiver of immunity may be effected after the dispute which gave rise to the proceedings has arisen or by prior written agreement, but a provision in an agreement that it is to be governed by the law of the Republic shall not be regarded as a waiver.

(3) A foreign state shall be deemed to have waived its immunity:

(a) if it has instituted the proceedings; or

(b) subject to the provisions of subsection (4), if it has intervened or taken any step in the proceedings.

(4) Subsection (3) (b) shall not apply to intervention or any step taken for the purpose only of:

(a) claiming immunity; or

(b) asserting an interest in property in circumstances such that the foreign state would have been entitled to immunity if the proceedings had been brought against it.

(5) A waiver in respect of any proceedings shall apply to any appeal and to any counter-claim arising out of the same legal relationship or facts as the claim.

(6) The head of a foreign state’s diplomatic mission in the Republic, or the person for the time being performing his functions, shall be deemed to have author-

ity to waive on behalf of the foreign state its immunity in respect of any proceedings, and any person who has entered into a contract on behalf of and with the authority of a foreign state shall be deemed to have authority to waive on behalf of the foreign state its immunity in respect of proceedings arising out of the contract.

4. (1) A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to:

- (a) a commercial transaction entered into by the foreign state; or
- (b) an obligation of the foreign state which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the Republic.

(2) Subsection (1) shall not apply if the parties to the dispute are foreign states or have agreed in writing that the dispute shall be justiciable by the courts of a foreign state.

(3) In subsection (1) "commercial transaction" means:

- (a) any contract for the supply of services or goods;
- (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such loan or other transaction or of any other financial obligation; and

(c) any other transaction or activity of a commercial, industrial, financial, professional or other similar character into which a foreign state enters or in which it engages otherwise than in the exercise of sovereign authority,

but does not include a contract of employment between a foreign state and an individual.

5. (1) A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to a contract of employment between the foreign state and an individual if:

- (a) the contract was entered into in the Republic or the work is to be performed wholly or partly in the Republic; and
- (b) at the time when the contract was entered into the individual was a South African citizen or was ordinarily resident in the Republic; and
- (c) at the time when the proceedings are brought the individual is not a citizen of the foreign state.

(2) Subsection (1) shall not apply if:

- (a) the parties to the contract have agreed in writing that the dispute or any dispute relating to the contract shall be justiciable by the courts of a foreign state; or
- (b) the proceedings relate to the employment of the head of a diplomatic mission or any member of the diplomatic, administrative, technical or service staff of the mission or to the employment of the head of a consular post or any member of the consular, labour, trade, administrative, technical or service staff of the post.

6. A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to:

- (a) the death or injury of any person; or

(b) damage to or loss of tangible property, caused by an act or omission in the Republic.

7. (1) A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to:

(a) any interest of the foreign state in, or its possession or use of, immovable property in the Republic;

(b) any obligation of the foreign state arising out of its interest in, or its possession or use of, such property; or

(c) any interest of the foreign state in movable or immovable property, being an interest arising by way of succession, gift or *bona vacantia*.

(2) Subsection (1) shall not apply to proceedings relating to a foreign state's title to, or its use or possession of, property used for a diplomatic mission or a consular post.

8. A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to:

(a) any patent, trade-mark, design or plant breeder's right belonging to the foreign state and registered or protected in the Republic or for which the foreign state has applied in the Republic; or

(b) an alleged infringement by the foreign state in the Republic of any patent, trade-mark, design, plant breeder's right or copyright; or

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

9. (1) A foreign state which is a member of an association or other body (whether a juristic person or not), or a partnership, which:

(a) has members that are not foreign states; and

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

shall not be immune from the jurisdiction of the courts of the Republic in proceedings which:

(i) relate to the foreign state's membership of the association, other body or partnership; and

(ii) arise between the foreign state and the association or other body or its other members or, as the case may be, between the foreign state and the other partners.

(2) Subsection (1) shall not apply if:

(a) in terms of an agreement in writing between the parties to the dispute; or

(b) in terms of the constitution or other instrument establishing or governing the association, other body or partnership in question, the dispute is justiciable by the courts of a foreign state.

10. (1) A foreign state which has agreed in writing to submit a dispute which has arisen, or may rise, to arbitration, shall not be immune from the jurisdiction of the courts of the Republic in any proceedings which relate to the arbitration.

(2) Subsection (1) shall not apply if:

(a) the arbitration agreement provides that the proceedings shall be brought in the courts of a foreign state; or

(b) the parties to the arbitration agreement are foreign states.

11. (1) A foreign state shall not be immune from the admiralty jurisdiction of any court of the Republic in:

(a) an action *in rem* against a ship belonging to the foreign state; or

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

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

(2) A foreign state shall not be immune from the admiralty jurisdiction of any court of the Republic in:

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

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

(3) Any reference in this section to a ship or cargo belonging to a foreign state shall be construed as including a reference to a ship or cargo in the possession or control of a foreign state or in which a foreign state claims an interest, and, subject to the provisions of subsection (2), subsection (1) shall apply to property other than a ship as it applies to a ship.

12. A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to the foreign state's liability for:

(a) sales tax or any customs or excise duty; or

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

13. (1) Any process or other document required to be served for instituting proceedings against a foreign state shall be served by being transmitted through the Department of Foreign Affairs and Information of the Republic to the ministry of foreign affairs of the foreign state, and service shall be deemed to have been effected when the process or other document is received at that ministry.

(2) Any time prescribed by rules of court or otherwise for notice of intention to defend or oppose or entering an appearance shall begin to run two months after the date on which the process or document is received as aforesaid.

(3) A foreign state which appears in proceedings cannot thereafter object that subsection (1) has not been complied with in the case of those proceedings.

(4) No judgment in default of appearance shall be given against a foreign state except on proof that subsection (1) has been complied with and that the time for notice of intention to defend or oppose or entering an appearance as extended by subsection (2) has expired.

(5) A copy of any default judgment against a foreign state shall be transmitted through the Department of Foreign Affairs and Information of the Republic to the

ministry of foreign affairs of the foreign state, and any time prescribed by rules of court or otherwise for applying to have the judgment set aside shall begin to run two months after the date on which the copy of the judgment is received at that ministry.

(6) Subsection (1) shall not prevent the service of any process or other document in any manner to which the foreign state has agreed, and subsections (2) and (4) shall not apply where service is effected in any such manner.

(7) The preceding provisions of this section shall not be construed as applying to proceedings against a foreign state by way of counter-claim or to an action *in rem*, and subsection (1) shall not be construed as affecting any rules of court whereby leave is required for the service of process outside the jurisdiction of the court.

14. (1) Subject to the provisions of subsections (2) and (3):

(a) relief shall not be given against a foreign state by way of interdict or order for specific performance or for the recovery of any movable or immovable property; and

(b) the property of a foreign state shall not be subject to any process for the enforcement of a judgment or an arbitration award or, in an action *in rem*, for its attachment or sale.

(2) Subsection (1) shall not prevent the giving of any relief or the issue of any process with the written consent of the foreign state concerned, and any such consent, which may be contained in a prior agreement, may be expressed so as to apply to a limited extent or generally, but a mere waiver of a foreign state's immunity from the jurisdiction of the courts of the Republic shall not be regarded as a consent for the purposes of this subsection.

(3) Subsection (1) (b) shall not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes.

15. (1) A separate entity shall be immune from the jurisdiction of the courts of the Republic only if:

(a) the proceedings relate to anything done by the separate entity in the exercise of sovereign authority; and

(b) the circumstances are such that a foreign state would have been so immune.

(2) If a separate entity, not being the central bank or other monetary authority of a foreign state, waives the immunity to which it is entitled by virtue of subsection (1) in respect of any proceedings, the provisions of section 14 shall apply to those proceedings as if references in those provisions to a foreign state were references to that separate entity.

(3) Property of the central bank or other monetary authority of a foreign state shall not be regarded for the purposes of subsection (3) of section 14 as in use or intended for use for commercial purposes, and where any such bank or authority is a separate entity the provisions of subsections (1) and (2) of that section shall apply to it as if references in those provisions to a foreign state were references to that bank or authority.

16. If it appears to the State President that the immunities and privileges conferred by this Act in relation to a particular foreign state:

(a) exceed or are less than those accorded by the law of that foreign state in relation to the Republic; or

(b) are less than those required by any treaty, convention or other international agreement to which that foreign state and the Republic are parties,

he may by proclamation in the *Gazette* restrict or, as the case may be, extend those immunities and privileges to such extent as appears to him to be appropriate.

17. A certificate by or on behalf of the Minister of Foreign Affairs and Information shall be conclusive evidence on any question:

(a) whether any foreign country is a state for the purposes of this Act;

(b) whether any territory is a constituent part of a federal foreign state for the said purposes;

(c) as to the person or persons to be regarded for the said purposes as the head of state or government of a foreign state;

(d) whether, and if so when, any document has been served or received as contemplated in section 13 (1) or (5).

18. This Act shall be called the Foreign States Immunities Act, 1981, and shall come into operation on a date to be fixed by the State President by proclamation in the *Gazette*.

O. UNION OF SOVIET SOCIALIST REPUBLICS¹²

ARTICLE 61 OF THE FUNDAMENTALS OF CIVIL PROCEDURE OF THE USSR AND THE UNION REPUBLICS

Fundamentals of Civil Procedure of the USSR and the Union Republics (Approved in the Law of the Union of Soviet Socialist Republics dated 8 December 1961, "Proceedings of the Supreme Soviet of the USSR", 1961, No. 50, p. 526)

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

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

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

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

¹² Transmitted to the Secretariat by that Government.

P. UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

1. STATE IMMUNITY ACT 1978

CHAPTER 33

An Act to make new provision with respect to proceedings in the United Kingdom by or against other States; to provide for the effect of judgments given against the United Kingdom in the courts of States parties to the European Convention on State Immunity; to make new provision with respect to the immunities and privileges of heads of State; and for connected purposes.

[20th July 1978]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

PART I

PROCEEDINGS IN UNITED KINGDOM BY OR AGAINST OTHER STATES

Immunity from jurisdiction

1. (1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.

(2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.

Exceptions from immunity

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

(2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to be governed by the law of the United Kingdom is not to be regarded as a submission.

(3) A State is deemed to have submitted:

(a) if it has instituted the proceedings; or

(b) subject to subsections (4) and (5) below, if it has intervened or taken any step in the proceedings.

(4) Subsection (3)(b) above does not apply to intervention or any step taken for the purpose only of:

(a) claiming immunity; or

(b) asserting an interest in property in circumstances such that the State would have been entitled to immunity if the proceedings had been brought against it.

(5) Subsection (3)(b) above does not apply to any step taken by the State in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained and immunity is claimed as soon as reasonably practicable.

(6) A submission in respect of any proceedings extends to any appeal but not

to any counter-claim unless it arises out of the same legal relationship or facts as the claim.

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

3. (1) A State is not immune as respects proceedings relating to:

(a) a commercial transaction entered into by the State; or

(b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom.

(2) This section does not apply if the parties to the dispute are States or have otherwise agreed in writing; and subsection (1)(b) above does not apply if the contract (not being a commercial transaction) was made in the territory of the State concerned and the obligation in question is governed by its administrative law.

(3) In this section "commercial transaction" means:

(a) any contract for the supply of goods or services;

(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and

(c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority;

but neither paragraph of subsection (1) above applies to a contract of employment between a State and an individual.

4. (1) A State is not immune as respects proceedings relating to a contract of employment between the State and an individual where the contract was made in the United Kingdom or the work is to be wholly or partly performed there.

(2) Subject to subsections (3) and (4) below, this section does not apply if:

(a) at the time when the proceedings are brought the individual is a national of the State concerned; or

(b) at the time when the contract was made the individual was neither a national of the United Kingdom nor habitually resident there; or

(c) the parties to the contract have otherwise agreed in writing.

(3) Where the work is for an office, agency or establishment maintained by the State in the United Kingdom for commercial purposes, subsection (2)(a) and (b) above do not exclude the application of this section unless the individual was, at the time when the contract was made, habitually resident in that State.

(4) Subsection (2)(c) above does not exclude the application of this section where the law of the United Kingdom requires the proceedings to be brought before a court of the United Kingdom.

(5) In subsection (2)(b) above "national of the United Kingdom" means a cit-

izen of the United Kingdom and Colonies, a person who is a British subject by virtue of section 2, 13 or 16 of the British Nationality Act 1948 or by virtue of the British Nationality Act 1965, a British protected person within the meaning of the said Act of 1948 or a citizen of Southern Rhodesia.

(6) In this section "proceedings relating to a contract of employment" includes proceedings between the parties to such a contract in respect of any statutory rights or duties to which they are entitled or subject as employer or employee.

5. A State is not immune as respects proceedings in respect of:

- (a) death or personal injury; or
- (b) damage to or loss of tangible property,

caused by an act or omission in the United Kingdom.

6. (1) A State is not immune as respects proceedings relating to:

- (a) any interest of the State in, or its possession or use of, immovable property in the United Kingdom; or
- (b) any obligation of the State arising out of its interest in, or its possession or use of, any such property.

(2) A State is not immune as respects 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.

(3) The fact that a State has or claims an interest in any property shall not preclude any court from exercising in respect of it any jurisdiction relating to the estates of deceased persons or persons of unsound mind or to insolvency, the winding up of companies or the administration of trusts.

(4) A court may entertain proceedings against a person other than a State notwithstanding that the proceedings relate to property:

- (a) which is in the possession or control of a State; or
- (b) in which a State claims an interest,

if the State would not have been immune had the proceedings been brought against it or, in a case within paragraph (b) above, if the claim is neither admitted nor supported by prima facie evidence.

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

- (a) any patent, trade-mark, design or plant breeders' rights belonging to the State and registered or protected in the United Kingdom or for which the State has applied in the United Kingdom;
- (b) an alleged infringement by the State in the United Kingdom of any patent, trade-mark, design, plant breeders' rights or copyright; or
- (c) the right to use a trade or business name in the United Kingdom.

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

- (a) has members other than States; and
- (b) is incorporated or constituted under the law of the United Kingdom or is controlled from or has its principal place of business in the United Kingdom,

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

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

9. (1) Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.

(2) This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States.

10. (1) This section applies to:

(a) Admiralty proceedings; and

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

(2) A State is not immune as respects:

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

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

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

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

(4) A State is not immune as respects:

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

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

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

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

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

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

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

Procedure

12. (1) Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the State and service shall be deemed to have been effected when the writ or document is received at the Ministry.

(2) Any time for entering an appearance (whether prescribed by rules of court or otherwise) shall begin to run two months after the date on which the writ or document is received as aforesaid.

(3) A State which appears in proceedings cannot thereafter object that subsection (1) above has not been complied with in the case of those proceedings.

(4) No judgment in default of appearance shall be given against a State except on proof that subsection (1) above has been complied with and that the time for entering an appearance as extended by subsection (2) above has expired.

(5) A copy of any judgment given against a State in default of appearance shall be transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of that State and any time for applying to have the judgment set aside (whether prescribed by rules of court or otherwise) shall begin to run two months after the date on which the copy of the judgment is received at the Ministry.

(6) Subsection (1) above does not prevent the service of a writ or other document in any manner to which the State has agreed and subsections (2) and (4) above do not apply where service is effected in any such manner.

(7) This section shall not be construed as applying to proceedings against a State by way of counter-claim or to an action in rem; and subsection (1) above shall not be construed as affecting any rules of court whereby leave is required for the service of process outside the jurisdiction.

13. (1) No penalty by way of committal or fine shall be imposed in respect of any failure or refusal by or on behalf of a State to disclose or produce any document or other information for the purposes of proceedings to which it is a party.

(2) Subject to subsections (3) and (4) below:

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

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

(3) Subsection (2) above does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.

(4) Subsection (2)(b) above does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes; but, in a case not falling within section 10 above, this subsection applies to property of a State party to the European Convention on State Immunity only if

(a) the process is for enforcing a judgment which is final within the meaning of section 18(1)(b) below and the State has made a declaration under Article 24 of the Convention; or

(b) the process is for enforcing an arbitration award.

(5) The head of a State's diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to give on behalf of the State any such consent as is mentioned in subsection (3) above and, for the purposes of subsection (4) above, his certificate to the effect that any property is not in use or intended for use by or on behalf of the State for commercial purposes shall be accepted as sufficient evidence of that fact unless the contrary is proved.

(6) In the application of this section to Scotland:

(a) the reference to "injunction" shall be construed as a reference to "interdict";

(b) for paragraph (b) of subsection (2) above there shall be substituted the following paragraph:

"(b) the property of a State shall not be subject to any diligence for enforcing a judgment or order of a court or a decree arbitral or, in an action in rem, to arrestment or sale"; and

(c) any reference to "process" shall be construed as a reference to "diligence", any reference to "the issue of any process" as a reference to "the doing of diligence" and the reference in subsection (4)(b) above to "an arbitration award" as a reference to "a decree arbitral".

Supplementary provisions

14. (1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include references to:

- (a) the sovereign or other head of that State in his public capacity;
- (b) the government of that State; and
- (c) any department of that government,

but not to any entity (hereafter referred to as a "separate entity") which is distinct from the executive organs of the government of the State and capable of suing or being sued.

(2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if:

(a) the proceedings relate to anything done by it in the exercise of sovereign authority; and

(b) the circumstances are such that a State (or, in the case of proceedings to which section 10 above applies, a State which is not a party to the Brussels Convention) would have been so immune.

(3) If a separate entity (not being a State's central bank or other monetary authority) submits to the jurisdiction in respect of proceedings in the case of which it is entitled to immunity by virtue of subsection (2) above, subsections (1) to (4) of sec-

tion 13 above shall apply to it in respect of those procedures as if references to a State were references to that entity.

(4) Property of a State's central bank or other monetary authority shall not be regarded for the purposes of subsection (4) of section 13 above as in use or intended for use for commercial purposes; and where any such bank or authority is a separate entity subsections (1) to (3) of that section shall apply to it as if references to a State were references to the bank or authority.

(5) Section 12 above applies to proceedings against the constituent territories of a federal State; and Her Majesty may by Order in Council provide for the other provisions of this Part of this Act to apply to any such constituent territory specified in the Order as they apply to a State.

(6) Where the provisions of this Part of this Act do not apply to a constituent territory by virtue of any such Order subsections (2) and (3) above shall apply to it as if it were a separate entity.

15. (1) If it appears to Her Majesty that the immunities and privileges conferred by this Part of this Act in relation to any State:

(a) exceed those accorded by the law of that State in relation to the United Kingdom; or

(b) are less than those required by any treaty, convention or other international agreement to which that State and the United Kingdom are parties,

Her Majesty may by Order in Council provide for restricting or, as the case may be, extending those immunities and privileges to such extent as appears to Her Majesty to be appropriate.

(2) Any statutory instrument containing an Order under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.

16. (1) This Part of this Act does not affect any immunity or privilege conferred by the Diplomatic Privileges Act 1964 or the Consular Relations Act 1968; and:

(a) section 4 above does not apply to proceedings concerning the employment of the members of a mission within the meaning of the Convention scheduled to the said Act of 1964 or of the members of a consular post within the meaning of the Convention scheduled to the said Act of 1968;

(b) section 6(1) above does not apply to proceedings concerning a State's title to or its possession of property used for the purposes of a diplomatic mission.

(2) This Part of this Act does not apply to proceedings relating to anything done by or in relation to the armed forces of a State while present in the United Kingdom and, in particular, has effect subject to the Visiting Forces Act 1952.

(3) This Part of this Act does not apply to proceedings to which section 17(6) of the Nuclear Installations Act 1965 applies.

(4) This Part of this Act does not apply to criminal proceedings.

(5) This Part of this Act does not apply to any proceedings relating to taxation other than those mentioned in section 11 above.

17. (1) In this Part of this Act:

“the Brussels Convention” means the International Convention for the Unification of Certain Rules Concerning the Immunity of State-owned Ships, signed in Brussels on 10th April 1926;

“commercial purposes” means purposes of such transactions or activities as are mentioned in section 3(3) above;

“ship” includes hovercraft.

(2) In sections 2(2) and 13(3) above references to an agreement include references to a treaty, convention or other international agreement.

(3) For the purposes of sections 3 to 8 above the territory of the United Kingdom shall be deemed to include any dependent territory in respect of which the United Kingdom is a party to the European Convention on State Immunity.

(4) In sections 3(1), 4(1), 5 and 16(2) above references to the United Kingdom include references to its territorial waters and any area designated under section 1(7) of the Continental Shelf Act 1964.

(5) In relation to Scotland in this Part of this Act “action in rem” means such an action only in relation to Admiralty proceedings.

PART II

JUDGMENTS AGAINST UNITED KINGDOM IN CONVENTION STATES

18. (1) This section applies to any judgment given against the United Kingdom by a court in another State party to the European Convention on State Immunity, being a judgment:

- (a) given in proceedings in which the United Kingdom was not entitled to immunity by virtue of provisions corresponding to those of sections 2 to 11 above; and
- (b) which is final, that is to say, which is not or is no longer subject to appeal or, if given in default of appearance, liable to be set aside.

(2) Subject to section 19 below, a judgment to which this section applies shall be recognised in any court in the United Kingdom as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied on by way of defence or counter-claim in such proceedings.

(3) Subsection (2) above (but not section 19 below) shall have effect also in relation to any settlement entered into by the United Kingdom before a court in another State party to the Convention which under the law of that State is treated as equivalent to a judgment.

(4) In this section references to a court in a State party to the Convention include references to a court in any territory in respect of which it is a party.

19. (1) A court need not give effect to section 18 above in the case of a judgment:

(a) if to do so would be manifestly contrary to public policy or if any party to the proceedings in which the judgment was given had no adequate opportunity to present his case; or

(b) if the judgment was given without provisions corresponding to those of section 12 above having been complied with and the United Kingdom has not entered an appearance or applied to have the judgment set aside.

- (2) A court need not give effect to section 18 above in the case of a judgment:
- (a) if proceedings between the same parties, based on the same facts and having the same purpose:
- (i) are pending before a court in the United Kingdom and were the first to be instituted; or
 - (ii) are pending before a court in another State party to the Convention, were the first to be instituted and may result in a judgment to which that section will apply; or
- (b) if the result of the judgment is inconsistent with the result of another judgment given in proceedings between the same parties and:
- (i) the other judgment is by a court in the United Kingdom and either those proceedings were the first to be instituted or the judgment of that court was given before the first-mentioned judgment became final within the meaning of subsection (1)(b) of section 18 above; or
 - (ii) the other judgment is by a court in another State party to the Convention and that section has already become applicable to it.
- (3) Where the judgment was given against the United Kingdom in proceedings in respect of which the United Kingdom was not entitled to immunity by virtue of a provision corresponding to section 6(2) above, a court need not give effect to section 18 above in respect of the judgment if the court that gave the judgment:
- (a) would not have had jurisdiction in the matter if it had applied rules of jurisdiction corresponding to those applicable to such matters in the United Kingdom; or
 - (b) applied a law other than that indicated by the United Kingdom rules of private international law and would have reached a different conclusion if it had applied the law so indicated.
- (4) In subsection (2) above references to a court in the United Kingdom include references to a court in any dependent territory in respect of which the United Kingdom is a party to the Convention, and references to a court in another State party to the Convention include references to a court in any territory in respect of which it is a party.

PART III

MISCELLANEOUS AND SUPPLEMENTARY

20. (1) Subject to the provisions of this section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to:
- (a) a sovereign or other head of State;
 - (b) members of his family forming part of his household; and
 - (c) his private servants,
- as it applies to the head of a diplomatic mission, to members of his family forming part of his household and to his private servants.
- (2) The immunities and privileges conferred by virtue of subsection (1)(a) and (b) above shall not be subject to the restrictions by reference to nationality or residence mentioned in Article 37(1) or 38 in Schedule 1 to the said Act of 1964.

(3) Subject to any direction to the contrary by the Secretary of State, a person on whom immunities and privileges are conferred by virtue of subsection (1) above shall be entitled to the exemption conferred by section 8(3) of the Immigration Act 1971.

(4) Except as respects value added tax and duties of customs or excise, this section does not affect any question whether a person is exempt from, or immune as respects proceedings relating to, taxation.

(5) This section applies to the sovereign or other head of any State on which immunities and privileges are conferred by Part I of this Act and is without prejudice to the application of that Part to any such sovereign or head of State in his public capacity.

21. A certificate by or on behalf of the Secretary of State shall be conclusive evidence on any question:

(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 had 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.

22. (1) In this Act "court" includes any tribunal or body exercising judicial functions; and references to the courts or law of the United Kingdom include references to the courts or law of any part of the United Kingdom.

(2) In this Act references to entry of appearance and judgments in default of appearance include references to any corresponding procedures.

(3) In this Act "the European Convention on State Immunity" means the Convention of that name signed in Basle on 16th May 1972.

(4) In this Act "dependent territory" means:

(a) any of the Channel Islands;

(b) the Isle of Man;

(c) any colony other than one for whose external relations a country other than the United Kingdom is responsible; or

(d) any country or territory outside Her Majesty's dominions in which Her Majesty has jurisdiction in right of the government of the United Kingdom.

(5) Any power conferred by this Act to make an Order in Council includes power to vary or revoke a previous Order.

23. (1) This Act may be cited as the State Immunity Act 1978.

(2) Section 13 of the Administration of Justice (Miscellaneous Provisions) Act 1938 and section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act

1940 (which become unnecessary in consequence of Part I of this Act) are hereby repealed.

(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) sections 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.

(5) This Act shall come into force on such date as may be specified by an order made by the Lord Chancellor by statutory instrument.

(6) This Act extends to Northern Ireland.

(7) Her Majesty may by Order in Council extend any of the provisions of this Act, with or without modification, to any dependent territory.

2. THE STATE IMMUNITY (MERCHANT SHIPPING) (UNION OF SOVIET SOCIALIST REPUBLICS) ORDER 1978

<i>Made</i>	24th October 1978
<i>Laid before Parliament</i>	1st November 1978
<i>Coming into Operation</i>	22nd November 1978

At the Court at Buckingham Palace, the 24th day of October 1978

Present,

The Queen's Most Excellent Majesty in Council

Her Majesty, in exercise of the powers conferred on Her by section 15(1) of the State Immunity Act 1978, or otherwise in Her Majesty vested, is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows:

1. This Order may be cited as the State Immunity (Merchant Shipping) (Union of Soviet Socialist Republics) Order 1978 and shall come into operation on 22nd November 1978.

2. The Interpretation Act 1889(b) shall apply to the interpretation of this Order as it applies to the interpretation of an Act of Parliament.

3. Notwithstanding section 13(4) of the State Immunity Act of 1978, no application shall be made for the issue of a warrant of arrest in an action *in rem* against a ship owned by the Union of Soviet Socialist Republics or cargo aboard it until notice has been served on a consular officer of that State in London or in the port at which it is intended to cause the ship to be arrested.

4. Notwithstanding section 13(4) of the State Immunity Act 1978, no ship or cargo owned by the Union of Soviet Socialist Republics shall be subject to any

process for the enforcement of a judgment or for the enforcement of terms of settlement filed with and taking effect as a court order.

N. E. LEIGH
Clerk of the Privy Council

EXPLANATORY NOTE

(This note is not part of the Order.)

This Order preserves the immunity from execution of ships and cargoes of the Union of Soviet Socialist Republics which would otherwise have been lost by virtue of section 13(4) of the State Immunity Act 1978, and requires notice to be given to a Soviet consul before a warrant of arrest is issued in an action *in rem* against a ship of that State or cargo on it. It gives effect to Articles 2 and 3 of the Protocol to the Treaty on Merchant Navigation between the United Kingdom of Great Britain and Northern Ireland and the Union of Soviet Socialist Republics which was signed at London on 3rd April 1968.

3. INTERNATIONAL IMMUNITIES AND PRIVILEGES. THE STATE
IMMUNITY ACT 1978 (COMMENCEMENT) ORDER 1978

Made

26th October 1978

The Lord Chancellor, in exercise of the powers conferred on him by section 23(5) of the State Immunity Act 1978, hereby makes the following Order:

1. This Order may be cited as the State Immunity Act 1978 (Commencement) Order 1978.

2. The State Immunity Act 1978 shall come into operation on 22nd November 1978.

Dated 26th October 1978.

ELWYN-JONES, C.

EXPLANATORY NOTE

(This note is not part of the Order.)

This Order brings into operation the State Immunity Act 1978 which restricts the immunity which Sovereign States can claim from the jurisdiction of civil courts and tribunals in the United Kingdom and regulates the personal immunities of Heads of State by equating them to those conferred on an Ambassador.

4. INTERNATIONAL IMMUNITIES AND PRIVILEGES. THE STATE IMMUNITY
(FEDERAL STATES) ORDER 1979

Made

11th April 1979

Coming into Operation

2nd May 1979

At the Court at Windsor Castle, the 11th day of April 1979

Present,

The Queen's Most Excellent Majesty in Council

Her Majesty, in exercise of the powers conferred on Her by section 14(5) of the

State Immunity Act 1978, or otherwise in Her Majesty vested, is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows:

1. This Order may be cited as the State Immunity (Federal States) Order 1979 and shall come into operation on 2nd May 1979.
2. The provisions of Part I of the State Immunity Act 1978 shall apply to the following constituent territories of the Republic of Austria as they apply to a State: Burgenland, Carinthia, Lower Austria, Upper Austria, Salzburg, Styria, Tyrol, Vorarlberg and Vienna.

N. E. LEIGH
Clerk of the Privy Council

EXPLANATORY NOTE

(This note is not part of the Order.)

This Order applies the provisions of Part I of the State Immunity Act 1978 to the constituent territories of the Republic of Austria, in accordance with paragraph 2 of Article 28 of the European Convention on State Immunity (Cmd. 5081).

5. INTERNATIONAL IMMUNITIES AND PRIVILEGES. THE STATE IMMUNITY
(OVERSEAS TERRITORIES) ORDER 1979

<i>Made</i>	<i>11th April 1979</i>
<i>Coming into Operation</i>	<i>2nd May 1979</i>

At the Court at Windsor Castle, the 11th day of April 1979

Present,

The Queen's Most Excellent Majesty in Council

Her Majesty, in exercise of the powers conferred upon Her by section 23(7) of the State Immunity Act 1978 or otherwise in Her Majesty vested, is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows:

1. This Order may be cited as the State Immunity (Overseas Territories) Order 1979 and shall come into operation on 2nd May 1979.
2. The provisions of the State Immunity Act 1978 shall extend to each of the territories specified in Schedule 1 to this Order with the adaptations and modifications specified in Schedule 2 to this Order.
3. For the purpose of construing the said Act as so extended as part of the law of a territory to which it extends "the Territory" means that territory and "any Territory" means any of the Territories to which it extends.

N. E. LEIGH
Clerk of the Privy Council

SCHEDULE 1

Belize	Montserrat
British Antarctic Territory	Pitcairn, Henderson, Ducie and Oeno Islands
British Virgin Islands	Sovereign Base Areas of Akrotiri and Dhekelia
Cayman Islands	Turks and Caicos Islands
Falkland Islands and Dependencies	
Gilbert Islands	
Hong Kong	

SCHEDULE 2

1. (a) For the references to the United Kingdom in sections 1(1), 2(1), 9(1), 14(2), 16(2), 18(1) and (3) and 19(1) and (3) there shall be substituted a reference to the Territory.

(b) To the reference to the United Kingdom in section 2(2) there shall be added a reference to any Territory.

2. Save as is provided otherwise, any reference to any enactment of the United Kingdom shall be construed as a reference to that enactment as applying or extended to the Territory.

3. In section 12(1) any writ or document required to be served and in section 12(5) a copy of any judgment given against a State in default of appearance shall be transmitted to the Governor of the territory (or in the case of Hong Kong to the Chief Secretary and in the case of the Sovereign Base areas of Akrotiri and Dhekelia to the Administrator) and by him to the Foreign and Commonwealth Office for onward transmission to the State concerned.

4. (a) In the application of section 16(1) to Belize, British Antarctic Territory, Cayman Islands, Falkland Islands and Dependencies and Hong Kong:

(i) for the words and numerals "Diplomatic Privileges Act 1964 or the Consular Relations Act 1968" there shall be substituted the words and numerals:

"Diplomatic Privileges and Consular Conventions Ordinance (Chapter 176) or the Consular Relations Ordinance 1972" in the case of Belize;

"Diplomatic Privileges (Extension) Ordinance (Chapter 20)" in the case of British Antarctic Territory and Falkland Islands;

"Consular Relations and Diplomatic Immunities and Privileges Law (Revised)" in the case of the Cayman Islands;

"International Organisations and Diplomatic Privileges Ordinance (Chapter 190) or the Consular Relations Ordinance (Chapter 259)" in the case of Hong Kong; and

(ii) for the words and numerals "said Act of 1964" and "said Act of 1968" there shall be substituted respectively the words and numerals "Diplomatic Privileges Act 1964" and "Consular Relations Act 1968";

(b) In the application of section 20 to Belize, British Antarctic Territory, Cayman Islands, Falkland Islands and Dependencies and Hong Kong:

- (i) in subsection (1) for the words and numerals "Diplomatic Privileges Act 1964" there shall be substituted the words and numerals:
- "Diplomatic Privileges and Consular Conventions Ordinance (Chapter 176)" in the case of Belize;
- "Diplomatic Privileges (Extension) Ordinance (Chapter 20)" in the case of British Antarctic Territory and Falkland Islands;
- "Consular Relations and Diplomatic Immunities and Privileges Law (Revised)" in the case of the Cayman Islands;
- "International Organisations and Diplomatic Privileges Ordinance (Chapter 190)" in the case of Hong Kong; and
- (ii) in subsection (2) for the words and numerals "said Act of 1964" there shall be substituted the words and numerals "Diplomatic Privileges Act 1964 and to any corresponding restrictions in the law of the Territory".

5. For the reference in section 20(3) to "the exemption conferred by section 8(3) of the Immigration Act 1971" there shall be substituted a reference to "exemption from immigration restrictions and regulations".

6. For section 23(5) there shall be substituted the following subsection:

"(5) This Act shall come into force on the coming into operation of the Order in Council extending it to the Territory."

EXPLANATORY NOTE

(This note is not part of the Order.)

This Order extends to the dependent territories specified in Schedule 1 the provisions of the State Immunity Act 1978, with minor adaptations set out in Schedule 2. This will enable effect to be given to the provisions of the European Convention on State Immunity (Cmd. 5081), the International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships (Cmd. 5672) and the Supplementary Protocol thereto (Cmd. 5673).

Q. UNITED STATES OF AMERICA

1. THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976, PUBLIC LAW 94-583, 90 STAT. 2891

AN ACT

To define the jurisdiction of United States courts in suits against foreign states, the circumstances in which foreign states are immune from suit and in which execution may not be levied on their property, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Foreign Sovereign Immunities Act of 1976".

Sec. 2. (a) That chapter 85 of title 28, United States Code, is amended by inserting immediately before section 1331 the following new section:

“§ 1330. *Actions against foreign states*

“(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief *in personam* with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

“(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

“(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.”.

(b) By inserting in the chapter analysis of that chapter before:

“1331. Federal question; amount in controversy; costs.”

the following new item:

“1330. Action against foreign states”.

Sec. 3. That section 1332 of title 28, United States Code, is amended by striking subsections (a) (2) and (3) and substituting in their place the following:

“(2) citizens of a State and citizens or subjects of a foreign state;

“(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

“(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.”.

Sec. 4. (a) That title 28, United States Code, is amended by inserting after chapter 95 the following new chapter:

“CHAPTER 97. JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

“Sec.

“1602. Findings and declaration of purpose.

“1603. Definitions.

“1604. Immunity of a foreign state from jurisdiction.

“1605. General exceptions to the jurisdictional immunity of a foreign state.

“1606. Extent of liability.

“1607. Counterclaims.

“1608. Service; time to answer default.

“1609. Immunity from attachment and execution of property of a foreign state.

“1610. Exceptions to the immunity from attachment or execution.

“1611. Certain types of property immune from execution.

“§ 1602. *Findings and declaration of purpose*

“The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would

serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

“§ 1603. *Definitions*

“For purposes of this chapter:

“(a) A ‘foreign state’, except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

“(b) An ‘agency or instrumentality of a foreign state’ means any entity:

“(1) which is a separate legal person, corporate or otherwise, and

“(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

“(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title, nor created under the laws of any third country.

“(c) The ‘United States’ includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

“(d) A ‘commercial activity’ means either a regular course of commercial conduct or a particular commercial transaction or act. 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.

“(e) A ‘commercial activity carried on in the United States by a foreign state’ means commercial activity carried on by such state and having substantial contact with the United States.

“§ 1604. *Immunity of a foreign state from jurisdiction*

“Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

“§ 1605. *General exceptions to the jurisdictional immunity of a foreign state*

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

“(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

“(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United

States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

“(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

“(4) 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; or

“(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to:

“(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

“(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

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

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

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

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

vessel or cargo upon which the maritime lien arose, such value to be determined as of the time notice is served under subsection (b)(1) of this section.

“§ 1606. *Extent of liability*

“As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent 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; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

“§ 1607. *Counterclaims*

“In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim:

“(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

“(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

“(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

“§ 1608. *Service; time to answer; default*

“(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

“(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

“(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

“(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

“(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary

shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a 'notice of suit' shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

“(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

“(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

“(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

“(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state:

“(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

“(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

“(C) as directed by order of the court consistent with the law of the place where service is to be made.

“(c) Service shall be deemed to have been made:

“(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

“(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

“(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

“(e) No judgment by default shall be entered by a court of the United States or of a State 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 to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

“§ 1609. *Immunity from attachment and execution of property of a foreign state*

“Subject to existing international agreements to which the United States is a

party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

“§ 1610. *Exceptions to the immunity from attachment or execution*

“(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a 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 court of the United States or of a State after the effective date of this Act, if:

“(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

“(2) the property is or was used for the commercial activity upon which the claim is based, or

“(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

“(4) the execution relates to a judgment establishing rights in property:

“(A) which is acquired by succession or gift, or

“(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

“(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment.

“(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in 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 court of the United States or of a State after the effective date of this Act, if:

“(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

“(2) the judgment relates 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) of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based.

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

“(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if:

“(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

“(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

“§ 1611. *Certain types of property immune from execution*

“(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

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

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

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

“(A) is of a military character, or

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

(b) That the analysis of “Part IV. Jurisdiction and Venue” of title 28, United States Code, is amended by inserting after:

“95. Customs Court.”,

the following new item:

“97. Jurisdictional Immunities of Foreign States.”.

Sec. 5. That section 1391 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

“(f) A civil action against a foreign state as defined in section 1603(a) of this title may be brought:

“(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

“(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

“(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

“(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.”

Sec. 6. That section 1441 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

“(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.”

Sec. 7. If any provision of this Act or the application thereof to any foreign state is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

Sec. 8. This Act shall take effect ninety days after the date of its enactment.

Approved October 21, 1976.

2. INCOME OF FOREIGN GOVERNMENTS (DEPARTMENT OF THE TREASURY)¹³

NOTICE OF PROPOSED RULEMAKING

Agency: Internal Revenue Service, Treasury.

Action: Notice of proposed rulemaking.

Summary: This document contains proposed regulations relating to the taxation of income of foreign governments. The regulations would provide guidance for taxing foreign sovereigns on their income from commercial activities within the United States.

Dates: Written comments and requests for a public hearing must be delivered or mailed on or before October 16, 1978. The amendments relating to the taxation of income earned by integral parts of a foreign sovereign are proposed to be effective for all taxable years. The amendments relating to the taxation of income earned by controlled entities are proposed to be effective with respect to income earned after [the date these regulations are filed at the *Federal Register* as a Treasury decision].

Address: Send comments and requests for a public hearing to: Commissioner of Internal Revenue, Attention: CC:LR:T (LR-1060-75), Washington, D.C. 20224.

For further information contact:

Anthony Bonanno of the Legislation and Regulations Division, Office of the Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, D.C. 20224, Attention: CC:LR:T, 202-566-3829, not a toll-free call.

¹³ Federal Register, vol. 43, No. 156, August 11, 1978, pp. 36111-36114.

SUPPLEMENTARY INFORMATION

Background

This document contains proposed amendments to the income tax regulations (26 CFR Part 1) under section 892 of the Internal Revenue Code of 1954. These amendments are proposed to clarify the regulations and are to be issued under the authority contained in section 7805 of the Internal Revenue Code of 1954 (68A Stat. 917; 26 U.S.C. 7805).

Section 892 provides in general that income from sources within the United States received by a foreign government is not to be included in gross income and is to be exempt from taxation. Neither section 892 nor the current regulations defines the term "foreign government." For purposes of section 892, a foreign government consists only of integral parts or controlled entities of a foreign sovereign. The proposed regulations generally provide that income derived by a foreign sovereign from commercial activities in the United States is not income of a foreign government for purposes of the exemption provided in section 892.

The proposed regulations provide definitions for the terms "integral part" of a foreign sovereign and "controlled entity" of a foreign sovereign. The proposed regulations further provide guidelines for the determination of what constitutes commercial activities within the United States.

In most respects, the requirements relating to controlled entities parallel the requirements of Rev. Rul. 75-298, relating to certain organizations created by foreign governments that are eligible for the section 892 exemption. The regulations generally required that a controlled entity must be organized under the laws of the foreign sovereign by which it is owned.

The proposed regulations also provide that the income from the *de minimis* commercial activities of a controlled entity is subject to tax.

COMMENTS AND REQUESTS FOR A PUBLIC HEARING

Before adopting these proposed regulations, consideration will be given to any written comments that are submitted (preferably six copies) to the Commissioner of Internal Revenue. All comments will be available for public inspection and copying. A public hearing will be held upon written request to the Commissioner by any person who has submitted written comments. If a public hearing is held, notice of the time and place will be published in the *Federal Register*.

DRAFTING INFORMATION

The principal author of these proposed regulations was Anthony Bonanno of the Legislation and Regulations Division of the Office of the Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing the regulation, both on matters of substance and style.

PROPOSED AMENDMENTS TO THE REGULATIONS

The proposed amendments to 26 CFR Part 1 are as follows:

§ 1.892 [Removed]

Paragraph 1. Section 1.892 is deleted.

Paragraph 2. Section 1.892-1 is amended as follows:

1. The title to § 1.892-1 is revised.
2. Paragraph (a) is deleted and in lieu thereof new paragraphs (a) through (l) are added.
3. Paragraphs (b) (1) and (2) are redesignated as paragraphs (a) and (b) respectively of a new § 1.892-2. The amended § 1.892-1 and new § 1.892-2 read as follows:

§ 1.892-1 Income of foreign governments.

(a) *Manner of taxing.* (1) *In general.* Section 892 provides, in general, that the income of a foreign government from sources within the United States is excluded from gross income and exempt from taxation. Paragraph (b) of this section describes the extent to which either an entity constituting the governing authority of a foreign sovereign or an organization created by a foreign sovereign will be treated as a foreign government for purposes of section 892. To the extent that income is derived by such an entity or organization of a foreign sovereign which does not qualify as a foreign government as defined in paragraph (b) of this section, a foreign sovereign shall be subject to tax on the income in accordance with the rules of this section.

(2) *Foreign government exemption.* The income derived by an integral part or controlled entity of a foreign sovereign from investments in the United States in stocks, bonds, or other domestic securities, owned by such integral part or controlled entity, or from interests on deposits in banks in the United States of moneys belonging to such integral part or controlled entity, or from any other source within the United States, shall generally be treated as income of a foreign government, shall not be included in gross income, and shall be exempt from taxation.

(3) *Foreign government exemption not available.* (1) Amounts derived by a foreign sovereign from commercial activities in the United States is not income of a foreign government for purposes of the exemption from taxation provided in section 892. Such amounts shall be included in the income of the foreign sovereign and taxed under section 881 or 882 (whichever is applicable).

(ii) Income derived by an organization created by a foreign sovereign that does not qualify as a controlled entity of the foreign sovereign under paragraph (b)(3) of this section shall be included in the gross income of the organization and taxed under the provisions of section 11, 1201, 881, or 882 (whichever is applicable).

(iii) Income derived by a controlled entity from commercial activities in the United States even though on a *de minimis* basis does not qualify as income of the foreign government and shall be included in gross income of the foreign sovereign and taxed under the provisions of section 11, 1201, 881, or 882 (whichever is applicable).

(b) *Foreign government defined.* (1) *Classes of a foreign government.* For purposes of this section, a foreign government consists only of integral parts or controlled entities of a foreign sovereign.

(2) *Integral part.* An "integral part" of a foreign sovereign is any person, body of persons, organization, agency, bureau, instrumentality, or body, however designated, that constitutes the governing authority of a foreign country that is not engaged in commercial activities in the United States. The net earnings of the governing authority must be credited to its own account or to other accounts of the for-

eign sovereign, with no portion inuring to the benefit of any private person. It does not include any individual who is a sovereign, official, or administrator acting in a private or personal capacity.

(3) *Controlled entity.* A “controlled entity” of a foreign sovereign is any organization (including a foreign central bank of issue qualifying under section 895) created by a foreign sovereign that is not an integral part and that meets the following requirements:

- (i) It is wholly owned and controlled by a foreign sovereign;
- (ii) It is organized under the laws of the foreign sovereign by which it is owned or, if the law of a State of the United States requires, organized under the law of that State;
- (iii) Its net earnings are credited either to its own account or to other accounts of the foreign sovereign, with no portion of its income inuring to the benefit of any private person;
- (iv) Its assets must vest in the foreign sovereign upon dissolution; and
- (v) It does not engage in the United States in commercial activities on more than a *de minimis* basis.

The term “controlled entity” does not include any entity wholly owned and controlled by more than one foreign sovereign. Thus, a foreign financial organization organized and wholly owned and controlled by several foreign sovereigns to foster economic, financial and technical cooperation between various foreign nations is not a controlled entity for purposes of this section.

(4) *Political subdivision and transnational entity.* The rules that apply to a foreign sovereign apply to political subdivisions of a foreign country and to transnational entities. A transnational entity is an organization created by several foreign sovereigns that has broad powers over external and domestic affairs of all participating foreign countries stretching beyond economic subjects to those concerning legal relations and transcending state or political boundaries.

(c) *Characterization of activities.* (1) *Commercial activities.* For purposes of this section, “commercial activities” generally include activities that constitute a “trade or business within the United States” within the meaning of section 864(b). “Commercial activities” also include activities customarily attributable to and carried on by private enterprise for profit in the United States. The commercial character of an activity is determined by reference to a course of conduct or particular transaction rather than by reference to its purpose. The fact that in some instances Federal, State, or local governments of the United States also are engaged in the same or similar activity does not mean that the activity will not be considered commercial. For example, even though the U.S. Government is engaged in the activity of operating a railroad, operating a railroad is a commercial activity.

(2) *Net lease.* Obtaining and holding “net leases” on property is considered to be a commercial activity.

(3) *Certain activities that are not commercial.* The following activities, among others, are not commercial activities:

- (i) Investments in the United States in stocks, bonds, or other domestic securities, or the holding of deposits in banks in the United States which produce interest

or dividends not effectively connected with the conduct of a trade or business within the United States;

(ii) Performances and exhibitions within the United States devoted to the promotion of the arts by cultural organizations; and

(iii) The mere purchase of goods in the United States for use of the foreign sovereign.

(d) *Other operative sections.* In determining whether income is from sources within or without the United States, see sections 861 through 863 and the regulations thereunder. For purposes of determining whether income is effectively connected with a trade or business, see section 864(c) and the regulations thereunder. For rules with respect to withholding of tax at source under section 1442 in the case of foreign corporations, see § 1.1441-1.

(e) *Accounting rules.* (1) *Choice of method of accounting.* A foreign sovereign may choose any method of accounting permissible under section 446(c) and the regulations thereunder. Changes in the method of accounting are subject to the requirements of section 446(e) and the regulations thereunder.

(2) *Choice of annual accounting period.* A foreign sovereign may choose its annual accounting period in accordance with section 441 and the regulations thereunder. Changes in the annual accounting period are subject to the requirements of section 442 and the regulations thereunder.

(f) *Filing of returns.* A return with respect to income taxes under subtitle A shall be made by a foreign sovereign, political subdivision, or a transnational entity with respect to all amounts included in gross income under paragraph (a)(3)(i) of this section, and by every controlled entity subject to tax under paragraph (a)(3)(iii) of this section. See section 6012 for other persons required to make returns of income.

(g) *Relationship of section 892 to certain code sections.* (1) *Section 893.* The term "foreign government" referred to in section 893 (relating to the exemption of compensation of employees of foreign governments) shall have the same meaning as given such term in paragraph (b) of this section.

(2) *Section 895.* A foreign central bank of issue (as defined in § 1.895-1(b)) that fails to qualify for the exemption from tax provided by this section may nevertheless be exempt from tax on the items of income described in section 895. Thus, a foreign central bank of issue that is not wholly owned and controlled by a foreign sovereign, although not qualifying for exemption under this section, may be exempt under section 895 on the items of income enumerated in such section.

(3) *Section 1442.* No withholding is required under section 1442 and § 1.1442-1 in the case of income exempt from taxation and not included in gross income under paragraph (a)(2) of this section.

(h) *Illustrations.* This section may be illustrated by the following examples:

Example (1). For 1979, the Office of the President of a foreign country invests funds from the foreign sovereign's treasury in publicly traded stocks, bonds, and other domestic securities, and interest bearing bank deposits, the income from which is not effectively connected with the conduct of a trade or business within the United States. The Office of the President has also purchased in 1979 a hotel in the United States which is operated by a U.S. agent. Income from its investments that do not constitute commercial activities under paragraph (c)(3)(i) of this section is ex-

empt from taxation pursuant to paragraph (a)(2) of this section. Income derived from the operation of the hotel is subject to tax pursuant to paragraph (a)(3)(i) of this section since the Office of the President is engaged in commercial activities in the United States by reason of its hotel operations. By reason of section 864(c)(3) and § 1.864-4(b), this income is effectively connected for 1979 with the conduct of a trade or business within the United States by the Office of the President and is taxed under section 882.

Example (2). Pursuant to a general agreement on contracts, exchanges, and cooperation between the United States and a foreign country, the State Concert Bureau, a bureau of a foreign sovereign, entered into four separate contracts to be performed in 1979 with a U.S. corporation engaged in the business of promoting international cultural programs. Under the first contract, the State Concert Bureau agreed to send a singer and accompanists on tour for 3 weeks in the United States. Under the second contract, the Bureau agreed to send a conductor on tour for 4 weeks in the United States. Under the third contract, the Bureau agreed to send the State ensemble of folk dance on tour for 5 weeks in the United States. Under the fourth contract, the Bureau agreed to send the State ballet and opera troupe on tour for 6 weeks in the United States. The State Concert Bureau received approximately \$80,000 from the performances and from the sale of programs from the tours. During 1979, the income received by the State Concert Bureau is exempt from taxation under paragraph (a)(2) of this section since the activities of the Bureau are not commercial activities under paragraph (c)(3)(ii) of this section. Depending on the facts and circumstances, the State Concert Bureau may be engaged in commercial activities where it receives income from sources within the United States derived from the tour groups' radio or television appearances, motion picture productions, or record and tape recordings.

Example (3). (a) In 1979 a foreign sovereign organizes under its law M Corp. as a wholly owned government corporation under the auspices of the Ministry of Industry and Tourism. M Corp. engages in the purchasing in the United States of grain and other agricultural goods for free distribution to the poor in its foreign country. In addition, when purchases of grain exceed demand in its foreign country (which rarely occurs), M Corp. engages in the sale of the grain in the United States on a *de minimis* basis. M Corp. also engages in the trading of commodities futures through a resident broker. It does not have an office or other fixed place of business in the United States through which or by the direction of which the transactions in commodities futures are effected. The purchasing and trading activities of M Corp. are not commercial activities under paragraph (c) of this section. M Corp. is a controlled entity under paragraph (b)(3) of this section. Accordingly, the income from these activities derived by M Corp. from sources within the United States is exempt from tax under paragraph (a)(2) of this section. Any income derived by M Corp. from its sale of grain in the United States on a *de minimis* basis is not considered to be income of a foreign government and is subject to tax pursuant to paragraph (a)(3)(iii) of this section.

(b) The facts are the same as in example (3)(a), except that in 1979, M Corp. opens an office in Washington, D.C., through which transactions of selling commodities futures in the United States are effected. Since M is now considered to be engaged in a trade or business in the United States under section 864, these activities are commercial activities under paragraph (c) of this section. Since M engages in commercial activities on more than a *de minimis* basis, it is not a controlled entity. M is not entitled to the exemption from tax provided by section 892. Accordingly, M

Corp. is taxed under the applicable provisions of sections 881 and 882. In addition, under paragraph (g)(1) of this section, M Corp. is not a foreign government for purposes of section 893.

(i) *Effective date.* The provisions of this section relating to controlled entities are effective with respect to income derived after [the date these regulations are filed at the *Federal Register* as a Treasury decision].

§ 1.892-2 Income of international organizations.

- (a) Exempt from tax.
- (b) Income received prior to Presidential designation.

JEROME KURTZ
Commissioner of
Internal Revenue

R. YUGOSLAVIA¹⁴

1. EXCERPT FROM THE LAW ON LITIGIOUS PROCEDURE

Article 26

With reference to the competences of Yugoslav courts for instituting court proceedings against foreign nationals enjoying immunities in the Socialist Federal Republic of Yugoslavia and for instituting court proceedings against foreign States and international organizations, the provisions of international law are applicable.

In case of doubt as to the existence and the extent of the right of immunity, the explanation is rendered by the Federal Organ for Administration of Justice.

2. EXCERPT FROM THE LAW ON EXECUTIVE PROCEDURE

Article 13

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

3. EXCERPT FROM THE LAW ON THE GENERAL ADMINISTRATIVE PROCEDURE

Article 26

(1) With reference to the competences of the Yugoslav organs in matters when a party is a foreign national enjoying the right to immunity in Yugoslavia, a foreign State or an international organization, the provisions of international law, recognized by the Socialist Federal Republic of Yugoslavia, are applicable.

(2) In case of doubt as to the existence or the extent of the right to immunity, the explanation is rendered by the Federal Organ for Administration of Justice.

¹⁴ Transmitted to the Secretariat by that Government

(3) Official actions relating to persons enjoying the right to immunity are carried out through a federal organ competent for foreign affairs.

4. EXCERPT FROM THE LAW ON MARITIME AND INLAND NAVIGATION

Article 869

The following cannot be subject to execution or attachment:

(1) Foreign and Yugoslav war vessels and vessels enjoying equal status, public and sanitary vessels;

(2) Foreign vessels on innocent passage through the territorial sea or inland waters of the SFR of Yugoslavia and which comply with the international or inter-State navigation regime;

(3) Foreign vessels, stopping at inland maritime waters, ports and harbours of the SFR of Yugoslavia either due to *vis majeure* or navigational needs, for the duration of the *vis majeure* or the navigational needs. Vessels referred to in items 2 and 3 of paragraph 1 of this Article can be subject to execution or insurance if the procedure is undertaken in connection with execution or security of costs incurred during the passage or delay of the vessel in the territory of the SFR of Yugoslavia.

Part II
OFFICIAL RECORDS AND
CORRESPONDENCE

Deuxième partie
ACTES OFFICIELS ET CORRESPONDANCE

A. ARGENTINA

ANALYSIS OF THE RELEVANT ARGENTINE NATIONAL LEGISLATION AND THE DECISIONS OF NATIONAL COURTS REGARDING JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY TRANSMITTED BY THAT GOVERNMENT TO THE SECRETARIAT ON 8 MAY 1979

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

“In the action brought by the Minister Plenipotentiary of Chile against Carlos Porta, bankruptcy trustee of Fratelli Lavarello fú Gio Batta, for annulment of the sale of the *SS Aguila*, the Court stated in its decision that: “The contract of sale whose annulment has been applied for, and from which the present case originates, was made and came into being and was intended to be, and in fact was, performed and complied with within the jurisdictional limits of the Argentine Republic. Both these circumstances, together with the fact that only a few days before this action was brought a representative of the firm selling the vessel applied to the national courts for the enforcement of its rights in connexion with this transaction and also applied for and obtained in enforcement of the said contract an order blocking the monies of the Government of Chile which it had deposited in this country, and together also with the circumstance that the plaintiff alleges that there are in Buenos Aires funds arising out of this transaction and he for his part is applying for an order blocking these funds, *clearly show that the intrinsic validity of this contract and all matters relating to it should be regulated in accordance with the general laws of the Nation and that the national courts are competent in such matters*”.

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

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

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

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

This question of immunity of States was considered at the time when on account of the Civil War, the Spanish Government decided to appropriate the vessel *Cabo Quilates* and assign it to the auxiliary naval forces for Government Service. When the vessel put in at Buenos Aires, the ship owners brought an action against the Spanish Government for recovery of the vessel. When the case opened, the Spanish Government, through its Ambassador, announced that it was unwilling to submit to the jurisdiction of the Argentine courts "on a matter of Government property used in the service of the Government". In other words, the Spanish Government expressly declared its refusal to accept the jurisdiction of the Argentine courts. The Court observed that it was a fundamental principle of international public law and constitutional law that there could be no compulsion of a State in such cases. It went on to explain, clearly and concisely, the considerations underlying this principle. "The wisdom and foresight of this rule of public law are unquestionable. *If the acts of a sovereign State could be examined by the courts of another State and could perhaps contrary to the former's wishes be declared null and void, friendly relations between Governments would undoubtedly be jeopardized and international peace disturbed*" (Decision No. 178, page 173).

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

1. A foreign State may execute deeds governed by the ordinary law;
2. A foreign Government may be sued in an Argentine court, but its prior consent is necessary before the case can continue;
3. A statement by the diplomatic representative is sufficient to determine the nature of the deed or service in question.

B. BARBADOS

LETTER CONCERNING THE TOPIC OF JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY TRANSMITTED BY THE GOVERNMENT OF BARBADOS TO THE SECRETARIAT ON 16 JULY 1979

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

The Government of Barbados further wishes to state that to date there has been no relevant diplomatic or official correspondence on the matter. The Barbados Government is however at the moment in the process of considering such legislation and

in addition is spearheading efforts for a Caribbean Convention on State Immunity. The Government of Barbados would therefore be very interested in seeing the International Law Commission develop a Convention on this topic.

C. CANADA

1. REPLY BY THE SECRETARY OF STATE FOR EXTERNAL AFFAIRS TO A REQUEST BY THE AMBASSADOR OF GOVERNMENT X REGARDING THE GRANTING OF SOVEREIGN IMMUNITY FOR THE AIRCRAFT CARRYING THE PRESIDENT OF X¹

... Your excellency's statement to the effect that an aircraft owned by a foreign state and carrying its Head of State is entitled under universally accepted rules of international law to sovereign immunity while on the territory of another state is concurred in. While there is no specific Canadian legislation on the subject the principle of sovereign immunity of such an aircraft would be recognized on Canadian territory to the extent that general principles of international law have been embodied in Canadian law as reflected by numerous decisions on the subject by Canadian courts.

Notwithstanding, a principle which is firmly established in the Canadian system of law and government is that of the separation of the executive, legislative and judicial powers. As a consequence, it would not be within the executive power of the Canadian government, to comply with a request such as that expressed in your Note, that the appropriate authorities be ordered to respect the sovereign immunity of a state-owned aircraft carrying [its] President... while on Canadian territory. If the issue of immunity were raised in some fashion, under the Canadian constitutional system, it would be for the Judiciary exclusively to rule upon. It would therefore neither be possible nor proper for the Executive Authority to attempt to interfere in a field outside its jurisdiction.

At the same time, such administrative measures as were appropriate were undertaken in order to facilitate the transit of the aircraft carrying His Excellency the President. . . .

2. GOVERNMENT MEMORANDUM CONCERNING THE ISSUE OF SOVEREIGN IMMUNITY IN RELATION TO A CASE IN THE UNITED STATES DISTRICT COURT²

In an action in a United States District Court arising from a collision on May 23, 1965, in the Detroit River involving a United States vessel and the Belgian M/V *Patignies* with a Canadian pilot on board, holder of a Great Lakes pilot registration certificate issued by the Department of Transport, the government of Canada, in connection with the issue of its sovereign immunity in respect of damage resulting from the collision, submitted on June 12, 1968, the following memorandum of law on sovereign immunity:

Introduction

This action which has been commenced in the United States District Court,

¹ *Canadian Yearbook of International Law*, vol. 3 (1965), p. 316.

² *Ibid.*, vol. 7 (1969), p. 298.

Eastern District of Michigan, Southern Division, arises from a collision on May 23, 1965, in the Detroit River between the Belgian M/V *Patignies* and the *Seventh Angel*, a small United States pleasure craft registered under the No. "MC-0915-B.J."

At the time of the collision, the pilot aboard the M/V *Patignies* was John Bowie, a holder of a Great Lakes pilot registration certificate No. 1713 issued by the Department of Transport of Canada and which states: "This certifies that the holder is a registered pilot as defined in part VI, A of the Canada Shipping and the United States Great Lakes Pilotage Act of 1960 for the waters of lakes Ontario, Erie, Huron, and Michigan". Mr. Bowie is a servant of the Government of Canada.

The function of a pilot is to direct the navigation of vessels at the discretion of and subject to the customary authority of the master of the ship.

Neither the Government of Canada nor the Canadian Department of Transport owned or operated the M/V *Patignies*. Except for the presence of the pilot, John Bowie, aboard the M/V *Patignies*, there is no connection between that ship or the collision of May 23, 1965, and the Government of Canada or the Canadian Department of Transport.

The Government of Canada is interested in this court action as a result of a Court Order given by the said court to bring the Department of Transport, Canada, into this action as an additional party. Under the court's order a summons was issued. As a result of this court Order, the issuance of the summons, and the purported service thereof upon the Department of Transport, the Embassy of Canada on behalf of its government delivered, on March 13, 1968, a note to the United States State Department pointing out that the Government of Canada had been improperly named and served under the designation of the Department of Transport and requesting that the Sovereign Immunity of the Canadian Government from suit in the Domestic Courts of the United States be upheld in regard to the above action, and that appropriate steps be taken to bring to the attention of the Court the Sovereign Immunity of the Government of Canada in this action.

Issue

At stake is the question of the recognition by the Government of the United States of America of the Sovereign Immunity of the Government of Canada from suit in action entitled *Delores Pruitt vs. M/V Patignies, et al.*, filed in the United States District Court, Eastern District of Michigan, Southern Division.

I

Argument

The Government of Canada is aware that the Department of State of the United States of America adopted in the "Tate letter" of May 19, 1952 a policy whereby the "restrictive" theory of Sovereign Immunity is followed and the "the Immunity of the Sovereign is recognized with regard to sovereign or public acts (*jus imperii*) of a State, but not with respect to private acts (*jure gestionis*)". The Government of Canada draws the attention of the State Department to the fact that the Government of Canada has never been and is in no way involved in the commercial or other activities performed by the Belgian vessel, M/V *Patignies*, which collided with the *Seventh Angel*, on May 23, 1965.

The Government of Canada has been drawn into this court action as a result of acts performed in fulfillment of its obligations under the agreement between the United States of America and Canada concerning coordination of pilotage services in the waters of the Great Lakes basin (with a memo of arrangement), signed at Washington on May 5, 1961 as amended by the exchange of notes of October 23, 1962 and February 21, 1963, by the exchange of notes of August 23, 1963 and September 10, 1963 and by a further exchange of notes of November 19, 1963 and December 4, 1963. These existing arrangements have since been replaced by a memo of arrangement forming an agreement on boundary waters: pilotage services on the Great Lakes and the St. Lawrence Seaway, signed at Washington on April 13, 1967. This agreement requires the Government of Canada to provide a "registered pilot" on board foreign vessels navigating in Canadian or United States waters of the Great Lakes. . . .

The Government of Canada points out that it was carrying out an international treaty obligation to the Government of the United States in providing a registered pilot for the *M/V Patignies* and was not engaged in any private or commercial activity in so doing. The Canadian Government does not accept the contention that the providing of a pilot aboard a vessel under an international agreement could result in a forfeiture of its sovereign immunity from this court action under the restrictive theory of the sovereign immunity on grounds that it was engaged in activities of a private or commercial nature (*jure gestionis*). It is the view of the Canadian Government that pilotage on the Great Lakes is to be regarded as a governmental function representing as such an act of sovereignty (*jure imperii*). This is so even under the restrictive theory of sovereign immunity set forth in the "Tate letter". Therefore, the immunity of the Government of Canada from this action should be upheld.

The Government of Canada is advised that a memo on behalf of Marvin Wingerter was filed with the Department of State, urging upon the department the position that the activities of the Government of Canada with respect to the incident in question fall beyond the restricted theory of sovereign immunity as set forth in the Tate letter.

The Government of Canada points out that most of the cases cited in that memo were concerned with the question of sovereign immunity in suits brought with respect to ships in which a foreign government had an actual interest, and which were operated either by that foreign government or by a third party for commercial purposes. While there may be some authority to the effect that sovereign immunity should not be afforded where a sovereign has a direct interest in a commercial vessel, it is submitted that even if that line of authority is legally correct, it is not determinative of the question at hand since those cases are neither factually nor legally relevant. Neither the providing of a pilot for the *M/V Patignies*, nor the activities of that pilot in any way carried with it participation by the Government of Canada or the Canadian Department of Transport, either *de jure* or *de facto*, in the commercial activities of the vessel *M/V Patignies*.

The Government of Canada knows of no legal authority which in any way directly questions the inherently governmental nature of the acts of the Canadian Government now under consideration, nor is any brought to its attention by the memo filed for Mr. Wingerter. Again, the Government of Canada emphasizes to the Department of State that in the situation at hand, the Government of Canada neither owned nor had an interest in the vessel in question, as was the case in most of the

authorities cited in the memo. As to those cases cited which deal with other factual situations, they bear even less relevance to the situation at hand.

II

As stated above, there was aboard the M/V *Patignies*, on May 23, 1965, date of the collision with the United States pleasure craft *Seventh Angel*, John Bowie, a holder of a Great Lakes pilot registration certificate number 1713 issued by the Department of Transport. This pilot was a servant of the Government of Canada and his sole function was to direct the navigation of the vessel at the discretion of and subject to customary authority of the master of the ship.

Furthermore, the nature of piloting is in itself the type of governmental activity that would bring it within the restrictive theory set forth in the "Tate letter", requiring as it does strict governmental regulation and control by the Canadian Government.

III

Although the Government of Canada considers that its submission in I above as to sovereign immunity is determinative of the issue, it wishes to point out that the memo submitted on behalf of Mr. Wingerter concedes on page one the possibility that the collision between the M/V *Patignies* and the *Seventh Angel* occurred within Canadian waters. It is understood by, and it is the position of, the Government of Canada that the collision did in fact occur within Canadian waters, and that accordingly an action arising therefrom involving the Canadian Government does not fall within the purview of a United States Court.

Conclusion

It is the position of the Government of Canada that the activity of pilotage on the Great Lakes as well as the working relationship between private pilots and the Government of Canada is a governmental function. Accordingly, the restrictive theory of sovereign immunity as declared in the "Tate letter" is applicable in the present case, and the sovereign immunity of the Government of Canada should be recognized.

D. COLOMBIA

1. LETTER REGARDING THE TOPIC OF JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY TRANSMITTED BY THE GOVERNMENT OF COLOMBIA TO THE SECRETARIAT ON 16 JULY 1979

... In this connexion I should like, first of all, to call attention to the existing international legislation on the topic, namely the Vienna Convention on Diplomatic Relations, signed on 18 April 1961 and approved by Colombia in Act No. 6a of 1972 and in force, and the Vienna Convention on Consular Relations, signed on 24 April 1963, approved by Act No. 17 of 1971 and in force.

"These Conventions establish the privileges and immunities of diplomats and consuls. It is a known fact that the immunities and privileges of the diplomatic and consular corps have been laid down with a view to facilitating the effective functioning of foreign diplomatic missions and consular offices and are conferred on the sending State rather than on its representative. The Conventions deal in detail

with immunities relating to property. For example they recognize the inviolability of the archives and documents, wherever they may be, and of the premises and their furnishings and other property situated therein.

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

2. NOTE O/J 767/86 OF 24 AUGUST 1964, ADDRESSED TO THE
AMBASSADOR OF COLOMBIA IN BONN

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

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

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

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

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

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

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

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

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

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

This is precisely the key point, for the practical result of the German decision is nothing less than interference with and disregard of the diplomatic sphere of the agent of the defendant State, since it is he, as duly accredited representative of that State, who would be notified of the legal action and of everything that occurred in the proceeding in which he was called upon to appear, give evidence and act on behalf of his Government, the international personification of the State in question.

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

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

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

Thus, in the absence of a public treaty directing compliance and of the application of legislative reciprocity or *de facto* reciprocity, the result would be non-compliance with the German decision in the foreign State against which it had been

rendered. One does not have to be a clairvoyant to foresee the difficulties that this would introduce in the normal development of relations of every kind between the two States in question, nor would it be rash to suppose that the German State and its courts would be tempted to try to enforce their decision which had failed of compliance by taking retaliatory measures directed precisely against the diplomatic and consular mission of the country against which the decision had been rendered.

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

The German decision argues that a distinction must be made between the immunity of States as a general problem and the immunity of diplomatic missions as a special problem. It concludes that, in the case in point, no importance should be attached to the latter problem since the exercise of German jurisdiction does not imply any violation of diplomatic prerogatives and immunities. The decision adds that the criterion to be applied in distinguishing between sovereign State acts, which are exempt from jurisdiction or immune, and private State acts, which are not immune and are subject to German jurisdiction, must be sought in accordance with German domestic law.

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

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

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

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

These are the brief observations suggested to me by the decision of the Consti-

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

May I say in conclusion that, in connexion with this legal discussion, both the Secretary-General of the Foreign Ministry and the undersigned reviewed earlier presentations on the subject and, in so doing, refreshed our recollection of the wise teachings along similar lines imparted to many generations of Colombians by the distinguished professor and specialist in international law, Dr. Hermann Meyer-Lindenberg, at present Assistant Director of the Legal Division of the Federal Ministry of Foreign Affairs, with whom you might wish to discuss the contents of this note.

(Signed) Humberto Ruiz VARELA
Acting Legal Counsel

E. CZECHOSLOVAKIA

ANALYSIS OF THE TOPIC OF JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY SUBMITTED BY THE GOVERNMENT OF CZECHOSLOVAKIA TO THE SECRETARIAT ON 20 JULY 1979

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

This theory represents a legal concept according to which a foreign state (and its property as well), being a sovereign territorial and political entity, cannot be submitted to jurisdiction of another State unless it expressly agrees to it. The theory of absolute immunity is the only possible and logic consequence of one of the cornerstones of contemporary international law—the principle of sovereign equality of states.

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

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

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

Summing up, the Permanent Mission would like to note that since the concept of absolute immunity is shared by a considerable number of members of the international community, the correctness and purposefulness of the attitude that the International Law Commission, or to be more exact, its appropriate Working Group, has adopted in this respect on its thirtieth session last year, must necessarily be questioned. The Permanent Mission has in mind particularly the following part of the above-mentioned Working Group's report: "A working distinction may eventually have to be drawn between activities of States performed in the exercise of sovereign authority which are covered by immunities, and other activities in which States, like individuals, are engaged in an increasing manner and often in direct competition with private sectors. . . . In other words only *acta iure imperii* or acts of sovereign authority as distinct from *acta iure gestionis* or *iure negotii* are covered by State immunities." (U.N. document A/33/10, p.388, para. 29). This approach to the topic in question cannot lead to any positive results, since it cannot be met in the affirmative by at least a significant part of the international community.

F. DENMARK

A LETTER CONCERNING THE TOPIC OF JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY TRANSMITTED BY THE GOVERNMENT OF DENMARK TO THE SECRETARIAT ON 16 NOVEMBER 1981

There exists no general Danish legislation on the topic under reference. In practice, however, the provisions of the Administration of Justice Act are interpreted in conformity with the general principles of international law relating to immunity of foreign States from lawsuit and execution.

Provisions governing execution, distress, arrest or other legal detention in ships of foreign States are, however, embodied in a special Act (No. 198 of 16 May 1950). In this connexion it should be noted that Denmark has ratified the Convention of 10 April 1926 on the adoption of certain uniform rules concerning immunity for ships of foreign States, with Additional Protocol of 24 May 1934. In the Danish view, these rules reflect the tendency in modern international practice to restrict at any rate the immunity from lawsuit to acts performed by a State in its capacity of a subject of international law, i.e. *iure imperii*.

In connexion with raising government loans abroad, the Danish authorities frequently consider whether and, if so, to what extent immunity should be waived—an

appraisal in which the general rules of international law are also taken into account. As a general rule, a Danish waiver of immunity is accompanied by an explicit reservation with respect to “real property and buildings and the contents thereof owned by the Danish Ministry of Foreign Affairs and situated outside the Kingdom of Denmark, and assets of the Kingdom necessary for the proper functioning of the Kingdom as a sovereign power”.

In the opinion of Denmark, this text—or wording to the same effect—of declarations by which States waive immunity—is in the nature of an *ordre public* reservation which follows also from general international law. Hence an exception with regard to assets such as referred to must be presumed to apply also where a State has waived immunity without making such an explicit reservation.

G. FINLAND

LETTER CONCERNING THE TOPIC OF JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY TRANSMITTED BY THE GOVERNMENT OF FINLAND TO THE SECRETARIAT ON 11 JUNE 1979

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

H. GERMAN DEMOCRATIC REPUBLIC

LETTER CONCERNING THE BASIC POSITION OF THE GERMAN DEMOCRATIC REPUBLIC ON THE TOPIC OF JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY TRANSMITTED BY THAT GOVERNMENT TO THE SECRETARIAT ON 7 APRIL 1981

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

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

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

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

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

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

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

I. GERMANY, FEDERAL REPUBLIC OF

1. CIRCULAR NOTE TRANSMITTED BY THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY TO FOREIGN EMBASSIES IN BONN ON 20 DECEMBER 1973 (TRANSMITTED TO THE SECRETARIAT BY THAT GOVERNMENT)

Note circulaire

Le Ministère fédéral des Affaires étrangères présente ses compliments aux Missions étrangères et, pour éviter certains malentendus, a l'honneur de porter à leur connaissance la notice ci-jointe, avec traductions, relative à l'octroi de l'immunité dans les procédures civiles engagées devant les tribunaux de la République fédérale d'Allemagne.

Le texte de la Décision y mentionnée, prise par la Cour constitutionnelle fédérale le 30 avril 1963, a été transmis en son temps à chacune des Missions étrangères par Note circulaire du 11 août 1964 — Prot 2 84.09 — accompagnée de deux traductions non officielles.

Le Ministère fédéral des Affaires étrangères saisit cette occasion pour adresser aux Missions étrangères les assurances de sa haute considération.

Bonn, le 20 décembre 1973

MEMORANDUM

Court proceedings against diplomatic missions and consular posts in the Federal Republic of Germany

In the implementation of civil law contracts to which members of the diplomatic missions and consular posts, or foreign States, are parties, differences of opinion have arisen now and then over their interpretation.

While there is usually no doubt that such contracts—except if is otherwise agreed—are, on principle, subject to German substantive law, it is often not clear whether the courts in the Federal Republic of Germany have jurisdiction to decide such questions.

In order to obviate misunderstandings from the outset, the German Federal Foreign Office wishes to draw attention to the following principles.

1. In so far as contracts are concerned to which individual members of diplomatic missions and consular posts are parties, the courts are held to observe §§ 18 to 21 of the Law of the Constitution of the Courts of 27 January 1877, as amended by Notification of 12 September 1950 (Bundesgesetzblatt—Federal Law Gazette—I p. 513), as well as the Vienna Conventions of 18 April 1961 on Diplomatic Relations and of 24 April 1963 on Consular Relations, which Conventions have been ratified by the Federal Republic of Germany (Bundesgesetzblatt 1964 II p. 957 ff and Bundesgesetzblatt 1969 II p. 1585 ff).

The privileged persons are, within the purview of those Conventions, exempt from the German jurisdiction.

2. In the case of contracts concluded on behalf of a foreign State rather than on behalf of individual members of diplomatic missions or consular posts, personal

immunity is not the decisive criterion; a court must in such cases decide whether or not "State immunity" exists.

There is at present no general rule of international law on the question of State immunity under which foreign States would be altogether exempt from national jurisdiction (theory of absolute immunity). Rather, a distinction has to be made between *acta iure imperii* (acts performed in the exercise of sovereign authority, public acts) and *acta iure gestionis* (acts under private law, private acts).

Whereas in respect of the former acts State immunity is today still generally recognized as a rule of international customary law, it cannot, according to recent trends in the practice of States and the governing jurisprudence, be invoked for the latter type of acts.

The highest court of the Federal Republic of Germany, the Federal Constitutional Court, too, in its decision of 30 April 1963 (Decisions of the Federal Constitutional Court, vol. 16 p. 27 ff) held to this effect on the problem of State immunity by taking into consideration especially the pertinent practice of States and the literature on international law. This decision has the force of law (Article 100, paragraph 2, of the Basic Law for the Federal Republic of Germany; § 31, paragraph 2, first sentence, and § 13 (12) of the Law concerning the Federal Constitutional Court) and must be observed accordingly by all courts of the Federal Republic of Germany.

3. In such proceedings, the Federal Foreign Office is frequently requested by the competent court to serve the writ of action. Over and beyond this the Federal Foreign Office has no functions in such proceedings.

Therefore, in view of the strict division of powers existing in the Federal Republic of Germany (Article 97, paragraph 1, and Article 20, paragraph 2, second sentence, of the Basic Law for the Federal Republic of Germany) the Federal Foreign Office cannot exert any influence on the proceedings in question. It is exclusively for the courts themselves to determine the admissibility of the process of law and also to decide whether a particular case is within the jurisdiction of German courts or if such jurisdiction is controverted by immunity.

Judicial decisions may be influenced only by the parties to the proceedings through the pleadings provided by law and may be contested, after their pronouncement, only with the remedies to which the parties are entitled. The Federal Foreign Office has no such means of recourse since it is not a party to the proceedings.

4. The decision as to whether and to what extent a natural person or a foreign State is exempt from jurisdiction in the Federal Republic of Germany hinges on a number of facts which can be established only if the defendant has taken a step in the proceedings. He must make known to the court facts which support the claim of immunity and which challenge contentions to the contrary by the plaintiff.

It is only in this manner that the defendant can ensure that the greatest possible allowance is made for his immunity. The assertion of immunity in pending proceedings cannot be construed as a waiver of such immunity.

If the defendant fails to take any step in the proceedings he runs the risk of the plaintiff securing a "default judgment" (§ 331, Code of Civil Procedure) on the subject in dispute and of his own immunity rights not being acknowledged since they have not been made known to the court within the scope of the proceedings.

In effect, if the plaintiff moves for a default judgment against a defendant who

does not appear—or is not represented by counsel—at the oral hearing, the court is held to deem the factual oral representations by the plaintiff to be admitted. Solely on the basis of the facts alleged by the plaintiff, the court examines whether or not exemption from the German jurisdiction is present. If the court holds such exemption not to be present, it must then decide in accordance with the plaintiff's motion, provided that his action is sound.

2. NOTE FROM THE CHARGÉ D'AFFAIRES OF THE PERMANENT MISSION OF THE FEDERAL REPUBLIC OF GERMANY TO THE SECRETARIAT ON 7 AUGUST 1979

The legal order of the Federal Republic of Germany makes no special provision (laws or regulations) for jurisdictional immunity for foreign States and their property (see also H. Stenberger: *International Law Association, State Immunity, Law and Practice in the United States and Europe*, Proceedings of Conference held on 17 November 1978, pp. 17-18).

However, article 25 of the Basic Law of the Federal Republic of Germany states that the general rules of public international law form part of federal law and that they take precedence over the laws. If, in the course of litigation, there are doubts as to whether a rule, as general rule of international law, forms part of federal law, the court shall submit the question to the Federal Constitutional Court for a ruling (Basic Law, Art. 100, para. 2).

...

It is thus the courts which first decide whether, and to what extent, foreign States and their property may enjoy jurisdictional immunity in the Federal Republic of Germany, with the Federal Constitutional Court playing a particular role in this connexion. In proceedings to determine whether or not certain rules of general international law form part of federal law (Basic Law, art. 100, para. 2), the Federal Constitutional Court also gives the Federal Government an opportunity to state its position.

Since the decisions taken by the Federal Constitutional Court on 30 October 1962 (decisions of the Federal Constitutional Court, 15/25) and 30 April 1963 (Decisions on the Federal Constitutional Court, 16/27), which have the force of law (Act establishing the Federal Constitutional Court, art. 31, para. 2), the courts of the Federal Republic of Germany have held that customary international law, as it now stands, affords immunity to States only in respect of their sovereign activities, and not of their non-sovereign activities. In its note verbale of 20 December 1973 to all diplomatic missions and consular posts in the Federal Republic of Germany, the Federal Ministry of Foreign Affairs drew attention to this legal situation.

...

On 13 December 1977, the Federal Constitutional Court ruled that the principle that immunity was functionally limited to sovereign activities applied not only to trial proceedings but also to execution proceedings (Decisions of the Federal Constitutional Court, 46/342). At the same time, the Federal Constitutional Court held that general international law did not allow the legend of forced execution on property used by a foreign State for sovereign purposes, including a bank account maintained in the State of the forum by a foreign State to cover the costs and expenses of its embassy.

These rulings by the Federal Constitutional Court raise the following question: under what law is it possible to distinguish between sovereign and non-sovereign activities and purposes? The Federal Constitutional Court decided to make the distinction between acts *juris imperii* and acts *juris gestionis* on the basis of the *lex fori*, since in its view no precise rule had been established on that point in international practice. However, the applicability—which is not in itself desirable—of the *lex fori* is in turn limited by the fact that international law takes precedence over it whenever a large majority of States is of the view that the act complained of actually constitutes sovereign conduct.

The general principles of the major decisions rendered by the courts of the Federal Republic of Germany, translated into French, are attached.

...

In its statement of position to the Federal Constitutional Court in connexion with the proceedings leading to the decision of 13 December 1977, the Federal Government expressly declared its support for the doctrine of limited immunity. International law does not, of course, prohibit the granting of absolute immunity. However, the Federal Government's argument was that international law required immunity only in respect of sovereign acts (acts *juris imperii*) or of property used for sovereign purposes.

J. GREECE

LETTER CONCERNING THE TOPIC OF JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY TRANSMITTED BY THE GOVERNMENT OF GREECE TO THE SECRETARIAT ON 14 AUGUST 1981

Greek courts and Greek jurisprudence in general follow the principle of the so called relative or restrictive extraterritoriality of foreign states. According to this principle, Greek courts have no competence to deal with and pronounce themselves on acts of foreign states committed *jure imperii*. On the other hand Greek courts are competent and pronounce themselves on acts of foreign states committed in their capacity as *fiscus*. A special category of cases are those concerning diplomatic and consular immunities, which are dealt with in accordance with the relevant treaties or conventions to which Greece is a party.

It should be noted that in practice the distinction between the two categories is difficult, and therefore the decision of the court depends on the characteristics of each particular case.

Greek jurisprudence uses in general two criteria to distinguish between acts *jure imperii* and acts *jure gestionis*: The criterion of the "purpose" and that of the "nature" of the act. According to the first, a foreign state enjoys extraterritoriality not only as regards relations of public law but also relations of private law, when the latter serve a public purpose (*imperium*). On the other hand, the criterion of the nature of the act consists in examining if the act is of such a nature that it can be committed by states only and not by individuals. It is the second criterion that appears to have the preference of Greek jurisprudence.

As regards the execution of court decisions and the adoption of conservatory measures, Greek jurisprudence admits their application *vis-à-vis* foreign states, provided the previous authorization of the Ministry of Justice is obtained (cf. articles 689 and 923 of the Code of Civil Procedure).

K. NORWAY

LETTER CONCERNING THE TOPIC OF JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY TRANSMITTED BY THE GOVERNMENT OF NORWAY TO THE SECRETARIAT ON 26 JULY 1979

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

L. POLAND

ANALYSIS OF POLISH DOMESTIC LEGISLATION AND DECISIONS OF NATIONAL TRIBUNALS REGARDING JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY, TRANSMITTED BY THAT GOVERNMENT TO THE SECRETARIAT ON 17 JULY 1979

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

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

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

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

The ruling of the Supreme Court of March 26th, 1958, [2 CR 172/56: *Orzecznictwo Sądów Polskich*, 1959, No. 6/60] stipulates that due to customary international practice, whereby bringing summons against one State in the national courts of another State is inadmissible. Polish courts, in principle, are not competent to deal with cases against foreign States.

It is neither admissible to deem a foreign State to be subjected to the jurisdiction of Polish courts by way of the so-called *facta concludentia* [such a position has been taken in the above quoted ruling of the supreme Court of December 14th, 1948] like the common implications of purchasing real estate in Poland by such a State. A foreign State may renounce its immunity from Polish court jurisdiction, such a renunciation, however, must be unambiguous, drawn in writing, in the form of a statement of the Government concerned, addressed to the Government of Poland.

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

M. SURINAME

LETTER CONCERNING THE TOPIC OF JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY TRANSMITTED BY THE GOVERNMENT OF SURINAME TO THE SECRETARIAT ON 20 JULY 1981

In Suriname there is no practice on the jurisdictional immunity of States and their property. There is no legislation, nor are there judicial decisions on this topic.

As a part of the Kingdom of the Netherlands Suriname participated, before independence, in the Brussels Convention of 10 April 1926 on the Establishment of

Uniform Rules concerning the Immunity of State owned Ships. As yet the Government has not made a specific declaration of succession with regard to this Convention, but in view of the general declaration of succession of the Government of Suriname of 29 November 1975, Suriname considers itself still bound by the Convention, which reflects the principle of restrictive immunity with regard to state owned ships.

The Government is of the opinion that the principle of absolute immunity has become obsolete in international law and favours in general restrictive immunity. Immunity will not be granted to a foreign state in cases of *acta iure gestionis* and *acta iure privatorum*.

The Government recognizes the difficulties that arise in trying to draw a clear distinction between *acta iure imperii* and *acta iure gestionis et privatorum*, but holds the view that these difficulties do not impair a casuistic application of the principle of restrictive immunity.

As the granting of restrictive immunity is incorporated in the practice of many states, this principle can be considered to be the leading one in international law on the topic of state immunity.

With regard to the question of execution the Government is of the opinion that execution against a foreign State is not contrary to international law. It recognizes however that execution in certain cases may give rise to some disturbance in bilateral relations. In such cases a conscientious weighing of interests by the Government needs to take place.

N. UNION OF SOVIET SOCIALIST REPUBLICS

EXTRACT FROM NOTE NO. 36 OF 11 JULY 1977 FROM THE EMBASSY OF THE UNION OF SOVIET SOCIALIST REPUBLICS IN THE UNITED STATES OF AMERICA TO THE STATE DEPARTMENT OF THE UNITED STATES OF AMERICA (TRANSMITTED BY THE USSR GOVERNMENT TO THE SECRETARIAT)

(In the aforementioned note, the Embassy informed the State Department of the views of the Soviet Union on questions relating to the immunity of a foreign State)

“ . . . The Soviet Union bases its position on the generally recognized principle of the sovereignty and sovereign equality of States, as affirmed in the Charter of the United Nations. Given the sovereign equality of States and their independence from one another, it follows that no State can exercise authority in respect of another State. A foreign State and its organs and missions enjoy immunity from the jurisdiction of another State. Proceedings against a State or its organs or missions in the court of another State and also arrest and the attachment of the property of a foreign State, are permissible only with the consent of that State. . . .”

O. UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

1. LETTER FROM THE UNITED KINGDOM'S PERMANENT REPRESENTATIVE TO THE COUNCIL OF EUROPE ADDRESSED TO THE COUNCIL OF EUROPE REGARDING THE RATIFICATION OF EUROPEAN CONVENTION ON STATE IMMUNITY (TRANSMITTED BY THAT GOVERNMENT TO THE SECRETARIAT)

Your Excellency,

I have the honour to refer to the instrument of ratification by the United Kingdom of Great Britain and Northern Ireland of the European Convention on State Immunity enclosed herewith, and to notify you of the following:

(a) In pursuance of the provisions of paragraph 1 of Article 24 thereof, the United Kingdom hereby declare that, in cases not falling within Articles 1 to 13, their courts and the courts of any territory in respect of which they are a Party to the Convention shall be entitled to entertain proceedings against another Contracting State to the extent that these courts are entitled to entertain proceedings against States not Party to the present Convention. This declaration is without prejudice to the immunity from jurisdiction which foreign States enjoy in respect of acts performed in the exercise of sovereign authority (*acta jure imperii*).

(b) In pursuance of the provisions of paragraph 2 of Article 19, the United Kingdom hereby declare that their courts, and the courts of any territory in respect of which they are a Party to the Convention, shall not be bound by the provisions of paragraph 1 of that Article.

(c) In pursuance of the provisions of paragraph 4 of Article 21, the United Kingdom hereby designate as competent courts: in England and Wales—the High Court of Justice; in Scotland—the Court of Session; in Northern Ireland—the Supreme Court of Judicature; and in any other territory in respect of which they are a Party to the Convention—the Supreme Court of the territory concerned. The question whether effect is to be given to a judgment in accordance with paragraph 1 of Article 21 may however also be justiciable in other civil courts in the exercise of their normal jurisdiction.

2. I also have the honour to inform you that simultaneously an instrument of ratification of the International Convention for the Unification of certain Rules concerning the Immunity of State-owned Ships, done at Brussels on 10 April, 1926, and of the Protocol supplementary thereto, done at Brussels on 24 May, 1934, is being deposited with the Government of the Kingdom of Belgium. This instrument of ratification, signed by Her Majesty The Queen in respect of the United Kingdom of Great Britain and Northern Ireland, contains the following reservations:

“We reserve the right to apply Article 1 of the Convention to any claim in respect of a ship which falls within the Admiralty jurisdiction of Our courts, or of Our courts in any territory in respect of which We are party to the Convention.

“We reserve the right, with respect to Article 2 of the Convention, to apply in proceedings concerning another High Contracting Party or ship of another High Contracting Party the rules of procedure set out in Chapter II of the European Convention on State Immunity, signed at Basle on the Sixteenth day of May, in the Year of Our Lord One thousand Nine hundred and Seventy-two.

“In order to give effect to the terms of any international agreement with a non-Contracting State, We reserve the right to make special provision

“(a) as regards the delay or arrest of a ship or cargo belonging to such a State, and

“(b) to prohibit seizure of or execution against such a ship or cargo.”

I avail myself of this opportunity to renew to Your Excellency the assurance of my highest consideration.

WHEREAS a European Convention on State Immunity, opened for signature by member States of the Council of Europe at Basle from the sixteenth day of May, one thousand nine hundred and seventy-two, was signed on that date on behalf of the United Kingdom of Great Britain and Northern Ireland;

NOW THEREFORE the Government of the United Kingdom of Great Britain and Northern Ireland, having considered the convention aforesaid, hereby confirm and ratify the same on behalf of:

The United Kingdom of Great Britain and Northern Ireland

Belize

British Antarctic Territory

British Virgin Islands

Cayman Islands

Falkland Islands and Dependencies

Gilbert Islands

Hong Kong

Montserrat

Pitcairn, Henderson, Ducie and Oeno Islands

Saint Helena and Dependencies

Turks and Caicos Islands

United Kingdom Sovereign Base Areas of Akrotiri and Dhekelia in the Island of Cyprus

and undertake faithfully to perform and carry out all the stipulations therein contained.

IN WITNESS whereof this Instrument of Ratification is signed and sealed by Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs.

Done at London the tenth day of May, one thousand nine hundred and seventy-nine.

2. NOTE FROM THE UNITED KINGDOM'S AMBASSADOR IN BRUSSELS, ADDRESSED TO THE BELGIAN MINISTER FOR FOREIGN AFFAIRS TO ACCOMPANY UK INSTRUMENT OF RATIFICATION OF THE INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES CONCERNING THE IMMUNITY OF STATE-OWNED SHIPS, 1926 8C PROTOCOL, THERETO (TRANSMITTED BY THE GOVERNMENT OF THE UNITED KINGDOM TO THE SECRETARIAT)

Your Excellency,

I have the honour to refer to the International Convention for the Unification of certain Rules concerning the Immunity of State-owned Ships, done at Brussels on 10

April 1926, and to the Protocol supplementary thereto, done at Brussels on 24 May 1934. In accordance with the provisions of Article 9 of the Convention, this Note is accompanied by the instrument of ratification by Her Majesty The Queen of the United Kingdom.

With reference to the provisions of Article 11 of the Convention, I have the honour to declare that the Convention and Protocol will not apply to the following territories under Her Majesty's sovereignty:

The Bailiwick of Jersey
 The Bailiwick of Guernsey
 The Isle of Man
 Bermuda
 British Indian Ocean Territory
 Gibraltar

I avail myself of this opportunity to renew to Your Excellency the assurance of my highest consideration.

3. INSTRUMENTS OF RATIFICATION OF THE INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES CONCERNING THE IMMUNITY OF STATE-OWNED SHIPS, 1926 8C PROTOCOL, THERETO

Elizabeth the Second, by the grace of God of the United Kingdom of Great Britain and Northern Ireland and of Her other realms and territories Queen, Head of the Commonwealth, Defender of the Faith, etc., etc., etc., to all and singular to whom these presents shall come, greeting!

Whereas an international Convention for the unification of certain rules concerning the immunity of State-owned ships was concluded and signed at Brussels on the tenth day of April in the year of our Lord one thousand nine hundred and twenty-six by the plenipotentiaries of us, in respect of our United Kingdom of Great Britain, and of the heads of certain other states;

And whereas a supplementary protocol, forming an integral part of the said Convention, was concluded at Brussels on the twenty-fourth day of May in the year of our Lord one thousand nine hundred and thirty-four;

Now therefore we, having seen and considered the Convention aforesaid, have approved, accepted and confirmed the same in all and every one of its articles and clauses, as we do by these presents approve, accept, confirm and ratify it, in respect of our United Kingdom of Great Britain and Northern Ireland, subject to the following reservations:

We reserve the right to apply Article 1 of the Convention to any claim in respect of a ship which falls within the Admiralty jurisdiction of our courts, or of our courts in any territory in respect of which we are party to the Convention.

We reserve the right, with respect to Article 2 of the Convention, to apply in proceedings concerning another high contracting party or ship of another high contracting party the rules of procedure set out in Chapter II of the European Convention on State Immunity, signed at Basle on the sixteenth day of May, in the year of our Lord one thousand nine hundred and seventy-two.

In order to give effect to the terms of any international agreement with a non-contracting State, we reserve the right to make special provision

(a) as regards the delay or arrest of a ship or cargo belonging to such a State, and

(b) to prohibit seizure of or execution against such a ship or cargo;

Engaging and promising upon our royal word that, subject to the said reservations, we will sincerely and faithfully perform and observe all and singular the things which are contained and expressed in the Convention aforesaid, and that we will never suffer the same to be violated by any one, or transgressed in any manner, as far as it lies in our Power. For the greater testimony and validity of all which, we have caused our great seal to be affixed to these presents, which we have signed with our royal hand.

Given at our Court of Saint James's the _____ day of _____ in the year of our Lord one thousand nine hundred and seventy-nine and in the twenty-eighth year of our reign.

4. LETTER CONCERNING THE TOPIC OF JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY SUBMITTED BY THE UNITED KINGDOM GOVERNMENT TO THE SECRETARIAT ON 3 JULY 1979

I am replying to your circular note of 18 January 1979, reference LE 113(32), in which you invited the United Kingdom to submit by 30 June relevant material on the topic of jurisdictional immunities of States and their property, including national legislation, decisions of national tribunals and diplomatic and official correspondence.

On 3 July, 1979, the United Kingdom Government deposited instruments of ratification of the European Convention on State Immunity, signed at Basle on 16 May 1972, and of the International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships, signed at Brussels on 10 April 1926, and the Supplementary Protocol to the Brussels Convention signed at Brussels on 24 May 1934. The instrument of ratification of the European Convention on State Immunity was accompanied by a number of declarations, and the instrument of ratification of the Brussels Convention was accompanied by a number of reservations. I enclose copies of both instruments and of the diplomatic notes with which they were transmitted. These documents show the territories in respect of which the United Kingdom has ratified the two Conventions.

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 provision 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 Conven-

tion, notified her constituent territories as being entitled to invoke the provisions of the Convention applicable to Contracting States.

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 section 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 or intended for use for commercial purposes.

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

I am also enclosing the texts of a number of important judgments on this topic by United Kingdom courts in the last few years. Although these judgments have largely been overtaken by the State Immunity Act they are of interest in showing the extent to which United Kingdom courts were beginning to move to bring the law in this field as applied in the United Kingdom into line with international law as applied by the courts and governments in other States. The decisions which I have selected as being of particular significance are the following:

Thai-Europe Tapioca Service Ltd v. Government of Pakistan, Ministry of Food and Agriculture, (Directorate of Agricultural Supplies Imports and Shipping Wing) (1975)

The Philippine Admiral. Philippine Admiral (Owners) v. Wallem Shipping (Hong Kong) Ltd (1975)

Trendtex Trading Corporation v. Central Bank of Nigeria (1976/77)

I. Congreso del Partido (1975/77)

Hispano Americano Mercantil SA v. Central Bank of Nigeria (1979). (In this case the court followed the reasoning in the *Trendtex Case*, holding that section 14(4) of the State Immunity Act, which was already in force, did not apply to proceedings in respect of matters that occurred before the coming into force of the Act.)

Uganda Company (Holdings) Ltd. v. Government of Uganda (This case was settled earlier this month before it came on for hearing in the Court of Appeal.)

P. UNITED STATES OF AMERICA

1. LEGISLATIVE HISTORY OF FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976; HOUSE REPORT NO. 94-1487

The Committee on the Judiciary, to whom was referred the bill (H.R. 11315) to define the jurisdiction of United States courts in suits against foreign states, the circumstances in which foreign states are immune from suit and in which execution may not be levied on their property, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill do pass.

Purpose

The purpose of the proposed legislation, as amended, is to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity.

Statement

The bill H.R. 11315 was introduced in accordance with the recommendations of an executive communication transmitted to the Congress by the Departments of State and Justice, and both Departments recommend its enactment with the amendments recommended in this report. The bill was the subject of hearings on June 2, 1976 and June 4, 1976 before this Committee's Subcommittee on Administrative Law and Governmental Relations. The amendments recommended to the bill are the result of matters discussed at those hearings and further developed in consultation with representatives of the Departments of State and Justice.

At the hearings on the bill it was pointed out that American citizens are increasingly coming into contact with foreign states and entities owned by foreign states. These interactions arise in a variety of circumstances, and they call into question whether our citizens will have access to the courts in order to resolve ordinary legal disputes. Instances of such contact occur when U.S. businessmen sell goods to a foreign state trading company, and disputes may arise concerning the purchase price. Another is when an American property owner agrees to sell land to a real estate investor that turns out to be a foreign government entity and conditions in the contract of sale may become a subject of contention. Still another example occurs when a citizen crossing the street may be struck by an automobile owned by a foreign embassy.

At present, there are no comprehensive provisions in our law available to inform parties when they can have recourse to the courts to assert a legal claim against a foreign state. Unlike other legal systems, U.S. law does not afford plaintiffs and their counsel with a means to commence a suit that is specifically addressed to foreign state defendants. It does not provide firm standards as to when a foreign state may validly assert the defense of sovereign immunity; and, in the event a plaintiff

should obtain a final judgment against a foreign state or one of its trading companies, our law does not provide the plaintiff with any means to obtain satisfaction of that judgment through execution against ordinary commercial assets.

In a modern world where foreign state enterprises are every day participants in commercial activities, H.R. 11315 is urgently needed legislation. The bill, which has been drafted over many years and which has involved extensive consultations within the administration, among bar associations and in the academic community, would accomplish four objectives:

First, the bill would codify the so-called "restrictive" principle of sovereign immunity, as presently recognized in international law. Under this principle, the immunity of a foreign state is "restricted" to suits involving a foreign state's public acts (*jure imperii*) and does not extend to suits based on its commercial or private acts (*jure gestionis*). This principle was adopted by the Department of State in 1952 and has been followed by the courts and by the executive branch ever since. Moreover, it is regularly applied against the United States in suits against the U.S. Government in foreign courts.

Second, the bill would insure that this restrictive principle of immunity is applied in litigation before U.S. courts. At present, this is not always the case. Today, when a foreign state wishes to assert immunity, it will often request the Department of State to make a formal suggestion of immunity to the court. Although the State Department espouses the restrictive principle of immunity, the foreign state may attempt to bring diplomatic influences to bear upon the State Department's determination. A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process. The Department of State would be freed from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity. As was brought out in the hearings on the bill, U.S. immunity practice would conform to the practice in virtually every other country—where sovereign immunity decisions are made exclusively by the courts and not by a foreign affairs agency.

Third, this bill would for the first time in U.S. law, provide a statutory procedure for making service upon, and obtaining in personam jurisdiction over, a foreign state. This would render unnecessary the practice of seizing and attaching the property of a foreign government for the purpose of obtaining jurisdiction.

Fourth, the bill would remedy, in part, the present predicament of a plaintiff who has obtained a judgment against a foreign state. Under existing law, a foreign state in our courts enjoys absolute immunity from execution, even in ordinary commercial litigation where commercial assets are available for the satisfaction of a judgment. H.R. 11315 seeks to restrict this broad immunity from execution. It would conform the execution immunity rules more closely to the jurisdiction immunity rules. It would provide the judgment creditor some remedy if, after a reasonable period, a foreign state or its enterprise failed to satisfy a final judgment.

Background

Sovereign immunity is a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state. It differs

from diplomatic immunity (which is drawn into issue when an individual diplomat is sued). H.R. 11315 deals solely with sovereign immunity.

Sovereign immunity as a doctrine of international law was first recognized in our courts in the landmark case of *The Schooner Exchange v. M'Faddon*, 7 Cranch 116 (1812). There, Chief Justice Marshall upheld a plea of immunity, supported by an executive branch suggestion, by noting that a recognition of immunity was supported by the law and practice of nations. In the early part of this century, the Supreme Court began to place less emphasis on whether immunity was supported by the law and practice of nations, and relied instead on the practices and policies of the State Department. This trend reached its culmination in *Ex Parte Peru*, 318 U.S. 578 (1943)³ and *Mexico v. Hoffman*, 324 U.S.30 (1945).⁴

Partly in response to these decisions and partly in response to developments in international law, the Department of State adopted the restrictive principle of sovereign immunity in its "Tate Letter" of 1952, 26 Department of State Bulletin 984. Thus, under the Tate letter, the Department undertook, in future sovereign immunity determinations, to recognize immunity in cases based on a foreign state's public acts, but not in cases based on commercial or private acts. The Tate letter, however, has posed a number of difficulties. From a legal standpoint, if the Department applies the restrictive principle in a given case, it is in the awkward position of a political institution trying to apply a legal standard to litigation already before the courts. Moreover, it does not have the machinery to take evidence, to hear witnesses, or to afford appellate review.

From a foreign relations standpoint, the initiative is left to the foreign state. The foreign state chooses which sovereign immunity determinations it will leave to the courts, and which it will take to the State Department. The foreign state also decides when it will attempt to exert diplomatic influences, thereby making it more difficult for the State Department to apply the Tate letter criteria.

From the standpoint of the private litigant, considerable uncertainty results. A private party who deals with a foreign government entity cannot be certain that his legal dispute with a foreign state will not be decided on the basis of nonlegal considerations through the foreign government's intercession with the Department of State.

The United States in foreign courts

Since World War II, the United States has increasingly become involved in litigation in foreign courts. This litigation has involved such diverse activities as the purchase of goods and services by our embassies, employment of local personnel by our military bases, the construction or lease of buildings for our foreign missions, and traffic accidents involving U.S. Government-owned vehicles.

In the mid-1950s, when the United States first became involved in foreign suits on a large scale, foreign counsel retained by the Department of Justice were instructed to plead sovereign immunity in almost every instance. However, the executive branch learned that almost every country in Western Europe followed the restrictive principle of sovereign immunity and the Government's pleas of immunity were routinely denied in tort and contract cases where the necessary contacts with the forum were present. Thus, in the 1960s, it became the practice of the Department of

³ 63 S.Ct. 793, 87 L.Ed. 1014.

⁴ 65 S.Ct. 530, 89 L.Ed. 729.

Justice to avoid claiming immunity when the United States was sued in countries that had adopted the restrictive principle of immunity, but to invoke immunity in those remaining countries that still held to the absolute immunity doctrine. Beginning in the early 1970s, it became the consistent practice of the Department of Justice not to plead sovereign immunity abroad in instances where, under the Tate letter standards, the Department would not recognize a foreign state's immunity in this country.

In virtually every country, the United States has found that sovereign immunity is a question of international law to be determined by the courts. The United States cannot take recourse to a foreign affairs agency abroad as other states have done in this country when they seek a suggestion of immunity from the Department of State.

History of the bill

H.R. 11315 is the product of many years of work by the Departments of State and Justice, in consultation with members of the bar and the academic community. Study of possible legislation began in the mid-1960s. In the early 1970s, a number of draft bills were prepared and submitted for comment to many authorities and practitioners in the international law field. On January 31, 1973, a bill (H.R. 3493) was introduced in the 93d Congress, and referred to the Committee on the Judiciary. The bill H.R. 3493 was the subject of a subcommittee hearing on June 7, 1973. Although extensive advice had already been obtained from the private sector, in the course of the subcommittee's consideration it became apparent that a few segments of the private bar had not been fully consulted. It was pointed out that the 93d Congress bill contained some technical deficiencies which could be remedied—particularly with respect to maritime cases and the jurisdictional provisions. The American Bar Association at the August 1976 meeting of its House of Delegates adopted a resolution urging approval of H.R. 11315. The letter of that association indicating its support is set out at the end of this report.

The current bill, H.R. 11315, contains revised language. It is essentially the same bill as was introduced in 1973, except for the technical improvements that have been made in the interim.

Committee amendments

The committee, after careful consideration of the bill, made the following amendments:

1. In sections 1604 and 1609 of the bill, the committee has preserved the reference to "existing international agreements" but has deleted the language that would make this bill subject to "future" agreements. Mention of future agreements was found to be unnecessary and misleading. The purpose for including the reference was to take into account the possibility that sovereign immunity might become the subject of an international convention. Such a convention would, under article VI of the Constitution, take precedence, whether or not the bill was made expressly subject to a future international agreement. Moreover, it was thought best to eliminate any possible question that this language might be construed to authorize a future international agreement. However, the reference to existing international agreements is essential to make it clear that this bill would not supersede the special procedures provided in existing international agreements, such as the North Atlantic Treaty—Status of Forces Agreement.
2. Section 1606, relating to public debt obligations, has been deleted and the former section 1605(c) has been renumbered as section 1606. The public debt provi-

sion was, at best, very limited. It applied only to debt obligations incurred "for general governmental purposes." It did not apply to debts incurred either for specific government projects (such as the building of a dam) or to further a commercial activity. In practice, the provision would have had virtually no effect because U.S. underwriters of foreign government bonds and U.S. banks lending to foreign governments would invariably include an express waiver of immunity in the debt instrument. Moreover, both a sale of bonds to the public and a direct loan from a U.S. commercial bank to a foreign government are activities which are of a commercial nature and should be treated like other similar commercial transactions. Such commercial activities would not otherwise give rise to immunity and would be subject to U.S. regulation, such as that provided by the securities laws. Thus, on reconsideration of all of the factors, the committee has concluded that a public debt provision would serve no significant purpose and would be inappropriate.

3. Former section 1605(c), renumbered as section 1606, has also been revised in two other respects. First, it makes clear that the exception for punitive damages applies to political subdivisions of foreign states, as well as to the foreign state itself. This accords with current international practice. Second, it would eliminate the exception for interest prior to judgment. Such an exception is not supported by international practice. If a foreign state is not immune from suit, it should be liable for interest to the same extent as a private party.

4. Section 1608 has been substantially revised, with the principal revisions being in subsection (a). A number of bar association studies, which otherwise expressed full support for the bill, pointed out that subsection (a), as previously drafted, created a significant gap in its provisions concerning service upon a foreign state through diplomatic channels. The Departments of Justice and State have reconsidered this provision and have indicated their preference for the revised language in the committee amendment. The committee has revised subsection (a) to fill the prior gap, and, at the same time, to minimize potential irritants to relations with foreign states. Subsection (a), as revised, would provide that service of a summons and complaint also be accompanied by a new document, called a notice of suit. The notice of suit is designed to provide a foreign state with an introductory explanation of the lawsuit, together with an explanation of the legal significance of the summons, complaint, and service.

The revised paragraphs (a)(2) and (b)(2) of section 1608 give emphasis to service under an "applicable international convention on service of judicial documents." At present, there is such an applicable international convention—the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, TIAS 6638, 20 UST 361—to which the Senate gave its advice and consent to ratification, and which entered into force for the United States in 1969. At present 18 nations are parties to this convention. In the committee's view, if a country has entered into such an international convention, priority should be given to this method for service.

Subsection (d) has been revised to delete the references to cross-claims and counterclaims. The existence of a counterclaim against a foreign state indicates that the foreign state has already entered an appearance in the lawsuit; thus, there is no necessity for affording the foreign state with a special time period in which to respond to a counterclaim. When a cross-claim is filed against a foreign state, rules 19 and 20, of the Federal Rules of Civil Procedure, require that original service be made. Under rules of the bill, this would mean service under section 1608 (a) and (b).

5. Finally, your committee has made a few perfecting amendments in the bill's provisions involving maritime jurisdiction. These include changes in section 1605(b) to make it clear that the delivery of notice to a master of a vessel under paragraph (1) does not itself constitute "service"; and to make clear, in cases where the plaintiff is unaware that he has arrested a foreign state-owned vessel, that the 10-day period in paragraph (2) does not begin to run until the plaintiff has determined that a foreign state owns the vessel. Section 1609 has been amended to make it clear that it applies to arrests of a vessel, as well as to attachment and execution.

CONCLUSION

On the basis of the facts outlined in the executive communication and the testimony at the hearings on the bill, the committee finds that there is a clearly defined need for the enactment of these provisions into law. It is recommended that the amended bill be approved.

SECTION-BY SECTION ANALYSIS

This bill, entitled the "Foreign Sovereign Immunities Act of 1976," sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States. It is intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities. It is also designed to bring U.S. practice into conformity with that of most other nations by leaving sovereign immunity decisions exclusively to the courts, thereby discontinuing the practice of judicial deference to "suggestions of immunity" from the executive branch. (See *Ex Parte Peru*, 318 U.S. 578, 588-589 (1943).⁵)

The bill is not intended to affect the substantive law of liability. Nor is it intended to affect either diplomatic or consular immunity, or the attribution of responsibility between or among entities of a foreign state; for example, whether the proper entity of a foreign state has been sued, or whether an entity sued is liable in whole or in part for the claimed wrong.

Aside from setting forth comprehensive rules governing sovereign immunity, the bill prescribes: the jurisdiction of U.S. district courts in cases involving foreign states, procedures for commencing a lawsuit against foreign states in both Federal and State courts, and circumstances under which attachment and execution may be obtained against the property of foreign states to satisfy a judgment against foreign states in both Federal and State courts.

Constitutional authority for enacting such legislation derives from the constitutional power of the Congress to prescribe the jurisdiction of Federal courts (art. I, sec. 8, cl. 9; art. III, sec. 1); to define offenses against the "Law of Nations" (art. I, sec. 8, cl. 10); to regulate commerce with foreign nations (art. I, sec. 8, cl. 3); and "to make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested . . . in the Government of the United States," including the judicial power of the United States over controversies between "a State, or the Citizens thereof, and foreign States . . ." (art. I, sec. 8, cl. 18; art. III, sec. 2, cl. 1). See *National Bank v. Republic of China*, 348 U.S. 356, 370-71 (1955)⁶ (Reed

⁵ 63 S.Ct. 793, 87 L.Ed. 1014.

⁶ 75 S.Ct. 423, 99 L.Ed. 389, rehearing denied 75 S.Ct. 598, 349 U.S. 913, 99 L.Ed. 1247.

J., dissenting); *cf. Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964).⁷

The committee wishes to emphasize that this section-by-section analysis supersedes the section-by-section analysis that accompanied the earlier version of the bill in the 93rd Congress (that is, S. 566 and H.R. 3493, 93d Cong., 1st sess.); the prior analysis should not be consulted in interpreting the current bill and its provisions, and no inferences should be drawn from differences between the two.

SEC. 2. JURISDICTION IN ACTIONS AGAINST FOREIGN STATES

Section 2 of the bill adds a new section 1330 to title 28 of the United States Code, and provides for subject matter and personal jurisdiction of U.S. district courts over foreign states and their political subdivisions, agencies, and instrumentalities. Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states. Such broad jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences. Plaintiffs, however, will have an election whether to proceed in Federal court or in a court of a State, subject to the removal provisions of section 6 of the bill.

(a) *Subject Matter Jurisdiction.*—Section 1330(a) gives Federal district courts original jurisdiction in personam against foreign states (defined as including political subdivisions, agencies, and instrumentalities of foreign states). The jurisdiction extends to any claim with respect to which the foreign state is not entitled to immunity under sections 1605–1607 proposed in the bill, or under any applicable international agreement of the type contemplated by the proposed section 1604.

As in suits against the U.S. Government, jury trials are excluded. See 28 U.S.C. 2402. Actions tried by a court without jury will tend to promote a uniformity in decision where foreign governments are involved.

In addition, the jurisdiction of district courts in cases against foreign states is to be without regard to amount in controversy. This is intended to encourage the bringing of actions against foreign states in Federal courts. Under existing law, the district courts have diversity jurisdiction in actions in which foreign states are parties, but only where the amount in controversy exceeds \$10,000. 28 U.S.C. 1332(a)(2) and (3). (See analysis of sec. 3 of the bill, below.)

A judgment dismissing an action for lack of jurisdiction because the foreign state is entitled to sovereign immunity would be determinative of the question of sovereign immunity. Thus, a private party, who lost on the question of jurisdiction, could not bring the same case in a State court claiming that the Federal court's decision extended only to the question of Federal jurisdiction and not to sovereign immunity.

(b) *Personal Jurisdiction.*—Section 1330(b) provides, in effect, a Federal long-arm statute over foreign states (including political subdivisions, agencies, and instrumentalities of foreign states). It is patterned after the long-arm statute Congress enacted for the District of Columbia. Public Law 91–358, sec. 132(a), title I, 84 Stat. 549. The requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision. *Cf. International Shoe Co. v. Washington*, 326 U.S.

⁷ 84 S.Ct. 923, 11 L.Ed.2d 804.

310 (1945),⁸ and *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957).⁹ For personal jurisdiction to exist under section 1330(b), the claim must first of all be one over which the district courts have original jurisdiction under section 1330(a), meaning a claim for which the foreign state is not entitled to immunity. Significantly, each of the immunity provisions in the bill, sections 1605–1607, requires some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction. These immunity provisions, therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction. Besides incorporating these jurisdictional contacts by reference, section 1330(b) also satisfies the due process requirement of adequate notice by prescribing that proper service be made under section 1608 of the bill. Thus, sections 1330(b), 1608, and 1605–1607 are all carefully interconnected.

(c) *Effect of an Appearance.*—Section 1330(c) states that a mere appearance by a foreign state in an action does not confer personal jurisdiction with respect to claims which could not be brought as an independent action under this bill. The purpose is to make it clear that a foreign state does not subject itself to claims unrelated to the action solely by virtue of an appearance before a U.S. court. While the plaintiff is free to amend his complaint, he is not permitted to add claims for relief not based on transactions or occurrences listed in the bill. The term “transaction or occurrence” includes each basis set forth in sections 1605–1607 for not granting immunity, including waivers.

SEC. 3. DIVERSITY JURISDICTION AS TO FOREIGN STATES

Section 3 of the bill amends those provisions of 28 U.S.C. 1332 which relate to diversity jurisdiction of U.S. district courts over foreign states. Since jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous. The amendment deletes references to “foreign states” now found in paragraphs (2) and (3) of 28 U.S.C. 1332(a), and adds a new paragraph (4) to provide for diversity jurisdiction in actions brought by a foreign state as plaintiff. These changes would not affect the applicability of section 1332 to entities that are both owned by a foreign state and are also citizens of a state of the United States as defined in 28 U.S.C. 1332(c) and (d). See analysis to section 1603(b).

SEC. 4. NEW CHAPTER 97: SOVEREIGN IMMUNITY PROVISIONS

Section 4 of the bill adds a new chapter 97 to title 28, United States Code, which sets forth the legal standards under which Federal and State courts would henceforth determine all claims of sovereign immunity raised by foreign states and their political subdivisions, agencies, and instrumentalities. The specific sections of chapter 97 are as follows:

Section 1602. Findings and declaration of purpose

Section 1602 sets forth the central premise of the bill: That decisions on claims by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime which incorporates standards recognized under international law.

⁸ 66 S.Ct. 154, 90 L.Ed. 95, 161 A.L.R. 1057.

⁹ 78 S.Ct. 199, 2 L.Ed.2d 223.

Although the general concept of sovereign immunity appears to be recognized in international law, its specific content and application have generally been left to the courts of individual nations. There is, however, a wide acceptance of the so-called restrictive theory of sovereign immunity: that is, that the sovereign immunity of foreign states should be "restricted" to cases involving acts of a foreign state which are sovereign or governmental in nature, as opposed to acts which are either commercial in nature or those which private persons normally perform. This restrictive theory has been adhered to by the Department of State since the "Tate Letter" of May 19, 1952. (26 Dept. of State Bull. 984 (1952).)

Section 1603. Definitions

Section 1603 defines five terms that are used in the bill:

(a) *Foreign state.*—Subsection (a) defines the term foreign state as used in all provisions of chapter 97, except section 1608. In section 1608, the term "foreign state" refers only to the sovereign state itself.

As the definition indicates, the term "foreign state" as used in every other section of chapter 97 includes not only the foreign state but also political subdivisions, agencies and instrumentalities of the foreign state. The term "political subdivisions" includes all governmental units beneath the central government, including local governments.

(b) *Agency or instrumentality of a foreign state.*—Subsection (b) defines an "agency or instrumentality of a foreign state" as any entity (1) which is a separate legal person, (2) which is an organ of a foreign state or of a political subdivision of a foreign state, or a majority of whose shares or other ownership interest is owned by a foreign state or by a foreign state's political subdivision, and (3) which is neither a citizen of a State of the United States as defined in 28 U.S.C. 1332(c) and (d) nor created under the laws of any third country.

The first criterion, that the entity be a separate legal person, is intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name.

The second criterion requires that the entity be either an organ of a foreign state (or of a foreign state's political subdivision), or that a majority of the entity's shares or other ownership interest be owned by a foreign state (or by a foreign state's political subdivision). If such entities are entirely owned by a foreign state, they would of course be included within the definition. Where ownership is divided between a foreign state and private interests, the entity will be deemed to be an agency or instrumentality of a foreign state only if a majority of the ownership interests (shares of stock or otherwise) is owned by a foreign state or by a foreign state's political subdivision.

The third criterion excludes entities which are citizens of a State of the United States as defined in 28 U.S.C. 1332(c) and (d)—for example a corporation organized and incorporated under the laws of the State of New York but owned by a foreign state. (See *Amtorg Trading Corp. v. United States*, 71 F.2d 524 (C.C.P.A. 1934).) Also excluded are entities which are created under the laws of third countries. The rationale behind these exclusions is that if a foreign state acquires or establishes a company or other legal entity in a foreign country, such entity is presumptively engaging in activities that are either commercial or private in nature.

An entity which does not fall within the definitions of sections 1603(a) or (b) would not be entitled to sovereign immunity in any case before a Federal or State court. On the other hand, the fact that an entity is an "agency or instrumentality of a foreign state" does not in itself establish an entitlement to sovereign immunity. A court would have to consider whether one of the sovereign immunity exceptions contained in the bill (see sections 1605–1607 and 1610–1611) was applicable.

As a general matter, entities which meet the definition of an "agency or instrumentality of a foreign state" could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.

(c) *United States*.—Paragraph (c) of section 1603 defines "United States" as including all territory and waters subject to the jurisdiction of the United States.

(d) *Commercial activity*.—Paragraph (c) of section 1603 defines the term "commercial activity" as including a broad spectrum of endeavor, from an individual commercial transaction or act to a regular course of commercial conduct. A "regular course of commercial conduct" includes the carrying on of a commercial enterprise such as a mineral extraction company, an airline or a state trading corporation. Certainly, if an activity is customarily carried on for profit, its commercial nature could readily be assumed. At the other end of the spectrum, a single contract, if of the same character as a contract which might be made by a private person, could constitute a "particular transaction or act."

As the definition indicates, the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity. The same would be true of a contract to make repairs on an embassy building. Such contracts should be considered to be commercial contracts, even if their ultimate object is to further a public function.

By contrast, a foreign state's mere participation in a foreign assistance program administered by the Agency for International Development (AID) is an activity whose essential nature is public or governmental, and it would not itself constitute a commercial activity. By the same token, a foreign state's activities in and "contacts" with the United States resulting from or necessitated by participation in such a program would not in themselves constitute a sufficient commercial nexus with the United States so as to give rise to jurisdiction (see sec. 1330) or to assets which could be subjected to attachment or execution with respect to unrelated commercial transactions (see sec. 1610(b)). However, a transaction to obtain goods or services from private parties would not lose its otherwise commercial character because it was entered into in connection with an AID program. Also public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States.

The courts would have a great deal of latitude in determining what is a "commercial activity" for purposes of this bill. It has seemed unwise to attempt an excessively precise definition of this term, even if that were practicable. Activities such as

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, would be among those included within the definition.

(e) *Commercial activity carried on in the United States by a foreign state.*—As paragraph (d) of section 1603 indicates, a commercial activity carried on in the United States by a foreign state would include not only a commercial transaction performed and executed in its entirety in the United States, but also a commercial transaction or act having a “substantial contact” with the United States. This definition includes cases based on commercial transactions performed in whole or in part in the United States, import-export transactions involving sales to, or purchases from, concerns in the United States, business torts occurring in the United States (cf. §1605(a)(5)), and an indebtedness incurred by a foreign state which negotiates or executes a loan agreement in the United States, or which receives financing from a private or public lending institution located in the United States—for example, loans, guarantees or insurance provided by the Export-Import Bank of the United States. It will be for the courts to determine whether a particular commercial activity has been performed in whole or in part in the United States. This definition, however, is intended to reflect a degree of contact beyond that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff.

Section 1604. Immunity of foreign states from jurisdiction

New chapter 97 of title 28, United States Code, starts from a premise of immunity and then creates exceptions to the general principle. The chapter is thus cast in a manner consistent with the way in which the law of sovereign immunity has developed. Stating the basic principle in terms of immunity may be of some advantage to foreign states in doubtful cases, but, since sovereign immunity is an affirmative defense which must be specially pleaded, the burden will remain on the foreign state to produce evidence in support of its claim of immunity. Thus, evidence must be produced to establish that a foreign state or one of its subdivisions, agencies, or instrumentalities is the defendant in the suit and that the plaintiff's claim relates to a public act of the foreign state—that is, an act not within the exceptions in sections 1605–1607. Once the foreign state has produced such prima facie evidence of immunity, the burden of going forward would shift to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity. The ultimate burden of proving immunity would rest with the foreign state.

The immunity from jurisdiction provided in section 1604 applies to proceedings in both Federal and State courts. Section 1604 would be the only basis under which a foreign state could claim immunity from the jurisdiction of any Federal or State court in the United States.

All immunity provisions in sections 1604 through 1607 are made subject to “existing” treaties and other international agreements to which the United States is a party. In the event an international agreement expressly conflicts with this bill, the international agreement would control. Thus, the bill would 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 contracts or agreements to which the United States is a party, calling for exclusive non-judicial remedies through arbitration or other procedures for the settlement of disputes.

Treaties of friendship, commerce and navigation and bilateral air transport agreements often contain provisions relating to the immunity of foreign states. Many provisions in such agreements are consistent with, but do not go as far as, the current bill. To the extent such international agreements are silent on a question of immunity, the bill would control; the international agreement would control only where a conflict was manifest.

Section 1605. General exceptions to the jurisdictional immunity of foreign states

Section 1605 sets forth the general circumstances in which a claim of sovereign immunity by a foreign state, as defined in section 1603(a), would not be recognized in a Federal or State court in the United States.

(a) *Waivers.*—Section 1605(a)(1) treats explicit and implied waivers by foreign states of sovereign immunity. With respect to explicit waivers, a foreign state may renounce its immunity by treaty, as has been done by the United States with respect to commercial and other activities in a series of treaties of friendship, commerce, and navigation, or a foreign state may waive its immunity in a contract with a private party. Since the sovereign immunity of a political subdivision, agency or instrumentality of a foreign state derives from the foreign state itself, the foreign state may waive the immunity of its political subdivisions, agencies or instrumentalities.

With respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract. An implicit waiver would also include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity.

The language, “notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver,” 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. In other words, if the foreign state agrees to a waiver of sovereign immunity in a contract, that waiver may subsequently be withdrawn only in a manner consistent with the expression of the waiver in the contract. Some court decisions have allowed subsequent and unilateral rescissions of waivers by foreign states. But the better view, and the one followed in this section, is that a foreign state which has induced a private person into a contract by promising not to invoke its immunity cannot, when a dispute arises, go back on its promise and seek to revoke the waiver unilaterally.

(a)(2) *Commercial activities having a nexus with the United States.*—Section 1605(a)(2) treats what is probably the most important instance in which foreign states are denied immunity, that in which the foreign state engages in a commercial activity. The definition of a “commercial activity” is set forth in section 1603(d) of the bill, and is discussed in the analysis to that section.

Section 1605(a)(2) mentions three situations in which a foreign state would not be entitled to immunity with respect to a claim based upon a commercial activity. The first of these situations is where the “commercial activity [is] carried on in the United States by the foreign state.” This phrase is defined in section 1603(e) of the bill. See the analysis to that section.

The second situation, an “act performed in the United States in connection with a commercial activity of the foreign state elsewhere,” looks to conduct of the foreign state in the United States which relates either to a regular course of commercial

conduct elsewhere or to a particular commercial transaction concluded or carried out in part elsewhere. Examples of this type of situation might include: a representation in the United States by an agent of a foreign state that leads to an action for restitution based on unjust enrichment; an act in the United States that violates U.S. securities laws or regulations; the wrongful discharge in the United States of an employee of the foreign state who has been employed in connection with a commercial activity carried on in some third country.

Although some or all of these acts might also be considered to be a "commercial activity carried on in the United States," as broadly defined in section 1603(e), it has seemed advisable to provide expressly for the case where a claim arises out of a specific act in the United States which is commercial or private in nature and which relates to a commercial activity abroad. It should be noted that the acts (or omissions) encompassed in this category are limited to those which in and of themselves are sufficient to form the basis of a cause of action.

The third situation—"an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States"—would embrace commercial conduct abroad having direct effects within the United States which would subject such conduct to the exercise of jurisdiction by the United States consistent with principles set forth in section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965).

Neither the term "direct effect" nor the concept of "substantial contacts" embodied in section 1603(e) is intended to alter the application of the Sherman Antitrust Act, 15 U.S.C. 1, *et seq.*, to any defendant. Thus, the bill does not affect the holdings in such cases as *United States v. Pacific & Arctic Ry. & Nav. Co.*, 228 U.S. 87 (1913),¹⁰ or *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 803 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093 (1969).¹¹

(a)(3) *Expropriation claims.*—Section 1605(a)(3) would, in two categories of cases, deny immunity where "rights in property taken in violation of international law are in issue." The first category involves cases where the property in question or any property exchanged for such property is present in the United States, and where such presence is in connection with a commercial activity carried on in the United States by the foreign state, or political subdivision, agency or instrumentality of the foreign state. The second category is where the property, or any property exchanged for such property, is (i) owned or operated by an agency or instrumentality of a foreign state and (ii) that agency or instrumentality is engaged in a commercial activity in the United States. Under the second category, the property need not be present in connection with a commercial activity of the agency or instrumentality.

The term "taken in violation of international law" would include the nationalization or expropriation of property without payment of the prompt adequate and effective compensation required by international law. It would also include takings which are arbitrary or discriminatory in nature. Since, however, this section deals solely with issues of immunity, it in no way affects existing law on the extent to

¹⁰ 33 S.Ct. 443, 57 L.Ed. 742.

¹¹ 89 S.Ct. 872, 21 L.Ed.2d 784.

which, if at all, the "act of state" doctrine may be applicable. See 22 U.S.C. 2370(e)(2).¹²

(a)(4) *Immovable, inherited, and gift property*.—Section 1605(a)(4) denies immunity in litigation relating to rights in real estate and in inherited or gift property located in the United States. It is established that, as set forth in the "Tate Letter" of 1952, sovereign immunity should not be granted in actions with respect to real property, diplomatic and consular property excepted. 26 Department of State Bulletin 984 (1952). It does not matter whether a particular piece of property is used for commercial or public purposes.

It is maintainable that the exception mentioned in the "Tate Letter" with respect to diplomatic and consular property is limited to questions of attachment and execution and does not apply to an adjudication of rights in that property. Thus the Vienna Convention on Diplomatic Relations, concluded in 1961, 23UST 3227, TIAS 7502 (1972), provides in article 22 that the "premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution." Actions short of attachment or execution seem to be permitted under the Convention, and a foreign state cannot deny to the local state the right to adjudicate questions of ownership, rent, servitudes, and similar matters, as long as the foreign state's possession of the premises is not disturbed.

There is general agreement that a foreign state may not claim immunity when the suit against it relates to rights in property, real or personal, obtained by gift or inherited by the foreign state and situated or administered in the country where the suit is brought. As stated in the "Tate Letter," immunity should not be granted "with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary." The reason is that, in claiming rights in a decedent's estate or obtained by gift, the foreign state claims the same right which is enjoyed by private persons.

¹² The committee has been advised that in some cases, after the defense of sovereign immunity has been denied or removed as an issue, the act of state doctrine may be improperly asserted in an effort to block litigation. Under the act of state doctrine, United States Courts may refuse to adjudicate the validity of purely public acts of foreign sovereigns, as distinguished from commercial acts, committed and effective within their own territory. For example, in the Supreme Court's recent decision in *Dunhill v. Republic of Cuba*, 44 U.S.L.W. 4665, No. 73-1288 (May 24, 1976), the respondent having brought suit (and thus clearly having waived the defense of sovereign immunity) attempted to assert that a refusal to pay a commercial obligation was not reviewable because it was an "act of state".

The committee has found it unnecessary to address the act of state doctrine in this legislation since decisions such as that in the *Dunhill* case demonstrate that our courts already have considerable guidance enabling them to reject improper assertions of the act of state doctrine. For example, it appears that the doctrine would not apply to the cases covered by H.R. 11315, whose touchstone is a concept of "commercial activity" involving significant jurisdictional contacts with this country. The conclusions of the committee are in concurrence with the position of the government in its *amicus* brief to the Supreme Court in the *Dunhill* case where the Solicitor General stated:

"[U]nder the modern restrictive theory of sovereign immunity, a foreign state is not immune from suit on its commercial obligations. To elevate the foreign state's commercial acts to the protected status of 'acts of state' would frustrate this modern development by permitting sovereign immunity to reenter through the back door, under the guise of the act of state doctrine." (Amicus Brief of United States, p. 41.)

(a)(5) *Noncommercial torts.*—Section 1605(a)(5) is directed primarily at the problem of traffic accidents but is cast in general terms as applying to all tort actions for money damages, not otherwise encompassed by section 1605(a)(2) relating to commercial activities. It denies immunity as to claims for personal injury or death, or for damage to or loss of property, caused by the tortious act or omission of a foreign state or its officials or employees, acting within the scope of their authority; the tortious act or omission must occur within the jurisdiction of the United States, and must not come within one of the exceptions enumerated in the second paragraph of the subsection.

As used in section 1605(a)(5), the phrase “tortious act or omission” is meant to include causes of action which are based on strict liability as well as on negligence. The exceptions provided in subparagraphs (A) and (B) of section 1605(a)(5) correspond to many of the claims with respect to which the U.S. Government retains immunity under the Federal Tort Claims Act, 28 U.S.C. 2680 (a) and (h).

Like other provisions in the bill, section 1605 is subject to existing international agreements (see section 1604), including Status of Forces Agreements; if a remedy is available under a Status of Forces Agreement, the foreign state is immune from such tort claims as are encompassed in sections 1605(a)(2) and 1605(a)(5).

Since the bill deals only with the immunity of foreign states and not its diplomatic or consular representatives, section 1605(a)(5) would not govern suits against diplomatic or consular representatives but only suits against the foreign state. It is noteworthy in this regard that while article 43 of the Vienna Convention on Consular Relations of 1963, 21 UST 77, TIAS 6820 (1970), expressly abolishes the immunity of consular officers with respect to civil actions brought by a third party for “damage arising from an accident in the receiving state caused by a vehicle, vessel or aircraft,” there is no such provision in the Vienna Convention on Diplomatic Relations of 1961, *supra*. Consequently, no case relating to a traffic accident can be brought against a member of a diplomatic mission.

The purpose of section 1605(a)(5) is to permit the victim of a traffic accident or other nonecommercial tort to maintain an action against the foreign state to the extent otherwise provided by law. See, however, section 1605(c).

(b) *Maritime liens.*—Section 1605(b) 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 conditions in paragraphs (1) and (2) of section 1605(b) have been complied with.

The purpose of this subsection is to permit a plaintiff to bring suit in a U.S. district court 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. Cf. 46 U.S.C. 741, *et seq.* In view of section 1609 of the bill, section 1605(b) is designed to avoid arrests of vessels or cargo of a foreign state to commence a suit. Instead, as provided in paragraph (1), a copy of the summons and complaint must be delivered to the master or other person having possession of the vessel or cargo (such as the second in command of the ship).

If, however, the vessel or its cargo is arrested or attached, the plaintiff will lose his in personam remedy and the foreign state will be entitled to immunity—except in

the case where the plaintiff was unaware that the vessel or cargo of a foreign state was involved. This would be a rare case because the flag of the vessel, the circumstances giving rise to the maritime lien, or the information contained in ship registries kept in ports throughout the United States should make known the ownership of the vessel in question, if not the cargo. By contrast, evidence that a party had relied on a standard registry of ships, which did not reveal a foreign state's interest in a vessel, would be *prima facie* evidence of the party's unawareness that a vessel of a foreign state was involved. More generally, a party could seek to establish its lack of awareness of the foreign state's ownership by submitting affidavits from itself and from its counsel. If, however, the vessel or cargo is mistakenly arrested, such arrest or attachment must, under section 1609, be immediately dissolved when the foreign state brings to the court's attention its interest in the vessel or cargo and, hence, its right to immunity from arrest.

Under paragraph (2), the plaintiff must also be able to prove that the procedures for service under section 1608(a) or (b) have commenced—for example, that the clerk of the court has mailed the requisite copies of the summons and complaint. The plaintiff need not show that service has actually been made under section 1608(c). The reason for this second requirement is to help make certain that the foreign state concerned receives prompt and actual notice of the institution of a suit in admiralty in the United States, even if the copies served on the master of the vessel should fail to reach the foreign state.

Section 1605(b) would not preclude a suit in accordance with other provisions of the bill—e.g., section 1605(a)(2). Nor would it preclude a second action, otherwise permissible, to recover the amount by which the value of the maritime lien exceeds the recovery in the first action.

Section 1606. Extent of liability

Section 1606 makes clear that if the foreign state, political subdivision, agency or instrumentality is not entitled to immunity from jurisdiction, liability exists as it would for a private party under like circumstances. However, the tort liability of a foreign state itself, and of its political subdivision (but not of an agency or instrumentality of a foreign state) does not extend to punitive damages. Under current international practice, punitive damages are usually not assessed against foreign states. See 5 Hackwork, *Digest of International Law*, 723–26 (1943); Garcia-Amador, *State Responsibility*, 94 *Hague Recueil des Cours* 365, 476–81 (1958). Interest prior to judgment and costs may be assessed against a foreign state just as against a private party. Cf. 46 U.S.C. 743, 745.

Consistent with this section, a court could, when circumstances were clearly appropriate, order an injunction or specific performance. But this is not determinative of the power of the court to enforce such an order. For example, a foreign diplomat or official could not be imprisoned for contempt because of his government's violation of an injunction. See 22 U.S.C. 252. Also a fine for violation of an injunction may be unenforceable if immunity exists under sections 1609–1610.

The bill does not attempt to deal with questions of discovery. Existing law appears to be adequate in this area. For example, if a private plaintiff sought the production of sensitive governmental documents of a foreign state, concepts of governmental privilege would apply.¹³ Or if a plaintiff sought to depose a diplomat in the

¹³ e.g., 5 U.S.C. 552 concerning public information.

United States or a high-ranking official of a foreign government, diplomatic and official immunity would apply. However, appropriate remedies would be available under Rule 37, F.R. Civ. P., for an unjustifiable failure to make discovery.

Section 1607. Counterclaims

Section 1607 applies to counterclaims against a foreign state which brings an action or intervenes in an action in a Federal or State court. It would deny immunity in three situations. First, immunity would be denied as to any counterclaim for which the foreign state would not be entitled to immunity under section 1605, if the counterclaim had been brought as a direct claim in a separate action against the foreign state. This provision is based upon article 1 of the European Convention on State Immunity 11 Int'l Legal Materials 470 (1972).

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.” This is the same terminology as that used in rule 13(a) of the Federal Rules of Civil Procedure and is consistent with section 70(2)(b), Restatement of the Law, Second, Foreign Relations Law of the United States (1965). Certainly, if a foreign state brings or intervenes in an action based on a particular transaction or occurrence, it should not obtain the benefits of litigation before U.S. courts while avoiding any legal liabilities claimed against it and arising from that same transaction or occurrence. See *Alfred Dunhill of London, Inc., v. Cuba*, _____ U.S. _____ No. 73–1288, decided May 24, 1976.¹⁴

Third, notwithstanding that the foreign state may be immune under subsections (a) and (b), the foreign state nevertheless would not be immune from a setoff. Subsection (c) codifies the rule enunciated in *National Bank v. Republic of China*, 348 U.S. 356 (1955).¹⁵

Section 1608. Service; time to answer; default

Section 1608 sets forth the exclusive procedures with respect to service on, the filing of an answer or other responsive pleading by, and obtaining a default judgment against a foreign state or its political subdivisions, agencies or instrumentalities. These procedural provisions are intended to fill a void in existing Federal and State law, and to insure that private persons have adequate means for commencing a suit against a foreign state to seek redress in the courts.

Provisions in section 1608 are closely interconnected with other parts of the bill—particularly the proposed section 1330 and sections 1605–1607. If notice is served under section 1608 and if the jurisdictional contacts embodied in sections 1605–1607 are satisfied, personal jurisdiction over a foreign state would exist under section 1330(b). In addition to its integral role in the bill, section 1608 follows on the precedents of other statutory service provisions in areas of unusual Federal interest. See, for example, 8 U.S.C. 1105a(3) and 15 U.S.C. 21(f) and 77v.

(a) *Service on Foreign States and Political Subdivisions.*—Subsection (a) of section 1608 sets forth the exclusive procedures for service on a foreign state, or political subdivision thereof, but not on an agency or instrumentality of a foreign state

¹⁴ 96 S.Ct. 1854, 48 L.Ed.2d 301.

¹⁵ 75 S.Ct. 423, 99 L.Ed. 389, rehearing denied 75 S.Ct. 598, 349 U.S. 913, 99 L.Ed. 1247.

which is covered in subsection (b). There is a hierarchy in the methods of service. Paragraph (1) provides for service in accordance with any special arrangement which may have been agreed upon between a plaintiff and the foreign state or political subdivision. If such an arrangement exists, service must be made under this method. The purpose of subsection (a)(1) is to encourage potential plaintiffs and foreign states to agree to a procedure on service.

If no special arrangement exists, paragraph (2) would permit service in accordance with an applicable international convention on service of judicial documents. The only such convention to which the United States is at present a party is the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, 20 UST 361, TIAS 6638 (1969). In order for an international convention to be "applicable", both the United States and the foreign state concerned must be a party to the convention.

If neither an applicable international convention nor a special arrangement exists, paragraph (3) would provide for service by mail. The clerk of the court would send a copy of a "notice of suit" as prescribed by the Secretary of State by regulation, together with a copy of the summons and complaint, by mail to the head of the foreign state's ministry of foreign affairs or its equivalent. This procedure is based on rule 4(i)(1)(I), F.R. Civ. P.

Finally, as a method of last resort, paragraph (4) would provide for service through diplomatic channels if service could not be made by mail within 30 days. The clerk of the court would send two copies of the notice of suit, summons and complaint to the Secretary of State for transmittal through diplomatic channels. Transmittal through diplomatic channels would mean that the Office of Special Consular Services in the Department of State will pouch a copy of these papers to the U.S. Embassy in the foreign state in question. The U.S. Embassy, in turn, would prepare a diplomatic note of transmittal and deliver the diplomatic note with the other papers to the appropriate official in the ministry of foreign affairs of the foreign state. Use of diplomatic channels could also include transmittal of the papers by the Department of State to the foreign state's embassy in Washington, D.C. "Transmittal" of the notice of suit, summons and complaint does not require that the foreign state formally accept these papers. It only requires that these papers be transmitted in such a way that the foreign state has actual notice of the suit. All papers to be served would be accompanied by translations into an official language of the foreign state. Finally, the Secretary of State would be required to send back to the court the diplomatic note used in transmitting the papers to the foreign state.

A "notice of suit" as used in this section would advise a foreign state of the legal proceeding, it would explain the legal significance of the summons, complaint and service, and it would indicate what steps are available under or required by U.S. law in order to defend the action. In short, it would provide an introductory explanation to a foreign state that may be unfamiliar with U.S. law or procedures.

Service through diplomatic channels is widely used in international practice. It is provided for in the European Convention on State Immunity, *supra*, which was negotiated by 18 European nations. It is accepted and indeed preferred by the United States in suits brought against the United States Government in foreign courts. See Department of State's circular instruction No. CA-10922, June 16, 1961, 56 Am. J. Int'l L. 523-33 (1962).

(b) *Service on Agencies or Instrumentalities.*—Subsection (b) of section 1608 provides the methods under which service shall be made upon an agency or instrumentality of a foreign state, as defined in section 1603(b). Again, service must always be made in accordance with any special arrangement for service between a plaintiff and the agency or instrumentality. If no such arrangement exists, then service must be made under subsection (b)(2) which provides for service upon officers, or managing, general or appointed agents in the United States of the agency or instrumentality—or in the alternative, in accordance with an applicable international convention such as the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, *supra*.

If there is no special arrangement and if the agency or instrumentality has no representative in the United States, service may be made under one of the three methods provided in subsection (b)(3). The first two methods provide for service by letter rogatory or request or by mail. The third method, subparagraph (C), authorizes a court to fashion a method of service, for example under rule 83, F.R. Civ. P., provided the method is “consistent with the law of the place where service is to be made.” This latter language takes into account the fact that the laws of foreign countries may prohibit the service in their country of judicial documents by process servers from the United States. It is contemplated that no court will direct service upon a foreign state by appointing someone to make a physical attempt at service abroad, unless it is clearly consistent with the law of the foreign jurisdiction where service is to be attempted. It is also contemplated that the courts will not direct service in the United States upon diplomatic representatives, *Hellenic Lines Ltd. v. Moore*, 345 F. 2d 978 (D.C. Cir. 1965), or upon consular representatives, *Oster v. Dominion of Canada*, 144 F. Supp. 746 (N.D.N.Y. 1956), *aff’d*, 238 F. 2d 400 (2d Cir. 1956).

(c) *When Service Is Made.*—Subsection (c) of section 1608 establishes the time when service shall be deemed to have been made under each of the methods provided in subsections (a) and (b).

(d) *Time To Answer or Reply.*—Subsection (d) of section 1608 gives each foreign state, political subdivision thereof or agency or instrumentality of a foreign state or political subdivision up to 60 days from the time service is deemed to have been made in which to answer or file a responsive pleading. This corresponds to similar provisions applicable in suits against the United States or its officers or agencies. Rule 12(a), F.R. Civ. P.

(e) *Default Judgments.*—Subdivision (e) of section 1608 provides that no default judgment may be entered against a foreign state, or its political subdivisions, agencies or instrumentalities, “unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.” This is the same requirement applicable to default judgments against the U.S. Government under rule 55(e), F.R. Civ. P. In determining whether the claimant has established his claim or right to relief, it is expected that courts will take into account the extent to which the plaintiff’s case depends on appropriate discovery against the foreign state.¹⁶ Once the default judgment is entered, notice of such judgment must be sent in the manner prescribed for service in sections 1608(a) or (b).

¹⁶ Cf. Statement in the analysis of section 1606 noting that appropriate remedies would be available under Rule 37, F.R. Civ. P., for an unjustifiable failure to make discovery.

Special note should be made of two means which are currently in use in attempting to commence litigation against a foreign state. First, the current practice of attempting to commence a suit by attachment of a foreign state's property would be prohibited under section 1609 in the bill, because of foreign relations considerations and because such attachments are rendered unnecessary by the liberal service and jurisdictional provisions of the bill. See the analysis to section 1609.

A second means, of questionable validity, involves the mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state. Section 1608 precludes this method so as to avoid questions of inconsistency with section 1 of article 22 of the Vienna Convention on Diplomatic Relations, 23 UST 3227, TIAS 7502 (1972), which entered into force in the United States on December 13, 1972. Service on an embassy by mail would be precluded under this bill. See 71 Dept. of State Bull. 458-59 (1974).

Section 1609. Immunity from Attachment and Execution of Property of a Foreign State

As in the case of section 1604 of the bill with respect to jurisdiction, section 1609 states a general proposition that the property of a foreign state, as defined in section 1603(a), is immune from attachment and from execution, and then exceptions to this proposition are carved out in sections 1610 and 1611. Here, it should be pointed out that neither section 1610 nor 1611 would permit an attachment for the purpose of obtaining jurisdiction over a foreign state or its property. For this reason, section 1609 has the effect of precluding attachments as a means for commencing a lawsuit.

Attachment of foreign government property for jurisdictional purposes has been recognized "where under international law a foreign government is not immune from suit", and where the property in the United States is commercial in nature, *Weilamann v. Chase Manhattan Bank*, 21 Misc. 2d 1086, 192 N.Y.S. 2d 469 (Sup. Ct. N.Y. 1959). Even in such cases, however, it has been recognized that property attached for jurisdictional purposes cannot be retained to satisfy a judgment because, under current practice, the property of a foreign sovereign is immune from execution.

Attachments for jurisdictional purposes have been criticized as involving U.S. courts in litigation not involving any significant U.S. interest or jurisdictional contacts, apart from the fortuitous presence of property in the jurisdiction. Such cases frequently require the application of foreign law to events which occur entirely abroad.

Such attachments can also give rise to serious friction in United States' foreign relations. In some cases, plaintiffs obtain numerous attachments over a variety of foreign government assets found in various parts of the United States. This shotgun approach has caused significant irritation to many foreign governments.

At the same time, one of the fundamental purposes of this bill is to provide a long-arm statute that makes attachment for jurisdictional purposes unnecessary in cases where there is a nexus between the claim and the United States. Claimants will clearly benefit from the expanded methods under the bill for service on a foreign state (sec. 1608), as well as from the certainty that section 1330(b) of the bill confers personal jurisdiction over a foreign state in Federal and State courts as to every claim for which the foreign state is not entitled to immunity. The elimination of attachment as a vehicle for commencing a lawsuit will ease the conduct of foreign relations by

the United States and help eliminate the necessity for determinations of claims of sovereign immunity by the State Department.

Section 1610. Exceptions to Immunity from Attachment or Execution

Section 1610 sets forth circumstances under which the property of a foreign state is not immune from attachment or execution to satisfy a judgment. Though the enforcement of judgments against foreign state property remains a somewhat controversial subject in international law, there is a marked trend toward limiting the immunity from execution.

A number of treaties of friendship, commerce and navigation concluded by the United States permit execution of judgments against foreign publicly owned or controlled enterprises (for example, Treaty with Japan, April 2, 1953, art. 18(2), 4 UST 2063, TIAS 2863). The widely ratified Brussels Convention for the Unification of Certain Rules relating to the Immunity of State-Owned Vessels, April 10, 1926, 196 L.N.T.S. 199, allows execution of judgments against public vessels engaged in commercial services in the same way as against privately owned vessels. Although not a party to this treaty, the United States follows a policy of not claiming immunity for its publicly-owned merchant vessels, both domestically, 46 U.S.C. 742, 781, and abroad, 46 U.S.C. 747; 2 Hackworth, *Digest of International Law*, 438-39 (1941). Articles 20 and 21 of the Geneva Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, 15 UST 1606, TIAS 5639, to which the United States is a party, recognize the liability to execution under appropriate circumstances of state-owned vessels used in commercial service.

However, the traditional view in the United States concerning execution has been that the property of foreign states is absolutely immune from execution. *Dexter and Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen*, 43 F. 2d 705 (2d Cir. 1930). Even after the "Tate Letter" of 1952, this continued to be the position of the Department of State and of the courts. See, *Weilamann v. Chase Manhattan Bank*, 21 Misc. 2d 1086, 192 N.Y.S. 2d 469, 473 (Sup. Ct. N.Y. 1959). Sections 1610(a) and (b) are intended to modify this rule by partially lowering the barrier of immunity from execution, so as to make this immunity conform more closely with the provisions on jurisdictional immunity in the bill.

(a) *Execution Against Property of Foreign States.*—Section 1610(a) relates to execution against property of a foreign state, including a political subdivision, agency, or instrumentality of a foreign state. The term "attachment in aid of execution" is intended to include attachments, garnishments, and supplemental proceedings available under applicable Federal or State law to obtain satisfaction of a judgment. See rule 69, F.R. Civ. P. The property in question must be used for a commercial activity in the United States. If so, attachment in aid of execution, and execution, upon judgments entered by Federal or State courts against the foreign state would be permitted in any of the circumstances set forth in paragraphs (1)–(5) of section 1610(a).

Paragraph (1) relates to explicit and implied waivers, and is governed by the same principles that apply to waivers of immunity from jurisdiction under section 1605(a) (1) of the bill. A foreign state may have waived its immunity from execution, *inter alia*, by the provisions of a treaty, a contract, an official statement, or certain steps taken by the foreign state in the proceedings leading to judgment or to execution. As in section 1605(a)(1), a waiver on behalf of an agency or instrumentality or by the foreign state itself.

Paragraph (2) of section 1610(a) denies immunity from execution against 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. Included would be commercial activities encompassed by section 1605(a)(2). The provision also includes a commercial activity giving rise to a claim with respect to which the foreign state has waived immunity under section 1605(a)(1). In addition, it includes a commercial activity which gave rise to a maritime lien with respect to which an admiralty suit was brought under section 1605(b). One could, of course, execute against commercial property other than a vessel or cargo which is the subject of a suit under section 1605(b), provided that the property was used in the same commercial activity upon which the maritime lien was based.

The language "is or was used" in paragraph (2) contemplates a situation where property may be transferred from the commercial activity which is the subject of the suit in an effort to avoid the process of the court. This language, however, does not bear on the question of whether particular property is to be deemed property of the entity against which the judgment was obtained. The courts will have to determine whether property "in the custody of" an agency or instrumentality is property "of" the agency or instrumentality, whether property held by one agency should be deemed to be property of another, whether property held by an agency is property of the foreign state. See *Prelude Corp. v. Owners of F/V Atlantic*, 1971, A.M.C. 2651 (N.D. Calif.); *American Hawaiian Ventures v. M.V.J. Latuharhary*, 257 F. Supp. 622, 626 (D.N.J. 1966).

Paragraph (3) would deny immunity from execution against 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. See the analysis to section 1605(a)(3).

Paragraph (4) would deny immunity from execution against 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. Specifically exempted are diplomatic and consular missions and the residences of the chiefs of such missions. This exemption applies to all of the situations encompassed by sections 1610(a) and (b); embassies and related buildings could not be deemed to be property used for a "commercial" activity as required by section 1610(a); also, since such buildings are those of the foreign state itself, they could not be property of an agency or instrumentality engaged in a commercial activity in the United States within the meaning of section 1610(b).

Paragraph (5) of section 1610(a) would deny immunity with respect to obligations owed to a foreign state under a policy of liability insurance. Such obligations would after judgment be treated as property of the foreign state subject to garnishment or related remedies in aid or in place of execution. The availability of such remedies would, of course, be governed by applicable State or Federal law. Paragraph (5) is intended to facilitate recovery by individuals who may be injured in accidents, including those involving vehicles operated by a foreign state or by its officials, or employees acting within the scope of their authority.

(b) *Additional Execution Against Agencies and Instrumentalities Engaged in Commercial Activity in the United States.*—Section 1610(b) provides for execution against the property of agencies or instrumentalities of a foreign state in circumstances additional to those provided in section 1610(a). However, the agency or in-

strumentality must be engaged in a commercial activity in the United States. If so, the plaintiff may obtain an attachment in aid of execution or execution against *any* property, commercial and noncommercial, of the agency or instrumentality, but only in the circumstances set forth in paragraphs (1) and (2).

Paragraph (1) denies immunity from execution against any property of an agency or instrumentality engaged in a commercial activity in the United States, where the agency or instrumentality has waived its immunity from execution. See the analysis to paragraph (1) of section 1610(a).

Paragraph (2) of section 1610(b) denies immunity from execution against any 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). Property will be subject to execution irrespective of whether the property was used for the same commercial or other activity upon which the claim giving rise to the judgment was based.

Section 1610(b) will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another, unrelated agency or instrumentality. See *Prelude Corp. v. Owners of FIV Atlantic*, 1971 A.M.C. 2651 (N.D. Calif.). There are compelling reasons for this. If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary. However, a court might find that property held by one agency is really the property of another. See the analysis to section 1610(a)(2).

(c) *Necessity of court order following reasonable notice.*—Section 1610(c) prohibits attachment or execution under sections 1610(a) and (b) unless the court has issued an order for such attachment and execution. In some jurisdictions in the United States, attachment and execution to satisfy a judgment may be had simply by applying to a clerk or to a local sheriff. This would not afford sufficient protection to a foreign state. This subsection contemplates that the courts will exercise their discretion in permitting execution. Prior to ordering attachment and execution, the court must determine that a reasonable period of time has elapsed following the entry of judgment, or in cases of a default judgment, since notice of the judgment was given to the foreign state under section 1608(e). In determining whether the period has been reasonable, the courts should take into account procedures, including legislation, that may be necessary for payment of a judgment by a foreign state, which may take several months; representations by the foreign state of steps being taken to satisfy the judgment; or any steps being taken to satisfy the judgment; or evidence that the foreign state is about to remove assets from the jurisdiction to frustrate satisfaction of the judgment.

(d) *Attachments upon explicit waiver to secure satisfaction of a judgment.*—Section 1610(d) relates to attachment against the property of a foreign state, or of a political subdivision, agency or instrumentality of a foreign state, prior to the entry of judgment or prior to the lapse of the “reasonable period of time” required under section 1610(c). Immunity from attachment will be denied only if the foreign state, political subdivision, agency or instrumentality has explicitly waived its immunity from attachment prior to judgment, and only 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 and not to secure jurisdiction. This subsection provides, in cases where there has been an explicit waiver, a provisional remedy, for example to prevent assets from being dissipated or removed from the jurisdiction in order to frustrate satisfaction of a judgment.

Section 1611. Certain types of property immune from execution

Section 1611 exempts certain types of property from the immunity provisions of section 1610 relating to attachment and execution.

(a) *Property held by international organizations.*—Section 1611(a) precludes attachment and execution against funds and other property of certain international organizations. The purpose of this subsection is to permit international organizations designated by the President pursuant to the International Organizations Immunities Act, 22 U.S.C. 288, *et seq.*, to carry out their functions from their offices located in the United States without hindrance by private claimants seeking to attach the payment of funds to a foreign state; such attachments would also violate the immunities accorded to such international institutions. See also article 9, section 3 of the Articles of Agreement of the International Monetary Fund, TIAS 1501, 60 Stat. 1401. International organizations covered by this provision would include, *inter alia*, the International Monetary Fund and the World Bank. The reference to “international organizations” in this subsection is not intended to restrict any immunity accorded to such international organizations under any other law or international agreement.

(b) *Central bank funds and military property.*—Section 1611(b)(1) provides for the immunity of central bank funds from attachment or execution. It applies to funds of a foreign central bank or monetary authority which are deposited in the United States and “held” for the bank’s or authority’s “own account”—i.e., funds used or held in connection with central banking activities, as distinguished from funds used solely to finance the commercial transactions of other entities or of foreign states. If execution could be levied on such funds without an explicit waiver, deposit of foreign funds in the United States might be discouraged. Moreover, execution against the reserves of foreign states could cause significant foreign relations problems.

Section 1611(b)(2) provides immunity from attachment and execution for property which is, or is intended to be, used in connection with a military activity and which fulfills either of two conditions: the property is either (A) of a military character or (B) under the control of a military authority or defense agency. Under the first condition, property is of a military character if it consists of equipment in the broad sense—such as weapons, ammunition, military transport, warships, tanks, communications equipment. Both the character and the function of the property must be military. The purpose of this condition is to avoid frustration of United States foreign policy in connection with purchases of military equipment and supplies in the United States by foreign governments.

The second condition is intended to protect other military property, such as food, clothing, fuel, and office equipment which, although not of a military character, is essential to military operations. “Control” is intended to include authority over disposition and use in addition to physical control, and a “defense agency” is intended to include civilian defense organizations comparable to the Defense Supply Agency in the United States. Each condition is subject to the overall condition that property will be immune only if its present or future use is military (e.g., surplus

military equipment withdrawn from military use would not be immune). Both conditions will avoid the possibility that a foreign state might permit execution on military property of the United States abroad under a reciprocal application of the act.

SEC. 5. VENUE

This section amends 28 U.S.C. §1391, which deals with venue generally. Under the new subsection (f), there are four express provisions for venue in civil actions brought against foreign states, political subdivisions or their agencies or instrumentalities.

(1) The action may be brought in the judicial district wherein a substantial part of the events or omissions giving rise to the claim occurred. This provision is analogous to 28 U.S.C. §1391(e), which allows an action against the United States to be brought, *inter alia*, in any judicial district in which "the cause of action arose." The test adopted, however, is the newer test recommended by the American Law Institute and incorporated in S. 1876, 92d Congress, 1st session, which does not imply that there is only one such district applicable in each case. In cases under section 1605(a)(2), involving a commercial activity abroad that causes a direct effect in the United States, venue would exist wherever the direct effect generated "a substantial part of the events" giving rise to the claim.

In cases where property or rights in property are involved, the action may be brought in the judicial district in which "a substantial part of the property that is the subject of the action is situated." No hardship will be caused to the foreign state if it is subject to suit where it has chosen to place the property that gives rise to the dispute.

(2) If the action is a suit in admiralty to enforce a maritime lien against a vessel or cargo of a foreign state, and if the action is brought under the new section 1605(b) in this bill, the action may be brought in the judicial district in which the vessel or cargo is situated at the time notice is delivered pursuant to section 1605(b)(1).

(3) If the action is brought against an agency or instrumentality of a foreign state, as defined in the new section 1603(b) in the bill, it may be brought in the judicial district where the agency or instrumentality is licensed to do business or is doing business. This provision is based on 28 U.S.C. §1391(c).

(4) If the action is brought against a foreign state or political subdivision, it may be brought in the U.S. District Court for the District of Columbia. It is in the District of Columbia that foreign states have diplomatic representatives and where it may be easiest for them to defend. New subsection (f) would, of course, not apply to entities that are owned by a foreign state and are also citizens of a state of the United States as defined in 28 U.S.C. 1332(c) and (d). For purposes of this bill, such entities are not agencies or instrumentalities of a foreign state. (See the analysis to sec. 1603(b).)

As with other provisions in 28 U.S.C. 1391, venue in any court could be waived by a foreign state, such as by failing to object to improper venue in a timely manner. (See rule 12(h), F.R. Civ. P.)

SEC. 6. REMOVAL OF CASES FROM STATE COURTS

The bill adds a new provision to 28 U.S.C. 1441 to provide for removal to a Federal district court of civil actions brought in the courts of the States against a for-

eign state or a political subdivision, agency or instrumentality of a foreign state. In view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum actions brought against them in the State courts. New subsection (d) of section 1441 permits the removal of any such action at the discretion of the foreign state, even if there are multiple defendants and some of these defendants desire not to remove the action or are citizens of the State in which the action has been brought.

As with other removal provisions, a petition for removal must be filed with the appropriate district court in a timely manner. (28 U.S.C. 1446.) However, in view of the 60-day period provided in section 1608(c) in the bill and in view of the bill's preference that actions involving foreign states be tried in federal courts, the time limitations for filing a petition of removal under 28 U.S.C. 1446 may be extended "at any time" for good cause shown.

Upon removal, the action would be heard and tried by the appropriate district court sitting without a jury. (Cf. 28 U.S.C. 2402, precluding jury trials in suits against the United States.) Thus, one effect of removing an action under the new section 1441(d) will be to extinguish a demand for a jury trial made in the state court. (Cf. rule 81(c), F.R. Civ. P.) Because the judicial power of the United States specifically encompasses actions "between a State, or the Citizens thereof, and foreign States" (U.S. Constitution, art. III, sec. 2, cl.1), this preemption of State court procedures in cases involving foreign sovereigns is clearly constitutional.

This section, again, would not apply to entities owned by a foreign state which are citizens of a State of the United States as defined in 28 U.S.C. 1332(c) and (d), or created under the laws of a third country.

SEC. 7. SEVERABILITY OF PROVISIONS

This action provides that if a portion of the act or any application of the act should be found invalid for any reason, such invalidity would not affect any other provision or application of the act.

SEC. 8. EFFECTIVE DATE

This section establishes that the effective date of the act shall be 90 days after it becomes law. A 90-day period is deemed necessary in order to give adequate notice of the act and its detailed provisions to all foreign states.

Statements under clause 2(1)(2)(B), Clause 2(1)(3) and Clause 2(1)(4) or Rule XI and Clause 7(a)(1) of Rule XIII of the House of Representatives

COMMITTEE VOTE

(Rule XI 2(1)(2)(B))

On September 9, 1976, the Full Committee on the Judiciary approved the bill H.R. 11315 by voice vote.

COST

(Rule XIII 7(a)(1))

The enactment of this bill will not require any new or additional authorization or appropriation of funds. Indeed, the enactment of the bill will result in a net saving, in an undetermined amount, in that the Department of State will no longer have

to undertake a consideration of diplomatic requests for sovereign immunity, and the Department of Justice will not be required to appear in the courts in support of the suggestions of immunity that are filed pursuant to the Department of State's sovereign immunity determinations.

OVERSIGHT STATEMENT

(Rule XI 2(1)(3)(A))

The Subcommittee on Administrative Law and Governmental Relations of this committee exercises the committee's oversight responsibility with reference matters involving the immunity of foreign states, in accordance with Rule VI(b) of the Rules of the Committee on the Judiciary. The favorable consideration of this bill was recommended by that subcommittee and the committee has determined that legislation should be enacted as set forth in this bill.

BUDGET STATEMENT

(Rule XI 2(1)(3)(B))

As has been indicated in the committee statement as to cost made pursuant to Rule XIII (7)(a)(1), the bill will not require any new or additional authorization or appropriation of funds. The bill does not involve new budget authority nor does it require new or increased tax expenditures as contemplated by Clause 2(1)(3)(B) of Rule XI.

ESTIMATE OF THE CONGRESSIONAL BUDGET OFFICE

(Rule XI 2(1)(3)(C))

The estimate received from the Director of the Congressional Budget Office is as follows:

Congress of the United States,
Congressional Budget Office,
Washington, D.C., July 6, 1976.

Hon. Peter W. RODINO, Jr.,
Chairman, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

Dear Mr. Chairman: In response to your letter of June 10, 1976 and pursuant to section 403 of the Congressional Budget Act, the Congressional Budget Office has analyzed the costs associated with H.R. 11315, the "Foreign Sovereign Immunities Act of 1976." This legislation is estimated to have no budgetary impact.

Should the committee so desire, we would be pleased to provide additional assistance on this and future legislation.

Sincerely,

Alice M. RIVLIN,
Director.

OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE ON GOVERNMENT OPERATIONS

(Rule XI 2(1)(3)(D))

No findings or recommendations of the Committee on Government Operations were received as referred to in subdivision (D) of clause 2(1)(3) of House Rule XI.

INFLATIONARY IMPACT

(Rule XI 2(1)(3))

In compliance with clause 2(1)(4) of House Rule XI it is stated that this legislation will have no inflationary impact on prices and costs in the operation of the national economy.

*

* *

[The executive communication from the Departments of State and Justice is as follows:]

Department of State,
Washington, D.C., October 31, 1975.

Hon. Carl O. ALBERT,
Speaker of the House of Representatives.

Dear Mr. Speaker: The Department of State and Department of Justice submit for your consideration and appropriate reference the enclosed draft bill, entitled "To define the circumstances in which foreign states are immune from the jurisdiction of U.S. courts and in which execution may not be levied on their assets, and for other purposes." This is a proposed revision of the draft bill which was submitted in a letter (enclosed) to you dated January 16, 1973, and subsequently introduced by Chairman Peter W. Rodino, Jr., and Congressman Edward Hutchinson as H.R. 3493. A revised section-by-section analysis explaining the provisions of the bill in some detail is also enclosed. A hearing was held on H.R. 3493 before the Subcommittee on Claims and Governmental Relations of the Committee of the Judiciary in the House of Representatives in the 1st session of the 93d Congress on June 7, 1973.

The broad purposes of this legislation—to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation—remain the same. To this end the revised bill, like its predecessor, would entrust the resolution of questions of sovereign immunity to the judicial branch of Government. The statute would codify and refine the "restrictive theory" of sovereign immunity which has guided United States practice with respect to jurisdiction originally set forth in the letter of May 19, 1952, from the Acting Legal Adviser, Jack B. Tate, to the Acting Attorney General, Philip B. Perlman. It would also replace the absolute immunity now accorded foreign states from execution of judgment with an immunity from execution conforming more closely to the restrictive theory of immunity from jurisdiction. The measure also includes provisions for service of process, venue, and jurisdiction in cases against foreign states which would make it unnecessary to attach the assets of foreign states for purposes of jurisdiction.

Numerous technical changes have been made in the bill on the basis of the hearing in the House of Representatives, commentaries in a number of legal journals, and extensive discussions which have been held with members of the bar as well as the reports and recommendations of committees of several bar associations. A number of these technical revisions are important, but none of them alters the basic concept of the legislation as originally submitted.

The most important changes include (1) further definition of "commercial activity carried on in the United States by a foreign state" and "public debt" in sec-

tion 1603; (2) clarification of the limitations of immunity in tort actions (sec. 1605(5)), in respect of counterclaims (sec. 1607), and in case of execution of judgment (sec. 1610); and (3) substantial revision of section 1608 relating to service of process to conform with article XXII of the Convention on Diplomatic Relations, signed at Vienna April 18, 1961, and with the Federal Rules of Civil Procedure.

In addition, important new provisions have been added to preserve the jurisdiction of the courts of the United States in cases in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of a foreign state (sec. 1605(b)), and to avoid interference with disbursements to foreign states by certain international organizations located in the United States (sec. 1611(a)). These and other changes are discussed in the enclosed analysis.

The Departments of State and Justice believe that this revised draft bill is worthy of and will receive the support of the bar and would welcome hearings before the appropriate committees of the House to consider this measure as soon as possible.

The Office of Management and Budget has advised that there is no objection to the enactment of this legislation from the standpoint of the administration's program.

Sincerely,

Robert S. INGERSOLL,
Deputy Secretary of State.
Harold R. TYLER, Jr.,
Deputy Attorney General.

2. TEXT OF LETTER TO THE ATTORNEY GENERAL FROM DEPARTMENT OF
STATE LEGAL ADVISER ON 2 NOVEMBER 1976

Honorable Edward H. LEVI
Attorney General
Department of Justice
Washington, D.C. 20530

*Re: The Foreign Sovereign Immunities Act
of 1976, P.L. 94-583*

Since the Tate Letter of 1952, 26 Dept. State Bull. 984, my predecessors and I have endeavored to keep your Department apprised of Department of State policy and practice with respect to the sovereign immunity of foreign states from the jurisdiction of United States courts. On October 21, 1976, the President signed into law the Foreign Sovereign Immunities Act of 1976, P.L. 94-583. This legislation, which was drafted by both of our Departments, has as one of its objectives the elimination of the State Department's current responsibility in making sovereign immunity determinations. In accordance with the practice in most other countries, the statute places the responsibility for deciding sovereign immunity issues exclusively with the courts.

P.L. 94-583 is to go into effect 90 days from the date it was approved by the President, or on January 19, 1977. We wish to advise you of how the Department of State proposes to treat sovereign immunity requests prior to January 19, 1977, and what the Department of State's interests will be after that date.

Immunity from suit. Until January 19, 1977, the Department of State will apply the Tate Letter, in the event that it makes any determination with respect to a for-

ign government's immunity from suit. It should be noted that P.L. 94-583 embodies in many respects the practice under the Tate Letter.

Immunity from attachment. Until January 19, 1977, the Department will continue to give prompt attention to diplomatic requests from foreign states, for recognition of immunity of foreign government property from attachment. The Department of State's policy until now has been to recognize an immunity of all foreign government property from attachment—unless (1) the property in question is devoted to a commercial or private use; (2) the underlying lawsuit is based on a commercial or private activity of the foreign state; and (3) the purpose of the attachment is to commence a lawsuit and not to assure satisfaction of a final judgment.

The Department does not contemplate changing this policy before P.L. 94-583 takes effect. We have noted that until P.L. 94-583 takes effect, it may be difficult for a private litigant to commence a suit against a foreign state or its entities. Also, since P.L. 94-583 will not have any effect whatsoever on the running of the statute of limitations, a continuation of existing policy on attachment until January 19, 1977 might be the only way a claim for relief could be preserved.

P.L. 94-583 will make two important and related changes in the Department's sovereign immunity practice with respect to attachment. First, the statute will prescribe a means for commencing a suit against a foreign state and its entities by service of a summons and complaint, thus making jurisdictional attachments of foreign government property unnecessary.

Second, Section 1609 of the statute will provide an absolute immunity of foreign government property from jurisdictional attachment. Such jurisdictional attachments have given rise to diplomatic irritants in the past and, in recent years, have been the principal impetus for a Department of State role in sovereign immunity determinations. It appears that after January 19, 1977, any jurisdictional attachment of foreign government property could, under Section 1609 of P.L. 94-583, be promptly vacated upon motion to the appropriate court by the foreign state defendant.

Immunity from execution. The Department of State has in the past recognized an absolute immunity of foreign government property from execution to satisfy a final judgment. The Department does not contemplate changing this policy in the period before January 19, 1977. On or after that date, execution may be obtained against foreign government property only upon court order and in conformity with the other requirements of Section 1610 of P.L. 94-583.

Future Department of State interests. The Department of State will not make any sovereign immunity determinations after the effective date of P.L. 94-583. Indeed, it would be inconsistent with the legislative intent of that Act for the Executive Branch to file any suggestion of immunity on or after January 19, 1977.

After P.L. 94-583 takes effect, the Executive Branch will, of course, play the same role in sovereign immunity cases that it does in other types of litigation—e.g., appearing as *amicus curiae* in cases of significant interest to the Government. Judicial construction of the new statute will be of general interest to the Department of State, since the statute, like the Tate Letter, endeavors to incorporate international law on sovereign immunity into domestic United States law and practice. If a court should misconstrue the new statute, the United States may well have an interest in making its views on the legal issues known to an appellate court.

Finally, we wish to express appreciation for the continuous advice and support

which your Department has provided during the ten years of work and consultation that led to the enactment of P.L. 94-583. We believe that the new statute will be a significant step in the growth of international order under law, to which the United States has always been committed.

Monroe LEIGH.

Part III
TREATY PROVISIONS

Troisième partie
DISPOSITIONS CONVENTIONNELLES DE
TRAITÉS

A. BILATERAL TREATIES

I. Treaties of friendship, commerce and navigation between non-socialist countries

- (a) UNITED STATES OF AMERICA AND DENMARK. TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION (WITH PROTOCOL AND MINUTES OF INTERPRETATION). SIGNED AT COPENHAGEN, ON 1 OCTOBER 1951¹

Article XVIII

...

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

- (b) UNITED STATES OF AMERICA AND FEDERAL REPUBLIC OF GERMANY. TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION (WITH PROTOCOL AND EXCHANGE OF NOTES). SIGNED AT WASHINGTON, ON 29 OCTOBER 1954²

Article XVIII

...

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

- (c) UNITED STATES OF AMERICA AND GREECE. TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION. SIGNED AT ATHENS ON 3 AUGUST 1951³

Article XIV

...

5. No enterprise of either Party which is publicly owned or controlled shall, if it engages in commercial, manufacturing, processing, shipping or other business ac-

¹ United Nations, *Treaty Series*, vol. 421, p. 105.

² United Nations, *Treaty Series*, vol. 273, p. 3.

³ United Nations, *Treaty Series*, vol. 224, p. 279.

tivities within the territories of the other Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.

- (d) UNITED STATES OF AMERICA AND REPUBLIC OF KOREA. FRIENDSHIP, COMMERCE AND NAVIGATION. SIGNED AT SEOUL, ON 28 NOVEMBER 1956⁴

Article XVIII

...

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

- (e) UNITED STATES OF AMERICA AND IRAN. TREATY OF AMITY, ECONOMIC RELATIONS, AND CONSULAR RIGHTS. SIGNED AT TEHRAN, ON 15 AUGUST 1955⁵

Article XI

...

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

- (f) UNITED STATES OF AMERICA AND IRELAND. TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION. SIGNED AT DUBLIN, ON 21 JANUARY 1950⁶

Article XV

...

3. No enterprise of either Party which is publicly owned or controlled shall, if it engages in commercial, manufacturing, processing, shipping or other business activities within the territories of the other Party, claim or enjoy, either for itself or for

⁴ *United States Treaty Series and other International Agreements*, vol. 8, p. 2217.

⁵ United Nations, *Treaty Series*, vol. 284, p. 93.

⁶ United Nations, *Treaty Series*, vol. 206, p. 270.

its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.

- (g) UNITED STATES OF AMERICA AND ISRAEL. TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION. SIGNED AT WASHINGTON, ON 23 AUGUST 1951⁷

Article XVIII

...

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

- (h) UNITED STATES OF AMERICA AND ITALIAN REPUBLIC. TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION. SIGNED AT ROME, ON 2 FEBRUARY 1948⁸

Article XXIV

...

6. No enterprise of either High Contracting Party which is publicly owned or controlled shall, if it engages in commercial, manufacturing, processing, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, from suit, from execution of judgment, or from any other liability to which a privately owned and controlled enterprise is subject therein.

- (i) UNITED STATES OF AMERICA AND JAPAN. TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION. SIGNED AT TOKYO, ON 2 APRIL 1953⁹

Article XVIII

...

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

⁷ United Nations, *Treaty Series*, vol. 219, p. 237.

⁸ United Nations, *Treaty Series*, vol. 79, p. 171.

⁹ United Nations, *Treaty Series*, vol. 206, p. 143.

- (j) UNITED STATES OF AMERICA AND THE KINGDOM OF THE NETHERLANDS. TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION. SIGNED AT THE HAGUE, ON 27 MARCH 1956¹⁰

Article XVIII

...

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

- (k) UNITED STATES OF AMERICA AND NICARAGUA. TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION (WITH PROTOCOL). SIGNED AT MANAGUA, ON 21 JANUARY 1956¹¹

Article XVIII

...

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

2. Treaties on trade and navigation between Socialist Countries

- (a) UNION OF SOVIET SOCIALIST REPUBLICS AND ALBANIA. TREATY OF TRADE AND NAVIGATION (WITH ANNEX). SIGNED AT MOSCOW, ON 15 FEBRUARY 1958¹²

ANNEX

THE LEGAL STATUS OF THE TRADE DELEGATION OF THE UNION OF SOVIET SOCIALIST REPUBLICS IN ALBANIA AND OF THE TRADE DELEGATION OF ALBANIA IN THE UNION OF SOVIET SOCIALIST REPUBLICS

Article 4

...

The Trade Delegation shall enjoy all the immunities to which a sovereign State is entitled and which relate also to foreign trade, with the following exceptions only, to which the Parties agree:

¹⁰ United Nations, *Treaty Series*, vol. 285, p. 231.

¹¹ United Nations, *Treaty Series*, vol. 367, p. 3.

¹² United Nations, *Treaty Series*, vol. 313, p. 261.

(a) Disputes regarding foreign commercial contracts concluded or guaranteed under article 3 by the Trade Delegation in the territory of the receiving State shall, in the absence of a reservation regarding arbitration or any other jurisdiction, be subject to examination by the courts of the said State. No interim court orders for the provision of security may be made;

(b) Final judicial decisions against the Trade Delegation in the afore-mentioned disputes which have become legally valid may be enforced by execution, but such execution may be levied only on the goods and claims outstanding to the credit of the Trade Delegation.

(b) UNION OF SOVIET SOCIALIST REPUBLICS AND BULGARIA. TREATY OF COMMERCE AND NAVIGATION (WITH ANNEX). SIGNED AT MOSCOW, ON 1 APRIL 1948¹³

ANNEX

THE LEGAL STATUS OF THE TRADE DELEGATION OF THE UNION OF SOVIET SOCIALIST REPUBLICS IN THE PEOPLE'S REPUBLIC OF BULGARIA

...

Article 4

The Trade Delegation shall enjoy all the immunities to which the Union of Soviet Socialist Republics is entitled and which relate also to foreign trade, with the following exceptions only, to which the Union of Soviet Socialist Republics agrees:

(a) Disputes regarding commercial contracts concluded or guaranteed in the territory of the People's Republic of Bulgaria by the Trade Delegation under article 3 of this annex shall, in the absence of a reservation regarding arbitration or any other jurisdiction, be subject to the competence of the courts of the People's Republic of Bulgaria. No interim orders may, however, be made against the Trade Delegation;

(b) Final judicial decisions against the Trade Delegation in the afore-mentioned disputes which have become legally valid may be enforced by execution, but such execution may only be levied on the goods and claims outstanding to the credit of the Trade Delegation.

(c) UNION OF SOVIET SOCIALIST REPUBLICS AND PEOPLE'S REPUBLIC OF CHINA. TREATY OF TRADE AND NAVIGATION (WITH ANNEX). SIGNED AT PEKING, ON 23 APRIL 1958¹⁴

ANNEX

THE LEGAL STATUS OF THE TRADE DELEGATION OF THE UNION OF SOVIET SOCIALIST REPUBLICS IN THE PEOPLE'S REPUBLIC OF CHINA AND OF THE TRADE DELEGATION OF THE PEOPLE'S REPUBLIC OF CHINA IN THE UNION OF SOVIET SOCIALIST REPUBLICS

...

Article 4

The Trade Delegation shall enjoy all the immunities to which a sovereign State is entitled and which relate also to foreign trade, with the following exceptions only, to which the Parties agree:

(a) Disputes regarding foreign commercial contracts concluded or guaranteed under article 3 by the Trade Delegation in the territory of the receiving State shall, in the absence of a

¹³ United Nations, *Treaty Series*, vol. 217, p. 97.

¹⁴ United Nations, *Treaty Series*, vol. 313, p. 135.

reservation regarding arbitration or any other jurisdiction, be subject to the competence of the courts of the said State. No interim court orders for the provision of the security may be made;

(b) Final judicial decisions against the Trade Delegation in the aforementioned disputes which have become legally valid may be enforced by execution, but such execution may be levied only on the goods and claims outstanding to the credit of the Trade Delegation.

- (d) UNION OF SOVIET SOCIALIST REPUBLICS AND CZECHOSLOVAKIA. TREATY OF COMMERCE AND NAVIGATION (WITH ANNEX). SIGNED AT MOSCOW, ON 11 DECEMBER 1947¹⁵

ANNEX

THE LEGAL STATUS OF THE TRADE DELEGATION OF THE UNION OF SOVIET SOCIALIST REPUBLICS
IN THE CZECHOSLOVAK REPUBLIC

...

Article 4

The Trade Delegation shall enjoy the privileges and immunities arising out of article 2 of this annex, with the following exceptions:

(a) Disputes regarding commercial contracts concluded or guaranteed in the territory of the Czechoslovak Republic by the Trade Delegation under the first paragraph of article 3 of this annex shall, in the absence of a reservation regarding arbitration or any other jurisdiction, be subject to the competence of the Czechoslovak courts and shall be settled in accordance with Czechoslovak law, save as otherwise provided by the terms of individual contracts or by Czechoslovak legislation. No interim orders may, however, be made against the Trade Delegation.

(b) Final judicial decisions against the Trade Delegation in the afore-mentioned disputes which have become legally valid may be enforced by execution but such execution may only be levied on the goods and credit balances of the Trade Delegation.

- (e) UNION OF SOVIET SOCIALIST REPUBLICS AND CZECHOSLOVAKIA. AGREEMENT CONCERNING THE TRADE DELEGATION OF THE CZECHOSLOVAK SOCIALIST REPUBLIC IN THE UNION OF SOVIET SOCIALIST REPUBLICS. SIGNED AT MOSCOW, ON 30 MAY 1973¹⁶

Article IV

...

The Government of the Czechoslovak Socialist Republic shall be responsible only for such commercial transactions as may be concluded or guaranteed in the Union of Soviet Socialist Republics on behalf of the Trade Delegation signed by the persons authorized for that purpose.

The Trade Delegation shall enjoy all the immunities deriving from article 3 of this Agreement with the following exceptions:

(a) Any dispute concerning commercial transactions concluded or guaranteed in the territory of the Union of Soviet Socialist Republics by the Trade Delegation in accordance with the previous article shall, in the absence of a reservation regarding

¹⁵ United Nations, *Treaty Series*, vol. 217, p. 35.

¹⁶ See Certified Text No. 12907 (Office of Legal Affairs, Treaty Section).

any other jurisdiction or arbitration, be subject to the jurisdiction of the courts of the Union of Soviet Socialist Republics. No interim orders may, however, be made against the Trade Delegation;

(b) Execution may be levied in respect to judicial decisions against the Trade Delegation which have become *res judicata* in disputes of the kind mentioned above, but only in respect of the goods and debt claims of the Trade Delegation.

(f) UNION OF SOVIET SOCIALIST REPUBLICS AND GERMAN DEMOCRATIC REPUBLIC. TREATY OF TRADE AND NAVIGATION (WITH ANNEX). SIGNED AT BERLIN, ON 27 SEPTEMBER 1957¹⁷

ANNEX

THE LEGAL STATUS OF THE TRADE DELEGATION OF THE UNION OF SOVIET SOCIALIST REPUBLICS IN THE GERMAN DEMOCRATIC REPUBLIC AND OF THE TRADE DELEGATION OF THE GERMAN DEMOCRATIC REPUBLIC IN THE UNION OF SOVIET SOCIALIST REPUBLICS

...

Article 4

The Trade Delegation shall enjoy all the immunities to which a sovereign State is entitled and which relate also to foreign trade, with the following exceptions only, to which the Parties agree:

(a) Disputes regarding foreign commercial contracts concluded or guaranteed under article 3 by the Trade Delegation in the territory of the receiving State shall, in the absence of a reservation regarding arbitration or any other jurisdiction, be subject to the competence of the courts of the said State. No interim court orders for the provision of security may be made;

(b) Final judicial decisions, which have become legally valid, against the Trade Delegation in the afore-mentioned disputes may be enforced by execution, but only on the Trade Delegation's goods and on claims outstanding to its credit.

(g) UNION OF SOVIET SOCIALIST REPUBLICS AND HUNGARY. TREATY OF COMMERCE AND NAVIGATION (WITH ANNEX). SIGNED AT MOSCOW, ON 15 JULY 1947¹⁸

ANNEX

THE LEGAL STATUS OF THE TRADE DELEGATION OF THE UNION OF SOVIET SOCIALIST REPUBLICS IN THE HUNGARIAN REPUBLIC

...

Article 5

The Trade Delegation shall enjoy the privileges and immunities arising out of article 2 of this annex, with the following exceptions:

Disputes regarding commercial contracts concluded or guaranteed in the territory of the Hungarian Republic by the Trade Delegation under the first paragraph of article 3 of this annex shall, in the absence of a reservation regarding arbitration or any other jurisdiction, be subject to the competence of the Hungarian courts and shall be settled in accordance with Hungarian

¹⁷ United Nations, *Treaty Series*, vol. 292, p. 75.

¹⁸ United Nations, *Treaty Series*, vol. 216, p. 247.

law, save as otherwise provided by the terms of individual contracts or by Hungarian legislation. No interim orders may, however, be made against the Trade Delegation. Final judicial decisions against the Trade Delegation in the afore-mentioned disputes which have become legally valid may be enforced by execution, but such execution may only be levied on the goods and claims outstanding to the credit of the Trade Delegation.

- (h) UNION OF SOVIET SOCIALIST REPUBLICS AND DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA. TREATY OF TRADE AND NAVIGATION (WITH ANNEX). SIGNED AT MOSCOW, ON 22 JUNE 1960¹⁹

ANNEX

THE LEGAL STATUS OF THE TRADE DELEGATION OF THE UNION OF SOVIET SOCIALIST REPUBLICS IN THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA AND OF THE TRADE DELEGATION OF THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA IN THE UNION OF SOVIET SOCIALIST REPUBLICS

Article 4

The Trade Delegation shall enjoy all the immunities to which a sovereign State is entitled and which relate also to foreign trade, with the following exceptions only, to which the Parties agree:

(a) Disputes relating to foreign commercial contracts concluded or guaranteed under articles by the Trade Delegation in the territory of the receiving State shall, in the absence of a reservation providing for arbitration or for some other jurisdiction, be subject to the jurisdiction of the courts of the said State. No interim court orders for the provision of security may be made;

(b) Final judicial decisions against the Trade Delegation in such disputes shall be enforceable when they have acquired legal effect, but execution may be levied only on goods and claims standing to the credit of the Trade Delegation.

- (i) UNION OF SOVIET SOCIALIST REPUBLICS AND MONGOLIA. TRADE TREATY (WITH ANNEX). SIGNED AT MOSCOW, ON 17 DECEMBER 1957²⁰

ANNEX

THE LEGAL STATUS OF THE TRADE DELEGATION OF THE UNION OF SOVIET SOCIALIST REPUBLICS IN THE MONGOLIAN PEOPLE'S REPUBLIC AND OF THE TRADE DELEGATION OF THE MONGOLIAN PEOPLE'S REPUBLIC IN THE UNION OF SOVIET SOCIALIST REPUBLICS

Article 4

The Trade Delegation shall enjoy all the immunities to which a sovereign State is entitled and which relate also to foreign trade, with the following exceptions only, to which the Parties agree:

(a) Disputes relating to foreign commercial contracts concluded or guaranteed under article 3 by the Trade Delegation in the territory of the receiving State shall be subject, in the absence of a reservation providing for arbitration or some other jurisdiction, to the jurisdiction of the courts of the said State. No interim court orders for the provision of security may be made;

¹⁹ United Nations, *Treaty Series*, vol. 399, p. 3.

²⁰ United Nations, *Treaty Series*, vol. 687, p. 237.

(b) Final judicial decisions against the Trade Delegation in such disputes may, when they have acquired legal effect, be enforced by execution, but such execution may be levied only on goods and claims standing to the credit of the Trade Delegation.

(j) UNION OF SOVIET SOCIALIST REPUBLICS AND ROMANIA. TREATY ON TRADE AND NAVIGATION (WITH ANNEX). SIGNED AT MOSCOW, ON 20 FEBRUARY 1947²¹

ANNEX

THE LEGAL STATUS OF THE TRADE DELEGATION OF THE UNION OF SOVIET SOCIALIST REPUBLICS IN ROMANIA

5. The Trade Delegation shall enjoy the privileges and immunities arising out of article 2 of this annex, with the following exceptions:

Disputes regarding commercial contracts concluded or guaranteed in the territory of Romania by the Trade Delegation under the first paragraph of article 3 of this annex shall, in the absence of a reservation regarding arbitration or any other jurisdiction, be subject to the competence of the Romanian courts and shall be settled in accordance with Romanian law, save as otherwise provided by the terms of individual contracts or by Romanian legislation. No interim orders may, however, be made against the Trade Delegation. Final judicial decisions against the Trade Delegation in the aforementioned disputes which have become legally valid may be enforced by execution, but such execution may only be levied on the goods and claims outstanding to the credit of the Trade Delegation.

6. The Trade Delegation shall not be subject to the regulations governing commercial registration. It shall publish in the Government publication of Romania the names of the persons authorized to take legal action on its behalf and information concerning the extent to which each such person is empowered to sign commercial contracts on its behalf.

(k) UNION OF SOVIET SOCIALIST REPUBLICS AND DEMOCRATIC REPUBLIC OF VIET-NAM. TREATY OF TRADE AND NAVIGATION (WITH ANNEX). SIGNED AT HANOI, ON 12 MARCH 1958²²

ANNEX

THE LEGAL STATUS OF THE TRADE DELEGATION OF THE UNION OF SOVIET SOCIALIST REPUBLICS IN THE DEMOCRATIC REPUBLIC OF VIET-NAM AND OF THE TRADE DELEGATION OF THE DEMOCRATIC REPUBLIC OF VIET-NAM IN THE UNION OF SOVIET SOCIALIST REPUBLICS

Article 4

The Trade Delegation shall enjoy all the immunities to which a sovereign State is entitled and which relate also to foreign trade, with the following exceptions only, to which the Parties agree:

(a) Disputes relating to foreign commercial contracts concluded or guaranteed under article 3 by the Trade Delegation in the territory of the receiving State shall be subject, in the absence of a reservation providing for arbitration or some other jurisdiction, to the jurisdiction of the courts of the said State. No interim court orders for the provisions of security may be made;

²¹ United Nations, *Treaty Series*, vol. 226, p. 79.

²² United Nations, *Treaty Series*, vol. 356, p. 149.

(b) Final judicial decisions against the Trade Delegation in such disputes may, when they have acquired legal effect, be enforced by execution, but such execution may be levied only on goods and claims standing to the credit of the Trade Delegation.

3. Treaties between Socialist Countries and developed countries

- (a) UNION OF SOVIET SOCIALIST REPUBLICS AND AUSTRIA. TREATY OF TRADE AND NAVIGATION (WITH ANNEX). SIGNED AT VIENNA, ON 17 OCTOBER 1955²³

ANNEX

THE LEGAL STATUS OF THE TRADE DELEGATION OF THE UNION OF SOVIET SOCIALIST REPUBLICS IN THE REPUBLIC OF AUSTRIA

...

Article 4

The immunities and privileges accorded to the Trade Delegation shall extend to its commercial activities, with the following exceptions:

(a) Disputes arising out of commercial contracts concluded or guaranteed in the territory of Austria by the Trade Delegation shall, in the absence of an arbitration agreement, be subject to the jurisdiction of the Austrian courts and shall be settled in accordance with Austrian law, save as otherwise provided by the terms of individual contracts. No interim orders may, however, be made against the Trade Delegation;

(b) Final judicial decisions against the Trade Delegations in the disputes referred to in paragraph (a) may be enforced by execution, but such execution may only be levied on the Delegation's goods and the claims outstanding to its credit.

- (b) UNION OF SOVIET SOCIALIST REPUBLICS AND DENMARK. TREATY OF COMMERCE AND NAVIGATION (WITH ANNEX). SIGNED AT MOSCOW, ON 17 AUGUST 1946²⁴

ANNEX

THE LEGAL POSITION OF THE TRADE DELEGATION OF THE UNION OF SOVIET SOCIALIST REPUBLICS IN DENMARK

...

Article 6

The Trade Delegation shall enjoy the privileges and immunities arising out of article 2 of the present annex, with the following exceptions:

Disputes regarding commercial transactions concluded or guaranteed on the territory of Denmark by the Trade Delegation under the first paragraph of article 4 of the present annex shall be subject, in the absence of a reservation regarding arbitration or any other jurisdiction, to the competence of Danish courts and shall be settled in accordance with Danish law, unless otherwise provided for by the terms of individual contracts or by Danish legislation. No action for enforcement may, however, be taken against the Trade Delegation.

²³ United Nations, *Treaty Series*, vol. 240, p. 289.

²⁴ United Nations, *Treaty Series*, vol. 8, p. 201.

In enforcement of all final court decisions which have become legally valid, in respect of transactions in which the Trade Delegation is concerned, distraint may be levied upon all Government property belonging to the Union of Soviet Socialist Republics in Denmark and, in particular, upon property, rights and interests arising out of transactions effected by the Trade Delegation or with its guarantee, with the exception of property belonging to the organizations mentioned in the second paragraph of article 4 of the present annex.

Property or premises devoted exclusively to the discharge in Denmark of the political and diplomatic functions of the Government of the Union of Soviet Socialist Republics, under international law, and also premises occupied by the Trade Delegation and the movable property contained therein shall not be subject to measures of distraint.

(c) UNION OF SOVIET SOCIALIST REPUBLICS AND FINLAND. TREATY OF COMMERCE (WITH ANNEX). SIGNED AT MOSCOW, ON 1 DECEMBER 1947²⁵
ANNEX

THE LEGAL STATUS OF THE TRADE DELEGATION OF THE UNION OF SOVIET SOCIALIST REPUBLICS IN THE REPUBLIC OF FINLAND

Article 4

The Trade Delegation shall enjoy all the immunities to which the Union of Soviet Socialist Republics is entitled and which relate also to foreign trade, with the following exceptions only, to which the Union of Soviet Socialist Republics agrees:

(a) Disputes regarding commercial contracts concluded or guaranteed in the territory of Finland by the Trade Delegation under article 3 of this annex shall, in the absence of a reservation regarding arbitration or any other jurisdiction, be subject to the competence of the Finnish courts. No interim orders may, however, be made against the Trade Delegation;

(b) Final judicial decisions against the Trade Delegation in the afore-mentioned disputes which have become legally valid may be enforced by execution, but such execution may only be levied on the goods and claims outstanding to the credit of the Trade Delegation.

(d) UNION OF SOVIET SOCIALIST REPUBLICS AND FRANCE. AGREEMENT (WITH PROTOCOL) CONCERNING RECIPROCAL TRADE RELATIONS AND THE STATUS OF THE TRADE DELEGATION OF THE UNION OF SOVIET SOCIALIST REPUBLICS IN FRANCE. SIGNED AT PARIS, ON 3 SEPTEMBER 1951²⁶

Article 10

The Trade Delegation of the Union of Soviet Socialist Republics in France shall enjoy the privileges and immunities arising out of article 6 above, with the following exceptions:

Disputes regarding commercial transactions concluded or guaranteed in the territory of France by the Trade Delegation of the Union of Soviet Socialist Republics under the first paragraph of article 8 of this Agreement shall, in the absence of a reservation regarding arbitration or any other jurisdiction, be subject to the competence

²⁵ United Nations, *Treaty Series*, vol. 217, p. 3.

²⁶ United Nations, *Treaty Series*, vol. 221, p. 79.

of the French courts and be settled in accordance with French law, save as otherwise provided by the terms of individual contracts or by French legislation.

No interim orders may, however, be made against the Trade Delegation.

Execution of judgements relating to transactions to which the Trade Delegation of the Union of Soviet Socialist Republics in France is a party may be taken against all State property of the Union of Soviet Socialist Republics in France, in particular property, rights and interests arising from transactions concluded or guaranteed by the Trade Delegation of the Union of Soviet Socialist Republics in France, with the exception of property belonging to an organization as referred to in the second paragraph of article 8.

Property and premises intended solely for the exercise in France of the political and diplomatic rights of the Government of the Union of Soviet Socialist Republics in accordance with international practice, as well as the premises occupied by the Trade Delegation of the Union of Soviet Socialist Republics in France and the movable property situated there, shall be liable to execution.

- (e) UNION OF SOVIET SOCIALIST REPUBLICS AND FEDERAL REPUBLIC OF GERMANY. AGREEMENT (WITH ANNEX AND EXCHANGE OF LETTERS) CONCERNING GENERAL MATTERS OF TRADE AND NAVIGATION. SIGNED AT BONN, ON 25 APRIL 1958²⁷

ANNEX

THE LEGAL STATUS OF THE TRADE DELEGATION OF THE UNION OF SOVIET SOCIALIST REPUBLICS IN THE FEDERAL REPUBLIC OF GERMANY

Article 4

The rights, immunities and privileges accorded to the Trade Delegation under article 2, first paragraph, of this annex shall extend to its commercial activities, with the following exceptions:

(a) Disputes arising out of commercial contracts concluded or guaranteed in the territory of the Federal Republic of Germany under article 3 of this annex by the Trade Delegation shall, in the absence of agreement regarding arbitration or any other jurisdiction, be subject to the jurisdiction of the courts of the Federal Republic of Germany; in these disputes the defendant or plaintiff shall be the Trade Delegation of the Union of Soviet Socialist Republics in the Federal Republic of Germany. No interim orders may, however, be made against the Trade Delegation;

(b) Final judicial decisions against the Trade Delegation in the disputes referred to in paragraph (a) hereof which have become legally valid may be enforced by execution. Such execution may be levied on all State property of the Union of Soviet Socialist Republics in the Federal Republic of Germany, in particular property, rights and interests arising out of contracts concluded or guaranteed by the Trade Delegation, with the exception of property belonging to the organizations referred to in article 3, third paragraph, of this annex.

Property and premises intended solely for the exercise in the Federal Republic of Germany of the political and diplomatic rights of the Union of Soviet Socialist Republics, in accordance with international practice, and also the premises occupied by the Trade Delegation and the movable property situated therein, shall not be liable to execution measures.

²⁷ United Nations, *Treaty Series*, vol. 346, p. 71.

(f) UNION OF SOVIET SOCIALIST REPUBLICS AND ITALY. TREATY OF COMMERCE AND NAVIGATION (WITH ANNEX AND PROTOCOL). SIGNED AT MOSCOW, ON 11 DECEMBER 1948²⁸

ANNEX

THE LEGAL STATUS OF THE TRADE DELEGATION OF THE UNION OF SOVIET SOCIALIST REPUBLICS IN ITALY

Article 4

The immunities and privileges accorded to the Trade Delegation shall extend to its commercial activities, with the following exceptions:

(a) Disputes regarding commercial contracts concluded or guaranteed in the territory of Italy by the Trade Delegation shall, in the absence of an arbitration clause, be subject to the jurisdiction of the Italian courts and shall be settled in accordance with Italian law, save as otherwise provided by the terms of individual contracts. No interim orders may, however, be made against the Trade Delegation;

(b) Final judicial decisions against the Trade Delegation in the aforementioned disputes may be enforced by execution; nevertheless such execution may be levied only on the Trade Delegation's goods, the claims outstanding to its credit, and its other assets directly attributable to the commercial transactions concluded by it.

(g) UNION OF SOVIET SOCIALIST REPUBLICS AND JAPAN. TREATY OF COMMERCE (WITH ANNEX AND EXCHANGE OF NOTES). SIGNED AT TOKYO, ON 6 DECEMBER 1957²⁹

Article 4

The Trade Delegation shall enjoy the privileges and immunities arising out of the provisions of article 2, with the following exceptions:

Disputes regarding commercial contracts concluded or guaranteed in the territory of Japan by the Trade Delegation under the provisions of article 3, second paragraph, shall, in the absence of an arbitration agreement or an agreement providing for any other jurisdiction, be subject to the jurisdiction of the Japanese courts and shall be settled in accordance with Japanese law, save as otherwise provided by the terms of individual contracts or by Japanese legislation. No interim orders may, however, be made against the Trade Delegation.

In respect of legal proceedings before the courts in connexion with actions which may be brought concerning the disputes mentioned in the preceding paragraph, the Government of the Union of Soviet Socialist Republics shall waive the privileges and immunities referred to in article 2 on behalf of the Trade Delegate and his two deputies and undertakes to authorize the Trade Delegate and, in the event of his absence, a deputy Trade Delegate to represent its country so that the Japanese courts may conduct legal proceedings in the actions which may be brought before them in accordance with the provisions of the preceding paragraph.

Execution of judgements relating to contracts to which the Trade Delegation is a party may be taken against all State property of the Union of Soviet Socialist Republics.

²⁸ United Nations, *Treaty Series*, vol. 217, p. 181.

²⁹ United Nations, *Treaty Series*, vol. 325, p. 35.

lics in Japan, in particular property, rights and interests arising out of contracts concluded or guaranteed by the Trade Delegation, with exception of property belonging to the organizations referred to in article 3, fourth paragraph, which are not a party to the contract guaranteed by the Trade Delegation.

Property and premises intended solely for the exercise in Japan of the diplomatic and consular rights of the Government of the Union of Soviet Socialist Republics, in accordance with international practice, and also the premises occupied by the Trade Delegation and the movable property situated therein, shall not be liable to execution.

- (h) UNION OF SOVIET SOCIALIST REPUBLICS AND THE KINGDOM OF THE NETHERLANDS. PROTOCOL CONCERNING THE STATUTE OF THE TRADE DELEGATION OF THE UNION OF SOVIET SOCIALIST REPUBLICS IN THE NETHERLANDS. SIGNED AT BRUSSELS ON 14 JUNE 1971³⁰

...

Article 7

The Trade Delegation shall enjoy the privileges and immunities arising out of the present Protocol, with the following exceptions.

Disputes regarding commercial transactions concluded or guaranteed on the territory of the Netherlands by the Trade Delegation shall be subject, in the absence of a reservation in the contracts regarding arbitration or any other jurisdiction, to the competence of the courts of the Netherlands and shall be settled, in accordance with its national law. No interim orders may, however, be made against the Trade Delegation.

Execution of all final judicial decisions which have become legally valid, in respect of commercial transactions concluded or guaranteed by the Trade Delegation, may be taken against all State property of the Union of Soviet Socialist Republics, in particular property, rights and interests arising out of the aforementioned transactions, with the exception of property belonging to the organizations mentioned in the second paragraph of article 6 of the present Protocol.

Property and premises, intended solely for the exercise in the Netherlands of the political and diplomatic rights of the Government of the Union of Soviet Socialist Republics, in accordance with international practice, and also premises occupied by the Trade Delegation and the movable property situated therein, shall not be subject to measures of distraint.

- (i) UNION OF SOVIET SOCIALIST REPUBLICS AND SWITZERLAND. AGREEMENT CONCERNING THE TRADE DELEGATION OF THE UNION OF SOVIET SOCIALIST REPUBLICS IN SWITZERLAND. SIGNED AT MOSCOW, ON 17 MARCH 1948³¹

...

Article 5

The rights and privileges accorded to the Trade Delegation under article 3 above shall extend also to its commercial activities. with the following exceptions:

³⁰ *Tractatenblad van het Koninkrijk der Nederlanden*, Jaargang 1971, nr. 163.

³¹ United Nations, *Treaty Series*, vol. 217, p. 87.

(a) Disputes regarding commercial contracts concluded or guaranteed in the territory of Switzerland by the Trade Delegation under article 4 of this Agreement shall, in the absence of a reservation regarding arbitration or any other jurisdiction, be subject to the competence of the Swiss courts. No interim orders may, however, be made against the Trade Delegation.

(b) Final judicial decisions against the Trade Delegation in the aforementioned disputes may be enforced by execution; nevertheless, such execution may be levied only on the assets of the Trade Delegations and the goods which are its property.

4. Treaties between Socialist countries and developing countries

(a) UNION OF SOVIET SOCIALIST REPUBLICS AND BOLIVIA. PROTOCOL. THE GOVERNMENT OF THE UNION OF SOVIET SOCIALIST REPUBLICS AND THE GOVERNMENT OF THE REPUBLIC OF BOLIVIA, DESIRING TO PROMOTE THE DEVELOPMENT OF TRADE RELATIONS BETWEEN THE TWO COUNTRIES, HAVE AGREED AS FOLLOWS. SIGNED IN MOSCOW ON 17 AUGUST 1970³²

...

Article 6

The Trade Mission shall enjoy the privileges and immunities deriving from the provisions of article 3 with the following exceptions:

1. Disputes arising from commercial transactions concluded or guaranteed in Bolivian territory by the Trade Mission under the provisions of the second paragraph of article 5 shall fall within the competence of the Bolivian courts if the transaction in question does not contain a reservation regarding arbitration and does not expressly provide otherwise and if the parties concerned do not come to some other agreement. No interim orders may, however, be made against the Trade Mission.

2. The enforcement of judicial decisions relating to transactions concluded or guaranteed by the Trade Mission may be effected in respect of State property of the USSR in Bolivia, and particularly in respect of property, rights and interests arising from transactions concluded or guaranteed by the Trade Mission.

In accordance with international practice, property and premises intended for the functioning in Bolivia of the Embassy and Trade Mission of the USSR, as well as movable property and appurtenances present on the said premises, shall not be subject to any measures of forcible recovery.

(b) UNION OF SOVIET SOCIALIST REPUBLICS AND BRAZIL. PROTOCOL CONCERNING THE REORGANIZATION OF THE SOVIET TRADE MISSION IN BRAZIL AS THE TRADE DELEGATION OF THE UNION OF SOVIET SOCIALIST REPUBLICS IN BRAZIL. SIGNED AT RIO DE JANEIRO, ON 20 APRIL 1963³³

...

Article 5

The Trade Delegation shall enjoy the immunities and privileges deriving from the provisions of article 1, with the following exceptions:

³² See Certified Text No. 13736 (Office of Legal Affairs/Treaty Section).

³³ United Nations, *Treaty Series*, vol. 646, p. 277.

1. Disputes regarding commercial contracts concluded or guaranteed in the territory of Brazil by the Trade Delegation in accordance with the provisions of the second paragraph of article 4 shall, in the absence of a reservation in the contract concerning the court of arbitration or unless otherwise specified in the terms of the contract or otherwise agreed between the interested parties, be subject to the competence of the Brazilian courts. No interim orders may, however, be made against the Trade Delegation.

2. In respect of judicial proceedings conducted by Brazilian courts in connexion with actions brought as a result of disputes of the kind described in the preceding paragraph, the Government of the USSR shall not invoke the immunities and privileges referred to in article 2 on behalf of the Trade Representative, his two deputies or other members of the Trade Delegation, and it undertakes to authorize the Trade Representative or, in his absence, one of the deputy Trade Representatives to represent his country for the purpose of enabling the Brazilian courts to conduct judicial proceedings in connexion with the actions brought before them in accordance with the provisions of the preceding paragraph.

Enforcement of judicial decisions relating to contracts to which the Trade Delegation is a party may be effected in respect of any of the State property of the Union of Soviet Socialist Republics in Brazil, and in particular the property, rights and interests arising out of contracts concluded or guaranteed by the Trade Delegation, but excluding the property of the organizations referred to in the fourth paragraph of article 4 which are not parties to contracts guaranteed by the Trade Delegation.

In accordance with international practice, no measures of forcible recovery may be taken against property or premises intended exclusively for the performance in Brazil of the functions of the USSR Embassy, Trade Delegation or Consulate, or against any moveable property or appurtenances on such premises.

(c) UNION OF SOVIET SOCIALIST REPUBLICS AND COSTA RICA. PROTOCOL. THE GOVERNMENT OF THE UNION OF SOVIET SOCIALIST REPUBLICS AND THE GOVERNMENT OF THE REPUBLIC OF COSTA RICA, DESIRING TO DEVELOP TRADE RELATIONS BETWEEN THE TWO COUNTRIES, HAVE AGREED AS FOLLOWS. SIGNED IN MOSCOW ON 26 JUNE 1970³⁴

...

Article 4

The Trade Mission of the USSR shall enjoy the immunities and privileges deriving from the provisions of article 2 of this Protocol with the following exceptions:

(a) Disputes relating to commercial transactions concluded or guaranteed on behalf of the Trade Mission under article 3 of this Protocol shall fall within the competence of the Costa Rican courts if the transaction in question does not contain a reservation regarding arbitration and does not expressly provide otherwise and if the parties concerned do not come to some other agreement; in such cases, the Trade Mission shall authorize a representative to appear in court.

(b) The enforcement of judicial decisions relating to transactions concluded or

³⁴ See Certified Text No. 13734 (Office of Legal Affairs/Treaty Section).

guaranteed by the Trade Mission may be affected in respect of State property of the USSR in Costa Rica, particularly in respect of property, rights and interests arising from transactions concluded or guaranteed by the Trade Mission.

In accordance with international practice, property and premises required for the normal functioning of the Trade Mission and, if the Parties exchange diplomatic representatives, the property and premises of the diplomatic mission of the USSR shall constitute an exception.

(d) UNION OF SOVIET SOCIALIST REPUBLICS AND EGYPT. PROTOCOL ON THE TRADE DELEGATION OF THE UNION OF SOVIET SOCIALIST REPUBLICS IN THE REPUBLIC OF EGYPT. SIGNED AT CAIRO ON 15 JULY 1956³⁵

...

Article 6

The privileges and immunities accorded to the Trade Delegation under article 3 above shall apply also to its trading activities, with the following exceptions:

(a) Disputes relating to commercial contracts concluded or guaranteed in the Republic of Egypt by the Trade Delegation in accordance with article 2 of this Protocol shall, in the absence of an arbitration clause, be subject to the jurisdiction of the courts of the Republic of Egypt, and in such cases the Trade Delegation shall designate a representative to appear on its behalf before the court;

(b) Execution may be levied in respect of final judicial decisions against the Trade Delegation in disputes of the kind mentioned above but only on the property of the Trade Delegation and on goods belonging to it.

(e) UNION OF SOVIET SOCIALIST REPUBLICS AND GHANA. PROTOCOL ON LEGAL STATUS OF THE TRADE REPRESENTATION OF THE UNION OF SOVIET SOCIALIST REPUBLICS IN THE REPUBLIC OF GHANA. SIGNED AT ACCRA ON 2 JULY 1961³⁶

...

Article 4

Any question which may arise in respect of commercial transactions entered into or guaranteed in the Republic of Ghana by the Trade Representation shall be determined by the Courts of the Republic of Ghana in accordance with the laws thereof and in such cases the Trade Representation or its representative shall submit to the jurisdiction of such Courts.

Property of the Union of Soviet Socialist Republics in the Republic of Ghana shall be subject to such measures as may lawfully be taken to give effect to the orders of the Courts of the Republic of Ghana in so far as these orders have been issued in connexion with transactions referred to in paragraph 1 of the present article unless it is property which according to International Law is immune from such

³⁵ United Nations, *Treaty Series*, vol. 687, p. 221.

³⁶ United Nations, *Treaty Series*, vol. 655, p. 171.

measures, as being necessary for the exercise of the rights of State Sovereignty or for the official function of Diplomatic or Consular Representatives of the Union of Soviet Socialist Republics.

- (f) UNION OF SOVIET SOCIALIST REPUBLICS AND INDIA. TRADE AGREEMENT (WITH SCHEDULES AND EXCHANGE OF LETTERS). SIGNED AT NEW DELHI, ON 2 DECEMBER 1953³⁷

EXCHANGE OF LETTERS

1

New Delhi, the 2nd December, 1953

...

3. It was agreed that the commercial transactions entered into or guaranteed in India by the members of the Trade Representation including those stationed in New Delhi shall be subject to the jurisdiction of the Courts of India and the laws thereof unless otherwise provided by agreement between the contracting parties to the said transactions. Only the goods, debt demands and other assets of the Trade Representation directly relating to the commercial transactions concluded or guaranteed by the Trade Representation shall be liable in execution of decrees and orders passed in respect of such transactions. It was understood that the Trade Representation will not be responsible for any transactions concluded by other Soviet Organisations direct, without the Trade Representation's guarantee.

- (g) UNION OF SOVIET SOCIALIST REPUBLICS AND IRAQ. PROTOCOL ON THE TRADE DELEGATION OF THE UNION OF SOVIET SOCIALIST REPUBLICS IN THE REPUBLIC OF IRAQ. SIGNED AT BAGHDAD, ON 11 OCTOBER 1958³⁸

...

Article 6

The privileges and immunities accorded to the Trade Delegation under article 3 above shall apply also to its trading activities, with the following exceptions only:

(a) Disputes regarding commercial contracts concluded or guaranteed in the Republic of Iraq by the Trade Delegation under article 2 of this Protocol shall be subject to the competence of the courts of the Republic of Iraq, unless provision to the contrary is made under the terms of individual contracts;

(b) Forcible execution of final judicial decisions against the Trade Delegation in the above-mentioned disputes may be levied only on the property of the Trade Delegation and on goods belonging to it.

³⁷ United Nations, *Treaty Series*, vol. 240, p. 143.

³⁸ United Nations, *Treaty Series*, vol. 328, p. 118.

- (h) UNION OF SOVIET SOCIALIST REPUBLICS AND SINGAPORE. TRADE AGREEMENT (WITH ANNEX AND EXCHANGE OF LETTERS). SIGNED AT SINGAPORE, ON 2 APRIL 1966³⁹

...

Article 16

The Trade Representation of the U.S.S.R. enjoys the immunities and privileges resulting from the provisions of Article 12 with the following exemptions:

(a) Disputes on commercial transactions concluded or guaranteed in the Republic of Singapore by the Trade Representation in accordance with Article 15 of this Agreement are subject in the absence of any clause regarding arbitration to the jurisdiction of Singapore courts and in such cases the Trade Representation shall authorize its representative to appear in court;

(b) The enforcement of a final court decision brought against the Trade Representation as a result of the above disputes can take place but the same can be applied only to funds of the Trade Representation and to goods being its property.

- (i) UNION OF SOVIET SOCIALIST REPUBLICS AND TOGO. PROTOCOL CONCERNING THE STATUS OF THE TRADE DELEGATION OF THE UNION OF SOVIET SOCIALIST REPUBLICS IN THE TOGOLESE REPUBLIC. SIGNED AT LOMÉ ON 14 JUNE 1961⁴⁰

...

Article 4

The privileges and immunities accorded to the Trade Delegation under article 2 shall apply also to its commercial activities, with the following exceptions:

(a) Disputes regarding commercial transactions concluded or guaranteed in Togo by the Trade Delegation under article 3 of this Protocol shall, in the absence of a reservation regarding arbitration, be within the jurisdiction of the competent courts of the Togolese Republic; in such cases, the Trade Delegation shall authorize a representative to appear in court. No interim orders may, however, be made against the Trade Delegation;

(b) Compulsory execution of final judgements against the Trade Delegation following such disputes may be taken against all State property of the USSR in Togo, in particular property, rights and interests arising from transactions concluded or guaranteed by the Trade Delegation, with the exception of property belonging to an organization referred to in the second paragraph of article 3.

³⁹ United Nations, *Treaty Series*, vol. 631, p. 125.

⁴⁰ United Nations, *Treaty Series*, vol. 730, p. 187.

- (j) UNION OF SOVIET SOCIALIST REPUBLICS AND YEMEN. PROTOCOL ON THE TRADE DELEGATION OF THE UNION OF SOVIET SOCIALIST REPUBLICS IN THE YEMEN ARAB REPUBLIC. SIGNED AT SANA'A ON 19 MARCH 1963⁴¹

...

Article 6

The privileges and immunities accorded to the Trade Delegation under article 3 above shall apply also to its trading activities, with the following exceptions:

(a) Disputes relating to commercial contracts concluded or guaranteed in the Yemen Arab Republic by the Trade Delegation in accordance with article 2 of the Protocol shall, in the absence of a reservation regarding arbitration, be subject to the jurisdiction of the Yemeni courts, and in this case the Trade Delegation shall designate a representative to appear on its behalf before the courts;

(b) Execution may be levied in respect of final judicial decisions against the Trade Delegation in disputes of the kind mentioned above, but only on the property of the Trade Delegation and on goods belonging to it.

B. MULTILATERAL TREATIES

1. Bustamante Code, Code of Private International Law of 1928⁴²

...

Article 333. 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 case of express submission or of counterclaims.

Article 334. In the same case and with the same exception, they shall be incompetent when real actions are exercised, if the contracting State or its head has acted on the case as such and in its public character, when the provisions of the last paragraph of Article 318 shall be applied.

Article 335. 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.

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

Article 337. The provisions established in preceding articles shall be applied to foreign diplomatic agents and to the commanders of war vessels or aircraft.

⁴¹ United Nations, *Treaty Series*, vol. 672, p. 315.

⁴² *The International Conference of American States* (ed. by James Brown Scott) (1931), p. 359. The Code was adopted at the Sixth Interamerican Conference at Havana in 1928.

Article 338. Foreign consuls shall not be exempt from the civil jurisdiction of the judges and courts of the country in which they act, except in respect to their official acts.

2. Convention on the Recognition and Enforcement of Foreign Arbitral Awards. (Done at New York, on 10 June 1958)⁴³

...

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

...

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

⁴³ United Nations, *Treaty Series*, vol. 330, p. 38.

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923⁴⁴ and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927⁴⁵ shall cease to have ef-

⁴⁴ League of Nations, *Treaty Series*, Vol. XXVII, p. 157; Vol. XXXI, p. 260; Vol. XXXV, p. 314; Vol. XXXIX, p. 190; Vol. XLV, p. 116; Vol. L, p. 161; Vol. LIX, p. 355; Vol. LXIX, p. 79; Vol. LXXII, p. 452; Vol. LXXXIII, p. 393; Vol. LXXXVIII, p. 312; Vol. XCVI, p. 190; Vol. C, p. 211; Vol. CIV, p. 499; Vol. CVII, p. 470; Vol. CXI, p. 403; Vol. CXVII, p. 55; Vol. CLVI, p. 185; Vol. CLXXXI, p. 356; Vol. CLXXXV, p. 372; Vol. CXCIII, p. 268, and Vol. CC, p. 500; and United Nations, *Treaty Series*, Vol. 117, p. 394; Vol. 261, p. 422, and Vol. 325.

⁴⁵ League of Nations, *Treaty Series*, Vol. XCII, p. 301; Vol. XCVI, p. 205; Vol. C, p. 259; Vol. CIV, p. 526; Vol. CVII, p. 528; Vol. CXI, p. 414; Vol. CXVII, p. 303; Vol. CXXX, p. 457; Vol. CLVI, p. 210; Vol. CLXXXI, p. 389; Vol. CLXXXV, p. 391, and Vol. CXCIII, p. 269; and United Nations, *Treaty Series*, Vol. 122, p. 346; Vol. 134, p. 402; Vol. 269, p. 384, and Vol. 325.

fect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

...

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

...

Article XIII

...

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

3. Convention on the Execution of Foreign Arbitral Awards. (Signed at Geneva on 26 September 1927)⁴⁶

Article I

In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement whether relating to ex-

⁴⁶ League of Nations, *Treaty Series*, vol. XCII, p. 301.

isting or future differences (hereinafter called "a submission to arbitration") covered by the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923, shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.

To obtain such recognition or enforcement, it shall, further, be necessary:

(a) That the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;

(b) That the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon;

(c) That the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;

(d) That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to *opposition*, *appel* or *pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;

(e) That the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.

Article 2

Even if the conditions laid down in Article 1 hereof are fulfilled, recognition and enforcement of the award shall be refused if the Court is satisfied:

(a) That the award has been annulled in the country in which it was made;

(b) That the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;

(c) That the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration.

If the award has not covered all the questions submitted to the arbitral tribunal, the competent authority of the country where recognition or enforcement of the award is sought can, if it thinks fit, postpone such recognition or enforcement or grant it subject to such guarantee as that authority may decide.

4. Convention on the High Seas. (Done at Geneva, on 29 April 1958)⁴⁷

...

Article 9

Ships owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State.

5. Convention on the Settlement of Investment Disputes between States and Nationals of other States. (Opened for signature at Washington, on 18 March 1965)⁴⁸

...

SECTION 6. RECOGNITION AND ENFORCEMENT OF THE AWARD

Article 53

(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

(2) For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.

Article 54

(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

Article 55

Nothing in Article 54 shall be construed as derogating from the law in force in

⁴⁷ United Nations, *Treaty Series*, vol. 450, p. 82.

⁴⁸ United Nations, *Treaty Series*, vol. 575, p. 159.

any Contracting State relating to immunity of that State or of any foreign State from execution.

6. Convention on the Territorial Sea and the Contiguous Zone. (Done at Geneva, on 29 April 1958)⁴⁹

...

SUB-SECTION C. RULES APPLICABLE TO GOVERNMENT SHIPS OTHER THAN WARSHIPS

Article 21

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

Article 22

1. The rules contained in sub-section A and in article 18 shall apply to government ships operated for non-commercial purposes.

2. With such exceptions as are contained in the provisions referred to in the preceding paragraph, nothing in these articles affects the immunities which such ships enjoy under these articles or other rules of international law.

7. European Convention on State Immunity and Additional Protocol⁵⁰

PREAMBLE

The member States of the Council of Europe, signatory hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its Members;

Taking into account the fact that there is in international law a tendency to restrict the cases in which a State may claim immunity before foreign courts;

Desiring to establish in their mutual relations common rules relating to the scope of the immunity of one State from the jurisdiction of the courts of another State, and designed to ensure compliance with judgments given against another State;

Considering that the adoption of such rules will tend to advance the work of harmonisation undertaken by the member States of the Council of Europe in the legal field,

Have agreed as follows:

CHAPTER I. IMMUNITY FROM JURISDICTION

Article 1

1. A Contracting State which institutes or intervenes in proceedings before a

⁴⁹ United Nations, *Treaty Series*, vol. 516, p. 205.

⁵⁰ *Council of Europe*, No. 74 (1972).

court of another Contracting State submits, for the purpose of those proceedings, to the jurisdiction of the courts of that State.

2. Such a Contracting State cannot claim immunity from the jurisdiction of the courts of the other Contracting State in respect of any counterclaim:

(a) arising out of the legal relationship or the facts on which the principal claim is based;

(b) if, according to the provisions of this Convention, it would not have been entitled to invoke immunity in respect of that counterclaim had separate proceedings been brought against it in those courts.

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

Article 2

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

(a) by international agreement;

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

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

Article 3

1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if, before claiming immunity, it takes any step in the proceedings relating to the merits. However, if the State satisfies the court that it could not have acquired knowledge of facts on which a claim to immunity can be based until after it has taken such a step, it can claim immunity based on these facts if it does so at the earliest possible moment.

2. A Contracting State is not deemed to have waived immunity if it appears before a court of another Contracting State in order to assert immunity.

Article 4

1. Subject to the provisions of Article 5, a Contracting State cannot claim immunity from the jurisdiction of the courts of another Contracting State if the proceedings relate to an obligation of the State, which, by virtue of a contract, falls to be discharged in the territory of the State of the forum.

2. Paragraph 1 shall not apply:

(a) in the case of a contract concluded between States;

(b) if the parties to the contract have otherwise agreed in writing;

(c) if the State is party to a contract concluded on its territory and the obligation of the State is governed by its administrative law.

Article 5

1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to a contract of employment

between the State and an individual where the work has to be performed on the territory of the State of the forum.

2. Paragraph 1 shall not apply where:

(a) the individual is a national of the employing State at the time when the proceedings are brought;

(b) at the time when the contract was entered into the individual was neither a national of the State of the forum nor habitually resident in that State; or

(c) the parties to the contract have otherwise agreed in writing, unless, in accordance with the law of the State of the forum, the courts of that State have exclusive jurisdiction by reason of the subject-matter.

3. Where the work is done for an office, agency or other establishment referred to in Article 7, paragraphs 2 (a) and (b) of the present Article apply only if, at the time the contract was entered into, the individual had his habitual residence in the Contracting State which employs him.

Article 6

1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it participates with one or more private persons in a company, association or other legal entity having its seat, registered office or principal place of business on the territory of the State of the forum, and the proceedings concern the relationship, in matters arising out of that participation, between the State on the one hand and the entity or any other participant on the other hand.

2. Paragraph 1 shall not apply if it is otherwise agreed in writing.

Article 7

1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it has on the territory of the State of the forum an office, agency or other establishment through which it engages, in the same manner as a private person, in an industrial, commercial or financial activity, and the proceedings relate to that activity of the office, agency or establishment.

2. Paragraph 1 shall not apply if all the parties to the dispute are States, or if the parties have otherwise agreed in writing.

Article 8

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

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

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

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

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

Article 9

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

- (a) its rights or interests in, or its use or possession of, immovable property;
 - or
 - (b) its obligations arising out of its rights or interests in, or use or possession of, immovable property
- and the property is situated in the territory of the State of the forum.

Article 10

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to a right in movable or immovable property arising by way of succession, gift or *bona vacantia*.

Article 11

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred.

Article 12

1. Where a Contracting State has agreed in writing to submit to arbitration a dispute which has arisen or may arise out of a civil or commercial matter, that State may not claim immunity from the jurisdiction of a court of another Contracting State on the territory or according to the law of which the arbitration has taken or will take place in respect of any proceedings relating to:

- (a) the validity or interpretation of the arbitration agreement;
- (b) the arbitration procedure;
- (c) the setting aside of the award,

unless the arbitration agreement otherwise provides.

- 2. Paragraph 1 shall not apply to an arbitration agreement between States.

Article 13

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

Article 14

Nothing in this Convention shall be interpreted as preventing a court of a Contracting State from administering or supervising or arranging for the administration of property, such as trust property or the estate of a bankrupt, solely on account of the fact that another Contracting State has a right or interest in the property.

Article 15

A Contracting State shall be entitled to immunity from the jurisdiction of the courts of another Contracting State if the proceedings do not fall within Articles 1 to 14; the court shall decline to entertain such proceedings even if the State does not appear.

CHAPTER II. PROCEDURAL RULES

Article 16

1. In proceedings against a Contracting State in a court of another Contracting State, the following rules shall apply.

2. The competent authorities of the State of the forum shall transmit the original or a copy of the document by which the proceedings are instituted; a copy of any judgment given by default against a State which was defendant in the proceedings,

through the diplomatic channel to the Ministry of Foreign Affairs of the defendant State, for onward transmission, where appropriate, to the competent authority. These documents shall be accompanied, if necessary, by a translation into the official language, or one of the official languages, of the defendant State.

3. Service of the documents referred to in paragraph 2 is deemed to have been effected by their receipt by the Ministry of Foreign Affairs.

4. The time-limits within which the State must enter an appearance or appeal against any judgment given by default shall begin to run two months after the date on which the document by which the proceedings were instituted or the copy of the judgment is received by the Ministry of Foreign Affairs.

5. If it rests with the court to prescribe the time-limits for entering an appearance or for appealing against a judgment given by default, the court shall allow the State not less than two months after the date on which the document by which the proceedings are instituted or the copy of the judgment is received by the Ministry of Foreign Affairs.

6. A Contracting State which appears in the proceedings is deemed to have waived any objection to the method of service.

7. If the Contracting State has not appeared, judgment by default may be given against it only if it is established that the document by which the proceedings were instituted has been transmitted in conformity with paragraph 2, and that the time-limits for entering an appearance provided for in paragraphs 4 and 5 have been observed.

Article 17

No security, bond or deposit, however described, which could not have been required in the State of the forum of a national of that State or a person domiciled or resident there, shall be required of a Contracting State to guarantee the payment of judicial costs or expenses. A State which is a claimant in the courts of another Contracting State shall pay any judicial costs or expenses for which it may become liable.

Article 18

A Contracting State party to proceedings before a court of another Contracting State may not be subjected to any measure of coercion, or any penalty, by reason of its failure or refusal to disclose any documents or other evidence. However the court may draw any conclusion it thinks fit from such failure or refusal.

Article 19

1. A court before which proceedings to which a Contracting State is a party are instituted shall, at the request of one of the parties or, if its national law so permits, of its own motion, decline to proceed with the case or shall stay the proceedings if other proceedings between the same parties, based on the same facts and having the same purpose.

(a) are pending before a court of that Contracting State, and were the first to be instituted; or

(b) are pending before a court of any other Contracting State, were the first to be instituted and may result in a judgment to which the State party to the proceedings must give effect by virtue of Article 20 or Article 25.

2. Any Contracting State whose law gives the courts a discretion to decline to proceed with a case or to stay the proceedings in cases where proceedings between the same parties, based on the same facts and having the same purpose, are pending before a court of another Contracting State, may, by notification addressed to the Secretary General of the Council of Europe, declare that its courts shall not be bound by the provisions of paragraph 1.

CHAPTER III. EFFECT OF JUDGMENT

Article 20

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

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

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

2. Nevertheless, a Contracting State is not obliged to give effect to such a judgment in any case:

(a) where it would be manifestly contrary to public policy in that State to do so, or where, in the circumstances, either party had no adequate opportunity fairly to present his case;

(b) where proceedings between the same parties, based on the same facts and having the same purpose:

(i) are pending before a court of that State and were the first to be instituted;

(ii) are pending before a court of another Contracting State, were the first to be instituted and may result in a judgment to which the State party to the proceedings must give effect under the terms of this Convention;

(c) where the result of the judgment is inconsistent with the result of another judgment given between the same parties:

- (i) by a court of the Contracting State, if the proceedings before that court were the first to be instituted or if the other judgment has been given before the judgment satisfied the conditions specified in paragraph 1 (b); or
- (ii) by a court of another Contracting State where the other judgment is the first to satisfy the requirements laid down in the present Convention;

(d) where the provisions of Article 16 have not been observed and the State has not entered an appearance or has not appealed against a judgment by default.

3. In addition, in the cases provided for in Article 10, a Contracting State is not obliged to give effect to the judgment.

(a) if the courts of the State of the forum would not have been entitled to assume jurisdiction had they applied, *mutatis mutandis*, the rules of jurisdiction (other than those mentioned in the Annex to the present Convention) which operate in the State against which judgment is given; or

(b) if the court, by applying a law other than that which would have been applied in accordance with the rules of private international law of that State, has reached a result different from that which would have been reached by applying the law determined by those rules.

However, a Contracting State may not rely upon the grounds of refusal specified in sub-paragraphs (a) and (b) above if it is bound by an agreement with the State of the forum on the recognition and enforcement of judgments and the judgment fulfils the requirement of that agreement as regards jurisdiction and, where appropriate, the law applied.

Article 21

1. Where a judgment has been given against a Contracting State and that State does not give effect thereto, the party which seeks to invoke the judgment shall be entitled to have determined by the competent court of that State the question whether effect should be given to the judgment in accordance with Article 20. Proceedings may also be brought before this court by the State against which judgment has been given, if its law so permits.

2. Save in so far as may be necessary for the application of Article 20, the competent court of the State in question may not review the merits of the judgment.

3. Where proceedings are instituted before a court of a State in accordance with paragraph 1:

(a) the parties shall be given an opportunity to be heard in the proceedings;

(b) documents produced by the party seeking to invoke the judgment shall not be subject to legalisation or any other like formality;

(c) no security, bond or deposit, however described, shall be required of the party invoking the judgment by reason of his nationality, domicile or residence;

(d) the party invoking the judgment shall be entitled to legal aid under conditions no less favourable than those applicable to nationals of the State who are domiciled and resident therein.

4. Each Contracting State shall, when depositing its instrument of ratification, acceptance or accession, designate the court or courts referred to in paragraph 1, and inform the Secretary General of the Council of Europe thereof.

Article 22

1. A Contracting State shall give effect to a settlement to which it is a party and which has been made before a court of another Contracting State in the course of the proceedings; the provisions of Article 20 do not apply to such a settlement.

2. If the State does not give effect to the settlement, the procedure provided for in Article 21 may be used.

Article 23

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

CHAPTER IV. OPTIONAL PROVISIONS

Article 24

1. Notwithstanding the provisions of Article 15, any State may, when signing this Convention or depositing its instrument of ratification, acceptance or accession, or at any later date, by notification addressed to the Secretary General of the Council of Europe, declare that, in cases not falling within Articles 1 to 13, its courts shall be entitled to entertain proceedings against another Contracting State to the extent that its courts are entitled to entertain proceedings against States not Party to the present Convention. Such a declaration shall be without prejudice to the immunity from jurisdiction which foreign States enjoy in respect of acts performed in the exercise of sovereign authority (*acta jure imperii*).

2. The courts of a State which has made the declaration provided for in paragraph 1 shall not however be entitled to entertain such proceedings against another Contracting State if their jurisdiction could have been based solely on one or more of the grounds mentioned in the Annex to the present Convention, unless that other Contracting State has taken a step in the proceedings relating to the merits without first challenging the jurisdiction of the court.

3. The provisions of Chapter II apply to proceedings instituted against a Contracting State in accordance with the present Article.

4. The declaration made under paragraph 1 may be withdrawn by notification addressed to the Secretary General of the Council of Europe. The withdrawal shall take effect three months after the date of its receipt, but this shall not affect proceedings instituted before the date on which the withdrawal becomes effective.

Article 25

1. Any Contracting State which has made a declaration under Article 24 shall, in cases not falling within Articles 1 to 13, give effect to a judgment given by a court of another Contracting State which has made a like declaration:

(a) if the conditions prescribed in paragraph 1 (b) of Article 20 have been fulfilled, and

(b) if the court is considered to have jurisdiction in accordance with the following paragraphs.

2. However, the Contracting State is not obliged to give effect to such a judgment:

(a) if there is a ground for refusal as provided for in paragraph 2 of Article 20; or

(b) if the provisions of paragraph 2 of Article 24 have not been observed.

3. Subject to the provisions of paragraph 4, a court of a Contracting State shall be considered to have jurisdiction for the purpose of paragraph 1 (b):

(a) if its jurisdiction is recognised in accordance with the provisions of an agreement to which the State of the forum and the other Contracting State are Parties;

(b) where there is no agreement between the two States concerning the recognition and enforcement of judgments in civil matters, if the courts of the State of the forum would have been entitled to assume jurisdiction had they applied, *mutatis mutandis*, the rules of jurisdiction (other than those mentioned in the Annex to the present Convention) which operate in the State against which the judgment was given. This provision does not apply to questions arising out of contracts.

4. The Contracting States having made the declaration provided for in Article 24 may, by means of a supplementary agreement to this Convention, determine the circumstances in which their courts shall be considered to have jurisdiction for the purposes of paragraph 1 (b) of this Article.

5. If the Contracting State does not give effect to the judgment, the procedure provided for in Article 21 may be used.

Article 26

Notwithstanding the provisions of Article 23, a judgment rendered against a Contracting State in proceedings relating to an industrial or commercial activity, in which the State is engaged in the same manner as a private person, may be enforced in the State of the forum against property of the State against which judgment has been given, used exclusively in connection with such an activity, if

(a) both the State of the forum and the State against which the judgment has been given have made declarations under Article 24;

(b) the proceedings which resulted in the judgment fell within Articles 1 to 13 or were instituted in accordance with paragraphs 1 and 2 of Article 24; and

(c) the judgment satisfies the requirements laid down in paragraph 1 (b) of Article 20.

CHAPTER V. GENERAL PROVISIONS

Article 27

1. For the purposes of the present Convention, the expression "Contracting State" shall not include any legal entity of a Contracting State which is distinct therefrom and is capable of suing or being sued, even if that entity has been entrusted with public functions.

2. Proceedings may be instituted against any entity referred to in paragraph 1 before the courts of another Contracting State in the same manner as against a private person; however, the courts may not entertain proceedings in respect of acts performed by the entity in the exercise of sovereign authority (*acta jure imperii*).

3. Proceedings may in any event be instituted against any such entity before those courts if, in corresponding circumstances, the courts would have had jurisdiction if the proceedings had been instituted against a Contracting State.

Article 28

1. Without prejudice to the provisions of Article 27, the constituent States of a Federal State do not enjoy immunity.

2. However, a Federal State Party to the present Convention, may, by notification addressed to the Secretary General of the Council of Europe, declare that its constituent States may invoke the provisions of the Convention applicable to Contracting States, and have the same obligations.

3. Where a Federal State has made a declaration in accordance with paragraph 2, service of documents on a constituent State of a Federation shall be made on the Ministry of Foreign Affairs of the Federal State, in conformity with Article 16.

4. The Federal State alone is competent to make the declarations, notifications and communications provided for in the present Convention, and the Federal State alone may be party to proceedings pursuant to Article 34.

Article 29

The present Convention shall not apply to proceedings concerning:

- (a) social security;
- (b) damage or injury in nuclear matters;
- (c) customs duties, taxes or penalties.

Article 30

The present Convention shall not apply to proceedings in respect of claims relating to the operation of seagoing vessels owned or operated by a Contracting State or to the carriage of cargoes and of passengers by such vessels or to the carriage of cargoes owned by a Contracting State and carried on board merchant vessels.

Article 31

Nothing in this Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State.

Article 32

Nothing in the present Convention shall affect privileges and immunities relating to the exercise of the functions of diplomatic missions and consular posts and of persons connected with them.

Article 33

Nothing in the present Convention shall affect existing or future international agreements in special fields which relate to matters dealt with in the present Convention.

Article 34

1. Any dispute which might arise between two or more Contracting States concerning the interpretation or application of the present Convention shall be submitted to the International Court of Justice on the application of one of the parties to the dispute or by special agreement unless the parties agree on a different method of peaceful settlement of the dispute.

2. However, proceedings may not be instituted before the International Court of Justice which relate to:

(a) a dispute concerning a question arising in proceedings instituted against a Contracting State before a court of another Contracting State, before the court has given a judgment which fulfils the condition provided for in paragraph 1 (b) of Article 20;

(b) a dispute concerning a question arising in proceedings instituted before a court of a Contracting State in accordance with paragraph 1 of Article 21, before the court has rendered a final decision in such proceedings.

Article 35

1. The present Convention shall apply only to proceedings introduced after its entry into force.

2. When a State has become Party to this Convention after it has entered into force, the Convention shall apply only to proceedings introduced after it has entered into force with respect to that State.

3. Nothing in this Convention shall apply to proceedings arising out of, or judgments based on, acts, omissions or facts prior to the date on which the present Convention is opened for signature.

CHAPTER VI. FINAL PROVISIONS

Article 36

1. The present Convention shall be open to signature by the member States of the Council of Europe. It shall be subject to ratification or acceptance. Instruments of ratification or acceptance shall be deposited with the Secretary General of the Council of Europe.

2. The Convention shall enter into force three months after the date of the deposit of the third instrument of ratification or acceptance.

• 3. In respect of a signatory State ratifying or accepting subsequently, the Convention shall enter into force three months after the date of the deposit of its instrument of ratification or acceptance.

Article 37

1. After the entry into force of the present Convention, the Committee of Ministers of the Council of Europe may, by a decision taken by a unanimous vote of the members casting a vote, invite any non-member State to accede thereto.

2. Such accession shall be effected by depositing with the Secretary General of the Council of Europe an instrument of accession which shall take effect three months after the date of its deposit.

3. However, if a State having already acceded to the Convention notifies the Secretary General of the Council of Europe of its objection to the accession of another non-member State, before the entry into force of this accession, the Convention shall not apply to the relations between these two States.

Article 38

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or accession, specify the territory or territories to which the present Convention shall apply.

2. Any State may, when depositing its instrument of ratification, acceptance or accession or at any later date, by declaration addressed to the Secretary General of the Council of Europe, extend this Convention to any other territory or territories specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings.

3. Any declaration made in pursuance of the preceding paragraph may, in respect of any territory mentioned in such declaration, be withdrawn according to the procedure laid down in Article 40 of this Convention.

Article 39

No reservation is permitted to the present Convention.

Article 40

1. Any Contracting State may, in so far as it is concerned, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.

2. Such denunciation shall take effect six months after the date of receipt by the Secretary General of such notification. This Convention shall, however, continue to apply to proceedings introduced before the date on which the denunciation takes effect, and to judgments given in such proceedings.

Article 41

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe and any State which has acceded to this Convention of:

- (a) any signature;
- (b) any deposit of an instrument of ratification, acceptance or accession;
- (c) any date of entry into force of this Convention in accordance with Articles 36 and 37 thereof;
- (d) any notification received in pursuance of the provisions of paragraph 2 of Article 19;
- (e) any communication received in pursuance of the provisions of paragraph 4 of Article 21;
- (f) any notification received in pursuance of the provisions of paragraph 1 of Article 24;
- (g) the withdrawal of any notification made in pursuance of the provisions of paragraph 4 of Article 24;

(h) any notification received in pursuance of the provisions of paragraph 2 of Article 28;

(i) any notification received in pursuance of the provisions of paragraph 3 of Article 37;

(j) any declaration received in pursuance of the provisions of Article 38;

(k) any notification received in pursuance of the provisions of Article 40 and the date on which denunciation takes effect.

ANNEX

The grounds of jurisdiction referred to in paragraph 3, sub-paragraph (a), of Article 20, paragraph 2 of Article 24 and paragraph 3, sub-paragraph (b), of Article 25 are the following:

(a) the presence in the territory of the State of the forum of property belonging to the defendant, or the seizure by the plaintiff of property situated there, unless

the action is brought to assert proprietary or possessory rights in that property, or arises from another issue relating to such property; or

the property constitutes the security for a debt which is the subject-matter of the action;

(b) the nationality of the plaintiff;

(c) the domicile, habitual residence or ordinary residence of the plaintiff within the territory of the State of the forum unless the assumption of jurisdiction on such a ground is permitted by way of an exception made on account of the particular subject-matter of a class of contracts;

(d) the fact that the defendant carried on business within the territory of the State of the forum, unless the action arises from that business;

(e) a unilateral specification of the forum by the plaintiff, particularly in an invoice.

A legal person shall be considered to have its domicile or habitual residence where it has its seat, registered office or principal place of business.

ADDITIONAL PROTOCOL TO THE EUROPEAN CONVENTION ON STATE IMMUNITY

The member States of the Council of Europe, signatory to the present Protocol,

Having taken note of the European Convention on State Immunity—hereinafter referred to as “the Convention”—and in particular Articles 21 and 34 thereof;

Desiring to develop the work of harmonisation in the field covered by the Convention by the addition of provisions concerning a European procedure for the settlement of disputes,

Have agreed as follows:

PART I

Article 1

1. Where a judgment has been given against a State Party to the Convention and that State does not give effect thereto, the party which seeks to invoke the judgment shall be entitled to have determined the question whether effect should be given to the judgment in conformity with Article 20 or Article 25 of the Convention, by instituting proceedings before either:

(a) the competent court of that State in application of Article 21 of the Convention; or

(b) the European Tribunal constituted in conformity with the provisions of Part III of the present Protocol, provided that that State is a Party to the present Protocol and has not made the declaration referred to in Part IV thereof.

The choice between these two possibilities shall be final.

2. If the State intends to institute proceedings before its court in accordance with the provisions of paragraph 1 of Article 21 of the Convention it must give notice of its intention to do so to the party in whose favour the judgment has been given; the State may thereafter institute such proceedings before the European Tribunal. Once this period has elapsed, the party in whose favour the judgment has been given may no longer institute proceedings before the European Tribunal.

3. Save in so far as may be necessary for the application of Articles 20 and 25 of the Convention, the European Tribunal may not review the merits of the judgment.

PART II

Article 2

1. Any dispute which might arise between two or more States Parties to the present Protocol concerning the interpretation or application of the Convention shall be submitted, on the application of one of the parties to the dispute or by special agreement, to the European Tribunal constituted in conformity with the provisions of Part III of the present Protocol. The States Parties to the present Protocol undertake not to submit such a dispute to a different mode of settlement.

2. If the dispute concerns a question arising in proceedings instituted before a court of one State Party to the Convention against another State Party to the Convention, or a question arising in proceedings instituted before a court of a State Party to the Convention in accordance with Article 21 of the Convention, it may not be referred to the European Tribunal until the court has given a final decision in such proceedings.

3. Proceedings may not be instituted before the European Tribunal which relate to a dispute concerning a judgment which it has already determined or is required to determine by virtue of Part I of this Protocol.

Article 3

Nothing in the present Protocol shall be interpreted as preventing the European Tribunal from determining any dispute which might arise between two or more States Parties to the Convention concerning the interpretation or application thereof and which might be submitted to it by special agreement, even if these States, or any of them, are not Parties to the present Protocol.

PART III

Article 4

1. There shall be established a European Tribunal in matters of State Immunity to determine cases brought before it in conformity with the provisions of Parts I and II of the present Protocol.

2. The European Tribunal shall consist of the members of the European Court of Human Rights and, in respect of each non-member State of the Council of Europe which has acceded to the present Protocol, a person possessing the qualifications required of members of that Court designated, with the agreement of the Committee of Ministers of the Council of Europe, by the government of that State for a period of nine years.

3. The President of the European Tribunal shall be the President of the European Court of Human Rights.

Article 5

1. Where proceedings are instituted before the European Tribunal in accordance with the provisions of Part I of the present Protocol, the European Tribunal shall consist of a Chamber composed of seven members. There shall sit as *ex officio* members of the Chamber the member of the European Tribunal who is a national of the State against which the judgment has been given and the member of the European Tribunal who is a national of the State of the forum, or, should there be no such member in one or the other case, a person designated by the government of the State concerned to sit in the capacity of a member of the Chamber. The names of the other five members shall be chosen by lot by the President of the European Tribunal in the presence of the Registrar.

2. Where proceedings are instituted before the European Tribunal in accordance with the provisions of Part II of the present Protocol, the Chamber shall be constituted in the manner provided for in the preceding paragraph. However, there shall sit as *ex officio* members of the Chamber the members of the European Tribunal who are nationals of the States parties to the dispute or, should there be no such member, a person designated by the government of the State concerned to sit in the capacity of a member of the Chamber.

3. Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or of the present Protocol, the Chamber may, at any time, relinquish jurisdiction in favour of the European Tribunal meeting in plenary session. The relinquishment of jurisdiction shall be obligatory where the resolution of such question might have a result inconsistent with a judgment previously delivered by a Chamber or by the European Tribunal meeting in plenary session. The relinquishment of jurisdiction shall be final. Reasons need not be given for the decision to relinquish jurisdiction.

Article 6

1. The European Tribunal shall decide any disputes as to whether the Tribunal has jurisdiction.

2. The hearings of the European Tribunal shall be public unless the Tribunal in exceptional circumstances decides otherwise.

3. The judgments of the European Tribunal, taken by a majority of the members present, are to be delivered in public session. Reasons shall be given for the judgment of the European Tribunal. If the judgment does not represent in whole or in part the unanimous opinion of the European Tribunal, any member shall be entitled to deliver a separate opinion.

4. The judgments of the European Tribunal shall be final and binding upon the parties.

Article 7

1. The European Tribunal shall draw up its own rules and fix its own procedure.
2. The Registry of the European Tribunal shall be provided by the Registrar of the European Court of Human Rights.

Article 8

1. The operating costs of the European Tribunal shall be borne by the Council of Europe. States non-members of the Council of Europe having acceded to the present Protocol shall contribute thereto in a manner to be decided by the Committee of Ministers after agreement with these States.
2. The members of the European Tribunal shall receive for each day of duty a compensation to be determined by the Committee of Ministers.

PART IV

Article 9

1. Any State may, by notification addressed to the Secretary General of the Council of Europe at the moment of its signature of the present Protocol, or of the deposit of its instrument of ratification, acceptance or accession thereto, declare that it will only be bound by Parts II to V of the present Protocol.
2. Such a notification may be withdrawn at any time.

PART V

Article 10

1. The present Protocol shall be open to signature by the member States of the Council of Europe which have signed the Convention. It shall be subject to ratification or acceptance. Instruments of ratification or acceptance shall be deposited with the Secretary General of the Council of Europe.
2. The present Protocol shall enter into force three months after the date of the deposit of the fifth instrument of ratification or acceptance.
3. In respect of a signatory State ratifying or accepting subsequently, the Protocol shall enter into force three months after the date of the deposit of its instrument of ratification or acceptance.
4. A member State of the Council of Europe may not ratify or accept the present Protocol without having ratified or accepted the Convention.

Article 11

1. A State which has acceded to the Convention may accede to the present Protocol after the Protocol has entered into force.
2. Such accession shall be effected by depositing with the Secretary General of the Council of Europe an instrument of accession which shall take effect three months after the date of its deposit.

Article 12

No reservation is permitted to the present Protocol.

Article 13

1. Any Contracting State may, in so far as it is concerned, denounce the present Protocol by means of a notification addressed to the Secretary General of the Council of Europe.

2. Such denunciation shall take effect six months after the date of receipt by the Secretary General of such notification. The Protocol shall, however, continue to apply to proceedings introduced in conformity with the provisions of the Protocol before the date on which such denunciation takes effect.

3. Denunciation of the Convention shall automatically entail denunciation of the present Protocol.

Article 14

The Secretary General of the Council of Europe shall notify the member States of the Council and any State which has acceded to the Convention of:

- (a) any signature of the present Protocol;
- (b) any deposit of an instrument of ratification, acceptance or accession;
- (c) any date of entry into force of the present Protocol in accordance with Articles 10 and 11 thereof;
- (d) any notification received in pursuance of the provisions of Part IV and any withdrawal of any such notification;
- (e) any notification received in pursuance of the provisions of Article 13 and the date on which such denunciation takes effect.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Protocol.

Done at Basle, this 16th day of May 1972, in English and French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each of the signatory and acceding States.

RESOLUTION (72) 2 OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE
CONCERNING THE EUROPEAN CONVENTION ON STATE IMMUNITY ADOPTED AT THE
206TH MEETING OF THE MINISTERS' DEPUTIES ON 18 JANUARY 1972

The Committee of Ministers of the Council of Europe,

Having taken note of the text of the European Convention on State Immunity;

Considering that one of the aims of this Convention is to ensure compliance with judgments given against a State,

Recommends the governments of those member States which shall become Parties to this Convention to establish, for the purpose of Article 21 of the Convention, a procedure which shall be as expeditious and simple as possible.

8. International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels. (Signed at Brussels, April 10th, 1926, and Additional Protocol, signed at Brussels, May 24th, 1934)⁵¹

...

Article 2

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

Article 3

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

Nevertheless, claimants shall have the right of taking proceedings in the competent tribunals of the State owning or operating the vessel, without that State being permitted to avail itself of its immunity:

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

§ 2. The same rules shall apply to State-owned cargoes carried on board the vessels hereinabove mentioned.

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

Nevertheless, actions in respect of collision and accidents of navigation, assistance and salvage, and general average, and actions on a contract relating to such cargo may be brought before the tribunal having jurisdiction under Article 2.

Article 4

States may plead all measures of defense, prescription, and limitation of liability, which are available to private vessels and their owners.

If it becomes necessary to adopt or modify the provisions relative to such means of defence, prescription, and limitation so as to make them applicable to ships of war, or Government vessels coming within the terms of Article 3, a special convention shall be concluded to that effect. In the meantime, any necessary measures may be effected by national legislation in conformity with the spirit and principles of this Convention.

⁵¹ League of Nations, *Treaty Series*, vol. CLXXVI, p. 200.

Article 5

If in the case of Article 3 there is in the opinion of the tribunal a doubt as to the Governmental and non-commercial character of the vessel or cargo, a certificate signed by the diplomatic representative of the contracting State to which the vessel or cargo belongs, produced through the intercession of the State before whose courts and tribunals the case is pending, shall serve as evidence that the vessel or cargo comes within the terms of Article 3, but only for the purpose of securing a release from seizure, attachment, or detention, that may have been ordered by legal process.

Article 6

The provisions of this Convention shall be applied in each contracting State, with the reservation that its benefits may not be extended to non-contracting States and their nationals, and that its application may be conditioned on reciprocity.

On the other hand, nothing will prevent a contracting State from regulating by its own laws the rights accorded to its own nationals in its own courts.

Article 7

Each contracting State reserves the right to suspend the application of this Convention in time of war by a declaration notified to the other contracting States, in the sense that in that event neither the vessels owned or operated by it nor the cargoes belonging to it shall be subject to attachment, seizure, or detention by any foreign court of justice, but the claimant will have the right to bring his action before the court competent by virtue of Articles 2 and 3.

Article 8

Nothing in this Convention shall affect the rights of the contracting States to take any measures that the rights and duties of neutrality may demand.

Article 9

After an interval of not more than two years from the day on which the Convention is signed, the Belgian Government shall place itself in communication with the Governments of the High Contracting Parties which have declared themselves prepared to ratify the Convention, with a view to deciding whether it shall be put into force. The ratifications shall be deposited at Brussels at a date to be fixed by agreement among the said Governments. The first deposit of ratifications shall be recorded in a *procès-verbal* signed by the representatives of the Powers which take part therein and by the Belgian Minister for Foreign Affairs.

The subsequent deposits of ratifications shall be made by means of a written notification, addressed to the Belgian Government, and accompanied by the instrument of ratification.

A duly certified copy of the *procès-verbal* relating to the first deposit of ratifications, of the notifications referred to in the previous paragraph and also of the instruments of ratification accompanying them, shall be immediately sent by the Belgian Government through the diplomatic channel to the Powers who have signed this Convention or who have acceded to it. In the cases contemplated in the preceding paragraph the said Government shall inform them at the same time of the date on which it received the notification.

PROTOCOL

ADDITIONAL TO THE INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES CONCERNING THE IMMUNITY OF STATE-OWNED VESSELS, SIGNED AT BRUSSELS ON APRIL 10TH, 1926. SIGNED AT BRUSSELS ON MAY 24TH, 1934

I

Doubts having arisen as to whether and how far the words "operated by a State" in Article 3 of the Convention apply to, or might be interpreted as applying to, vessels chartered by a State either for a given period or by the voyage, the following declaration is made in order to dispel those doubts:

"Vessels chartered by States either for a given time or by the voyage, provided they are exclusively used on Governmental and non-commercial service, and the cargoes carried by such vessels, shall not be subject to seizure, attachment or detention of any kind, but this immunity shall not prejudicially affect any other rights or remedies open to the parties concerned. A certificate issued by the diplomatic representative of the State concerned, in the manner laid down in Article 5 of the Convention, shall also afford in this case proof of the nature of the service on which the vessel is employed."

II

As regards the exception provided for in Article 3, paragraph 1, it is understood that the ownership, or the operation of the vessel by the State, at the time of the measures of seizure, attachment or detention, is placed on the same footing as ownership or operation at the time when a cause of action arose.

Accordingly, this Article may be relied on by States in respect of vessels owned or operated by them at the time of seizure, attachment or detention if they are being used exclusively on Governmental and non-commercial service.

III

It is understood that nothing in the provisions of Article 5 of the Convention shall preclude the Governments concerned from appearing themselves, while complying with the procedure laid down by the national laws, before the court to which the dispute has been referred, and from there producing the certificate provided for in the said Article.

IV

As the Convention does not in any respect affect the rights or obligations of belligerents and neutrals, Article 7 shall in no way restrict the jurisdiction of duly constituted prize courts.

V

It is understood that nothing in the provisions of Article 2 of the Convention shall in any way limit or affect the application of national rules of procedure in cases in which the State is a party.

VI

When the question of the proofs or documents to be produced arises, if in the opinion of the Government concerned such proofs or documents cannot be produced without prejudicing national interests, the said Government may refrain from producing them on the ground of the protection of such national interests.

In faith whereof the undersigned, duly authorized by their Governments, have signed the present Additional Protocol, which shall be deemed to form an integral part of the Convention of April 10th, 1926, to which it refers.

9. International Convention on Civil Liability for Oil Pollution Damage, Signed on 29 November 1969⁵²

Article X

1. Any judgment given by a Court with jurisdiction in accordance with Article IX which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognized in any Contracting State, except:

- (a) where the judgment was obtained by fraud; or
- (b) where the defendant was not given reasonable notice and a fair opportunity to present his case.

2. A judgment recognized under paragraph 1 of this Article shall be enforceable in each Contracting State as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be reopened.

Article XI

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

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

10. Protocol on Arbitration Clauses (Signed at Geneva, on 24 September 1923)⁵³

Registered July 28, 1924, following its entry into force.

The undersigned, being duly authorised, declare that they accept, on behalf of the countries which they represent, the following provisions:

(1) Each of the Contracting States recognises the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.

⁵² *International Legal Materials*, vol. 9, p. 45.

⁵³ League of Nations, *Treaty Series*, vol. XXVII, p. 157.

Each Contracting State reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law. Any Contracting State which avails itself of this right will notify the Secretary-General of the League of Nations, in order that the other Contracting States may be so informed.

(2) The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.

The Contracting States agree to facilitate all steps in the procedure which require to be taken in their own territories, in accordance with the provisions of their law governing arbitral procedure applicable to existing differences.

(3) Each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles.

(4) The tribunals of the Contracting Parties, on being seized of a dispute regarding a contract made between persons to whom Article 1 applies and including an Arbitration Agreement whether referring to present or future differences which is valid in virtue of the said article and capable of being carried into effect, shall refer the parties on the application of either of them to the decision of the arbitrators.

Such reference shall not prejudice the competence of the judicial tribunals in case the agreement or the arbitration cannot proceed or becomes inoperative.

11. Treaty on International Commercial Navigation Law (Signed at Montevideo on 19 March 1940)⁵⁴

TITLE X. OF VESSELS BELONGING TO THE STATE

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

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

Article 36. In the actions or claims to which the preceding article refers, the owner- or outfitter-State cannot avail itself of its special immunities if the case comes under one of the following heads:

1. Actions arising from collisions or other accidents of navigation;

⁵⁴ *American Journal of International Law*, vol. 37 (Supp. 1943), p. 114.

2. Actions arising from services of assistance or salvage, or relating to general average;

3. Actions based upon repairs, supplies, or contracts on other matters relative to the vessel.

Article 37. The vessels to which Article 35 refers cannot in any case be the object of attachment, or of any other judicial proceeding, not authorized by the law of the owner- or outfitter-State.

Article 38. The same rules apply to freight belonging to a given State and transported in any of the vessels mentioned in Article 35.

Article 39. Freight which belongs to a given State, and which is transported on board commercial vessels in the performance of public services outside the field of commerce, cannot be the object of attachment or arrest or any judicial proceeding.

However, actions based on collision or other accidents of navigation, assistance, salvage, or general average, and likewise actions arising out of contracts relative to the freight, may be brought in conformity with Article 36.

Article 40. In every case of doubt as to the character of a public service unrelated to the commercial role of the vessel or its freight, the attestation of the State, signed by its diplomatic representative, shall constitute full proof for the purposes of release from attachment or arrest.

Article 41. The privilege of immunity from attachment cannot be invoked for acts performed during the employment of a vessel of the State in a public service outside the field of commerce, if at the time when the judicial proceeding is undertaken, the ownership of the vessel, or its operation, has been transferred to private third parties.

Article 42. Vessels of a State which are assigned to commercial service, and private vessels engaged in postal service, cannot be attached by their creditors at the ports of call where they are obliged to perform the services in question.

Part IV
DECISIONS OF DOMESTIC TRIBUNALS

Quatrième partie
JUGEMENTS DES TRIBUNAUX NATIONAUX

A. AUSTRALIA

*Grunfeld and Another v. United States of America and Others*¹

DECISION BY THE SUPREME COURT ON 26 APRIL 1968

Summary of the facts:

By an originating summons, the plaintiffs sought declarations that each of the three defendants, the United States of America, the United States Rest and Recuperation Office in Sydney, and the commanding officer of that Office, was a party to a valid and subsisting contract with them. They also sought injunctions restraining the defendants from purporting to terminate the contract. The alleged contract, signed by one of the plaintiffs and by the officer commanding the Rest and Recuperation Office, was for the provision by the plaintiffs of a civilian clothing hire service for members of the United States Forces temporarily visiting Sydney. The plaintiffs claimed to have spent a sum of money in acquiring clothing for the fulfilment of the contract. The defendants pleaded that the court had no jurisdiction by reason of the sovereign immunity claimed on their behalf.

Excerpts from the judgment:

The present summons seeks an order that the proceedings be stayed and the originating summons set aside. This application was made subsequent to a conditional appearance being filed on behalf of the three defendants, notifying the intention to apply for a stay of proceedings on the ground that the Court has no jurisdiction, first, by reason of the sovereign immunity claimed on behalf of the defendants, and second, by reason of there having been no effective service upon either the United States of America or the United States R. & R. Office.

Mr. Wright, who appears for the defendants, contends in the first instance that the defendant, United States of America, is a foreign sovereign state, and that as such it cannot be impleaded before the courts of this State against its will. As counsel appearing for the United States, he asserts that this foreign sovereign state does not assent to being impleaded before this Court.

It is clear on the authorities that a foreign sovereign cannot be made a party to litigation before courts in this country against his will. In *Rahimtoola v. Nizam of Hyderabad*, [1957] 3 All E.R. 441, at pp. 445–6; [1958] A.C. 379, at p. 393, Viscount Simonds said: “No doubt, if a defendant, by whatever name he is called, can be identified with the sovereign State, his task is easy; he need prove no more in order to stay the action against him.” In the present case the first defendant is itself a sovereign state, and in my view nothing more is necessary to entitle the United

¹ Reproduced from *International Law Reports*, vol. 52, p. 332. It is originally reported in *New South Wales Reports*, vol. 3 (1968), p. 36. Decisions of domestic tribunals from *International Law Reports* are reproduced in this Part with the kind permission of the Editor of *International Law Reports*.

States of America to a stay of proceedings and the setting aside of the summons against it than for it to appear, as it does by its counsel, and claim its immunity.

So far as concerns the second and third defendants, it is necessary to have regard to their particular status and to the nature of the proceedings in order to determine whether or not, as regards them, the claim to sovereign immunity is substantiated. It is well settled that an entitlement to sovereign immunity is not limited to the foreign sovereign himself. The passage I have already read from the judgment of Viscount Simonds in the *Nizam of Hyerabad Case* continues: "But as soon as it is proved that quoad the subject of the action the defendant is the agent of a sovereign State, that, in other words, the interests or property of the State are to be the subject of adjudication, the same result is reached." The reference to "the same result" is to a stay of the action.

In the present case the allegations made on behalf of the plaintiffs are that the United States R. & R. Office and a person describing himself as a Major and Officer-in-Charge of that office entered into an agreement with the plaintiffs binding the plaintiffs to make available for hire clothing such as might be required by members of the United States forces coming to Sydney on rest and recuperation. The obtaining of such an agreement appears to me to fall clearly within the type of function which will be regarded as being done on behalf of a foreign sovereign. There is evidence to which I have already referred establishing that the United States R. & R. Office is a detachment of the United States forces stationed in Sydney, and that its commanding officer is Major Boyd. It is clear beyond all argument that Major Boyd did not contract in a personal capacity when he signed the Memorandum of Understanding. And it is, to my mind, equally clear that both he and the entity, whatever may be its juristic nature, known as the United States R. & R. Office, were acting as agents of the United States of America in a sense which is relevant to attract the operation of the well-settled principles.

Mr. Mahoney, Q.C., who appears for the plaintiffs, has referred me to the decision of the High Court in *Chow Hung Ching v. R.* (1948), 77 C.L.R. 449, and to the decision of the Supreme Court of New South Wales in *Wright v. Cantrell* (1943), 44 S.R. (N.S.W.) 45. Both of these authorities deal with a situation in which the defendant claimed immunity merely by reason of his happening to be either an employee of a foreign sovereign state or a member of the disciplined forces of a foreign state.

In *Chow Hung Ching's Case* the defendants were labourers who had been sent by the Republic of China to the Island of Manus, along with some 300 other Chinese Nationals, to remove property which had been acquired by the Republic of China. It was held that the two defendants in *Chow Hung Ching's Case* were not immune from the criminal laws of the Territory of Papua and New Guinea, they having claimed immunity merely by reason of their happening to be members of this contingent sent to Manus by the Republic of China.

In *Wright v. Cantrell* immunity was claimed in respect of what was said to be a defamatory statement made by an employee of the United States Army, in which he criticized another member of the United States Forces. It was held that the defamatory statement was not made in such circumstances as to entitle the defendant to the sovereign immunity which he invoked. These cases are both, in my view, clearly distinguishable from the present case.

The facts before me are to the effect that a contract was made for the purposes

of the United States meeting what was foreseen by its local representatives to be the requirements of members of its services who would be visiting Sydney. Major Boyd, as I have said, did not act in a personal capacity, and it is clear that what was done through or in the name of the United States R. & R. Office was done for the purposes of the foreign state itself.

I am accordingly of opinion that the challenge made by Mr. Wright succeeds. There is no necessity to examine the further challenge by Mr. Wright that there has been no effective service upon the United States R. & R. Office.

I have not, in the circumstances of this application, directed any attention whatever to the merits of the case. Whether or not the plaintiffs are justified in the assertions made in Mr. G. T. Grunfeld's affidavit is a matter which has not been investigated.

The order that I make is that all proceedings in the suit be stayed, and that the originating summons be set aside; the respondent plaintiffs must pay the costs of the applicants.

B. AUSTRIA

1. DECISION BY THE SUPREME COURT ON 10 MAY 1950 *X v. the Government of Czechoslovakia*²

The judgement:

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

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

The question whether a foreign State can be sued in domestic courts has not been answered in a uniform manner in Austrian judgements. The older practice of all countries was to exempt foreign States from municipal jurisdiction, the exceptions being at the most actions *in rem* and voluntary submission to the jurisdiction. This was also the attitude of the Austrian courts until the turn of the century, as exemplified by GIU 2694, 2698, 6549, 6771, 7559, 11709, GIUNF 1804. The first departure from this principle appeared in the judgement of 17 December 1907 (Röll, *Eisenbahnrechtliche Entscheidungen*, XXI (1907), No. 122). In its statement of grounds, this judgement held that "The State as entrepreneur is a juridical person within the realm of private law and can therefore, in the same way as other physical or juridical persons, be sued in the ordinary courts in matters concerning private law wherever the law makes no exception in this respect. This unquestionably applies to the home State, but there is no reason to depart from this principle in the case of a foreign State. This does not constitute an infringement of territorial sovereignty any more than does the act of suing a foreign national in a municipal court whenever the competence of the court can be in any way justified under the rules of jurisdiction."

For the next 20 years, the courts adhered to the principles expressed in this fundamental judgement. Thus, in the judgement of 5 February 1918, GZ 1918, p. 111,

² Sz 23/143, *Supruchreportorium Wo.* 28 Neu. [Translated by the Secretariat.]

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

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

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

A further judgement was rendered on 5 January 1920 (*SZ*, II/1). In this case, the Ottoman State was sued for payment for certain building work at the Embassy in Vienna which the Ottoman Ambassador in Vienna had ordered but not paid for. The Supreme Court decided in favour of Austrian jurisdiction on the following grounds: "The view that the concept of sovereignty of a State includes the absolute freedom of that State from the jurisdiction of every foreign court is not correct. It is true that in matters concerning the sovereignty of the foreign State, which serves as the basis for the application of the rules of international law, municipal jurisdiction cannot be assumed. Where, on the other hand, the foreign State conducts itself as the holder of ordinary private rights and enters into contracts to be performed within the territory of the other State, it enters the confines of the legal system of that State and cannot

therefore remain entirely independent of it; in such cases, the foreign State, too, must be subject to the jurisdiction of the State in whose territory the business enterprise is domiciled. In the case under review, we are concerned with a claim under private law which does not concern the sovereignty of the defendant State in any way. The reference to principles applicable to the extraterritoriality of ambassadors is out of place because the object of extraterritoriality is to exclude everything that might hinder the ambassador in carrying out his mission; this latter consideration is not in question here." The Supreme Court referred, in addition, to the relevant justification offered for the judgement of the Court of Appeal, which had essentially repeated the grounds for the judgement of 5 February 1918.

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

The judgement of 11 September 1928 (*SZ*, X/177) does not answer the question of whether a foreign State can ever be subject to domestic jurisdiction irrespective of whether it became involved in litigation in exercise of its national sovereign rights or as a party to a private law transaction. In all cases, however—with the exception of those involving jurisdiction over immovable property—the judgement demanded explicit submission, since State sovereignty, which was indivisible, would otherwise be infringed. It therefore denied the admissibility of a suit against the Czechoslovak State for damages incurred through an accident in the Legation building. "The foreign State's ownership of this building renders that State subject to Austrian jurisdiction only in so far as the lawsuit relates to the immovable property itself or to binding agreements concluded in relation thereto. Such claims for damages—in which it cannot be said, as in the other cases mentioned, that the foreign State has entered the confines of the domestic legal system and thus submitted thereto in advance—cannot be subject to domestic jurisdiction."

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

This judgement is not incompatible with the judgement of 22 May 1928 (*Rspr*, 1928, No. 381) concerning the appointment of a priority trustee against the Bulgarian National Bank, since, although all the latter's shares were owned by the Bulgar-

ian State, the Bank constituted a special juridical person and the case related to the dismissal of an exceptional appeal under article 16 of the Act on Non-Contentious Proceedings in which the Supreme Court stated that the question of whether a foreign State could be subject to domestic jurisdiction in matters of private law was controversial from the standpoint of legal doctrine.

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

The only judgement rendered since 1945 shares this view. This judgement (of 17 September 1947; 1 Ob 621/47, *JB1*, 1947, p. 491) dismissed a claim for damages against the German State Railways under the State Liability Act on the ground that there was no jurisdiction. The German State Railways were said to be the property of the German Reich, and municipal courts were not entitled to assume jurisdiction over foreign States. This was said to be acknowledged in doctrine and practice. The judgement did not make reference to the decisions previously referred to which expressed the opposite view. Summing up, therefore, it cannot be said that there is as yet any uniformity of case law in so far as concerns the extent to which foreign States are subject to Austrian jurisdiction. In view of the fact that we are here concerned with a question of international law, we must examine the practice of the courts of civilized countries and find out whether from that practice we can deduce a uniform view; this is the only way to ascertain whether there still exists a principle of international law to the effect that foreign States, even in so far as concerns claims belonging to the realm of private law, cannot be sued in domestic courts. The first court to enunciate the principle that in matters belonging purely to the realm of private law foreign States cannot claim immunity was the—at the time still independent—Court of Cassation of Naples in a judgement of 27 March 1886 (*Giurisprudenza Italiana*, 1886, I, 1, 228). A few months later, the Court of Cassation of Florence (in a judgement of 16 July 1886; *Giurisprudenza Italiana*, 1886, I, 1, 486) followed this decision. The Court of Cassation of Rome did likewise on 1 July and 12 October 1893 (*Giurisprudenza Italiana*, 1893, I, 1, 1213). The case was concerned with the following facts: On 17 May 1866, the Austrian Government made an agreement with a certain firm by the name of Fisola by which the latter undertook to build fortifications along the Venetian border. When Venetia had ceased to be part of Austria, the Austrian State refused to pay for the work. The Court of Cassation of Rome decided in favour of municipal jurisdiction, mainly on the ground that a distinction had to be made between a case in which a Government acted in its capacity of *ente politico* and one in which it acted in its capacity of *ente civile*. In the former case, its acts could not be subject to adjudication by foreign courts, while in the latter case the Government acted in the capacity of a legal personality of private law and was subject to the rules of private law and therefore also to municipal jurisdiction. The case under consideration involved an agreement between the Austrian Government and Fisola which was purely within the realm of private law. In the judgement of 25 May 1896 (*Giurisprudenza Italiana*, 1896, I, 1, 664), the—at the time still independent—Court of Cassation of Florence took the same view. The Italian courts have since adhered to this legal view (in recent times, the plenary judgements of 12 June 1925 (Corte di Cassazione, 1925, No. 1456) and 11 February/13 March 1926 (Corte, 1926, No. 1661); further, the judgement of 3 August 1935 (*Giurisprudenza Italiana*, 1935, I, 1, 109), etc.).

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

The recent practice of the Swiss courts has moved in the same direction. The judgement of the Federal Court of 13 March 1918 (*BG*, E44, 1, 54) affirmed, on the application of the holder of an issue of an Austrian Government loan, a distraint order against the Austrian Ministry of Finance; broadly speaking, the reasons given were as follows: "The principle of extraterritoriality and of the exemption of a foreign State from the jurisdiction of the municipal courts cannot by any means be recognized as generally and unconditionally applicable. It is quite true that there is a widely acknowledged doctrine which infers from the sovereignty and mutual independence of States as recognized by international law that a State is immune from foreign jurisdiction not only in relation to acts in the exercise of its sovereign power (*jure imperii*) but also, generally speaking, in so far as concerns its capacity as a party to private legal relations (*jure gestionis*). This practice is followed more particularly by German, Austrian,"—the judgement of 17 December 1907 obviously escaped the notice of the Federal Court, and the judgement of 5 February 1918 was first published in the second issue of the *Allgemeine Österreichische Gerichtszeitung* of 30 March 1918, which appeared subsequent to the Swiss judgement of 13 March 1918—"French, British and American courts. It must, however, be contrasted, since 1886 and 1903 respectively, with the practice of the Italian and Belgian courts according to which a foreign State can in general be sued in the municipal courts, like a private individual, when acting in the capacity of a party to private legal relations (cf. van Praag, *Jurisdiction et droit international public*, p. 406 *et seq.*, and the

grounds stated for the judgement of the Brussels Court of Cassation, which was fundamental for Belgium, in Neumeyer's *Zeitschrift für Internationales Privat- und öffentliches Recht*, XVI (1906), p. 243 *et seq.*). Likewise, the prevailing opinions in their countries are opposed, for example, in France by André Weiss, *Droit international privé*, V. pp. 96-115, and in Germany by Friedrich Stein, *Zivilprozessordnung*, 10th ed., p. 16—now Jonas-Pohle; 16th ed., V, A3 preceding article 1. Moreover, this opinion itself admits exceptions in cases such as those in which the foreign State explicitly or implicitly acknowledges domestic jurisdiction (cf. v. Bar, *Theorie und Praxis des internationalen Privatrechts*, II, p. 660 *et seq.*; A. Weiss, *op. cit.*, p. 109). Accordingly, the draft prepared by the Institut de droit international at its meeting in Hamburg in 1891 also made allowance for international regulation of the competence of courts with regard to foreign States and heads of State (art. II, para. 1 (5): 'actions based on contracts concluded by the foreign State in the territory if their full execution in that territory may be required under the terms of an explicit clause or in accordance with the nature of the action itself' (*Annuaire de l'Institut*, XI, p. 437; A. Weiss, *op. cit.*, p. 115, foot-note). Having regard to the legal position as here set out, the competence of the Swiss courts must be unreservedly recognized in the present case. The legal relationship between the Austrian State and the bondholders which results from the issue of the Treasury bonds concerned falls within the realm of private law. The State directly issued these bonds in Switzerland and expressly undertook also to redeem the bonds concerned ('stamped in Switzerland')—to which those submitted by the defendant at the appeal hearing belonged—in Swiss currency in Switzerland. With regard to such bonds, provision has in fact been made for the entire business to be transacted in Switzerland and, hence, for optional Swiss or Austrian jurisdiction in proceedings against the State, including relevant security measures such as distraint orders.'

These principles were repeated in the Federal Court judgement of 28 March 1930 in the case of the Hellenic Republic v. Zurich Higher Court (*BG*, E 56, 1, 247 *et seq.*). A number of bondholders had obtained a distraint order against the Hellenic Republic as assignee of a bonded debt of the Société de Chemin de Fer Ottoman Salonique-Monastir. The Federal Court acknowledged the admissibility of the legal proceedings but revoked the distraint on the ground of lack of local competence.

The reasons stated included the following: "The judgement in the Dreyfuss case (*BG*, E 44, 1, 54) holding that the exemption of foreign States from domestic jurisdiction is generally acknowledged in contested claims arising out of an act performed by a foreign State in exercise of its sovereign power (*jure imperii*), but that, on the other hand, this unanimity in no way extends to cases involving private legal relations entered into by a foreign State, has even today lost none of its validity. Since then, it is not merely the Belgian and Italian courts which have adhered to their above-mentioned practice—in Italy alone in the years 1924-1926 in four judgements, two of them by the Court of Cassation, the highest court in the Kingdom (cf. the quotations in Spruth, *Gerichtsbareit über fremde Staaten*, pp. 47, 42, and, again in Italy, Siotto-Pintór in *J.W.*, 1926, 2407). In a judgement of 5 January 1920, the Austrian Supreme Court also took the same stand, and, in two further judgements which unquestionably involved sovereign acts of foreign Governments, it at least referred to this distinction (Spruth, *op. cit.*, p. 33, with quotations). Even in France, where, as in Germany, England and the United States, the courts have until now been strictest in upholding the principle of absolute exemption except in specific, narrowly defined cases, the prevalent practice has begun to waver, although,

since it is for the most part only judgements of lower courts that are involved, it cannot be said that the previously held view has been abandoned (Spruth, *op. cit.*, pp. 41 and 42, 44-46; Secretain in the *Journal des Tribunaux*, 1925, p. 258 *et seq.*, especially 262-264; see also the judgement of 10 December 1921 of the German National Court (RGZ, 103, 274 *et seq.*), which obviously sought to leave open the possibility of a later change in court attitudes). The development of judicial practice has been paralleled by that of the literature on international law, in which the number of writers holding the view of the Belgian and Italian courts is also manifestly increasing (see the evidence in Spruth, *op. cit.*, pp. 21-69; de Visscher in the *Revue de droit international et de législation comparée*, 1922, p. 300 *et seq.*; Siotto-Pintór, *op. cit.*) However, the Swiss Federal Court places a fundamental restriction (p. 249 *et seq.*) on the admissibility of suits against foreign States in respect of so-called *acta gestionis*. Even Italian practice, which goes furthest in recognizing domestic jurisdiction over foreign States, does not find it sufficient that the contentious claim should derive from a legal relationship belonging to the realm of private law (justified by the foreign State *jure gestionis* rather than *jure imperii*). All of the above-mentioned recent judgements, in which the Italian courts took domestic jurisdiction for granted, referred rather to circumstances which went beyond that requirement and involved legal relations which had been established or entered into or were intended to be maintained by the foreign State in Italy, so that, by virtue of its origin and substance, the legal relationship giving rise to the proceedings was connected to Italy in such a manner as to make it appear subject to the latter's legal system.

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

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

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

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

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

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

"Since, however, the Mixed Tribunals (like the Italian and Belgian courts) are consistent in affirming that immunity relates only to sovereign acts and not to administrative acts in which the foreign State conducts itself in accordance with the principles of private law (9 May 1912, *Bull.*, 24, 330; 24 November 1920, *Bull.*,

30, 25; Tribunal of Alexandria, *Gaz.*, XVI, 123, No. 125; Tribunal of Cairo, 14 February 1927, *Gaz.*, XVII, 104, No. 151 . . .”.

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

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

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

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

The Ilfov Commercial Court (name of the Bucharest commercial court) also

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

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

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

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

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

This survey shows that today it can no longer be said that judicial practice generally recognizes the principle of exemption of foreign States in so far as concerns claims of a private character, because the majority of courts of different civilized countries deny the immunity of a foreign State in such cases, and more particularly because exceptions are made even in those countries which today still adhere to the traditional principle that no State is entitled to exercise jurisdiction over another State; by way of example we may refer to a judgement of the Supreme Court of Tennessee (see *Harvard Research* 584) which in 1923 assumed jurisdiction over land owned by the State of Georgia which that State had acquired for the purpose of building a railway. Thus, American courts, too, admit of exceptions to the classic doctrine of immunity at least in those cases which concern the exercise of jurisdiction over immovables (in the case under review, the question arose whether railway land owned by a foreign State could be expropriated for the purpose of widening a road).

The resolution adopted by the Imperial Economic Conference of the British Empire in 1923 is proof that this movement has also made headway elsewhere in the Anglo-Saxon countries; the resolution stated expressly that a Dominion engaged in

trade in another Dominion is not, for that reason, entitled to claim freedom from taxation (*Harvard Research*, 608: "shall not in its character as such be treated as entitled to any sovereign immunity from taxation either directly or through the claims of superiority to the jurisdiction of municipal courts").

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

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

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

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

Similarly, the various draft agreements of international associations contain proposals pointing in the same direction. The relevant proposal of the Institute de Droit International of 1891 was referred to in the above-mentioned judgement of the Swiss Federal Court (vol. 56, 1, 247).

The thirty-fourth Conference of the International Law Association in Vienna in 1926 again discussed the question, without adopting any definitive resolution. The same applies to the subcommittee of the League of Nations which confined itself to publishing a report on the *status causae* on 11 October 1926.

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

"A State may be made a respondent in a proceeding in a court of another State, when in the territory of such other State it engages in an industrial, commercial, financial or other business enterprise in which private persons may there engage, or does an act there in connection with such an enterprise wherever conducted, and the proceeding is based upon the conduct of such enterprise or upon such act.

"The foregoing provision shall not be construed to allow a State to be made a respondent in a proceeding relating to its public debt."

The authors of the draft refer in particular to the jurisprudence of Italy, Belgium and the Egyptian Mixed Tribunals and state that even if the distinction between *acta jure gestionis* and *acta jure imperii* has not been generally recognized, it is time to lay down such a distinction in an international codification (*Harvard Research*, 606). It is also worth mentioning that the introduction (p. 473) refers to a remark made by

Chief Justice Marshall, the author of the judgement given in 1812 which is still a leading decision in the United States, who said in that judgement that a head of State who descends into the marketplace must be treated like any private trader.

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

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

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

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

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

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

Accordingly, there clearly is no *communis opinio doctorum*.

The Supreme Court therefore reaches the conclusion that it can no longer be

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

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

The question of which persons enjoy extraterritoriality in this country is not dealt with at all in article IX of the Introductory Act, since this provision only refers to the principles of international law (para. 2). Article IX states only that even subjects of law who are in general exempt from Austrian jurisdiction may in any event be sued in this country in actions *in rem* and cases involving voluntary submission. Hence, if a principle of international law regarding the exemption of foreign States in matters of private law is found not to exist, a foreign State must, under what is then the only applicable law, be placed on the same footing as any other foreigner, since domestic Austrian law also contains no restrictions that go beyond international law.

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

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

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

The plaintiff's capacity to sue must be regarded as having been validated, since the lower courts have concurred in finding that it has been satisfactorily shown that the plaintiff is the general representative and licensee of the firm of Georg D. and that he has for years made use of the trade marks registered in the name of the Ham-

burg firm. However, the predominant practice of the Supreme Court (judgement of 22 December 1926, *Rspr.*, 1929, No. 79; 16 May 1935, *SZ*, XVII/87; an opposing view taken only in the judgement of 3 July 1929, *GRUR*, 34, 1213) has the effect of going beyond the text of the law and, in addition, granting the licensee a right to sue under article 9 of the Unfair Competition Act. The Supreme Court does not feel that there is any reason for it to alter this position, since it is in large measure a response to practical needs. Furthermore, the appellant's right to institute his action cannot be denied on the ground that the trade mark rights whose protection is sought are held by a German national. The institution of proceedings by the Austrian licensee of a German firm could only be regarded as intended for purposes of evasion and therefore as inadmissible if, under Austrian law, German owners of trade marks could not be given the right to sue. Since, however, German nationals are not prohibited by any Austrian law from asserting trade mark rights held by them prior to 1945, the plaintiff's right to appeal cannot be denied on these grounds, either.

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

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

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

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

From the standpoint of *internal* Czechoslovak law, therefore, there can be no doubt that the confiscation of the branch office at Bodenbach of the German firm of Georg Dralle is valid in law. Whether or not this confiscation can also be regarded as permissible under *international law* is immaterial in so far as concerns its internal validity. In international law the question is controversial (see Starke, *Introduction*, p. 267). For example, Verdross (*Völkerrecht*, p. 304) states that belligerent Powers are not entitled to liquidate enemy property situated in their territory. Georgio Balla-

dore Pallieri, *La guerra* (1935, p. 369) and the authorities there referred to take the opposite view; in the latter sense also the judgement of 8 December 1947 of the Supreme Court of the United States in *Silesian-American Corporation v. Clark* (68 Sup. Ct. 179). The [Austrian] Supreme Court would, at this stage of the proceedings, be called upon to consider this problem only if it reached the conclusion that war measures permissible under international law are also to be regarded as valid by non-belligerent States in their own territories. This, however, as appears from the prevailing practice and doctrine of international law, is not the case.

Thus, the Tribunal of Monaco, in a judgement of 24 May 1917 (*Clunet*, 1917, 1508), held that the plea of a debtor that a law enacted in his home State and prohibiting the making of payments to nationals of an enemy State was unavailing, the prohibition not being binding outside the territory of the home State; similarly a judgement of one of the Netherlands courts of appeal (*Clunet*, 1917, 236); *contra*: a judgement of first instance of the District Court of Rotterdam which allowed the prohibition to be treated as *force majeure* (see Solère, "Condition des biens ennemis", in *Répertoire de droit international*, IV, p. 465).

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

The Swiss courts have repeatedly had occasion to deal with the effect of war measures enacted by foreign States. The judgement of 17 December 1914 of the Federal Court (BGE 40/1, 486; *Revue*, 1917, 351) refused to consider them on grounds similar to those given by the Court of New Jersey, stating that it could not be the duty of the Federal Court to ensure the operation of an extraordinary war measure taken by a foreign State; similarly, a judgement of 17 April 1916 (BGE II, 813; *Revue*, 1917, 348) said that the judge of a neutral State could not be expected to apply foreign enactments which were designed to combat an enemy State in the economic or other fields. The judgement of 19 April 1918 (BGE 44 II, 170) repeated that the Federal Court had always adhered to the principle that the war measures of belligerent Powers could not be recognized by the Swiss courts.

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

In a judgement of 25 September 1944 (reported by Seidl-Hohenveldern, *Osterreichische Juristenzeitung*, 1949, 535, note 28), the Swedish Supreme Court refused to recognize the confiscation by the British Custodian of Enemy Property of a British

company 99 per cent of whose shares were in the hands of German shareholders; it ordered the assets standing to the credit of the company in Sweden to be paid to the German shareholders.

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

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

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

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

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

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

The question of whether a trade mark registered domestically in the name of a foreign enterprise is to be treated as identical with the marks of the home State, i.e.

whether the principle of the uniformity of trade marks is to be recognized in Austria, is governed by national Austrian law. It is not a question of general international law but of private international law. Austrian conflict law therefore resolves the issue of how trade mark law is to be applied to a foreign enterprise.

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

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

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

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

For all these reasons, the Supreme Court rejects the principle of the uniformity of trade mark rights and of their localization in the country of origin. Transfer meas-

ures in the home State which are not recognized domestically, such as war measures and the like, therefore cannot have the effect, in relation to marks owned by the enterprise, of causing the enforced transfer of the home State mark to be regarded as valid domestically in relation to a foreign mark.

The same view has been taken in international judicial practice.

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

Any extraterritorial effect of confiscations in relation to trade mark rights was also denied in the judgements rendered during the early 1900s in many different countries in the matter of the "Chartreuse" mark. Pursuant to an Act of 1 July 1901, the Carthusian Order in France was dissolved and its property confiscated; the property in question included the cloister "La Grande Chartreuse", where the monks manufactured a liquer with the brand name "Chartreuse". The purchaser of the manufacturing facilities and the liquidator of the cloister property thereupon became involved in a series of lawsuits with the trustee for the Carthusians, in whose name the marks were registered. In almost all the countries concerned, the lawsuits ended in judgements favourable to the Carthusians, since the confiscation of the Order's property by the French State was not deemed to have any extraterritorial effect. Reference may be made to the explanations of grounds (which do, to be sure, differ in points of detail) offered by, among others, the Swiss Federal Court in the judgement of 13 February 1906 of its Penal Chamber (*Clunet*, 1907, 213), the Brazilian Federal Court in its judgement of 10 May 1907 (*Clunet*, 1907, 1171), the Netherlands Court of Cassation in its judgement of 5 March 1908 (*Revue*, 1908, 843), the German National Court in its judgement of 29 May 1908 (*RGZ*, 69, 1), the House of Lords in its judgement of 18 March 1910 (*Revue*, 1910, 914) and the Brussels Court of Appeals in its judgement of 20 May 1910 (*Revue*, 1911, 732). Most recently, a similar view was taken in the Knäckebröt judgement of 19 July 1948 of the Hamburg Higher Land Court (*Monatsschrift für deutsches Recht*, 1948, 283), which held that the expropriation of trade mark rights had no effect outside the Occupation Zone. The extensive literature dealing with the Chartreuse judgements has also for the most part given expression to this view, e.g. A. Weiss (*Revue*, 1907, 425); Kohler, "Chartreuse and the French Government" (*Archiv für bürgerliches Recht*, 18, 207, and *Revue*, 1907, 440), and Pillet, "The Carthusian trade mark and the claims of the liquidator in foreign courts" (*Revue*, 1907, 525). Most recently, Benkard, "The separation of industrial patent and trade mark rights" (*Deutsche Rechtszeitschrift*, 1949, 320), comments on the Knäckebröt judgement (calling attention to the latest German literature in note 2). Opposing views are found only in the expert opinions rendered in favour of the liquidator of the Chartreuse enterprises by Lyon-Caen (*Revue*, 1907, 435) and Millerand (*Revue*, 1907, 444) and in Nussbaum, *Deutsches internationales Privatrecht*, 208, note 1. That the confiscation of trade mark rights has no extraterritorial effect has thus remained an unchallenged principle in judicial practice in the period since the Chartreuse trials; for example, the judgement of 24 October 1921 of the German-French Mixed Arbitral Tribunal (*Recueil des décisions des TAM*, I, p.

503) observes: "The Carthusians had their property expropriated without compensation and pursuant to an internal police-power law whose effects foreign States have not seen fit to recognize . . ."

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

"Having regard to the fact that this notion is clearly contrary to the ideas underlying both the sequestration measures taken during the war by the Allied and Associated Powers and the contractual provisions of the Treaty of Versailles which gave approval to these measures and supplemented them by authorizing the liquidation of the sequestrated German property for the benefit of the said Powers, that the aim in view was (annex to article 197, sections 3 and 4) to seize German property wherever it was situated and to hold it as security for the payments levied against Germany, that this aim would be only partly achieved if trade marks registered by a German firm established in France could not be sequestrated and liquidated either in France, because they were situated abroad, or in foreign countries, because they were inseparable from the business assets, of which only France could dispose, that that would result in the disappearance, for the benefit of no one, of things of economic value which it was essential to use in the manner provided for in the Treaty . . ."; a similar view is taken by the judgement of 31 January 1925 of the German-French Mixed Arbitral Tribunal (*Recueil*, V, 144) in the matter of the "Parfums d'Orsay" trade marks.

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

Accordingly, if the Supreme Court rejects the uniformity theory and finds that the liquidation undertaken in Czechoslovakia has no effect in relation to the Austrian marks, its ruling is consistent with the currently prevailing doctrine and practice of all civilized nations with regard to the extraterritorial effect of the confiscation of trade mark rights.

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

International registration of a trade mark does not provide the basis for a uni-

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

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

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

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

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

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

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

2. DECISION BY THE SUPREME COURT ON 10 FEBRUARY 1961
*X v. the Government of the United States*³

The judgement:

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

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

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

The appeal by the defendant was dismissed.

The defendant contested the view of the Court of Appeal that the claim was admissible since it did not involve an act of sovereign authority but rather a private act through which damage had been caused to the plaintiff. The defendant contended that the fact that the damage had been caused by one of its vehicles was irrelevant. All means used by a State in exercise of its sovereign rights constituted sovereign acts on the part of the State. This applied to the vehicle pool and to the weapons of the army, etc. The purchase, but not the use, of weapons was regarded as an act pertaining to the realm of private law. The criterion was not the question of the ownership and possession of the vehicle but the act which constituted the subject-matter of the claim. However, this act belonged to the realm of sovereign rights. The collection of mail for the air attaché had nothing to do with the activity of the State in its private capacity.

This view cannot be upheld.

The Supreme Court, under Precedent No. 28 (new), SZ, XXIII, 143, dealt with the question of whether, and subject to what conditions, a foreign State may be sued

³ Juristische Blaetter, Jahrgang 84, Heft 1/2, p. 43 ff. [Translated by the Secretariat.]

in an Austrian court. In the judgement in question, the Court reviewed all relevant Austrian and foreign practice and doctrine.

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

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

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

The Supreme Court has also considered the views of writers on this question because the *communis opinio doctorum* must also be regarded as a source of international law. The Court reached the conclusion that among writers there is no uniform opinion one way or the other. In so far as concerns the judicial practice of individual countries and the different views expressed by writers, we can, in order to avoid repetition, refer to what has been said in the judgement referred to above.

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

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

In its appeal, the defendant contends that the means whereby a State exercises its sovereign rights are irrelevant because all means at its disposal belong to the sphere of private law and that the decisive factor is the act performed by the State with the aid of those means. It is contended that in this case the motorcar was the

means whereby the sovereign act (the collection of mail for the Embassy) was carried out and that the case must be judged in accordance with this act.

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

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

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

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

These examples show the soundness of the view that, in determining whether an

action may be brought, it is the act from which the claim is derived that is decisive and not the purpose of the act.

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

If we apply the basic principles here outlined to the case before us, we must conclude that the act from which the plaintiff derives his claim for damages against the defendant is not the collection of mail but the operation of a motorcar by the defendant and the latter's action as a road user. By operating a motorcar and using the public roads, the defendant moves in spheres in which private individuals also move. In these spheres, the parties face one another on a basis of equality, and there can be no question here of any supremacy and subordination. It follows that in so far as liability for damage is concerned, the foreign State must be treated like a private individual. The damage alleged by the plaintiff could not, under these circumstances, have been caused by the collection of mail from the airport but only by the operation of the motorcar and the use of public roads by the defendant. The plaintiff thus derives his claim from a private legal relationship. The development of traffic on public roads and the dangers to every road user from such traffic compel us to accept this view. To deny the liability of a foreign State arising from the operation of motor vehicles on the public roads would lead to intolerable results and hardships for private citizens. This is best illustrated by the present case, assuming always that the plaintiff's allegations are true, which will emerge when the case is heard on the merits. Spruth (*op. cit.*, p. 77) has made certain observations which are apposite in the present case. There is no doubt that the foreign State, in the event of a collision involving a motor vehicle owned by it, would be entitled to bring an action for damages against a private individual in the local courts and in accordance with local law. The foreign State is thus given rights to invoke the jurisdiction of the courts of another State, and it could do so as it pleases and for its own benefit. Not so the private individual. The latter would have no rights whatever against the foreign State if, depending on the purpose of the journey, the operation of motor vehicles and the use of public roads by foreign States were to be regarded as a sovereign act. It could be argued that the claims, however well-founded, of a private individual in respect of damage caused by a collision could not be pursued against the foreign State by a separate action (cf. Parliamentary bill, explanatory note on the Introductory Act on the Jurisdiction Norm, *Materialien I*, p. 614) or a counterclaim. A State would thus have to deny to its citizens rights which it granted to a foreign State.

Finally, the Court must express its views on some of the arguments put forward against limitation of the exemption of foreign States from jurisdiction. It is said that it is one of the fundamental rights of a State not to allow another State to subject it to its authority and that such subordination creates a risk of political complications and prevents the foreign State from performing the tasks which by international usage it is entitled to perform in the territories of other States. Moreover, the "fear of execution" has caused many writers to deny all jurisdiction over foreign States (Spruth, *op. cit.*, p. 94). The unlimited recognition of such a "fundamental right" in respect of *acta jure gestionis* would constitute an infringement of the sovereignty of the

State of the forum. The risk of political complications is far greater if disputes of a private nature are fought out at the diplomatic level before the facts and the legal position have been clarified. Experience shows that the objective judgement of an independent court is more likely to be accepted than a political decision. The foreign State is not in the least hindered in the performance of its tasks if—like all other road users—it is brought before a court to have its liability for an accident determined in accordance with the provisions of civil law. In so far as concerns the lack of means to execute a judgement, we need only point out that such means exist under international law within the framework of municipal law. There can be no violation of foreign sovereignty because the binding force of a judgement operates only within the territory of the forum State and the judgement can be enforced only within that territory (Spruth, *op. cit.*, p. 97).

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

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

3. DECISION BY THE SUPREME COURT ON 14 FEBRUARY 1963 *X v. the Government of the Federal Republic of Germany*⁴

The judgement:

The court of appeal, in dealing with the question of whether domestic jurisdiction could be invoked for the claim, could take the matter up only in connexion with a valid appeal which had been filed within the prescribed time-limits. If it had acted on a late appeal, it would have violated proper legal procedure, thus invalidating the proceedings and the judgement and compelling the Supreme Court to take cognizance of the matter *ex officio* (article 411 (2) of the Code of Civil Procedure, SZ, XXX, 48). This Court concurs in the view of the court of appeal that the appeal was filed within the prescribed time-limits. By a note verbale of 27 February 1962, the German Embassy returned the default judgement of 22 January 1962 together with the uncompleted service form to the Federal Ministry of Foreign Affairs, stating that the Federal Republic of Germany was refusing service of the judgement pursuant to

⁴ SZ 36/26. [Translated by the Secretariat.]

article 4 of the Hague Convention of 1 March 1954 relating to Civil Procedure. Under this provision, service may be refused only if the State in whose territory it is to be effected deems it likely to prejudice its sovereignty or security. Even though in the present instance the defendant may at the same time be the State applied to for legal assistance, it is nevertheless not the case that the defendant refused to accept service, which would have made it necessary to proceed in accordance with article 109 of the Code of Civil Procedure, but rather that the foreign State applied to refused to provide legal assistance. This refusal is a sovereign right of the foreign State against whose exercise remedy may, under the second paragraph of article 1 of the Convention, be sought only through diplomatic channels. Accordingly, the default judgement was not even served on the defendant, and the period prescribed for the filing of an appeal therefore could not begin to run. Hence, the defendant's appeal cannot be said to have been filed too late. It has been consistently held by the courts that a party wishing to contest a judgement is not required to wait until service is effected and the period prescribed for legal remedy has begun to run but may do so as soon as a link has been established between the court and its judgement, e.g. through delivery of the judgement to the court registry (SZ, XXI, 2, etc.). The appeal was therefore correctly considered to have been filed within the prescribed time-limits.

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

not based on a collective agreement under private law or on individual agreements between the German Reich and the resettled persons but is an obligation under public law resulting from a political measure taken by the German Reich. The fulfilment of this obligation is, like all legal questions relating to war damage, a matter for legislation. The question of compensation can be settled with universal binding effect only by a law or, in the case of resettled persons of different nationality, by an agreement between States. Both courses were adopted by the defendant, i.e. through the Equalization of Burdens Act of 31 December 1952 and through the Financial and Equalization Treaty of 27 November 1961 (*BGB1*, No. 283/1962), under article 8 (1) of which the defendant is obligated to ensure that expellees and resettled persons of Austrian nationality are also granted benefits pursuant to the Equalization of Burdens Act under certain conditions. It has also been held in German judicial practice (*BGHZ*, 22 286) that compensation claims by resettled persons fall within the sphere of public law and cannot be represented as being claims under private law. It therefore follows from the principle of relative immunity that the claim is not subject to domestic jurisdiction. The action was properly dismissed on this ground.

C. BELGIUM

1. DECISION BY THE COURT OF APPEAL OF LEOPOLDVILLE ON 29 MAY 1956 *De Decker v. United States of America*⁵

Summary of facts:

The appellant was employed as an assistant librarian in the United States information service from October 5, 1953, to April 12, 1954, and as such was an official of the United States Foreign Service. Upon the termination of her appointment, for budgetary reasons, she sued for compensation for breach of contract. The United States entered a plea to the jurisdiction of the Courts of the Belgian Congo. The Court of first instance of Léopoldville, by decision of October 14, 1955, held that it was incompetent to hear an action against a foreign State in respect of the performance of what must be considered to be acts of sovereignty. This was an appeal from that decision.

Excerpts from the judgement:

In virtue of Article 118 of the Decree consolidated by the royal Order of December 22, 1954, concerning the Organisation of the Judiciary and its jurisdiction, the Courts of the Congo have jurisdiction over Belgian nationals and over aliens. The latter term refers not only to physical persons but also to corporate entities, amongst which foreign States must be included (*cf.* the decision of the Court of Léopoldville of November 26, 1935: *Rev. jur.*, 1936, p. II). On the other hand, it is an international tradition, based on an idea of courtesy towards foreign sovereignty

⁵ Reproduced from *International Law Reports* (1956), p. 209. Reported originally in *Pasiecrisie Belge* (1957), II, p. 55.

which is indispensable to good understanding between countries, and which is unanimously recognized, that foreign States, as well as their heads and their diplomatic agents, enjoy immunity from jurisdiction. That immunity used to be considered to be absolute. According to more modern ideas there are exceptions thereto, particularly where there has been express, or even tacit but regular and certain, waiver by the beneficiary, or when the beneficiary acted as a private person according to the procedure of private law.

In this case the respondent State has not in any way waived its immunity. Not only did it enter a plea to the jurisdiction *in limine litis*, but its Ambassador in Brussels made a formal statement to that effect on July 8, 1955.

The question of the competence of the Tribunal thus arises only with reference to the question whether in appointing the appellant and in subsequently terminating her appointment the respondent State acted as a sovereign power in the exercise of its *imperium* or whether it acted as a private person. It appears from the documents submitted to the Court, and in particular from the document entitled 'U.S.I.A. Division of Foreign Service Personnel—Personnel Action', that the relationship between the parties did not arise under a simple contract of employment, freely concluded. The appellant, no doubt at her request—or at least with her consent, since she never objected—was incorporated in the Foreign Service of the United States of America as assistant librarian in the information service of that country. In this connection it may be noted that at no time during her service from October 5, 1953, to April 12, 1954, did she claim the benefit of the provisions of the Decree of June 25, 1949, concerning contracts of employment in the Belgian Congo. The application of that Decree is not required by public international or universal policy. It is required by internal public policy, but not in respect of the sovereignty of a foreign State (*cf.* Brussels, July 17, 1938: *Journ. trib.*, March 6, 1938, No. 3525).

In appointing the appellant as an official ('*sous statut*') and in terminating her appointment for budgetary reasons, the Government of the United States undoubtedly acted as a public authority in the exercise of its *imperium*, and not as a private person. That is so, in particular, in view of the fact that the appellant was attached to the information service, which is political in nature. The place where she was appointed, her nationality, and the relative unimportance of her functions, are irrelevant.

Accordingly, the Court of first instance, which cannot interfere with the exercise of the sovereignty of a foreign State, correctly held that it was incompetent.

2. DECISION BY THE COURT OF APPEAL OF BRUSSELS OF 4 DECEMBER 1963 *Société Anonyme "Dhellemes et Masurel" v. Banque Centrale de la République de Turquie*⁶

Summary of the facts:

The appellant, a Belgian company, had sold goods to Turkish importers. At the time of the sales, and of the present action, there was in force between Turkey and Belgium the Payments Agreement of 2 December 1948, which provided that all payments for goods imported into Turkey from Belgium should be effected by debiting

⁶ Reproduced from *International Law Reports*, vol. 45, p. 85. Reported originally in *Pasicrisie Belge* (1965), II, p. 42.

an account opened by the respondent, the Central Bank of Turkey, with the National Bank of Belgium, the funds in such account to be obtained by crediting it with the value of Belgian imports from Turkey. The Agreement was to come into operation on 15 December 1948, although it was not approved by the Belgian Parliament until 9 April 1958, after the above sales had been concluded and in fact after the date of the issue of the writ in the present proceedings (2 February 1957). The contracts of sale had made no mention of this Agreement, merely providing that payment was to be made by the importers depositing the price of the goods in Turkish pounds with the respondent and the latter then paying over to the appellant the equivalent amount in Belgian francs.

The appellant claimed that such payment had not been made and sued the Bank for the total amount due on the sales. This action, heard by the Brussels Court (Tribunal de Première Instance), failed. The appellant now appealed from that decision. However, in view of the fact that since the date of the decision (3 December 1958) a new multilateral Agreement had been signed with Turkey and approved by the Belgian Parliament, whereby the credits of Belgian nationals with the Bank of Turkey were not to be transferred until payment was authorized by the Turkish Government, the appellant now sought to amend its claim. It no longer sought payment of the sums claimed but merely a declaration that they had been due at the date of the writ and were now owing to it.

Before the lower Court the Bank had raised the plea that, as an organ of the Turkish State, it was immune from the jurisdiction of the Belgian courts. That plea had been rejected, and the Bank now brought an interlocutory appeal against that decision.

Excerpts from the judgement:

As to the plea raised by the respondent that it is immune from jurisdiction and that the Court is incompetent to hear the case:

While possessing a legal personality distinct from the Turkish State, the respondent has been provided with powers that give it the right to act in certain circumstances as the agent of that State. However, immunity from jurisdiction depends upon the nature of the act rather than upon the character of the body responsible for it. Whether it emanates from the foreign State itself, or from one of its organs, or from a public body in the form of a corporation acting on behalf of the State, the act is covered by immunity from jurisdiction only when it constitutes an act of government or of executive power, or, as it is also put, when it is done *jure imperii*; on the other hand, it loses such immunity when it is done *jure gestionis*.

The act on which the appellant bases its claim is the alleged undertaking by the respondent of an obligation to transfer to the appellant, in Belgian francs within a fixed period, the total amount of the sale price of certain goods imported into Turkey, such amount having been received by the respondent in Turkish pounds.

Regulating external trade, decreeing measures for the protection of the currency, concluding trade or payments agreements with foreign countries, ordering or forbidding transfers of currency—all these constitute acts of executive power, since, in such cases, the State, whether of itself or through its agents, has a right of decision in the exercise of its prerogatives that cannot be called into question, and is exercising its governmental authority. Such is not the case with the act which the appellant alleges against the respondent. Here, without the executive power being

brought into play, the respondent, in connection with a private contract, merely undertook an obligation in such a way as to conform with certain legal provisions or international agreements.

Thus the Judge was correct in declaring that he had jurisdiction to hear the case. . . . [After disposing of two procedural points the Court dealt with the appellant company's plea to amend its claim:]

On appeal, the appellant company no longer seeks an order against the respondent for payment of the sums claimed. It merely seeks a declaration that 'if the said sums are now no longer due, by reason of the multilateral Agreements of 11 May and 12 August 1959, approved by the Belgian Law of 29 June 1960, they were due at the date of the writ [*assignation*]'. . . .

These claims come within the original writ, since the payment sought in the writ would only have been ordered after the Court had first established that the sums were due and owing. . . . The above Agreements provided that sums paid into the Central Bank of the Republic of Turkey for the credit of Belgian nationals were to remain in the said Bank until their transfer, in Belgian francs, should be authorized by the Turkish Government. It was these Agreements which caused the appellant to limit the scope of its claim. . . . [The Court then dealt with certain detailed questions of fact not material to the point of international law, and continued:]

The appellant company claims to deduce from what is stated in the documents now produced that the respondent undertook an obligation to transfer to it in Belgian francs, within a stated time, the amount of Turkish currency equivalent to the value of the goods imported by the appellant into Turkey. It is said that this obligation was undertaken either towards itself, the appellant company, or towards the Turkish buyers, the latter having imposed conditions in the former's favour upon the respondent, so that as a result of this undertaking the appellant became the respondent's creditor. The appellant company claims on the basis of the foregoing that the respondent owes it the sum of 6,912,739 francs, the amount alleged to have been due at the date of the writ.

The appellant's claim must be dismissed.

The case must be decided taking into account the Turco-Belgian Payments Agreement of 2 December 1948. Under Articles 2 and 3 of this Agreement, payments for the value of goods of Turkish origin imported into Belgium 'shall be effected by making payments into an account kept in Belgian francs in the name of the Central Bank of the Republic of Turkey with the National Bank of Belgium', and payments for the value of goods of Belgian origin imported into Turkey 'shall be effected by debiting this account'. Article 5, paragraph 2, of the same Agreement provides that

"The National Bank of Belgium shall execute without delay, according to the availability of funds in the aforementioned account, orders for payment received from the Central Bank of the Republic of Turkey."

Neither the parties nor the Turkish buyers can have been ignorant of the terms of these provisions. They go together with the Trade Agreement between Turkey and Belgium of the same date, within the framework of which the contracts were concluded. Sellers, buyers and bankers all enquired as to the way in which payments would be made, and they were certainly informed as to this. At the time of the con-

tracts the system set up under the Payments Agreement had already been functioning for some years.

Moreover, the advice notes produced in evidence by the appellant state that the import of the goods takes place 'within the framework of the provisions in force of the rules governing external trade'. The Turkish Decree of 1 September 1953, on the rules of external trade, provides in its Article 1 that

"commercial dealings with countries who have a payments agreement with Turkey shall be carried out in accordance with the provisions of such agreements."

And the Trade Agreement between Turkey and Belgium of 2 December 1948 provides in Article 5 that

"all payments in connection with commercial dealings which shall be effected while this agreement is in force shall be governed by the provisions of the Payments Agreement signed on this day."

The Payments Agreement between Turkey and Belgium of 2 December 1948, having been at first provisional, was extended from year to year and approved by the Belgian Law of 9 April 1958. By its nature, its aim and its object, this Agreement could be applied without having to wait for the legislature's formal approval. Moreover, this was the intention of the contracting parties, who expressly agreed that the Agreement would come into force on the same day as the Trade Agreement, namely 15 December 1948, and immediately set up the machinery provided for to facilitate payments, and hence commercial dealings, between Turkey and Belgium.

The Belgian courts are bound to apply this Agreement; it is an international treaty, which is binding upon the nationals of the two countries and governs the manner in which payments in connection with their commercial dealings are to be effected. The arguments as to the alleged violation of Belgian public international policy by the Turkish legislation are entirely devoid of relevance.

It was only subject to this Agreement that the respondent could bind itself in favour of the appellant. Its obligation was necessarily limited to giving conditional orders for payment to the National Bank of Belgium. The execution of these orders for payment was subject to the existence of sufficient available funds in Belgian francs in the account opened in the name of the respondent with the above Bank in pursuance of the international Payments Agreement.

The times for payment stated in the documents produced in evidence applied only to these conditional orders for payment. Moreover, these times had not been fixed by the respondent of its own free will, but resulted from the allocations of currency granted by the Turkish Minister of Economy and Trade for certain specific periods.

There is no evidence that the conditional orders for payment were not given, within the times provided for, by the respondent to the National Bank of Belgium, the respondent having thus discharged the obligation which it had undertaken. If the giving of these orders was not followed by the National Bank of Belgium making a payment of Belgian currency to the appellant, this was because there were no available funds in the account opened in the respondent's name in pursuance of the Payments Agreement. Whether such funds were available depended in no way upon the respondent, but on the trading balance of Turkey *vis-à-vis* Belgium. This was in deficit because the volume of imports into Turkey exceeded that of its exports.

It follows from the foregoing considerations that not only were the sums of Belgian francs in dispute not due from the respondent to the appellant at the date of the writ, but also that at that date the respondent did not owe the said sums, any more than it does at the present time.

Since the principal sum was not owing, there can be no question of interest being due.

For these reasons, after hearing both parties, . . . the Court hereby acknowledges that the appellant no longer claims an order against the respondent for payment of the principal sum of 6,912,739 francs and of 1,160,578 francs as interest due on such principal up to 1 October 1956, plus interest at 8 per cent on 6,912,739 francs from 1 October 1956 to February 1957, the date of the writ.

The Court confirms the judgment of the lower Court in so far as it dismissed the respondent's plea of immunity from jurisdiction and lack of competence and also the objection to the Court competence *ratione loci*. The Court nullifies the remainder of the judgment of the lower Court and, by way of amendment, declares that the claim, as now limited by the appellant, fails. It declares that the sums claimed were not due at the date of the writ, that the respondent did not at that date owe the appellant the said principal sums, nor interest thereon, and that it does not now do so.

The appellant to pay the costs of the appeal, the respondent those of the interlocutory appeal.

D. BURMA

I. *U Kyaw Din v. The British Government*

DECISION BY THE HIGH COURT OF RANGOON ON 14 JULY 1948⁷

Summary of the facts:

The plaintiff brought an action against the Government of the United Kingdom for recovery of money being the value of goods belonging to him said to have been destroyed by the British forces on the eve of the evacuation of Rangoon in 1942. When the matter came up before the Court the plaintiff's claim was accepted by the Judge subject to objections (if any) by the defendants. Thereafter the Registrar (original side) sent in lieu of a summons a written intimation of the suit to His Majesty's Ambassador to the Union of Burma. The Foreign Office replied that the Ambassador declined to accept the letter substituted for a summons on the ground that no action lay in the Burmese courts against the British Government.

Excerpts from the judgement:

The case has . . . been placed before me for argument as to whether this Court has jurisdiction to entertain the suit against the defendant. . . . The plaintiff contends that in view of the provisions of Sections 9 and 86 of the Civil Procedure Code the present suit lies against the defendant. But Section 9 of the Code merely mentions the nature of suits that may be instituted, and Section 86 provides that in certain circumstances, and subject to the consent of the authority concerned, suits may be insti-

⁷ Reproduced from *International Law Reports* (1956), p. 214. Reported originally in *Burma Law Reports* (1948), p. 524.

tuted against a Sovereign Prince or Ruling Chief, or against an Ambassador or Envoy of a Foreign State, but makes no mention of a foreign State as being amenable to the jurisdiction of the Burmese courts. It is significant that while under Section 84 of the Civil Procedure Code a foreign State may sue in any court in the Union of Burma, there is no provision in the Code which permits the institution of an action against a foreign State.

It would seem therefore that the authors of the Code of Civil Procedure followed the general law. There is a considerable body of weighty and unanimous authority for the view that 'although States can sue in foreign courts, they cannot as a rule be sued there, unless they voluntarily submit to the jurisdiction of the court concerned' (*International Law* by Oppenheim, 6th ed., vol. I, p. 239). This, as the learned author observes, flows from the fact that all member States of the Family of Nations are equal before international law and consequently no State can claim jurisdiction over another.

Since the . . . defendant has refused to submit to the jurisdiction of this Court, the question that now arises is as to the course to be adopted with regard to this defendant. In this connexion the observations of Kay L.J. in *Mighell v. Sultan of Johore* (L.R. [1894] I Q.B. 149 at p. 162) are pertinent. There his Lordship observed:

"It is said that an independent sovereign may waive his right to immunity, and may treat himself as subject to the jurisdiction. I agree. But how is that to be done? This seems to me, in the first place, quite clear. Supposing, by way of illustration, that some well-known potentate, such as one of the great European emperors, were to be sued in a Court of this country, and took no kind of notice of the proceeding; it would be the duty of the Court to recognize his position, and to say at once that the person cited was an independent foreign sovereign over whom it had no jurisdiction. Therefore it is not right to say that such a sovereign must come forward and assert his right. I do not think that he need. I think the Court itself would be bound to take notice of the fact that it had no jurisdiction."

I accordingly dismiss the suit as against the defendant.

2. *U. Zeya v. The British Secretary of State for War*

DECISION BY THE HIGH COURT OF RANGOON ON 2 FEBRUARY 1949⁸

Summary of the facts:

The plaintiff-appellant, U Zeya, brought an action in the City Civil Court of Rangoon against the Secretary of State for War of the United Kingdom for the recovery of a sum of money as compensation for the use and occupation of a house at Rangoon after the British re-occupation of Burma, for the period from June 1, 1945, to the end of November 1946. A petition and a subsequent written statement were filed by the Assistant Director of the Claims and Hirings Department, Burma, of the British Army, contending that the Court had no jurisdiction to hear this action. The Court held that the action was not maintainable against the defendant in view of the provisions of Section 86 of the Code of Civil Procedure (which deals with immunity) and in view of the fact that Burma became an independent country from January 4, 1948.

⁸ Reproduced from *International Law Reports* (1956), p. 212. Reported originally in *Burma Law Reports* (1949), p. 402.

The plaintiff appealed to the High Court, notice of appeal being served on the British Ambassador in Rangoon. On the question of the immunity from jurisdiction of the respondent, the appellant contended that the filing of the petition and the statement above mentioned constituted an implied submission by the British Secretary of State to the jurisdiction of the courts of Burma.

Excerpts from the judgement:

It is a recognized principle of international law that a foreign Sovereign and his property are not subject to the process of a court of another country, and this exemption is also extended to the Ambassador who represents the Sovereign . . . It is necessary to consider whether there is any provision in the law of Burma which allows a foreign Sovereign or State or the Ambassador who represents such Sovereign or State to be sued in Burma. It is clear that His Britannic Majesty's Ambassador cannot ordinarily be served with notice of an action. The purport of Section 86 of the Code of Civil Procedure is apparently to give effect to certain principles of international law.

The contention of the plaintiff-appellant is that the City Civil Court has jurisdiction to try the action which he instituted against His Britannic Majesty's Secretary of State for War on the ground that the defendant-respondent had submitted to the jurisdiction. . . . He contends that His Britannic Majesty's Secretary of State for War had properly been represented by Lt.-Col. E. G. Josling, who was in charge of Claims and Hirings, Burma

The action in the present case was in reality a suit against a foreign State or Sovereign, and we do not find anything on the record to indicate that Lt.-Col. Josling was at any time capable of representing His Britannic Majesty in the action in question. He did not produce any authority which would entitle him to represent His Britannic Majesty and Lt.-Col. Josling is not a person who can be assumed to be a representative of His Britannic Majesty's Secretary of State for War. The record of the case also indicates that there was in fact no acquiescence in the jurisdiction of the Court by the defendant-respondent in the present case. Lt.-Col. Josling presented a petition dated January 27, 1948, in para. 3 of which he clearly stated that he had no authority to accept service of summons or to defend a suit on behalf of the Secretary of State for War. It is, however, argued by the plaintiff-appellant that para. 7 of the petition suggests that Lt.-Col. Josling had acquiesced in the jurisdiction of the City Civil Court, but it seems to us that para. 7 must be read with para. 3 of the petition, and when they are read together it appears to us that what Lt.-Col. Josling purported to do was [to indicate] that he was willing to have the case argued on behalf of the Secretary of State for War, if the plaintiff-appellant persisted in proceeding with the suit, to show that the Court had no jurisdiction to entertain the suit against His Britannic Majesty's Secretary of State for War. It is said that Lt.-Col. Josling in fact filed a written statement on a subsequent date which purported to be on behalf of the Secretary of State for War and that the action of Lt.-Col. Josling should be taken to indicate that the defendant-respondent had acquiesced in the jurisdiction of the City Civil Court of Rangoon. We cannot accede to this contention, even assuming that Lt.-Col. Josling had proper authority to represent the defendant in the suit, because it is clear from Clause C of para. 9 of the amended written statement that it was still being contended by Lt.-Col. Josling that the City Civil Court had no jurisdiction to entertain the suit against the Secretary of State for War. Moreover, para. 5 of the amended written statement shows clearly that Lt.-Col. Josling, who was the Assist-

ant Director of the Claims and Hirings Department, Burma, had no authority to represent the Secretary of State for War; and para. 5 of the amended written statement is as follows: 'the defendant is not aware of the allegation contained in para. 5 of the plaint and states that in any case neither the Defence Secretary to the Government of Burma nor the Headquarters Burma Command nor the Claims and Hirings Department, Burma [are] his legal representatives in Burma. The defendant submits that the very notice served on them, even if duly served, is not legally valid as against him.'

It must accordingly be held in the circumstances of this case that there had in fact been no acquiescence by the defendant-respondent in the jurisdiction of the City Civil Court in the present case.

3. *Kovtunen v. U Law Yone*

DECISION BY THE SUPREME COURT ON 1 MARCH 1960⁹

Summary of the facts:

The Tass news agency in Rangoon, of which the applicant, Kovtunen, was a representative, published a news item in its bulletin to the effect that the *Nation*, an English language newspaper of which the respondent was editor-in-chief, and two other named newspapers, had received large sums of money from the American Embassy in Burma. The respondent lodged a complaint in the Court of the District Magistrate, Rangoon, in criminal libel against Kovtunen. The latter, after a period of avoiding process by sheltering in the Soviet Embassy, appeared through counsel and deposited a sum of money for his bail. Requests were made by the Soviet Embassy to the Foreign Office to intervene, and a certificate was produced declaring that Tass was a department of the Soviet Government. The Foreign Office declined to intervene, and the proceedings continued before the District Magistrate, who denied Kovtunen's motion that the proceedings be quashed on the alleged ground that the Court lacked jurisdiction. Kovtunen then applied to the Supreme Court to have the proceedings quashed by way of writ, claiming that the prosecution against him was in effect a prosecution against the Soviet Government, in whose service and in the performance of his duties he had published the Tass bulletin complained of. The applicant admitted that he did not enjoy full diplomatic status and immunities, but argued that his acts, done within the scope of duties as charged and authorized by the Soviet Government, were acts of a sovereign State and therefore clothed with immunity from process.

Excerpts from the judgement:

A host of authorities were cited. We have been referred to Blackstone who in his *Commentaries* said that no suit or action could be brought against the King and that no jurisdiction upon earth would have the power to try him in a criminal way, much less to condemn him to punishment. And it would appear that no distinction can be drawn between acts done by a sovereign in his political and his private capacity. See *Mighell v. Sultan of Johore* [1894] 1 Q.B. 149, where the action was for breach of promise, undoubtedly an extreme case of a contract made in private. Also *Statham v. Statham and the Gaekwar of Baroda* [1912], p. 92, where the action was for divorce, with the Prince as the co-respondent. In both cases it was held that the Courts had no jurisdiction over a sovereign. This concept of sovereignty is now uni-

⁹ Reproduced from *International Law Reports*, vol. 31, p. 259. Reported originally in *Burma Law Reports* (1960), p. 51.

versally accepted and all States have, as a matter of policy, agreed to certain limitations of their territorial jurisdiction over a foreign sovereign within their territory, over his army, over his property and over his ships of war.

These limitations naturally extend to the State itself, since the King's sovereignty is because of his representation of the State. The concept of State sovereignty, at least in England, is so well established that in *Compagnia Mercantile Argentina v. The United States Shipping Board*, 40 T.L.R. (1924) 601, where the latter was sued for return of alleged overpayment of freight, the Court of Appeal in setting aside the proceedings said:

“... it is established to the satisfaction of the Court that the body against whom the proceedings are taken is a body representing a sovereign State.”

From the certificate furnished by the Ambassador of the United States, the Court held that the Shipping Board was “just as much a representative of the United States as the Ambassador himself” and further that “there is no authority anywhere to be found that the mere fact that a sovereign is engaging in some trading business subjects him to the processes of the Courts of a foreign country.”

The latest decision cited to us is *Krajina v. The Tass Agency*, [1949] 2 A.E.R. 274, another decision of the Court of Appeal. On the certificate filed by the Soviet Ambassador the Court accepted the statement therein that Tass was a department of the Soviet Government and held that the normal immunity attaching to a department of a foreign State under international law would prevail.

The concept of sovereign immunity, as understood in England, seems limitless and many would share the anxiety of Scrutton L.J. expressed in *The Porto Alexandre*, [1920] p. 30, when he said:

“Now this State and other States proceed in their jurisprudence on the assumption that sovereign States are equal and independent and that as a matter of international courtesy no one sovereign State will exercise jurisdiction over the person or property of any other sovereign State; and now that sovereigns move about more freely than they used to do, and do things which they used not to do, and now that States do things which they used not to do, the question arises whether there are limits to the immunity which international courtesy gives as between sovereign independent States and their sovereigns.”

Be that as it may, *Krajina's case* is still authority for the proposition that a department of a sovereign Government is immune from civil process.

The position in regard to immunity from criminal process, however, remains unclear. Judicial pronouncements do not exist. Mention is made in text-books of *R. v. Guerchy* (1 Wm. Bl. 545) and *R. v. A.B.* ([1941] 1 K.B. 454). Neither case decided the issue, for in respect of the first a *nolle prosequi* was entered and in respect of the second immunity had been waived. It is inconceivable that a sovereign State as such could ever be tried criminally. Satisfaction would have to be sought through the usual diplomatic channels or through war.

...

After a hundred years of British rule and trained in the law as we are according to Anglo-Saxon concepts, we tend to rely upon English and American authorities, but, in dealing with the matter before us, we must bear in mind that in the Anglo-

American systems there is always the common law to rely upon and that international law is deemed to be a part of the law of the land.

(The Court then quoted the following passages from Oppenheim's *International Law*, vol. I (8th ed. by Lauterpacht), at pp. 39-40):

"As regards Great Britain, the following points must be noted: (a) all such rules of customary International Law as are either universally recognised or have at any rate received the assent of this country are *per se* part of the law of the land. To that extent there is still valid in England the common law doctrine, to which Blackstone gave expression in a striking passage, [*Commentaries on the Laws of England*, Book IV, Chap. 5] that the Law of Nations is part of the law of the land. It has been repeatedly acted upon by courts. Apart from isolated *obiter dicta* it has never been denied by judges. . . ."

And from pp. 41-42:

"In the United States the principle that International Law is part of the law of the land has been adopted even more clearly. Such customary International Law as is universally recognised or has at any rate received the assent of the United States, and further all international conventions ratified by the United States, are binding upon American courts, even if in conflict with previous American statutory law; . . ."

. . .

The position prevailing in our country is not quite the same, in that Section 214 of our Constitution provides that no international agreement as such shall be part of the municipal law save as may be determined by Parliament. Under Section 226, subject to the Constitution itself and to the extent to which they are not inconsistent therewith, the "existing laws" continue in force. But the definition of "existing laws" in Section 226 (1) makes no mention of international law. It is, however, urged that because of Section 211 of the Constitution, which in part reads:

"The Union of Burma . . . accepts the generally recognised principles of international law as its rule in its relation with foreign States",

it should be taken that it is recognised as part of the law of the land.

It is an attractive proposition, but in our judgment a rule of conduct that the Union Government should follow "in its relation with foreign States" is not necessarily the procedure that a Burmese court is to observe in the absence of a specific enactment which would make such observance legal. We interpret the section to mean that it is a declaration of policy which provides guidance to the Government in its international relations and makes it incumbent upon it to take such legislative measures as may be necessary to bring it into line with other States.

There is Section 13(3) of the Burma Laws Act under which, in the absence of a specific enactment, our Courts must decide "according to justice, equity and good conscience". The law relating to torts is an example where this provision has to be invoked. It would thus be within the competence of the Courts to follow the principle of international law, not as such, but as being in accord with justice, equity and good conscience. However, in considering whether a particular principle can be adopted, the provisions of Sections 211 and 213 of the Constitution, to which reference has already been made, should not be lost sight of. Thus, for a particular principle of international law to be acceptable in our Courts, firstly it must be generally

recognised customary law of the nations and secondly it must not conflict with our municipal law. To illustrate the position, we shall take the case of an Ambassador, who, according to accepted principles of international law, is immune from process. In this country, however, he may in theory be sued, but under Section 86 of the Civil Procedure Code the President's consent is necessary. The section itself restricts the grant of consent only to cases specified in it and in actual practice the stage for the President to accord such consent is unlikely to be reached.

[The Chief Justice then pointed out that in criminal proceedings the Penal Code specifically conferred jurisdiction on the courts over every person, including foreigners, and continued:] No person, not even the President of Burma, merely by virtue of his status, can claim immunity from the penal laws of this country and, in so far as the courts are concerned, a complaint of the nature involved in the present case will have to be dealt with according to law. There is no provision in the Penal Code similar to Section 361 (1) of the Indian Constitution in view of which the President or the Governor is not answerable to any court for the exercise and performance of the powers and duties of their office or for any act done or purported to be done in pursuance thereof.

This, however, does not mean that every alleged offender, without exception, has to undergo the indignity of a trial, because it is within the competence of the Executive to intervene by withdrawing the prosecution, a procedure which is often resorted to in many countries, on the ground of public policy. The incapacity of the Court to reject a complaint, except for reasons permissible in law, does not in any way fetter the Government's freedom of action in dealing with the matter.

We have no doubt that the Foreign Office will consider the matter and in its wisdom decide upon what is appropriate. But calling to mind the Burmese adage that even the wise might be inadvertent, we quote the opinions of eminent authorities on international law on the subject of criminal process.

. . .

As far as we can see, the purpose of the existence of the Tass Agency in Rangoon is to gather information in Burma and to disseminate information obtained from sources which are not confined to Burma, on behalf of the Soviet Government through the medium of the Tass Bulletin, which is distributed free and widely, six days a week. If the applicant is concerned at all in the publication of the Bulletin, including the item to which exception has been taken, his act in publishing it might be an official act authorised by his Government and within the scope of his official duties, as the applicant's learned counsel contends. But that in itself could not be a defence in law in this country. However, it is a factor to be taken into consideration if Executive intervention is sought.

The contention made by the learned Assistant Attorney General that in the absence of formal or official accreditation Tass should be regarded as operating as a private news agency, has no relevance. A sovereign can make known his real character at any time, whereupon he assumes the privileges due to him, as did the Sultan of Johore when the suit against him was launched.

Our attention has also been drawn to the *United Nations Legislative Series Publication* (1958) regarding Diplomatic and Consular Privileges and Immunities accorded to foreign diplomatic and consular representatives by Governments. On p. 52 appears a memorandum relating to Privileges and Immunities accorded to foreign

Diplomatic and Consular Representatives by the Government of Burma, in which is mentioned that immunity from legal process and criminal prosecution is accorded to, among others, "officials not being citizens of the Union of Burma employed directly under the orders of the Ambassadors, the Ministers of foreign embassies, the legations in their diplomatic capacity". Embassies and legations accredited to Burma would expect the statements in this memorandum to be observed, the more so because they are generally recognised principles of international law. To incorporate these principles into our municipal law is the duty of the Government under Section 211 of the Constitution and this we think can be achieved as far as civil process is concerned by making suitable amendments to Sections 85 and 86 of the Civil Procedure Code and by restoring Section 87 which had been deleted by the Adaptation Order, 1948. In regard to criminal process, a provision requiring the President's sanction may perhaps be incorporated in the Criminal Procedure Code.

We cannot anticipate what the Government's action will be and the case may have to proceed ultimately. In the circumstances prevailing in this case, we consider that it is one which should be tried in the High Court. . . .

(The application for a writ to quash the criminal proceedings below was dismissed. The case was ordered to be transferred from the District Magistrate to the High Court.)

E. CANADA

1. *Fraser-Brace et al. v. Saint John County et al.* DECISION BY THE SUPREME COURT OF NEW BRUNSWICK ON 17 AUGUST 1956¹⁰

Summary of the facts:

By an agreement dated June 28, 1951, and modified in 1952, a group of three firms undertook in partnership by the name of Fraser-Brace Terminal Constructors (referred to herein as Fraser-Brace) to construct for the United States of America certain works in Canada in connexion with a series of radar installations forming part of a continental defence system mutually undertaken by Canada and the United States. Their construction by the United States Government was undertaken pursuant to an Agreement between it and the Government of Canada. The contract was negotiated on behalf of the United States Government by the Corps of Engineers and was signed on behalf of the United States by a member of the Corps. He and the Corps of Engineers under his command had general supervision of the operations contemplated by the contract.

The construction contract provided that "the contractor shall, in the shortest practicable time, furnish the labour, materials, tools, machinery and equipment, facilities, supplies not furnished by the Government, and services, and do all things necessary for the completion of the work", which involved the construction in the radar chain of nine stations located in Newfoundland, Labrador and Baffin's Land. It also provided that "the amount of all foreign taxes, fees, duties and/or charges of all kinds, which may be required on account of the performance of this contract—shall be reimbursable" to the contractor.

¹⁰ Reproduced from *International Law Reports* (1956), p. 217. Reported originally in *Maritime Provinces Report*, vol. 39, p. 33.

Fraser-Brace acquired various necessary premises. In late 1951 or early in 1952, Fraser-Brace took a lease of a warehouse, which building lay partly within the City of Saint John and partly in the Parish of Simonds. In June or July 1952, substantial facilities were established in the Parish of Simonds, in pursuance of a lease dated May 29, 1952, by which Fraser-Brace obtained from a Mrs. McDonald property on which to construct the necessary buildings. The lease contained the following covenant respecting taxes:

“(2) That the lessee shall pay promptly when due all taxes for personal property, buildings and improvements and other charges which may be payable by reason of the occupancy of the said premises by the said lessee.”

It also contained a covenant against assigning or subletting without the lessor’s written consent which was qualified by the following provisions:

“(11) Notwithstanding anything to the contrary herein contained, the lessor grants to the lessee and to the United States of America the right of any employees of the United States Government to occupy any part of the said premises.”

Excerpts from the judgement:

II. *Claim to Sovereign Immunity.*—It remains only to consider the plaintiff’s submission that all properties covered by the assessments were entitled to exemption from taxation as belonging to the Government of a sovereign state.

Many authorities were cited on that point. I do not think that even on the assumption that legal title was vested in the United States Government they would support the submission made.

The relevant principles were considered by the Supreme Court of Canada in the *Reference as to the Powers of certain Municipal Corporations to levy rates on Foreign Legations and High Commissioners’ Residences*, reported in [1943] S.C.R. p. 208.

At p. 213 Chief Justice Duff quotes, with approval, a passage from the judgment of the Judicial committee in *Chung Chi Cheung v. The King*, [1939] A.C. 160 delivered by Lord Atkin who, at pp. 167-8, says:

“It must always be remembered that, so far, at any rate, as the Courts of this country are concerned, international law has no validity, except in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into our domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.”

At p. 215, the learned Chief Justice refers to the judgment in the celebrated case of *The Schooner Exchange v. McFaddon* (1912), 7 Cranch 116 delivered by Marshall C.J., (United States) where, at pp. 138-9, he says:

“The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemptions, every sovereign

would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain—privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.”

The principles which were applied to effect personal immunity for a foreign sovereign and his representatives have been extended in their application to embrace certain classes of property. At p. 217 the learned Chief Justice refers to the case of *Musurus Bey v. Gadban*, [1894], 2 Q.B. 352 (English Court of Appeal) and to the judgment therein of Davey L.J., where, at p. 361, he says:

“These passages, in my opinion, correctly state the legal principles on which the exemption is founded, and are in accordance with the course of decisions in our own Courts: see, for example, the latest case of *The Parlement Belge* (1880), 5 P.D. 197, in the Court of Appeal, in which it was said . . . that as a consequence of the absolute independence of every sovereign State and of the international comity which induces every sovereign State to respect the independence of every other sovereign State, each State declines to exercise by means of any of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador, or over the public property of any State which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador or property be within its territory.”

At p. 220 Chief Justice Duff, observing upon the reasons for, and the scope of, the immunity accorded property says:

“One of the immunities recognized by the English law, as already intimated, is the inviolability of the ambassador’s residence, that is to say, of the legation. Vattel puts it this way:—(Chap. IX, p. 494, para. 117) ‘The independence of the ambassador would be very imperfect, and his security very precarious, if the house in which he lives were not to enjoy a perfect immunity, and to be inaccessible to the ordinary officers of justice. The ambassador might be molested under a thousand pretexts; his secrets might be discovered by searching his papers, and his person exposed to insults. Thus all the reasons which establish his independence and inviolability, concur likewise in securing the freedom of his house.’ ”

And at p. 221:

“Parallel with this rule touching the immunity of legations, there runs the principle of the immunity of the *property of a foreign state devoted to public use in the traditional sense*. In *The Parlement Belge* (*supra*) it was held that this immunity applies to a ship used by a foreign government in carrying mail. The Supreme Court of the United States has held that it is enjoyed by a ship, the property of a foreign sovereignty and employed by the foreign government for trading purposes. *Berizzi Brothers Co. v. SS. Pesaro* (1926, 271 U.S. 562). It most certainly cannot be said this is settled doctrine, in view of the opinion expressed in the *Cristina* case (1938, A.C. 485) although Lord Atkin, who delivered the judgment of the Judicial Committee in *Chung Chi Cheung v. The King* (*supra*) at p. 175 uses a

general phrase:—‘The sovereign himself, his envoy, and his property, including his public armed ships, are not to be subjected to legal process.’”

The Supreme Court of Canada, in the case under consideration, held that the freedom of the property of a foreign sovereignty or its diplomatic representatives from legal process should extend to make it immune from local rates and taxes arising under the general provisions of a domestic statute. The question before the Court was stated by Duff C.J., at p. 222, where he says:

“The precise question we have to consider is whether a tax imposed by a statute in general terms in respect of the ownership and of the occupation of real property, or levied upon real property itself, extends to the case where such property is owned, or occupied, by a foreign state, or its diplomatic agent, and is employed for the public diplomatic purposes.”

On this question, at p. 228, he further says:

“The general result appears to be that in England taxes and rates imposed by statute in general terms in respect of the occupation or ownership of real property are not recoverable from diplomatic agents in respect of real property occupied by them or owned by them, or their States, and occupied and used for diplomatic purposes. Such a charge creates no liability to pay, as we have seen, and it cannot, I think, consistently with principle, create any effective charge upon the property. The property is not subject to process, or to visitation by government officers; and the foundation of this privilege is that the foreign State and its ambassador are immune from coercion direct, or indirect.”

In so disposing of the question he proceeded to point out that the immunity, arising as it does from implication, can be removed by the legislative body, having territorial jurisdiction, but only by clear and precise enactment. In the quotation from the judgment of Lord Atkin in *Chung Chi Cheung v. The King* (*supra*) that proposition will be noted. The learned Chief Justice on this point adopts the language of Marshall C.J. in the *Schooner Exchange* case where, at p. 231, the latter says:

“Without doubt the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. . . . Those general statutory provisions . . . which are descriptive of the ordinary jurisdiction . . . ought not, in the opinion of the Court, to be so construed as to give them jurisdiction in a case, in which the sovereign power has impliedly consented to waive its jurisdiction.”

The immunity accorded property used for diplomatic purposes was early extended to foreign ships of war. In *The Parlement Belge* (1880), 5 P.D. 197 it was applied to protect an unarmed packet belonging to a foreign sovereign, and in the hands of officers commissioned by him, and employed in carrying mails. The head-note, in part, reads:

“As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each state declines to exercise by means of any of its Courts any of its territorial jurisdiction over *the person of any sovereign or ambassador, or over the public property of any state which is destined to its public use* or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory.”

In *The Porto Alexandre*, [1920] P.D. 30, another decision of the English Court of Appeal, the immunity was further extended to embrace a vessel owned and operated by a foreign state and used in ordinary trading voyages carrying cargoes for private individuals for reward. It was contended, as against the claim to immunity, that it was not sufficient for a sovereign or a sovereign state to allege that a vessel is the property of such sovereign or sovereign state, and that the allegation must go further and say the vessel is employed in the public service or on public service. The Court, however, considering the question concluded by the decision in *The Parlement Belge*, found in favour of the immunity.

As pointed out by Chief Justice Duff in the *Reference* case a similar decision was, in 1926, rendered by the Supreme Court of the United States in the case of *Berizzi Brothers v. SS. Pesaro* (*supra*). He also pointed out that doubt was later thrown upon the soundness of those views in the House of Lords.

The case which he had in mind is *Compania Naviera Vascongado v. Steamship Cristina*, [1938] A.C. 485. Lord Thankerton at p. 496 and Lord MacMillan at p. 498 alike expressed doubt upon the soundness of the decision in *The Porto Alexandre* case which, in their view, appeared to extend the application of the immunity doctrine to an extent not established as recognized by the nations under accepted rules of international law.

It seems beyond question that to accede to the plaintiff's contention that all the property from time to time in their possession in the Parish of Simonds was entitled to immunity would be carrying the application of the accepted principles far beyond all former limits.

The Government of the United States had, according to my views, neither legal title to, nor possession of, the property. I find it impossible to regard it as public property of the United States which was "destined for its public use" or "devoted to public use in the traditional sense". Its connection with the works being established in Northern Canada which when erected were, presumably, to become property of the United States devoted to a public use, was remote. It was for the most part, if not in its entirety, of the nature of expendable property in the hands of private contractors and used by them to carry on what were, in essence, commercial operations.

I would repeat the words of Lord MacMillan in the *Christina* case (*supra*) where, at p. 497, he says:

"Now it is a recognized prerequisite of the adoption in our municipal law of a doctrine of public international law that it shall have attained the position of general acceptance by civilized nations as a rule of international conduct, evidenced by international treaties and conventions, authoritative text-books, practice and judicial decisions. It is manifestly of the highest importance that the Courts of this country before they give the force of law within this realm to any doctrine of international law should be satisfied that it has the hall-marks of general assent and reciprocity."

No judicial decisions, binding on this Court or otherwise, have been found nor have the plaintiffs presented any other material to indicate that the doctrine of sovereign immunity has by international consensus been extended to cover matters of the nature of that under consideration. In consequence I must find against the plaintiffs on this aspect of the case.

The result is that the plaintiffs have failed on all issues. The action will therefore be dismissed with costs.

2. *Fraser-Brace Overseas Corporation et al. v. Municipality of the City and County of Saint John et al.* DECISION BY THE SUPREME COURT OF NEW BRUNSWICK (APPEAL DIVISION) ON 9 MAY 1957¹¹

Summary of the facts:

By an agreement made in June 1951, a group of three firms referred to as Fraser-Brace undertook to construct for the United States of America certain works in Canada in connection with a series of radar installations forming part of a continental defence system mutually undertaken by Canada and the United States. Their construction by the United States Government was undertaken pursuant to an agreement between it and the Government of Canada.

The construction contract provided that taxes, fees, duties and charges of all kinds required on account of the performance of the contract shall be reimbursable to the contractor. The contract also contained detailed provisions whereby title to property vested in the United States Government.

Fraser-Brace acquired various necessary buildings and equipment. Fraser-Brace paid for these, being reimbursed by the Government of the United States.

At a later stage, when work on some sites was finished, much of the property and equipment was transferred from Fraser-Brace to a partnership referred to as Drake-Merritt (the second plaintiff in this action) on terms substantially similar to those on which Fraser-Brace had held them. In particular, the provisions respecting title or ownership of property were repeated in the Drake-Merritt contract.

Taxes were levied by the Municipality on the property which was the subject of the contracts. Fraser-Brace sought to recover from the Municipality various sums which were paid as taxes resulting from assessments made in 1952 and 1953. They also claimed an injunction to restrain the Municipality and its co-defendants, two of the officials of the Parish of Simonds, from collecting or attempting to collect taxes assessed against them in 1954 which were not paid. Drake-Merritt similarly claimed an injunction to restrain the collection of taxes assessed against them in 1954 and 1955 which were not paid. The plaintiffs contested the assessment on two grounds. First, they contended that they at no time had any title to, or right or interest in, such property capable of being assessed, the ownership thereof being vested in the United States of America. Secondly, they contended that the title to the properties was at all times vested in the United States of America and consequently was not liable to assessment since it belonged to a foreign sovereign State.

It was held by the Supreme Court of New Brunswick that legal title to the property was vested in Fraser-Brace and Drake-Merritt, who were therefore properly assessed for taxes; further, it was held that, since the United States Government had neither legal title to nor possession of the property, and since it was not possible to regard the property as the public property of the United States destined for its public use, there was no entitlement to exemption from the assessment on the ground of sovereign immunity. Fraser-Brace and Drake-Merritt appealed.

Excerpts from the judgement:

[*On sovereign immunity*] Could the United States have been assessed for such

¹¹ Reproduced from *International Law Reports* (1957), p. 231. Reported originally in *D.L.R.*, vol. 9 (1957-2d), p. 391.

personal property? Could the United States as owners have claimed immunity from taxation? The criterion is whether such personal property was owned and being used in Canada by the United States, a foreign power, for public or national purposes. There cannot be very much doubt that the chain of outposts across the northern part of Canada was for the national defence of the whole of America. The evidence was to the effect that the goods warehoused in Saint John were materials and supplies destined to the construction of such defences. That they were in the possession of either Fraser-Brace or Drake-Merritt contractors for the construction of such defences is to my mind immaterial. As such contractors, they were the mere agents of the United States and their role was in no way different than had such goods been in the possession of the army personnel of the United States and no doubt some of this property, such as motor vehicles and office equipment, was used by such personnel, part of the buildings being used by them. By the same token I cannot draw any distinction between materials which went directly into the construction of these defence outposts, and the other personal property such as office and radio equipment as well as motor vehicles which were as necessary as machinery for the carrying out of the works which were being done. This personal property was neither for the convenience nor for the personal benefit of the contractors and if same was far removed from the site of the actual construction, geographical conditions made it necessary that such property be kept in a depot such as was maintained in New Brunswick.

When does a foreign Sovereign possess immunity from suit or legal proceedings in a foreign country? What is the basis for such immunity and why, and where, is such immunity recognized? The circumstances under which the principle has been applied are set out in *Baccus S.R.L. v. Servicio Nacional del Trigo*, [1956] 3 All E.R. 715. This case, not exactly in point with the present matter, nevertheless illustrates the situations and conditions where immunity from legal process has been invoked by a foreign Sovereign and where, notwithstanding that it might appear such immunity may have been waived or lost, yet the principle has been applied because the foreign Sovereign is the only one who can forego such immunity.

The defendants were a Department of the Spanish State carrying on business in Spain as buyers and sellers of wheat under orders of the Spanish Ministry of Agriculture. They purchased goods from the plaintiff, an Italian company. A dispute arose and the plaintiffs brought an action in England as it had been agreed by the parties that in the case of dispute the matter would be settled by English laws or customs. After the action was brought one Senor Conero, head of the Department in Spain, had retained solicitors in England and they put in an appearance and issued a summons for security for costs and a consent order was granted. Conero did not know that the right to immunity would be prejudiced and acted without the knowledge or authority of the Minister or any representative of the State of Spain able to waive the foreign immunity from suit. An order setting aside the writ and other proceedings was granted notwithstanding the objections of plaintiff that the defendants had waived immunity by taking further steps after the issue of writ. On appeal against this order it was held that the defendants were entitled to sovereign immunity from suit as a Department of State of Spain for the following reasons: (1) that the defendants were a Department of State even though they had corporate powers; (2) that the steps taken had not prejudiced the defendants in their right to immunity as they had no authority from their Sovereign.

Jenkins L.J. [said in the *Baccus* case]:

[It is contended by plaintiffs] "that immunity cannot be claimed on behalf of a

separate legal entity engaged in trading activities, even though the government of the Sovereign State concerned is interested in those activities. [At p. 731.]

“Each case must . . . depend on its own facts, and it is not to be taken as following from what I have so far said that every corporation in which a foreign sovereign State may be interested, whatever the nature of the activities of the corporation and whatever the nature or extent of the interest taken by the foreign sovereign State, becomes itself a department of State. [At p. 732.]

“The doctrine of immunity comes to no more than this, that the courts of this country will not allow a foreign sovereign to be impleaded directly, or a foreign sovereign’s property to be put in jeopardy by a suit in rem. Whether a particular proceeding amounts to an impleading of a sovereign within the meaning of that doctrine seems to me to be a question of fact, and probably also a question of local law, in every case. Once the general principal of immunity is recognised, the fact that a particular transaction is held to fall within the rule does not make a decision to that effect an extension of the doctrine merely because occasion for its application to precisely comparable facts has never before arisen.” [At p. 733.]

He [Jenkins L.J.] went on to say [quoting Lord Porter in *France v. Dollfus*, [1952] 1 All E.R. 572 at p. 586] that reciprocity was not essential: “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”.

In *Re Republic of Bolivia Explorations Syndicate Ltd.*, [1914] 1 Ch. 139, it was held immunity could only be waived with the sanction of the Sovereign. It was held also that even though a diplomatic agent could waive his privilege, which is really the privilege of the Sovereign, he can only do so intentionally, with full knowledge of his rights and with the sanction of his Sovereign or legation. It was held that Senor Conero did not know he was waiving his right to immunity when he submitted to the jurisdiction.

According to the learned trial Judge his principal reason for holding that both real and personal property were assessable was because he felt satisfied that it had not been established that any of this property was the property of the United States Government. He has quoted many authorities however which support the proposition that it has always been recognized that the property of a foreign sovereign is immune from taxation. I would gather as well from his judgment that even if he had found the title to this property was in the United States Government that same would not be immune from taxation on the ground that it was not “property destined for the public use” or “devoted to the public use in the traditional sense”. Since I disagree with him as to the title to the personal property as well as to whether such property was so used or employed as to make it immune from taxation, it is unnecessary for me to quote from the decisions mentioned in his judgment which in my opinion support the proposition that this property was not taxable.

Fraser-Brace was assessed for 1952 on personal property for \$10,000 and taxed \$460 and having taken advantage of the discount they paid the sum of \$437. Another assessment was made the same year 1952 on real property for a period of six months for the sum of \$71,250 and billed for the sum of \$3,277.50 and having taken advantage of the discount [Fraser-Brace] paid the sum of \$3,113.62. In 1953, real estate was assessed for the full year the sum of \$142,500 for which they were taxed \$6,483.75 and for personal property they were assessed for \$171,200 and taxed \$7,786.90. They paid this amount without discount. They therefore paid tax on per-

sonal property for the years 1952 and 1953 of \$8,246.90. Having found that they were not liable for assessment on personal property they are therefore entitled to a refund of \$8,246.90. For the year 1954 they were assessed on personal property for 2 months for \$23,150 and taxed for \$1,222.32 which they refused to pay. On real estate Fraser-Brace were assessed for the following amounts: 1952 assessed for ½ year at \$71,250 and taxed \$3,277.50; 1953 the full year for \$142,500 and taxed for \$6,483.75; and for 1954 for 4 months at \$47,500 and taxed \$2,508. They paid the 1952 and 1953 taxes on real estate but refused to pay the 1954 taxes, which they still owe. Deducting the amount due, viz., \$2,508 on real property from the amount of refund due them on personal property \$8,246.90 leaves a net amount of \$5,738.90 which they are entitled to.

Drake-Merritt were assessed for the year 1954 on real estate for \$95,000 and taxed at \$5,016 and on personal property they were taxed for the sum of \$1,129.92. For the year 1955 Drake-Merritt were assessed on real property for the sum of \$76,000 and for personal property on an assessment of \$15,000 for a total tax liability for both real and personal property of \$5,478.20. These taxes were not paid.

The appeal is allowed with costs. Judgment will be entered for the plaintiff Fraser-Brace for the sum of \$8,246.90 with costs of appeal and costs below, and an injunction is granted to restrain the defendants from enforcing payment of the taxes levied against them on personal property during the years 1952, 1953, 1954. The plaintiffs Drake-Merritt are entitled to an injunction restraining the defendants from enforcing payment of the taxes levied on personal property for the years 1954 and 1955. The municipality is entitled to collect taxes levied against them for these two years on real property. Since these taxes were not paid by Drake-Merritt and they have only succeeded in their appeal with reference to personal property, they are only allowed costs in the Court below on a 50% basis.

The appellants, Drake-Merritt, are allowed costs of this appeal.

(Bridges J., in a partially dissenting judgment, briefly reviewed the facts, and continued): The findings of the learned trial Judge which are pertinent to the case may, I think, be summarised as follows:

- (1) That all property brought by Fraser-Brace into the Parish of Simonds, including the materials for the buildings, was after-acquired property and not property furnished by the United States Government.
- (2) That the buildings erected were properly regarded by the assessors as real estate and lawfully assessed as such against Fraser-Brace and Drake-Merritt.
- (3) That Fraser-Brace and later Drake-Merritt held all property both real and personal, which came into their possession in the Parish of Simonds as legal owners in trust for the United States Government.
- (4) That none of the property, either real or personal, was exempt from taxation on the ground that it was owned by a foreign sovereign state.

[*On sovereign immunity*] It is necessary to consider if the buildings, in which the United States Government had an equitable interest, are exempt from taxation on the ground that they were the property of a foreign sovereign state. It is apparent from the authorities that it is not necessary for the sovereign state to have the legal title for the doctrine of sovereign immunity to apply. In the case of *Compania Na-*

quiera Vascongada v. SS. Christina, [1938] A.C. 160, 1 All E.R. 719, it was held to apply to a Spanish vessel which had been requisitioned by the Government of that country.

There are not authorities in point or which have much bearing on the facts in this case. In *Reference re Tax on Foreign Legations*, [1943] 2 D.L.R. 481, S.C.R. 208, Duff C.J.C. dealt at length with the question of the exemption of property occupied by an Embassy or Legation of a foreign state from taxation and referred with approval at p. 487 D.L.R., p. 217 S.C.R., to what Davey L.J. said in *Musurus Bey v. Badban* [1894] 2 Q.B. 352 at p. 361, which was as follows:

“These passages, in my opinion, correctly state the legal principles on which the exemption is founded, and are in accordance with the course of decisions in our own Courts: see for example the latest case of *The Parlement Belge* (5 P.D. 197) in the Court of Appeals, in which it was said . . . that as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign State to respect the independence of every other sovereign State, each State declines to exercise by means of any of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador, or over the public property of any State which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory.”

At pp. 491–2 D.L.R., p. 221 S.C.R. pp. 341–342 of *Annual Digest*, 1941–1942, of his judgment, Duff C.J.C. after referring to the inviolability of an Ambassador’s residence said:

“Parallel with this rule touching the immunity of legations, there runs the principle of the immunity of the property of a foreign State devoted to public use in the traditional sense. In *The Parlement Belge* (1880), 5 P.D. 197, it was held that this immunity applies to a ship used by a foreign government in carrying mail. The Supreme Court of the United States has held that it is enjoyed by a ship, the property of a foreign sovereignty and employed by the foreign government for trading purposes: *Berizzi Bros. v. SS. Pesaro* (1926), 271 U.S. 562. It most certainly cannot be said that this is a settled doctrine, in view of the opinions expressed in *Compania Naviera Vascongado v. SS. Cristina* [1938] A.C. 485, although Lord Atkin, who delivered the judgment of the Judicial Committee in *Chung Chi Cheung v. The King*, [1939] A.C. 160 at p. 175, uses a general phrase: ‘The sovereign himself, his envoy, and his property, including his public armed ships, are not to be subjected to legal process’.”

In *The Parlement Belge* (1880), 5 P.D. 197, a case of a ship owned by the King of the Belgians, Brett L.J. uses the expression “substantially for national purposes” in dealing with the inviolability of such ships from arrest. In *Yin-Tso Hsiung v. Toronto* [1950] 4 D.L.R. 209, O.R. 463, Smily J. held that the property of a foreign state occupied by its consul and used for the “public purposes” of such state was exempt from taxation. While there is dictum to the effect that all property of a foreign state comes under the immunity doctrine, grave doubt has been expressed upon the subject and as pointed out by Duff C.J.C. in the *Reference re Tax on Foreign Legations* case, the matter has not been definitely settled.

It does seem to me that in determining if the buildings are exempt from taxation one should consider the following questions in regard to them: Were they destined to the public use of the United States Government or were they being used for substan-

tially national or public purposes of the United States? To me, the buildings, except for a small portion, were being used by Fraser-Brace for the purpose of carrying out their contract with the United States Government. Suppose that instead of erecting buildings Fraser-Brace had leased suitable buildings in the Parish of Simonds. No person could surely contend that the use and occupation of such buildings by Fraser-Brace would in such case be a public or national use by the United States Government and I can see little, if any, difference in the fact that they were erected and owned by Fraser-Brace. After Fraser-Brace vacated the buildings they were put to no use by the United States Government. If there was evidence that it was the intention of the United States Government to use the buildings later for some national or public purpose it might be different but the evidence is that they were turned over to Crown Assets Corp. of Canada. It is my opinion that Fraser-Brace was properly assessed in respect to the buildings. It is my opinion that the personal property, although owned by the United States Government, was not exempt from taxation. It was not being used by the United States Government for public or national purposes but by Fraser-Brace in the performance of its contract. To hold the personal property exempt on the ground of sovereign immunity would I think be too great an extension of the doctrine. In the cases in which it has been held to apply, the property has, I think, been under the control or in the possession of the foreign state or a Department thereof which it was not when the assessments in question were made.

The assessments for personal property should have been against the United States Government instead of Fraser-Brace and Drake-Merritt. All taxes levied in 1952 and 1953 were paid by Fraser-Brace. The personal property taxes for those years amounted to \$8,226.60 for which Fraser-Brace was reimbursed by the United States Government, so the latter who should have been assessed have in reality paid such taxes. I think the assessments can be corrected. Section 123 of the Rates and Taxes Act provides that if property belonging to one person is assessed in the name of another the assessors may correct such error.

Section 127 (e) of the Rates and Taxes Act reads as follows:

“127. On any rule nisi being granted for a *certiorari* to bring up any rate, any proceeding touching such rate with a view to the quashing of the same, the court shall have and exercise the following power in reference thereto; . . .

“(e) the Court shall have and exercise, in every and all cases, the full power by order to direct the assessors or other proper parties, to do such act, matter and thing in regard to any assessment and to the rectification thereof, as shall appear to the Court just and equitable.”

While the plaintiffs have not expressly asked in their statement of claim that the rate be quashed, their claim is to the same effect and I think a Court under such circumstances has power to direct the assessors to correct the assessments. The plaintiffs have not questioned the power of the assessors to assess property for only a portion of a year, and I shall therefore not deal with the matter though I have grave doubts as to the validity of such action.

The appeal should in my opinion be dismissed with costs. The judgment of the learned trial Judge dismissing the action should be varied by adding an order directing the assessors for the Parish of Simonds to correct the assessment rolls for the years 1952, 1953, 1954 and 1955 so that the personal property will be assessed in the name of the United States Government. In view of this order the declaration and injunction sought by the plaintiffs should be refused.

3. *Municipality of the City and County of Saint John, Logan and Clayton v. Fraser-Brace Overseas Corporation et al.* DECISION BY THE SUPREME COURT ON APRIL 1, 1958¹²

Summary of the facts:

By an agreement made in June 1951, a group of three firms, referred to as Fraser-Brace, undertook to construct for the Government of the United States of America certain works in Canada in connection with a series of radar installations forming part of a continental defence system mutually undertaken by Canada and the United States. Their construction by the United States Government was undertaken pursuant to an Agreement between that Government and the Government of Canada. The construction contract between Fraser-Brace and the Government of the United States contained detailed provisions whereby title to property used by the contractors vested in the United States.

Fraser-Brace acquired various necessary buildings and equipment, within the jurisdiction of the Municipality of the City and County of St. John. At a later stage, much of this property and equipment was transferred from Fraser-Brace to a partnership referred to as Drake-Merritt (the second plaintiff in this action), on terms substantially similar to those on which Fraser-Brace had held them: in particular, the provisions respecting title or ownership of property were repeated in the contract with Drake-Merritt.

Taxes were levied by the Municipality on the property which was the subject of the contract: this property consisted of moveable personal property and of two leases of land on which temporary buildings were erected. Taxes were assessed for the years 1952 to 1955 inclusive, and had been paid for the years 1952 and 1953. Fraser-Brace sought to recover the taxes actually paid for those two years, and Fraser-Brace and Drake-Merritt together sought injunctions to restrain the Municipality from collecting taxes assessed for the years 1954 and 1955.

It was held by the Supreme Court of New Brunswick that legal title to the property was vested in Fraser-Brace and Drake-Merritt, who were therefore properly assessed for taxes; further, it was held that since the United States Government had neither legal title to nor possession of the property, and since it was not possible to regard the property as the public property of the United States destined for its public use, there was no entitlement to exemption from the assessment on the ground of sovereign immunity.

On appeal to the Supreme Court of New Brunswick (Appeal Division) it was held that the legal title to the moveable personal property had vested in the Government of the United States and that, being devoted to a public or national use, such property was immune from assessment for taxes; and that the legal title to the leases of land with buildings thereon vested in the contractors, who were thus properly assessed for taxes, notwithstanding that they held such property as trustees for the United States Government.

The Municipality (the appellants in the present action) appealed against this decision in respect of the assessment on the moveable personal property, and Fraser-

¹² Reproduced from *International Law Reports*, vol. 26, p. 165. Reported originally in *D.L.R.*, vol. 13 (1958-2d), p. 177.

Brace and Drake-Merritt (the respondents) entered a cross-appeal in respect of the assessment for the property covered by the two leases.

Excerpts from the judgement:

Rand J.:

. . . There, as here, he was dealing with taxation under general language in which the interpretation of the statute only was in question. The significant aspect of the matter examined by him was that of the theory on which the immunity is to be placed. In the early considerations given it, the idea of extritoriality, the physical projection of one sovereignty within the borders of another, arose probably from one of its earliest examples, that of a public vessel entering a foreign port. But as new contacts and relations between states developed, the multiplied situations appearing rendered necessary a more realistic and flexible conception. At p. 489 D.L.R., at 218 S.C.R. of his reasons, after quoting a passage from Vattel on the immunities of an ambassador's residence, which includes the qualification in the application of the rule, "at least in all the ordinary affairs of life", Duff C.J.C. observed, on the latter, that it must be read "as excluding the fiction of extritoriality in its extreme form". The notion was, in his view, finally rejected by the Judicial Committee in *Chung Chi Cheung v. The King*, [1939] A.C. 160; and reverting to it at p. 501 D.L.R., p. 230 S.C.R. he repeats "this fiction of extritoriality must be disregarded".

What is substituted is the conception of an invitation by the host state to the visiting state. That is the core of what was laid down by Marshall C.J. in *Schooner Exchange v. M'Faddon* (1812), 7 Cranch 116 which Duff C.J.C. adopts. The fundamental attitude which states adopt towards each other is the recognition and observance of individual sovereignty, that is, the acknowledgment of the absolute independence of each; and on this basic footing their intercourse is conducted. When one state admits within its boundaries a foreign Sovereign or his representative, the terms of that entry are to be gathered from the circumstances of the invitation and its acceptance. In the language of Marshall C.J. [pp. 138-143]:

"A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he had selected for that purpose cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him implies a consent that he shall possess those privileges which his principal intended he should retain. . . . Its extent must be regulated by the nature of the case and the views under which the parties requiring and conceding it must be supposed to act."

In the absence of something special or unusual, when a visiting Sovereign steps upon the foreign soil he does so free from any submission to its immanent law; from that he remains insulated; and the recourse against what may be considered to be an infringement of the privileges of the invitation becomes a matter for diplomatic and not legal adjustment. In the language of Marshall C.J. quoted by Duff C.J.C. at pp. 485-6 D.L.R., p. 215 S.C.R.:

"The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of

his nation with a foreign power, to the care of a person whom he had selected for that purpose, cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain—privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.”

. . .

It is obvious that the life of every state is, under the swift transformations of these days, becoming deeply implicated with that of the others in a *de facto* society of nations. If in 1767 Lord Mansfield, as in *Heathfield v. Chilton*, 4 Burr. 2015, 98 E.R. 50 could say “the law of nations will be carried as far in England, as any where”, in this country, in the 20th century, in the presence of the United Nations and the multiplicity of impacts with which technical developments have entwined the entire globe, we cannot say anything less.

In the language of Lord Cockburn quoted by Lord Atkin in *Chung Chi Cheung, supra*, in the absence of precise precedent we must seek the rule which “reason and good sense . . . would prescribe”. In this we are not to disregard the practical consideration, if not the necessity, of that “general assent and reciprocity”, of which Lord Macmillan speaks in *The Cristina, Compania Naviera Vascongado v. SS. Cristina* [1938] A.C. 485 at p. 497, cited in the reasons of McNair C.J. But to say that precedent is now required for every proposed application to matter which differs only in accidentals, that new concrete instances must be left to legislation or convention, would be a virtual repudiation of the concept of inherent adaptability which has maintained the life of the common law and a retrograde step in evolving the rules of international intercourse. However slowly and meticulously they are to be fashioned they must be permitted to meet the necessities of increasing international involvements. It is the essence of the principle of precedent that new applications are to be determined according to their total elements including assumptions and attitudes, and in the international sphere the whole field of the behaviour of states, whether exhibited in actual conduct, conventions, arbitrations or adjudications, is pertinent to the determination of each issue.

The nature and purpose of the invitation before us, interpreted against the background of the assumptions implied by sovereignty, and the generality of assent and reciprocity, furnish the data for the juridical deductions of its implications. A similar situation arose during the late World War from the admission to Canada of members of the United States forces. The question of the jurisdiction of their military tribunals over offences committed in this country was referred to this Court and the opinions expressed in *Reference re Exemption of United States Forces from Canadian Criminal Law*, [1943] 4 D.L.R. 11, S.C.R. 483, 80 Can. C.C. 161, appear to me to have accepted that basis of determination.

That the subject-matter was of the most vital importance to both countries surely does not require debate; it was national defence in the most sensitive area. A foreign state, in peace time, was privileged to exercise, in this country, powers of high sovereign character. Its necessity was equal to its uniqueness, and the scope and character of those powers determine the scope and character of the implied privileges.

Public works of this sort are not ordinarily considered subjects of taxation. Their object is to preserve the agencies that produce national wealth, the source of

taxes. So to tax Government is simply to remit locally what has been exacted nationally. The work carried on by either Government in its own land would be untaxable, and that principle must carry over to the territory of the joint work.

I am unable, then, to infer that with an identity of purpose, status and role in each country, either the invitation or its acceptance proceeded upon any other basis than that of the rule of exemption from taxation. Why should we deny to property designed for common national preservation a sovereign character and purpose equal at least to that of an Ambassador's furniture? Works of this sort are not to be looked upon, in principle, as furnishing a source of taxation for municipalities nor state necessities an object of revenue; any other view would be a strange commentary upon our conception of the role in these days of Government. Public works may, at times, impose upon local resources burdens of municipal responsibility; but the exemption here does not touch services for which payment is ordinarily made, as water, electricity, etc. These the foreign invitees must, as their food supply and property generally, acquire as purchasers. If strictly general municipal services providing fire protection, repairs of streets, etc., are excessively affected, the appeal must be to the domestic Government as participant in the work; and adjustment between the two countries becomes a political matter.

The immunity extends likewise to the leases. Since the argument there has been brought to our attention a recent decision of the House of Lords which is most pertinent to this feature. In *Rahimtoola v. Nizam of Hyderabad*, [1957] 3 All E.R. 441, moneys belonging to the State of Hyderabad had been transferred by an agent to a bank in London in the name of the High Commissioner of Pakistan to Great Britain. While the money was still held in the bank, notice was received from the Nizam that the transfer had been made without authority and a demand made on the bank for its return. This the bank refused. The Nizam thereupon commenced proceedings against both the High Commissioner and the bank. On application by the defendants, the writ was set aside *in toto*, but on appeal the order was reversed. In the House of Lords it was held that as the legal title to the account was admittedly in the High Commissioner as bare trustee or proprietary agent for Pakistan, the latter's exemption from proceedings against its property had been infringed; the interest of Pakistan, the right to direct the action of the agent, was sufficient to raise the immunity, notwithstanding that the ultimate beneficial interest was not claimed. The decision, restoring the original order, demonstrates that what is to be looked at is the substance of the matter raised and not the form; and if, in that view, an infringement appears, the consequence is rigorously applied. It was assumed in all Courts that if the beneficial interest in the money had been shown to be in Pakistan the immunity arose; but even without that the bare legal title sufficed. It is unnecessary to do more than to indicate the difference between an ordinary trustee and such a fiduciary. The former is charged with active duties towards both the property and the beneficiary; and it is contemplated that for all such ordinary incidents of ownership as taxes he represents all interests. But even for such a case, we have been referred to no authority which holds a trustee taxable in respect of the interest of a beneficiary exempt. Here a bare title is held passively by the agent, and he is chargeable with no active responsibility in any capacity beyond what arises under the construction contract.

A further question remains. For the years 1952 and 1953 the taxes were paid. Before that happened the contractors had made it clear to the municipal authorities that the property belonged to the United States Government and that they stood on the position that it was exempt. Full discussion of this question took place and the

evidence puts it beyond controversy that the authorities had no intention of holding their hand in prosecuting collection and that that was made known to the contractors. It is equally evidenced that the ground taken by the contractors was maintained consistently throughout. The personal property taxes for 1952 and the total for 1953 were paid under express protest: in the payment of those on the real estate for 1952 the word "protest" was not used but that the municipal authorities understood it to be so is not to be seriously doubted. In considering the question of voluntariness or coercion, the status and circumstance of the party resisting is a matter to be taken into account. As representing the United States the contractors were firm in their objection to the taxation, and the municipal authorities, with all the information before them, equally insistent on pressing it. In that state of things, to require either the contractors or the United States Government to take proceedings that might be obviated, or to await action taken to seize the property, is going beyond what is necessary to rebut the inference of voluntary payment. "Voluntariness" implies acquiescence, the absence of pressure inducing payment. That pressure was present here inducing payment as a temporary means of avoiding rancorous controversy, as well as interference with the prosecution of the work. Nothing in the circumstances of payment makes it unfair to require the municipality to submit to an action for its return.

The considerations bearing upon a refusal to allow a recovery of this nature are indicated in *Grantham v. Toronto* (1847), 3 U.C.Q.B. 212. At p. 215 Robinson C.J. says:

"It is unreasonable to contend that the plaintiff paid the rate under compulsion, for the just presumption is, that if the plaintiff had made the defendants aware of the fact, nothing more would have been exacted than was right. If this action could lie, then it must follow that whenever an inhabitant of the city has been assessed for property which he did not own, or for more than he owned, and has paid the tax without objection, he can harass the corporation with an action to recover it back again."

Macaulay J.:

"He should have remonstrated at first; for if actions like this are tenable, any number of persons accidentally overrated may pay the rates without saying a word, and then bring actions for money had and received. It is too late."

What was done in the present case was precisely what is impliedly suggested by these quotations as furnishing ground for recovery.

For the assessment of 1953 there was an express protest in writing, with the same insistence on the right and intention to proceed to collect, and the same resistance.

I would, therefore, dismiss the appeal with costs and allow the cross-appeal with costs throughout.

(Locke J., with whom Cartwright J. concurred, reviewed the facts, and then continued):

The arrangement between the Government of Canada and the Government of the United States was made under the powers vested in the former by s. 91 (7) of the British North America Act, which assigns to Parliament exclusive legislative authority in relation to militia, military and naval service and defence. The installations

made in Northern Canada were matters undertaken for the defence of this country, and the arrangements to be made for effecting that purpose fell within the exclusive jurisdiction of the Government of Canada. It was for that Government to decide and settle the terms and conditions upon which the United States was permitted to join with it in carrying out these defence measures and the privileges and immunities to be afforded to the Corps of Engineers of the United States Army and the contractors and others employed by the Government of that country to carry out these works.

It was under the Rates and Taxes Act, R.S.N.B. 1952, c. 191 that the assessments in the present matter were made. The personal property in question falls within the definition of that expression in s. 1 (e), and the leasehold interests and the buildings placed on the land within the definition of real property in cl. (h) of that section. The statute, which has since been repealed and replaced by the Municipal Tax Act, 1955, c. 14, contained the usual provisions for levying municipal taxes upon such property, declared that they should "bind and be a special lien or charge" upon all the lands of the taxpayer in the parish within which the assessment is made (s. 171 (1)), and by s. 84, where default in payment within the prescribed time was made, provided for the issuing of execution and the sale of the property affected. By s. 85, execution might be issued against a non-resident whose property within the municipality has been assessed. It was under these powers that the clerk of the appellant municipality wrote to the respondents on September 1 and on September 25, 1953, and, had payment not been made by Fraser-Brace in that year, it is to be assumed that these properties of the United States Government, brought to the premises for the above described purposes, would have been seized and sold and the work upon the defence installations consequently impeded.

While the question as to the liability to municipal taxation of the properties of foreign countries used as legations under the Statutes of Ontario, which was considered in *Reference re Tax on Foreign Legations*, [1943] 2 D.L.R. 481, S.C.R. 208, related to property of a different nature to that with which this case is concerned, in my opinion the principles applied by Sir Lyman P. Duff C.J.C. and by Rinfret J. (as he then was) and Taschereau J. (the majority of the Court) are applicable.

The history of the immunity of the Sovereign and his property from suit or seizure within his dominions is traced from the earliest times in England in the judgment of Gray J. in *Briggs v. Light-Boats* (1865), 11 Allen (Mass.) 157 commencing at p. 166. It is by permission only of the Sovereign that such actions or proceedings against his person or his property may be taken and this principle is applicable in the United States, as is shown by the judgment of Marshall C.J. in *Schooner Exchange v. M'Faddon* (1812), 7 Cranch 116.

In *The Parlement Belge* (1880), 5 P.D. 197, where reference is made to the judgments in the Courts of the United States above mentioned, Brett L.J., delivering the judgment of the Court, quotes from Blackstone's Commentaries, vol. I, c. 7, a passage reading (p. 206):

"Our king owes no kind of subjection to any other potentate on earth. Hence it is that no suit or action can be brought against the king, even in civil matters, because no Court can have jurisdiction over him. For all jurisdiction implies superiority of power; authority to try would be vain and idle without an authority to redress, and the sentence of a Court would be contemptible unless the Court had power to command the execution of it, but who shall command the king?"

The immunity of the property of a foreign sovereign state from seizure in a friendly

country proceeds upon the ground that the exercise of jurisdiction over him or his property would be incompatible with his regal dignity, that is to say, with his absolute independence of every superior authority.

In the *Schooner Exchange* case, the property declared by the judgment of the Supreme Court of the United States to be exempt from seizure in that country was a war vessel of France. In *The Parlement Belge*, immunity from seizure was claimed for an unarmed packet belonging to the King of Belgium which was in the hands of officers commissioned by him and employed in carrying mails. The Court of Appeal held that the ship was not liable to be seized in a suit *in rem* to recover redress for a collision and that the right of immunity was not lost by reason of the fact that it also carried merchandise and passengers for hire. The first clause of the headnote to the report accurately summarizes the grounds for the decision:

“As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each state declines to exercise by means of any of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador, or over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory.”

The first of the questions to be decided was, as stated by Brett L.J., as to whether the Admiralty Division had jurisdiction to entertain an action *in rem* against a ship the property of a foreign Sovereign, “a public vessel of his state, in the sense of its being used for purposes treated by such sovereign and his advisers as public national services, it being admitted that such ship, though commissioned, is not an armed ship of war or employed as a part of the military force of his country” [p. 204].

In the case of the *Light-Boats* [*supra*] where the contest was between a litigant relying upon a right of lien claimed under a statute of the State of Massachusetts and the United States Government and where it was held that the lien could not attach, Gray J. said (p. 165):

“The immunity from such interference arises, not because they are instruments of war, but because they are instruments of sovereignty; and does not depend on the extent or manner of their actual use at any particular moment, but on the purpose to which they are devoted.”

In the *Schooner Exchange*, Chief Justice Marshall said in part (pp. 136–7):

“The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers. . .

“This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.”

This statement of the law was quoted with approval and adopted in the judgment of

the Judicial Committee delivered by Lord Atkin in *Chung Chi Cheung v. The King*, [1939] A.C. 160 at pp. 168–9.

In *The Tervaete*, [1922] P. 259, a claim for a maritime lien was asserted against the vessel which at the time of a collision was the property of the Belgian Government and employed on Government service but which subsequently had been transferred to a private owner. Dealing with a contention that, while the authorities were to the effect that the Courts were without jurisdiction to entertain an action against a sovereign state, they did not apply when the claim was for a lien upon the ship, Bankes L.J. said at pp. 268–9:

“It seems to me impossible consistently with the law as there expressed to hold that it is permissible to recognize a maritime lien as attaching to the property of a sovereign or a sovereign state. I see no distinction in principle between the act of the individual issuing the writ and the act of the law attaching the lien. Each equally offends the rule affording immunity.”

There is no evidence in the present matter as to whether the United States granted the immunity here claimed to Canada or to other nations, but this was clearly unnecessary. The question is what is the law of nations by which civilized nations in general are bound, not how two individual countries may treat one another (*United States of America v. Dollfus Mieg et Compagnie S.A.*, [1952] 1 All E.R. 572 at p. 586).

The property assessed in the present matter was the property of the United States destined for use for works which were for the defence of that country, and thus “destined to its public use”, as that expression was used in the *Light-Boats, Parlement Belge* and *The “Tervaete”* cases. The Government of that country, with the approval and consent of the Government of Canada, brought the property in question into Canadian territory and was thus entitled to rely upon the fact that, in accordance with the principles of international comity, it would not be subject to taxation, seizure or sale at the instance of municipal or other bodies empowered to impose taxes for their own purposes.

The true view of the matter is not that the Rates and Taxes Act, in so far as it purported to authorize the imposition of municipal taxes generally upon real or personal property within the limits of the municipalities and to give a right of seizure and sale and a lien to enforce payment, was *ultra vires*, but rather that it should be construed as inapplicable to property brought into the country with the approval and consent of the Government of Canada exercising the powers vested in it by s. 91 (7) of the British North America Act for purposes such as are above described. As pointed out by Sir Lyman P. Duff in *Reference re Tax on Foreign Legations*, [1943] 2 D.L.R. at pp. 501–2, S.C.R. at p. 231, it was there unnecessary to consider the respective jurisdictions of the Parliament of Canada and the local Legislatures in respect of real estate owned or occupied by a foreign state, since the general language of the enactment imposing the taxation must be construed as saving the privileges of foreign states.

In my opinion, neither the leasehold interests, the buildings or the personal property in question were liable to taxation by the appellant municipality and, unless the respondent Fraser-Brace has disentitled itself by its conduct to recover the amounts paid, there should be judgment for their recovery.

In the case of the sum of \$14,273.35 paid on September 29, 1953, the right of recovery appears to me to be clear. The amount was paid following the threats made in the letters of September 1 and September 25, 1953, that unless the amounts were paid a levy would be made: *Valpy v. Manley* (1845), 1 C.B. 594, 135 E.R. 673, Tindal C.J. at p. 602; *Maskell v. Horner*, [1915] 3 K.B. 106, Lord Reading C.J. at p. 118.

As to the earlier payments made in the year 1952, while there is no direct evidence that the payment of \$3,113.62 made in November 1952 was paid under protest, as was done in respect of the payment of \$437 made earlier, it is clear from the evidence that the contractors insisted from the outset that, as the property was that of the United States, it was immune from taxation and that the municipal authorities insisted the contrary, and it should be inferred, in my opinion, that both amounts were paid under protest and to avoid proceedings being taken to recover the amounts. In these circumstances, the moneys are, in my opinion, recoverable: *Watt v. London* (1892), 19 O.A.R. 675.

I would dismiss this appeal and allow the cross-appeal and direct that judgment be entered for the respondent Fraser-Brace for the amount of \$17,823.79 and declare that the assessments made against the respondent Drake-Merritt for the years 1954 and 1955 were invalid. The respondents should have their costs throughout.

(*Fauteux J.* agreed that the appeal should be dismissed and the cross-appeal allowed.)

(*Abbott J.*) I have had the advantage of considering the reasons of my brother Rand and I am in agreement with the views which he has expressed as to the principles upon which are based the immunities of a foreign state, its diplomatic agents and its property. I desire to add only the following observations.

As Duff C.J.C. pointed out in *Reference re Tax on Foreign Legations* [1943] 2 D.L.R. 481 at pp. 501-2, S.C.R. 208 at p. 231, the principles governing the immunities of a foreign state, its diplomatic agents and its property do not limit the legislative authority of the legislature having jurisdiction in the particular matter affected by any immunity claimed or alleged. After stating that in the view which he took it was not necessary to consider the respective jurisdictions of Parliament and the local Legislatures in the matter of taxation of property of a foreign state in Canada, the learned Chief Justice then made the following statements with which I am in agreement:

“The general language of the enactments imposing the taxation in question must be construed as saving to the privileges of foreign states. The general principle is put with great clearness and force in the judgment of Marshall C. J. from which I have quoted so freely. These are his words.

“Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force or by subjecting such vessels to the ordinary tribunals . . . Those general statutory provisions . . . which are descriptive of the ordinary jurisdiction . . . ought not, in the opinion of this Court, to be so construed as to give them jurisdiction in a case in which the sovereign power had impliedly consented to waive its jurisdiction.”

(The italics are mine.)

As my brother Rand has pointed out, there as here, Duff C.J.C. was dealing with taxation under general language in which the interpretation of the statute only

was in question. There is nothing in the Statutes of New Brunswick authorizing the imposition of taxes by municipalities in that Province upon real and personal property, which can be construed as "destroying this implication" that in acquiring property in Canada for public purposes a foreign state does so upon the condition that such property is exempt from local taxation.

For the reasons given by my brother Rand I would therefore dismiss the appeal with costs and allow the cross-appeal with costs.

4. *Flota Marítima Browning de Cuba S.A. v. The Steamship Canadian Conqueror et al. and The Republic of Cuba*. DECISION BY THE SUPREME COURT ON 11 JUNE 1962¹³

Summary of the facts:

This was a motion made by the Republic of Cuba to set aside the writ and warrant of arrest in an action against seven ships lying in the Port of Halifax (Nova Scotia), on the ground that these ships were public national property and the Court was therefore without jurisdiction to entertain such an action. Flota Marítima Browning de Cuba, a Cuban corporation belonging to citizens of the United States, had signed in 1958 a lease-purchase agreement with Banco Cubano del Comercio, another Cuban corporation, relating to the operation of a number of vessels. Eight of these vessels had not been in use for some time and were lying in the Port of Halifax, but they were equipped for passenger and freight service. Some months later Flota, claiming that the Cuban bank had usurped its rights under the contract, declared it a nullity and surrendered possession of the ships to an agent of the bank but reserved the right to claim damages for breach of contract. On 9 June 1959 the bank sold the ships to the Cuban Government. On 4 August 1960 Flota instituted proceedings *in rem* in the Nova Scotia Admiralty District of the Exchequer Court and was granted a warrant for the arrest of seven vessels which were still in Halifax. While the Republic of Cuba was not named as a defendant, the writ was directed to "the owners and all others interested in the defendant vessels". Counsel for the Republic of Cuba entered an appearance under protest on the ground that the Court had no jurisdiction and moved to set aside the writ and the warrant on the grounds that the vessels were public national property of the Republic, which could not be impleaded, and that the plaintiff (Flota) had, in the lease-purchase agreement, expressly submitted itself and all questions relating to the said agreement to the jurisdiction of the competent courts of the Republic of Cuba.

Excerpts from the judgement:

Per Ritchie J.: It has long been recognized that ships of war engaged in the service of a foreign State are to be treated as floating portions of the flag State and that as such in peace-time they are exempt from the jurisdiction of our courts, and this principle has been extended to include the ships of a foreign State which are used for the public purposes of that State such as mail-carrying packets (*The Parlement Belge*) and ships carrying coal for public purposes (*The Tervaete*), but the proposition that trading vessels owned and operated by a foreign sovereign State are equally immune from the jurisdiction of our Courts rests in large measure upon the

¹³ Reproduced from *International Law Reports*, vol. 42, p. 125. Reported originally in *Can. Sup. Ct.* (1962), p. 598.

case of *The Porto Alexandre*, decided in the Court of Appeal in England in 1920, and upon the minority opinion of Lord Atkin in *Compania Naviera Vascongado v. S.S. Cristina*. The law as to the immunity from the jurisdiction of our Courts of the property of a foreign sovereign State devoted to the public use of that State is fully discussed in the decisions of this Court in *Reference re Powers of the City of Ottawa and the Village of Rockcliffe Park to Levy Rates on Foreign Legations, etc.*, and *Municipality of Saint John et al. v. Fraser-Brace Overseas Corporation et al.*

The material before us clearly indicates that at the time of their arrest the defendant ships, although lying idle in Halifax harbour and being equipped as trading or passenger ships, were nonetheless owned by and in possession of a foreign State and were being supervised by G. T. R. Campbell & Company which company was accounting for such supervision to "a division of the Ministry of Revolutionary Armed Forces, Republic of Cuba". Although the ships might ultimately be used by Cuba as trading or passenger ships, there is no evidence before us as to the use for which they were destined, and, with the greatest respect for the contrary view adopted by Mr. Justice Pottier who had the benefit of viewing the ships, I nevertheless do not feel that we are in a position to say that these ships are going to be used for ordinary trading purposes. All that can be said is that they are available to be used by the Republic of Cuba for any purpose which its Government may select, and it seems to me that ships which are at the disposal of a foreign State and are being supervised for the account of a department of government of that State are to be regarded as "public ships of a sovereign State" at least until such time as some decision is made by the sovereign State in question as to the use to which they are to be put.

In the case of *The Cristina, supra*, which has been very fully reviewed in the Courts below, a ship which had been requisitioned by the Government of the Republic of Spain was arrested at Cardiff at the suit of its former owners and the Government of Spain entered a conditional appearance and moved to set aside the writ, the arrest and all subsequent proceedings on the ground that the *Cristina* was then the property of a foreign sovereign State. When the case came before the House of Lords it was the unanimous opinion of the Court that the ship was in the actual possession of the Spanish Republic "for public purposes" and that the Courts of England were without jurisdiction to arrest it. The majority of the judges in the House of Lords placed their judgments squarely on the ground that the ship was being employed for the public purposes of a sovereign State, and Lord Thankerton, Lord Macmillan and Lord Maugham expressly reserved their opinion on the question of whether such immunity from arrest would have attached to the ship if it had been engaged in trade. Lord Atkin, however, in the course of delivering his minority opinion, recited the following two propositions of international law at p. 490:

"The first is that the courts of a country will not implead a foreign sovereign. That is, they will not by their process make him against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages. The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his, or of which he is in possession or control."

This statement of the law was approved by Viscount Simonds in *Rahimtoola v. Nizam of Hyderabad*, but Lord Atkin went on to say:

"There has been some difference in the practice of nations as to possible limitations of this second principle as to whether it extends to property only used for the

commercial purposes of the sovereign or to personal private property. In this country it is in my opinion well settled that it applies to both."

These latter observations which were in accord with the decision of the Court of Appeal in *The Porto Alexandre*, *supra*, were not necessary to Lord Atkin's decision, were not approved by Viscount Simonds and, as will be seen, were expressly disowned by the majority of the Law Lords who sat in *The Cristina*, *supra*.

The opinions of Lord Thankerton, Lord Macmillan and Lord Maugham have been thoroughly examined in the careful decision in both Courts below and it is unnecessary for me to do more than refer to the analysis of the effect of that case made by Viscount Simon, speaking on behalf of the Privy Council, in *Sultan of Johore v. Abubakar Tunku Aris Bendahar* where he said at p. 344:

"An action in rem against a ship impleads persons who are interested in the ship. That is settled law. There is even high authority for the view that such persons are, or may be, directly impleaded by such proceedings (see *The Cristina* case *per* Lord Atkin and *per* Lord Wright). If, however, it had been definitely determined that in no case could a foreign sovereign be impleaded without his consent, there could have been no justification for reserving the case of a sovereign's ship engaged in ordinary commerce—a reservation that was in fact made by the majority of the House of Lords in *The Cristina*. For a sovereign is impleaded by an action in rem against his ship, whether it is engaged in ordinary commerce or is employed for purposes that are more usually distinguished as public. The extent of the impleading is the same in the one case as in the other. Indeed, a great deal of the reasoning of the judgment in *The Parlement Belge*, 5 P.D. 197, would be inexplicable if there could be applied a universal rule without possible exception to the effect that, once the circumstance of a foreign sovereign being impleaded against his will can be established, a proceeding necessarily becomes defective by virtue of that circumstance alone.

"To say this is merely to disavow an alleged absolute and universal rule. It does nothing to throw doubt on the existence of the general principle."

Mr. Justice Cameron in the present case appears to have adopted Lord Atkin's view as to the doctrine of absolute sovereign immunity, saying:

"While the matter is perhaps not entirely free from doubt, I have come to the conclusion that I should follow the rule as laid down by Lord Atkin in *The Cristina* and which has been cited with approval by the well-known textbook writer to whom I have referred. It was also followed in a Canadian case, that of *Thomas White v. The Ship Frank Dale*, [1946] Ex. C.R. 555, by Sir Joseph Chisholm D.D.J.A."

When reference is made to the decision of Sir Joseph Chisholm, it is found that that learned judge must have been misled by the headnote in *The Cristina*, *supra*, at p. 485 because he says:

"In the *Cristina* case the Courts held that the immunity claimed extended and applied to ships engaged in trade and belonging to a foreign sovereign State. The desirability of modifying the accepted rule so far as it concerned trading ships was pointed out by some of their Lordships and particularly by Lord Maugham, but the House was of opinion that in the case the immunity was properly claimed. That seems to be the principle applied in the United States: *Berizzi Bros. Co. v. S.S. Pesaro* (1926) 271 U.S. 562, and until changed must be accepted by our Court."

The fact that the view so expressed by Sir Joseph Chisholm has not been accepted in this Court appears from what is said by Sir Lyman Duff C.J. in *Reference re Powers of the City of Ottawa and the Village of Rockcliffe Park to Levy Rates on Foreign Legations, etc.*, *supra*, at p. 221, where he had occasion to say:

“Parallel with this rule touching the immunity of legations, there runs the principle of the immunity of the property of a foreign State devoted to public use in the traditional sense. In *The Parlement Belge*, *supra*, it was held that this immunity applies to a ship used by a foreign Government in carrying mail. The Supreme Court of the United States has held that it is enjoyed by a ship the property of a foreign sovereignty and employed by the foreign Government for trading purposes. *Berizzi Brothers Co. v. S.S. Pesaro*, (1926) 271 U.S. 562. *It most certainly cannot be said that this is a settled doctrine, in view of the opinions expressed in the Cristina case*, although Lord Atkin, who delivered the judgment of the Judicial Committee in *Chung Chi Cheung v. The King*, [1939] A.C. 160 at p. 175 uses a general phrase: “The sovereign himself, his envoy and his property, including his public armed ships are not to be subjected to legal process.” (The italics are mine.)

The implications involved in accepting the opinion which Lord Atkin expressed in *The Cristina*, *supra*, at p. 490 as “settled doctrine” applicable to State-owned trading ships appear to me to be indicated by the following excerpts from the works of recognized authors on international law.

In *Oppenheim's International Law*, 8th ed., 1955, vol. I, at p. 273, it is said:

“. . . the vast expansion of activities of the modern State in the economic sphere has tended to render unworkable a rule which grants to the State operating as a trader a privileged position as compared with private traders. Most States, including the United States, have now abandoned or are in the process of abandoning the rule of absolute immunity of foreign States with regard to what is usually described as acts of a private law nature. The position, in this respect, in Great Britain must be regarded as fluid.”

To this last sentence the author appends the following note:

“This is so in particular with regard to foreign public vessels engaged in commerce. In *The Cristina* [1938] A.C. 485 the majority of the House of Lords expressed views not favourable to immunity from jurisdiction in such cases. . . .”

Dr. Cheshire, who is not customarily addicted to violent language, makes this observation in his recent (6th) edition, 1961, of his work on *Private International Law*. He says at p. 96:

“That Sovereign States which engage in the sea-carrying trade should be relieved of the obligations to which private shipowners are subject is unjust, if indeed not preposterous. Moreover, the injustice has been increased by the emergence of welfare and totalitarian States for the activities of sovereign governments, originally mainly political, have now expanded immeasurably both in extent and scope.”

With the greatest respect for those who hold a different view, I do not find it necessary in the present case to adopt that part of Lord Atkin's judgment in *The Cristina*, *supra*, in which he expressed the opinion that property of a foreign sovereign State ‘only used for commercial purposes’ is immune from seizure under the

process of our Courts, and I would dispose of this appeal entirely on the basis that the defendant ships are to be treated as (to use the language of Sir Lyman Duff) "the property of a foreign State devoted to public use in the traditional sense", and that the Exchequer Court was, therefore, without jurisdiction to entertain this action.

I would, therefore, dismiss this appeal with costs.

5. *Chateau-Gai Wines Ltd. v. Le Gouvernement de la République française*. DECISION BY EXCHEQUER COURT ON 11 APRIL 1967¹⁴

Summary of the facts:

An application was made against the French Government for striking out the registration of a trade mark registered in its favour. The French Government claimed sovereign immunity.

Excerpts from the judgement:

J.P. (orally): This is an application for an order setting aside the originating notice of motion whereby these proceedings were instituted, and the service of that originating notice of motion, on the ground that the named respondent is a foreign sovereign State and, declining to submit to the jurisdiction of this Court or to accept service of the proceedings, is not liable to be impleaded in this Court.

The originating notice of motion was filed in this Court on March 23, 1967, and reads as follows:

CHATEAU-GAI WINES v. FRANCE

In the Exchequer Court of Canada: Between Chateau-Gai Wines Limited, Applicant, and Le Gouvernement de la République Française, Respondent: Originating Notice of Motion (Filed this 23rd day of March, A.D. 1967).

Take notice that pursuant to Section 56 of the Trade Marks Act a motion will be made on behalf of the Applicant herein before this Court at a time and place to be fixed by a judge thereof;

For an order directing that the whole of the entry in the Trade Mark Register maintained pursuant to the Trade Marks Act and relating to Registration No. N.S. 2709, Register 7, registered June 10th, 1933, by the Respondent herein be struck out for the reasons and on the grounds and facts set out in the Statement of Facts delivered herewith.

Dated at Toronto, Ontario, this 22nd day of March, 1967.

McCARTHY & McCARTHY
330 University Avenue
Toronto, Ontario
Solicitors for the Applicant.

As appears from the statement of facts referred to in the originating notice of motion, the position taken is that the registered trade mark in question is wholly invalid.

¹⁴ Reproduced from *International Law Reports*, vol. 53, p. 284. Reported originally in *D.L.R.*, vol. 61 (2d), p. 709.

I have no doubt that the originating notice of motion cannot be entertained in the form in which it has been filed unless the Government of the Republic of France submits to the jurisdiction of this Court for that purpose. The law on the point, as I understand it, is well settled and not open to doubt. It is expressed by Lord Maugham in *Compania Naviera Vascongada v. S.S. Cristina*, [1938] 1 All E.R. 719 at p. 737, where he says:

“My Lords, it is not in doubt that an action *in personam* against a foreign government will not be entertained in our courts unless that government submits to the jurisdiction. The rule was founded on the independence and dignity of the foreign government or sovereign, or, to use the language of the future Lord Esher, M.R., delivering judgment in the great case of *The Parlement Belge* (1880), 5 P.D. 197, at p. 207:

“. . . the real principle on which the exemption of every sovereign from the jurisdiction of every court has been deduced is that the exercise of such jurisdiction would be incompatible with his regal dignity—that is to say, with his absolute independence of every superior authority.”

This immunity, be it noted, has been admitted in all civilised countries, on similar principles, and with nearly the same limits.

Fortunately, these proceedings do not raise the question concerning which there has been so much debate, and which all the Judges of the Supreme Court of Canada in *Flota Marítima Browning de Cuba S.A. v. SS. Canadian Conqueror et al. and Republic of Cuba*, 34 D.L.R. (2d) 628, [1962] S.C.R. 598, 83 C.R.T.C. 219, held to be still undecided, as to whether the additional rule that property of a foreign power cannot be impleaded, seized or detained applies to property held by the foreign sovereign power for commercial purposes as well as to property held by it for public purposes. The contrast between the two rules is to be found near the end of the judgment of Locke and Judson, J.J., in the latter case at pp. 629–30, which reads, in part:

In my opinion the law applicable in these circumstances is as it is stated in *Compania Naviera Vascongada v. SS. Cristina*, [1938] A.C. 485 at p. 490, in the following terms:

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

“The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control.”

In *Rahimtoola v. Nizam of Hyderabad*, [1958] A.C. 379 at p. 394 Viscount Simonds adopted that statement as accurately stating these proceedings of international law.

The question as to whether the law extends to property only used for the commercial purposes of the sovereign does not arise in the present matter and I express no opinion as to it.

In this case it has been made to appear to the Court that the named respondent does not submit to the jurisdiction of this Court in respect of this matter. The matter cannot therefore be permitted to proceed as a matter in which, in form at least, relief is being sought, or might appear to be sought, as against the Government of the Republic of France.

That is not, however, the end of the matter. The question as to what is the essential nature of the matter remains to be considered. The relief sought is neither a judgment that the applicant is entitled to any relief from the Government of the Republic of France nor a judgment that would in any way affect any property that belongs to or is in the possession of that Government or in which that Government has any interest. The relief sought is relief that this Court has jurisdiction to give under s. 56 of the *Trade Marks Act*, 1952–53 (Can.), c. 49, which reads in part:

56(i) The Exchequer Court of Canada has exclusive original jurisdiction, on the application of the Registrar or of any person interested, to order that any entry in the register be struck out or amended on the ground that at the date of such application the entry as it appears on the register does not accurately express or define the existing rights of the person appearing to be the registered owner of the mark.

This must be read with s. 2(n) which defines “register” to mean the register kept under s. 26, which reads in part:

26(1) There shall be kept under the supervision of the Registrar, a register of trade marks and of transfers, disclaimers, amendments, judgments and orders relating to, and of registered users of, each registered trade mark.

What we have then is an application to this Court to exercise its statutory jurisdiction to order that an entry be struck out of this domestic trade mark register on the basis that there is no “existing rights” in the person appearing to be the registered owner.

In my view, the Court’s jurisdiction to police the trade mark register cannot be dependent upon its having jurisdiction over all persons who have, or might be suggested to have, some interest in the maintenance of the register in a particular form. Certainly, the Registrar must be able to apply under s. 56 where he is of the view that there is an entry that is invalid. What the Registrar can do, under s. 56, “any person interested” can do. The authority extends to them in the same terms.

The order will therefore be that the originating notice of motion be set aside 10 days from this date unless, within that time, an order be obtained from the Court amending the originating notice of motion and the statement of facts to change their form so that they neither are, nor have the appearance of being, a proceeding against the Government of the Republic of France.

As the proceeding in its present form is, apparently, if not actually, a proceeding *in personam* against a foreign government, and as such a proceeding is not only contrary to both international law and domestic law but is unauthorized by the Rules of this Court, any act that may have been effected as a purported service of such proceeding is hereby declared to be a nullity and set aside.

In the event that the proceedings are amended so as to be unobjectionable as to form, there should, in my view, be no further attempt at service of them unless it is made pursuant to a special order of the Court which, in my view, it is not likely that the Court would be inclined to grant. I should myself be inclined, if the proceedings

are so amended, to order that the Registrar bring them to the attention of the Deputy Attorney-General of Canada with the suggestion that the Secretary of State for External Affairs may desire to consider whether they should be brought to the attention of the Government of the Republic of France, in some appropriate way, as a matter of courtesy, and an indication that there will be a reasonable delay in the carrying on of the proceedings in this Court to provide the Government of the Republic of France with an opportunity of deciding whether it desires to take any action with regard thereto.

As the Government of the Republic of France has not submitted to the jurisdiction of the Court, there will be no order as to costs.

6. *Government of the Democratic Republic of the Congo v. Venne*
DECISION BY THE SUPREME COURT OF CANADA IN 1971¹⁵

Summary of the facts and the judgement:

In *Government of the Democratic Republic of the Congo v. Venne*, the Supreme Court of Canada, by a majority of seven to two, set aside the judgements of the Court of Appeal and of the Superior Court of Quebec. Ritchie J., who wrote the opinion for the majority, refused to discuss the question whether Quebec courts should continue to apply the doctrine of qualified or restrictive sovereign immunity as he did not accept the finding of the trial judge that when the government of the Democratic Republic of the Congo employed Mr. Jean Venne to prepare sketches of the national pavilion which it proposed to build at the International Exhibition, it was not performing a public act of a sovereign state but rather one of a purely private nature. His Lordship stated (page 673):

... in preparing for the construction of its national pavilion, a Department of the Government of a foreign State, together with its duly accredited diplomatic representatives, were engaged in the performance of a public sovereign act of State on behalf of their country and that the employment of the respondent was a step taken in the performance of that sovereign act. It therefore follows in my view that the appellant could not be impleaded in the Courts of this country even if the so-called doctrine of restrictive sovereign immunity had been adopted in our Courts, and it is therefore unnecessary for the determination of this appeal to answer the question posed by Mr. Justice Owen and so fully considered by the Court of Appeal. In an area of the law which has been so widely canvassed by legal commentators and which has been the subject of varying judicial opinions in different countries, I think it would be undesirable to add further *obiter dicta* to those which have already been pronounced and I am accordingly content to rest my opinion on the ground that the appellant's employment of the respondent was in the performance of a sovereign act of State.

He also said (pages 677-78);

I am of opinion that the contract here sought to be enforced to which the appellant's diplomatic representative and one of its Departments of Government were parties, was a contract made by a foreign Sovereign in the performance of a public act of State and that whatever view be taken of the doctrine of sovereign immu-

¹⁵ Reproduced from *Canadian Yearbook of International Law*, vol. 10 (1972), p. 319. For the complete decision see *D.L.R.*, vol. 22 (3d), p. 669.

nity, it was a matter in respect of which the Republic of the Congo cannot be impleaded in our Courts. I would allow this appeal on that ground.

The decision of the majority is somewhat ambiguous as no attempt is made to clarify the law. To some, it might appear that the majority has rejected the distinction between acts *jure imperii* and *jure gestionis* and reaffirmed the doctrine of absolute immunity. However, this does not seem to be the proper interpretation to be given to this decision. The question is still open. If the act of the government of the Democratic Republic of the Congo had been characterized by the court as *jure gestionis*, it would have had to pass upon the doctrine of restrictive sovereign immunity.

In a very learned dissenting opinion, Mr. Justice Laskin states: "To allow the declinatory exception is thus to reaffirm the doctrine of absolute immunity. I have made plain my opinion that the doctrine is spent."

He points out that neither the independence nor the dignity of states, nor international comity require vindication through a doctrine of immunity: "Independence as a support for absolute immunity is inconsistent with the absolute territorial jurisdiction of the host state; and dignity, which is a projection of independence or sovereignty, does not impress when regard is had to the submission of states to suit in their own courts. . . . Nor is comity any more realistic a foundation for absolute immunity unless it be through treaty."

Laskin J. also rejects extraterritoriality as a prop of absolute immunity. In his opinion, immunity must be considered from the standpoint of function rather than status (page 687):

Affirmatively, there is the simple matter of justice to a plaintiff; there is the reasonableness of recognizing equal accessibility to domestic courts by those engaged in trans-national activities, although one of the parties to a transaction may be a foreign State or an agency thereof; there is the promotion of international legal order by making certain disputes which involve a foreign State amenable to judicial processes, even though they be domestic; and, of course, the expansion of the range of activities and services in which the various States today are engaged has blurred the distinction between governmental and non-governmental functions or acts (or between so-called public and private domains of activity), so as to make it unjust to rely on status alone to determine immunity from the consequences of State action.

In other words, immunity should attach to certain classes of functions and not to others, for example, commercial transactions.

7. *Smith v. Canadian Javelin Ltd.* DECISION BY THE HIGH COURT OF ONTARIO IN 1976¹⁶

Summary of the facts and the judgement:

An agency of a foreign government cannot, subject to certain exceptions such as commercial transactions and disputes concerning property in Ontario, be impleaded in the courts of that province. Thus, no action could be brought against the Securities and Exchange Commission of the United States of America in respect of the performance of its functions pursuant to United States legislation.

¹⁶ Reproduced from *Canadian Yearbook of International Law*, vol. 15 (1977), p. 375. For the complete decision see *D.L.R.*, vol. 68 (3d), p. 428.

F. CHILE

1. DECISION BY THE SUPREME COURT ON 22 OCTOBER 1968

*X v. The Embassy of Yugoslavia*¹⁷

Summary of the facts and the judgement:

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

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

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

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

2. DECISION BY THE SUPREME COURT ON 3 SEPTEMBER 1969

X v. the Government of China

The Supreme Court of Justice, by a decision of 3 September 1969, annulled the judgement given by the Pedro Aguirre Cerda District Labour Court in the action brought by Mr. Marchant against "the Government of Nationalist China, represented in Chile by the Ambassador of that Republic, Mr. Ti Tsun Li". On that occasion, the Supreme Court stated that "it is a universally recognized principle of international law that neither sovereign nations nor their Governments are subject to the jurisdiction of the courts of other countries. There are", it added, "other extrajudicial means of claiming from those nations and their Governments performance of the obligations incumbent on them".

3. DECISION BY THE SUPREME COURT ON 10 DECEMBER 1969

X v. the Government of Bolivia

Following the doctrine upheld in the aforementioned rulings, the Supreme Court of Justice, by a decision of 10 December 1969, set aside the preventive injunctions obtained by an unofficial agent of the Gulf Oil Company from the Second Antofagasta superior departmental court, in the case of Gulf Oil Co. *versus* the Bolivian Government, on the ground that "it is unquestionable that the Chilean courts lack jurisdiction and competence to issue preventive injunctions or orders prohibiting the

¹⁷ The summary of the Chilean cases are submitted to the Secretariat by that Government.

conclusion of deeds and contracts, or to take other kinds of measures relating to goods, machinery and any other type of cargo sent to Bolivia from abroad through Chilean territory”.

4. DECISION BY THE SUPREME COURT ON 2 JUNE 1975
X v. the Government of Cuba

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

G. CHINA

Rizaeff Frères v. The Soviet Mercantile Fleet. DECISION BY THE PROVISIONAL COURT OF SHANGHAI (CIVIL DIVISION) ON 30 SEPTEMBER 1927¹⁸

Summary of the facts:

On 17 December 1925 the plaintiffs filed a petition in the former International Mixed Court at Shanghai, containing the following allegations: (1) that the plaintiffs were merchants of Persian nationality carrying on business in Shanghai; (2) that the defendant, who was the representative in title of the Russian Volunteer Fleet, was a Russian company carrying on business at 1 Whangpoo Road, Shanghai; (3) that by agreements in writing made by and between the plaintiffs and the Russian Volunteer Fleet the latter undertook for reward to convey quantities of tea and other goods to Bacou, Boukhara, Samarkand and elsewhere as the said agreements specified; (4) that it was a term of the agreements that the Volunteer Fleet should convey all the said tea and goods in the first place to Vladivostock and there effect the dispatch of them by the Chinese Eastern Railway to their ultimate destinations; and (5) that in consequence of a failure to perform the above-mentioned term of contract, the whole of the tea and goods to the value of two hundred and sixty-one thousand eight hundred and nineteen taels (Tls. 261,819.00) was lost to the plaintiffs.

On the strength of the above facts, the plaintiffs prayed judgement against the defendants for the estimated value of the goods, and in addition for fifty thousand taels (Tls. 50,000.00) by way of damages for breach of contract.

In January 1926, the plaintiffs filed a motion in the same Court, asking that service of the petition be made on the Sovtorgflot (the Soviet Mercantile Fleet) at No. 1 Whangpoo Road, Shanghai, and that the said Sovtorgflot as assignees and rep-

¹⁸ Reproduced from *International Law Reports*, vol. 40, p. 84. Reported originally in *The China Law Review* (English version), vol. 3, No. 6 (1927), p. 14.

representatives in title of the Russian Volunteer Fleet be called upon to defend this action. On 25 March 1926, the Mixed Court granted the motion and ruled that it had jurisdiction in the matter. On 12 April of the same year, Counsel for the Soviet Mercantile Fleet moved for rehearing. On 10 October the motion for rehearing on the question of jurisdiction was granted, "such rehearing to be set before the original Court". However, the Mixed Court never heard the case again. After the abolition of the Mixed Court it devolved on the Provisional Court of Shanghai to rehear the case.

Excerpts from the judgement:

The plaintiffs alleged that the Russian Volunteer Fleet formerly had its office at 1 Whangpoo Road; that in 1925 the said Fleet suddenly changed its name to Sovtorgflot (Soviet Mercantile Fleet); that as a matter of fact the two institutions are identical or, at least, the latter is an assignee or representative in title of the former. Counsel for the defendant, on the other hand, brought out two points in defence: (1) that the two institutions are independent of one another, and that Sovtorgflot is an innocent purchaser rather than a representative in title of the Russian Volunteer Fleet; (2) that granted for argument's sake that the allegations of the plaintiffs are true, the Court has no jurisdiction over the defendant as it is a governmental institution of the Union of Soviet Socialist Republics. From the evidence it is clear that the defendant Fleet is owned and controlled by the Union of Soviet Socialist Republics.

As the question of jurisdiction has been raised, that has to be decided before considering other questions. This question is one of international law. According to the prevailing customs of international law, merchant vessels belonging to a foreign State are exempt from local jurisdiction. As the defendant Fleet has been proved to be owned and controlled by a State in friendly relations with our country, it is clear that this Court does not have jurisdiction over this case. Therefore . . . the petition should be dismissed with costs.

H. CZECHOSLOVAKIA

In re Produkt, Ex parte Federal People's Republic of Yugoslavia.

DECISION BY THE REGIONAL COURT IN PRAGUE ON 16 DECEMBER 1955¹⁹

Summary of the facts:

By Order of April 6, 1955, the People's Civil Court (Court of first instance) made an order under secs. 570 ff. of the Code of Civil Procedure for the liquidation of Produkt Sales Co-operative of Metalworking Factories, a registered co-operative with limited liability. At the same time the Court, acting under s. 579 of the Code of Civil Procedure, ordered that claims of the creditors be proved within thirty days, *i.e.*, by May 5, 1955.

On June 28, 1955, the Federal People's Republic of Yugoslavia, acting on behalf of the Presidium of the Government of the People's Republic of Montenegro, a creditor of Produkt, lodged proof of its debt with the said Court through the consular

¹⁹ Reproduced from *International Law Reports* (1955), p. 242.

section of its Embassy in Prague. In the application it was stated that the delay in lodging it was due to the fact that the applicant had only on April 26, 1955, been informed of the winding-up order, through a diplomatic Note of the Ministry of Foreign Affairs of the Czechoslovak Republic, and that as all documentation was in Belgrade, the exact amount of the debt was not known to the applicant prior to the date of filing of the application.

The Court of first instance rejected the proof as having been lodged out of time. On appeal by the Presidium of the Government of the People's Republic of Montenegro.

Excerpts from the judgement:

According to the provisions of s. 611 of the Code of Civil Procedure, the jurisdiction of the Czechoslovak ordinary courts may be exercised in respect of matters that are submitted to the local courts either under international agreements, duly promulgated in the *Gazette of Laws and Decrees*, or under other rules of international law. The said rules, however, provide that a foreign State is not subject to the jurisdiction of the Czechoslovak courts unless it voluntarily waives the privilege of immunity.

“Since the appellant took no steps in proceedings before June 28, 1955, the date on which it lodged its proof of debt in the bankruptcy under consideration, its submission to the jurisdiction of the Czechoslovak courts cannot be implied save as from that date. It would plainly be erroneous to construe the previous attitude of the appellant in relation to the Czechoslovak courts as a failure to act within the legal meaning of that expression and to draw from this attitude the conclusions provided for in s. 576 (a) of the Code of Civil Procedure. Therefore, we are unable to accept the finding of the Court below which saw in the applicant's attitude a failure to act in the sense of s. 576 (c) and, accordingly, rejected the proof.

“In the result, we allow the appeal.”

I. FRANCE

I. DÉCISION DU TRIBUNAL CIVIL DE LA SEINE EN DATE DU 30 JANVIER 1956 *Salabert c. Gouvernement des États-Unis d'Amérique du Nord*²⁰

Résumé des faits et du jugement:

NOUS, PRÉSIDENT,—Attendu que par exploit en date du 25 janvier 1956, Salabert a fait citer à comparaître devant Nous en référé le Gouvernement des États-Unis d'Amérique du Nord, pris en la personne du Chef administratif de son ambassade en France, aux fins de voir désigner un expert avec la mission précisée au dispositif de ladite assignation;

Attendu que le défendeur n'a pas comparu;

Attendu que suivant un principe traditionnel du droit des gens, les États souverains et leurs gouvernements ne sont pas soumis à la justice d'un autre État;

²⁰ Reproduced from *Gazette du Palais* (1956), April 13, p. 254.

Attendu que ce principe revêt dans notre droit un caractère particulier, en ce sens qu'il est d'ordre public bien que les États étrangers aient la faculté de renoncer à son application et de se soumettre volontairement à la juridiction française;

Attendu que le juge saisi d'une assignation délivrée à un Gouvernement étranger a l'obligation d'examiner d'office sa propre compétence, lorsque ledit Gouvernement n'excipe pas formellement de l'immunité de juridiction, et notamment lorsqu'il fait défaut comme c'est le cas en l'espèce, le défaut n'étant pas de nature à faire présumer la renonciation à l'immunité;

Attendu qu'il échet donc, avant toute décision sur l'objet de la présente demande, de rechercher si, dans les circonstances de fait telles qu'elles sont exposées en l'assignation et établies par les pièces du dossier, le Gouvernement étranger assigné doit être réputé avoir renoncé au bénéfice de l'immunité de juridiction;

Attendu que si un État étranger peut être justiciable de la juridiction française à raison de certains actes de gestion purement privés, et notamment lorsqu'il fait des actes de commerce en se comportant comme un simple particulier, il n'apparaît pas établi avec certitude qu'il en soit ainsi dans la présente espèce, l'acquisition dont il va être ci-après parlé ayant eu pour but le logement ou l'hébergement des employés ou fonctionnaires du Gouvernement des États-Unis d'Amérique, dont certains peuvent faire partie du personnel diplomatique et bénéficier à ce titre d'une immunité personnelle;

Attendu qu'un État étranger renonce certainement à l'immunité de juridiction lorsqu'il prend l'initiative d'attirer un particulier devant la justice française;

Attendu que le particulier ainsi assigné peut opposer à la demande toutes défenses et toutes demandes reconventionnelles, sans que l'État étranger puisse alors exciper d'aucune immunité.

Attendu, en fait, que Salabert se prévaut d'un contrat sous seing privé en date du 27 novembre 1945, enregistré le 29 du même mois par lequel la Soc. à responsabilité limitée Hôtel des Deux Mondes lui a donné la gérance d'un salon de coiffure, pour une durée de 12 ans expirant le 31 décembre 1957;

Attendu qu'il expose que suivant acte reçu Cottenet et Constantin, notaires à Paris, le 23 juin 1952, tous les porteurs de parts de cette Société ont vendu leurs parts au Gouvernement des États-Unis d'Amérique et que la Société a été dissoute et liquidée, en sorte que l'immeuble ou était exploité le salon de coiffure se trouve aujourd'hui être la propriété de l'Etat assigné;

Attendu que suivant exploit en date du 20 janvier 1956, le Gouvernement des États-Unis d'Amérique a dénoncé à Salabert un procès-verbal de constat en date du 17 du même mois, d'où il appert que le salon de coiffure est fermé, l'a sommé d'exécuter une clause du contrat de gérance d'après laquelle le fonds de commerce doit être tenu constamment en activité et lui a déclaré que le propriétaire entendait se prévaloir de la clause résolutoire, d'après laquelle le contrat est résilié de plein droit en cas d'inexécution des clauses et conditions prévues et 8 jours après une sommation demeurée infructueuse;

Attendu que Salabert reconnaît que le fonds est fermé, mais soutient avoir été contraint à cette fermeture par suite des transformations matérielles réalisées dans l'immeuble et du changement d'affectation;

Attendu que l'expertise par lui sollicitée tend à rechercher les causes de la fermeture et à évaluer le préjudice qui a pu être subi par lui;

Attendu que le fait par un État étranger de dénoncer un procès-verbal de constat et de délivrer une sommation à un particulier en France ne peut être assimilé à la saisine d'une juridiction française;

Attendu que la sommation n'est que l'expression d'une prétention et que l'expiration du délai imparti a pour seule conséquence de permettre au propriétaire d'introduire une demande en constatation de résiliation et en expulsion;

Attendu que la sommation exhibée en copie ne reproduit que la partie de la clause qui prévoit la résiliation, mais non la phrase dans laquelle est attribuée compétence au Président du Tribunal de commerce de la Seine;

Attendu qu'il demeure donc une incertitude sur le point de savoir si le Gouvernement des Etats-Unis d'Amérique formera devant la juridiction française une demande en expulsion contre Salabert;

Attendu que si cette demande est formée Salabert, alors défendeur, pourra exiger de tous moyens de défense dans les mêmes conditions que si son propriétaire était un particulier, et notamment soutenir que l'infraction au contrat ne lui est pas imputable;

Attendu que tant que le Gouvernement étranger intéressé n'a pas renoncé à l'immunité de juridiction en saisissant lui-même une juridiction française cette juridiction est incompétente pour connaître de l'action préventive actuellement diligentée par Salabert;

Par ces motifs—Nous déclarons incompétent, en l'état, pour connaître de la demande d'expertise formée par Salabert.

2. DÉCISION DE LA COUR D'APPEL DE PARIS EN DATE DU 16 MARS 1960 *Société immobilière des Cités Fleuries Lafayette c. Etats-Unis d'Amérique*²¹

Résumé des faits et du jugement:

Statuant sur l'appel régulièrement interjeté par la société immobilière Cités Fleuries Lafayette d'un jugement rendu par défaut le 27 novembre 1957 par le Tribunal civil de la Seine qui s'est déclaré incompétent sur la demande formée par elle contre les Etats-Unis d'Amérique en résolution de contrat et dommages-intérêts;

Considérant que la société appelante soutient qu'en vertu d'un contrat passé avec les Etats-Unis d'Amérique par l'entreprise Himo, de Mont-de-Marsan (Landes), aux droits de laquelle elle se trouve, elle s'est engagée à acheter des terrains à Busac et à Captieux (Gironde), à y construire pour son propre compte des locaux à usage d'habitation et à les louer à des membres du personnel des camps militaires américains; que, de leur côté, les Etats-Unis d'Amérique se sont obligés à garantir, pendant un certain nombre d'années le paiement des loyers par ses ressortissants occupant lesdits locaux;

Considérant que pour rejeter leur compétence les premiers juges ont estimé que la convention invoquée se rattachait étroitement au pouvoir souverain d'un État

²¹ Reproduced from *Journal de droit international*, vol. 89 (1962), p. 133.

étranger de passer sur le territoire français tout accord utile pour assurer le fonctionnement d'un service public;

Considérant que l'appelante fait valoir que, s'agissant d'un simple contrat de garantie de loyers ne présentant ni par son objet ni par ses clauses le caractère d'un contrat administratif, le Tribunal saisi était compétent par application de l'article 14 du Code civil et conclut au fond à l'adjudication des fins de son exploit introductif d'instance;

Considérant que les Etats-Unis d'Amérique n'ont pas constitué avoué devant la Cour; qu'il échet de donner défaut contre eux;

Considérant qu'à admettre établie la prétention de la société appelante, relative à l'existence et aux modalités du contrat dont elle se prévaut, il apparaît que les Etats-Unis auraient agi en l'occurrence, dans la forme, selon le mode et suivant les données en droit privé; que si le but par lui poursuivi avait été le fonctionnement d'un service public, il n'en resterait pas moins que le gouvernement intimé ne serait fondé à se prévaloir de l'immunité de juridiction que si le contrat envisagé contenait des clauses dérogeant au droit commun et impliquait l'exercice des prérogatives de la puissance publique sur le territoire français;

Or, considérant qu'aucune référence n'a été faite par les parties à la convention de Londres du 19 juin 1951, concernant le statut des troupes étrangères stationnées en France dans le cadre de l'O.T.A.N. et qu'au surplus aucun accord d'application de cette convention n'est intervenu entre la France et les Etats-Unis au sujet de la construction des logements destinés au personnel militaire américain;

Considérant que dans ces conditions le gouvernement des Etats-Unis doit être réputé avoir agi pour donner satisfaction à des intérêts privés et avoir accompli un acte de simple gestion et non un acte d'autorité échappant au contrôle des juridictions françaises;

Qu'il y a lieu en conséquence d'infirmer la décision entreprise et évoquant, de statuer au fond, conformément aux conclusions de la société appelante, la matière étant susceptible de recevoir une solution définitive;

Considérant que la société Cités Fleuries Lafayette prétend dans son exploit introductif d'instance qu'elle a été chargée par le Headquarter United States European Command U.S. Eucom Family Housing Group, Hôtel Astoria à Paris, de l'étude et de la réalisation de deux groupes d'habitations destinée au personnel des camps américains de Bussac et de Captieux, et que c'est en se conformant aux instructions impératives des autorités américaines qu'elle a réalisé des avant-projets, puis des projets de construction et un plan de financement;

Que le dossier établi au résultat de toute cette phase préliminaire et notamment la convention de garantie qu'elle contenait a été envoyé à Washington pour approbation, laquelle a été obtenue sans réserve;

Qu'elle a alors fait toutes diligences pour l'édification des constructions prévues, en sollicitant notamment les permis de construire et les autorisations préfectorales de lotissement; qu'il ne s'agissait donc pas de sa part de simples « propositions » non susceptibles de lier le gouvernement des Etats-Unis, mais « d'une situation contractuelle définitive » dont la méconnaissance par son cocontractant lui a causé un préjudice dont elle est en droit de demander la réparation;

Mais considérant que si la société appelante justifie des pourparlers intervenus

et verse aux débats un projet de contrat non signé elle ne rapporte pas la preuve qu'elle a été sollicitée par les autorités américaines au sujet des constructions dont s'agit et qu'elle a obéi aux instructions de celles-ci; que ses prétentions sur ce point sont formellement contredites par une lettre du major général Robert W. Berry datée du 1^{er} août 1955 et dont il convient de détacher le passage suivant: « Vous affirmez « que les services des Etats-Unis vous ont demandé en mai 1953 de faire une étude « de construction de logements pour Captieux et Bussac. Permettez-moi de faire re-« marquer que, au contraire, c'est vous qui avez sollicité le «U.S. Eucom Hous-« Group» de votre propre gré et avez entrepris ces études volontairement. On ne «vous a jamais accordé des droits exclusifs d'éventuel répondant en ce qui concerne «ces deux projets ou autres projets. L'approbation de Washington à laquelle votre «lettre se réfère était une approbation tardive des projets de logements à garantie de «location en général et il n'y a pas eu d'approbation de Washington de vos proposi-« tions spécifiques»;

Considérant que le programme de construction invoqué par la société Cités Fleuries Lafayette portait seulement sur 140 maisons, dont 100 pour Bussac et 40 pour Captieux alors que les autorités américaines avaient envisagé l'édification d'un ensemble de 2 416 logements répartis dans toute la France; que le 30 juin 1955 elles en ont confié la réalisation intégrale à une autre entreprise traitant pour le tout, après un avis favorable de la Mission centrale de liaison;

Considérant qu'il est donc permis d'estimer que l'approbation de Washington a bien été donnée pour le principe même de la garantie de location et non pour le seul projet concernant Bussac et Captieux; qu'en tous cas la société appelante, qui ne justifie d'aucune notification officielle de ladite approbation, aurait dû au moins s'assurer avant de poursuivre ses diligences, que le Gouvernement des Etat-Unis avait spécialement autorisé les constructions envisagées;

Considérant qu'elle n'est donc pas fondée à se prévaloir d'une situation qu'elle a elle-même créée; qu'à défaut d'accord dont la preuve n'est pas rapportée une telle situation n'a pu faire naître de liens de droit entre les parties en cause;

Qu'il y a lieu en conséquence de débouter la société appelante de sa demande;

Par ces motifs:

Donne défaut contre les Etats-Unis d'Amérique;

Reçoit la société immobilière Cités Fleuries Lafayette en son appel;

Dit que le Tribunal s'est déclaré à tort incompétent;...

3. DÉCISION DE LA COUR DE CASSATION (CIVIL CHAMBRE) EN DATE DU 19 DECEMBRE 1961. *Gugenheim c. État du Viet-Nam*²²

Résumé des faits et du jugement:

Pourvoi en cassation contre un arrêt de la Cour d'appel de Paris du 7 janvier 1955.—Arrêt :

LA COUR—Sur le moyen unique en ses deux branches:

Attendu que Gugenheim, commerçant français, ayant en vertu de l'art. 14 C. civ., formé en France contre l'État vietnamien une action en exécution d'un marché

²² Reproduced from *Revue générale de droit international public*, vol. 66 (1962), p. 654.

de fournitures militaires, il est reproché à l'arrêt confirmatif attaqué d'avoir admis l'incompétence des juridictions françaises pour en connaître, en raison de l'immunité de juridiction des États étrangers, alors, selon le pourvoi, que cette immunité n'existe que quand l'État étranger a agi en sa qualité de puissance publique et non dans les termes du droit privé comme pourrait le faire un particulier, sans qu'importe la circonstance que le contrat litigieux, passé dans les formes du droit commun, ait été conclu dans l'intérêt d'un service public;

Mais, attendu qu'il résulte des énonciations de l'arrêt attaqué que le marché litigieux a été passé pour couvrir les besoins du service de la défense nationale vietnamienne; que la Cour d'appel a pu, en l'état de ces constatations, décider qu'un acte accompli de la sorte par le Viet-Nam dans l'exercice de ses fonctions étatiques de gestion publique se trouvait couvert par l'immunité de juridiction;—D'où il suit que l'arrêt attaqué, qui est motivé, a légalement justifié sa décision;

Par ces motifs,—Rejette...

4. DÉCISION DE LA COUR DE CASSATION EN DATE DU 19 DÉCEMBRE 1961
*Soc. Bauer—Marchal et Cie c. Min. des Finances de l'État turc*²³

Résumé du jugement:

Pourvoi en cassation contre un arrêt de la Cour d'appel de Paris du 29 janvier 1957.—Arrêt:

LA COUR,—Sur le moyen unique en sa 1^{re} branche: vu l'art. 14 C. civ.:

Attendu que l'État ottoman s'est, en 1913, rendu caution solidaire des obligations assumées par la ville de Constantinople, en vertu d'un emprunt municipal; que la Banque Bauer—Marchal et Cie ayant, en 1952, formé en France par application de l'art. 11 C. civ., contre la République turque, prise en sa qualité de débiteur accessoire, une demande en remboursement de titres amortis de l'emprunt et en paiement de coupons, la Cour d'appel a déclaré cette action couverte par l'immunité de juridiction des États étrangers et les tribunaux français incompétents pour en connaître; qu'en statuant de la sorte, sans s'expliquer sur les circonstances propres à justifier la qualification, par lui attribuée au cautionnement litigieux, d'acte de puissance publique emportant immunité de juridiction, l'arrêt attaqué n'a pas donné de base légale à sa décision;

Par ces motifs, et sans qu'il y ait lieu de se prononcer sur la 2^e branche du moyen,—Casse...

5. DÉCISION DE LA COUR D'APPEL DE PARIS EN DATE DU 7 FÉVRIER 1962.
*United States of America (Director of the United States Foreign Service) v. Perignon and others*²⁴

Résumé des faits et du jugement:

Ce nouvel arrêt de la 1^{re} chambre de la Cour d'appel de Paris suit celui du 16 mars 1960, qui a été reproduit et commenté dans cette *Revue* (*Clunet* 1962, 132); il

²³ Reproduced from *Revue Générale de Droit International Public*, vol. 66 (1962), p. 654.

²⁴ Reproduced from *Journal du Droit International*, vol. 89 (1962), p. 1017.

s'inspire de la même doctrine, savoir que l'immunité de l'Etat étranger dépendra, en matière contractuelle, de l'existence ou de l'absence de clauses dérogoires du droit commun impliquant l'exercice de prérogatives de puissance publique sur le territoire français.

Il s'agissait d'une demande en paiement de travaux résultant de marchés passés pour la construction, dans la banlieue parisienne, d'immeubles « à usage d'habitation réservés à des citoyens américains, fonctionnaires ou non, ne bénéficiant pas de l'immunité diplomatique ». Le tribunal s'était déclaré « incompétent » en raison de l'immunité des Etats-Unis. Devant la Cour, les appelants faisaient valoir que « les conventions, régies par les conditions générales élaborées par l'organisme américain, ne mettaient en œuvre, ni par leur objet ni par leur modalité, l'idée de service public ou de puissance publique, et qu'elles ne comportaient aucune clause exorbitante du droit commun ». Ils ajoutaient que d'ailleurs « il n'existe en la matière aucun traité susceptible de permettre au Gouvernement des Etats-Unis d'exercer sur le territoire français des prérogatives de puissance publique et que celui-ci doit être réputé dans l'espèce satisfaire à des intérêts privés et accomplir un simple acte de gestion ». Sans doute existait-il dans le contrat une clause donnant « compétence à l'officier » contractant puis au Secrétaire d'Etat américain pour trancher les contestations éventuelles », mais cette clause ne pouvait, selon les appelants, être retenue en raison de sa nullité d'ordre public, « ces deux personnes revêtant à l'évidence la qualité de juge et de partie ».

La Cour a tranché la contestation dans les termes où elle lui a été soumise: relevant dans le contrat l'existence de clauses dérogoires au droit commun, elle confirme le jugement du tribunal.

« Considérant qu'il n'est pas contesté que les conventions litigieuses sont l'œuvre d'un organisme d'Etat, contractant sur ordre ou pour le compte du gouvernement étranger;

« Considérant qu'il résulte des documents officiels produits que les immeubles de Boulogne-Billancourt et de Neuilly-sur-Seine étaient destinés au logement des fonctionnaires américains chargés d'appliquer en France la convention de coopération économique européenne dite « Plan Marshall » signée le 16 avril 1948 entre le gouvernement des U.S.A. et seize Etats européens;—Que par ailleurs, ces constructions ont été financées par les fonds provenant des ouvertures de crédit consenties à la France par les Etats-Unis à ce propos et que ces marchés étaient exonérés de toutes taxes françaises en vertu de l'Instruction de la Délégation générale des Impôts du 9 mai 1949, accordant certains privilèges et immunités destinés à faciliter le fonctionnement des organismes internationaux;

« Considérant, de surplus, que les « conditions générales » des contrats des 1^{er} et 5 décembre 1952 prévoient, dans leur article 8, le règlement des litiges suivant une procédure spéciale devant l'« officier contractant » puis le Secrétaire d'Etat donnent, par les articles 21 et 22 à l'autorité étrangère le droit d'accomplir elle-même le travail si l'entrepreneur ne respecte pas les délais ou si ce travail n'est pas exécuté, confèrent enfin aux Etats-Unis dans les articles 23 et 24 un pouvoir de résiliation unilatérale à la volonté de ce Gouvernement;

« Considérant ainsi que les conventions litigieuses contiennent des clauses exorbitantes du droit commun se rattachant aux prérogatives de puissance publique des U.S.A. qui agissaient incontestablement pour la satisfaction d'un intérêt public. »

Dans son arrêt du 16 mars 1960, précité, la Cour avait écarté l'immunité des Etats-Unis, ayant agi « dans la forme, selon le mode et suivant les données du « droit privé » pour construire des groupes d'habitations destinées au personnel des camps américains, dans le cadre d'un programme général établi pour toute la France par les autorités américaines. Nous avons exprimé des réserves sur la thèse qui ferait dépendre l'immunité des seules formes et modalités contractuelles employées : la finalité de l'acte fournit, pensons-nous, un critère meilleur comme correspondant au fondement de l'immunité. Le rapprochement des deux espèces, jugées en sens contraire par la Cour de Paris, en fournit l'illustration: les Etats-Unis bénéficient de l'immunité lorsqu'il s'agit du logement des missions américaines chargées d'appliquer le plan Marshall, et ils n'en bénéficient pas s'il s'agit de loger des militaires de l'O.T.A.N.

Nous avons cru pouvoir discerner, dans l'arrêt du 16 mars 1960, une certaine répugnance de la Cour à admettre qu'un service public étranger puisse exercer son activité en France sans y avoir été autorisé. La Cour avait relevé de façon révélatrice que la Convention de Londres n'avait pas été visée au contrat (« qu'aucune référence « n'a été faite par les parties à la Convention de Londres du 19 juin 1951 concernant « le statut des troupes étrangères stationnées en France dans le cadre de l'O.T.A.N. « et qu'au surplus aucun accord d'application de cette convention n'est intervenu « entre la France et les Etats-Unis au sujet de la construction des logements destinés « au personnel militaire américain »). Ainsi, pour écarter l'immunité, dans l'espèce relative au plan Marshall, les appelants avaient-ils expressément invoqué qu'aucun traité n'était intervenu à son sujet pour « permettre au Gouvernement des Etats-Unis d'exercer sur le territoire français des prérogatives de puissance publique » pour en tirer cette conséquence que les Etats-Unis devaient être réputés avoir agi pour satisfaire des intérêts privés. Il y a là une idée intéressante—encore que susceptible de réduire l'immunité de l'Etat étranger à une immunité conventionnelle, intermédiaire entre celle de l'Etat et celles des organismes internationaux. La Cour ne répond pas en droit à l'argument: elle relève utilement en fait qu'il s'agissait sans nul doute de l'application du plan Marshall, que l'opération était financée par des ouvertures de crédit consenties à la France par les Etats-Unis, et que les marchés, exonérés de toutes taxes françaises, bénéficiaient sur le plan fiscal des « privilèges et immunités destinés à faciliter le fonctionnement des organismes internationaux ».

6. DÉCISION DE LA COUR D'APPEL DE ROUEN EN DATE DU 10 FÉVRIER 1965
*Société Vauer-Marchal et Cie c. Gouvernement turc*²⁵

Résumé des faits et du jugement:

La règle d'après laquelle les Etats étrangers bénéficient d'une immunité de juridiction qui interdit aux tribunaux français de connaître des actions dirigées contre eux ne trouve son application que dans le cas où l'acte juridique qui sert de fondement à la demande est un acte de puissance publique.

En se portant « garant de la stricte et intégrale exécution » des obligations contractées par la ville de Constantine, l'Etat turc, qui accomplissait un acte qui, par sa nature, est un acte juridique de droit civil, a agi comme aurait pu le faire un particulier ou un groupe financier quelconque, même d'une nationalité différente. La notion de puissance publique est étrangère à son engagement, alors qu'aucune circonstance

²⁵ Reproduced from *Revue Générale de Droit International Public*, vol. 69 (1965), p. 1161.

n'indique ou ne conduit à penser qu'en agissant comme il l'a fait cet Etat ait fait un acte mettant en cause sa souveraineté et son pouvoir de gouverner.

LA COUR,—Attendu que la Soc. Bauer-Marchal et Cie a assigné l'Etat turc en paiement de la somme principale de 1.374.319,81 F en or ou leur contrevaieur en francs au jour du paiement ainsi qu'en validité d'une saisie-arrêt pratiquée le 24 juillet 1952 entre les mains de la Banque Générale pour le commerce étranger;

Attendu que la somme en litige représente le montant de coupons échus et non payés depuis 1915 d'obligations 5% 1913 de la ville de Constantinople, garanties par le gouvernement impérial ottoman dont est porteur la société appelante; que, d'ailleurs, cette société avait obtenu, par ordonnance de M. le Président du Tribunal civil de la Seine du 14 août 1935, que lui soit étendu, par application du décret du 8 août 1935, le bénéfice d'un jugement du Tribunal civil de la Seine du 28 octobre 1931 emportant, en faveur du sieur d'Arjuzon, autre porteur d'obligations du même emprunt, condamnation de la ville de Constantinople au paiement en francs-or des coupons échus desdites obligations;

Attendu que, sur cette demande, le jugement entrepris s'est déclaré incompétent au motif que tout Etat souverain étranger bénéficie d'une immunité de juridiction;

Attendu que la Soc. Bauer-Marchal et Cie., en demandant l'infirmité de ce jugement, conclut à ce que la Cour, évoquant, lui adjuge ses entières conclusions;

Sur la compétence:—Attendu que la règle d'après laquelle des Etats étrangers bénéficient d'une immunité de juridiction qui interdit aux tribunaux français de connaître des actions dirigées contre eux trouve son application que dans le cas où l'acte juridique qui sert de fondement à la demande est un acte de puissance publique;

Attendu qu'en se portant « garant de la stricte et intégrale exécution » des obligations contractées par la ville de Constantinople l'Etat turc, qui accomplissait un acte qui, par sa nature, est un acte juridique de droit civil, a agi comme aurait pu le faire un particulier ou un groupe financier quelconque, même d'une nationalité différente; que la notion de puissance publique est étrangère à son engagement, alors qu'aucune circonstance n'indique ou ne conduit à penser qu'en agissant comme il l'a fait cet Etat ait fait un acte mettant en cause sa souveraineté et son pouvoir de gouverner; que d'ailleurs, s'il en était autrement, on ne comprendrait pas que les titres émis portent, à côté de la signature du fonctionnaire qualifié de la ville de Constantinople et du ministre compétent de l'Etat défendeur, la signature « pour contrôle » du banquier parisien chez lequel des coupons étaient payables; que ce contrôle admis d'un banquier étranger, dans un acte auquel il participait, implique, de la part de l'Etat ottoman, la volonté de n'agir que comme un contractant ordinaire en dehors de ses attributions particulières d'Etat souverain; qu'il suit de là que les premiers juges étaient compétents pour examiner, au fond, la demande portée devant eux en ce qu'elle tendait à obtenir la condamnation de l'Etat intimé au paiement de certaines sommes; qu'ils ont, au contraire, exactement jugé, selon les règles fondamentales et constantes, en se déclarant incompétents pour examiner la demande en validité de saisie-arrêt qu'aucune mesure conservatoire, qu'aucun acte d'exécution, n'est admis de la part d'un particulier tant contre l'Etat français que contre les Etats étrangers;

Sur la demande au fond: —Attendu qu'en matière civile l'évocation est facultative; qu'elle implique que l'affaire soit en état;

Attendu que la République turque n'a pas conclu au fond, même à titre subsidiaire; que d'ailleurs la Soc. Bauer-Marchal et Cie n'apporte pas, quant à présent, de justifications suffisantes du bien-fondé de sa demande; qu'il n'y a pas lieu d'évoquer;

Par ces motifs.—Infirme le jugement entrepris (Trib. civ. Seine, 16 mars 1955) en ce qu'il s'est déclaré incompétent pour statuer sur la demande dirigée par la Soc. Bauer-Marchal et Cie contre l'Etat turc tendant à obtenir la condamnation de cet Etat au paiement de diverses sommes;—Déclare le Tribunal de grande instance de la Seine compétent pour examiner cette demande et renvoie les Parties devant lui pour être statué sur cette demande;

—Confirme ce jugement en ce qu'il s'est déclaré incompétent pour examiner la demande en validité de saisie-arrêt formée par la même Société demanderesse contre l'Etat turc;—Fait masse des dépens de 1^{re} instance et d'appel . . .

7. DÉCISION DE LA COUR D'APPEL DE PARIS EN DATE DU 22 FÉVRIER 1966
*Chaussois c. La Tabacoop de Bône*²⁶

Résumé du jugement:

Considérant que les défenderesses demandent à la Cour de déclarer le contredit irrecevable, qu'en tout cas l'article 14 du Code civil ne saurait recevoir application comme incompatible avec les déclarations et accords qui ont précédé et suivi la naissance de l'Etat algérien, que si elle a un doute sur la portée de ces accords, il échet pour la Cour de surseoir jusqu'à interprétation par le gouvernement français, que l'avenant au contrat d'origine de 1952, signé le 6 août 1963 par le Préfet de Bône et le contredisant, révèle que celui-ci a adhéré au processus nouveau suivant lequel, notamment la Tabacoop s'intégrait dans le service public du Ministère de l'Agriculture et de la réforme agraire, qu'il y avait non pas contrat de droit privé, mais contrat administratif auquel il a été mis fin par acte de souveraineté directe de l'Etat algérien, dont seules les juridictions algériennes pourraient connaître, qu'au demeurant et subsidiairement, les défenderesses, et en particulier la S.N.T.A. excipient de l'immunité de juridiction des Etats et de leurs services publics, qu'elles concluent à la confirmation du jugement;

Sur la recevabilité du contredit;... Considérant que la question revient à savoir si la procédure de contredit s'étend aux conflits de compétence internationale, si le privilège de juridiction des Etats étrangers constitue un cas d'incompétence au sens de l'article 169 du Code de Procédure Civile, 1^{er} alinéa, enfin si l'instance engagée par Chaussois échappe aux tribunaux de l'ordre judiciaire en raison de la nature du contrat;...

Considérant certes que la jurisprudence et la loi elle-même ont apporté des dérogations au système, au profit de la voie de l'appel;

Considérant que le principe demeure, qu'il reçoit notamment application dans l'hypothèse d'un conflit dépassant le cadre de la compétence interne, qu'il doit se conjuguer avec le respect de la souveraineté étrangère, autre principe fondamental, implicitement mais nécessairement réservé par le législateur dans les dispositions de l'article 169 du Code de Procédure Civile;

Considérant encore que rejeter *a priori* la procédure de contredit sur la seule re-

²⁶ Reproduced from *Annuaire Français de Droit International* (1967), p. 848.

vendication d'une compétence juridictionnelle étrangère reviendrait à dénier à la Cour le droit et le devoir, qu'elle tient de la loi, de régler de juges en attribuant compétence obligatoire à une juridiction relevant de la Cour de cassation, quand bien même aucune des parties en cause n'aurait excipé de la compétence de ladite juridiction;

Considérant, en définitive, que la procédure de contredit est recevable en cas de demande de renvoi de l'affaire devant un juge étranger, sauf pour la Cour à s'en tenir au seul règlement du problème de compétence lorsqu'elle ne reconnaît compétence à aucun juge français;

Considérant, sur l'immunité de juridiction des Etats étrangers, qu'il n'est aucune raison d'y voir un cas particulier d'incompétence échappant aux dispositions de principe de l'article 169 du Code de Procédure Civile;

Considérant en effet qu'en disposant pour le cas d'une prétendue incompétence «à raison du lieu ou de la matière», le législateur a entendu se référer, sans restriction aucune, à l'ancienne distinction entre l'incompétence *ratione personae vel loci* et l'incompétence *ratione materiae*;

Considérant qu'il a d'ailleurs été retenu, antérieurement, il est vrai à la réforme de 1958, que l'immunité de juridiction rentrait dans l'incompétence d'attribution (*Ni-boyet, Revue critique droit inter. privé*, 1950, 139);

Considérant enfin qu'il pourrait apparaître quelque peu paradoxal de constater qu'après un procès de compétence les juges déclarés compétents aient encore, préalablement à l'examen du fond, à prononcer sur une exception tirée d'une immunité de juridiction...;

Considérant qu'il s'ensuit que le contredit, régulièrement inscrit, doit être tenu pour recevable;

Sur le bien-fondé du contredit.—Considérant qu'aux termes du contrat passé en 3 exemplaires le 15 janvier 1952 entre le sieur Munck, agissant en qualité de président du Conseil d'administration de la Tabacoop, dûment habilité par le Conseil d'administration et Chaussois, il a été convenu que, moyennant traitement mensuel, gratification et divers avantages, ce dernier s'engageait à mettre toute son activité «au service de la Tabacoop et, d'une manière générale, à participer au fonctionnement de l'ensemble des associations agricoles de Bône», que le contrat était conclu pour une durée de 5 années et renouvelable par tacite reconduction;

Que l'avenant au contrat passé le 6 août 1962 entre le Préfet de Bône et Chaussois ne contient que quelques dispositions mineures ayant trait aux indemnités et avantages consentis à Chaussois, stipulant toutefois que les deux parties s'engageaient «à rediscuter, avant le 1^{er} janvier 1964, les clauses du contrat en vigueur relatives aux garanties réciproques»...

Qu'il a été mis fin aux fonctions de Chaussois, lequel séjournait alors en France, par une lettre recommandée, signée de deux gérants de la Tabacoop, en date du 3 août 1964;...

Considérant qu'il est acquis, tant en jurisprudence qu'en doctrine, qu'une distinction est à faire dans les contrats internationaux passés par les Etats (ou leurs services publics) suivant que ceux-ci, en traitant, ont agi en tant que puissance publique ou en tant que particulier, n'ayant en vue, dans ce dernier cas, que des intérêts,

privés, d'ordre commercial par exemple, qui ne légitiment aucunement, dans l'hypothèse d'une contestation, l'immunité de juridiction;

Que le fondement de l'immunité, savoir le respect dû à la souveraineté étrangère, conjugué avec la vieille idée de courtoisie internationale ne s'y rencontrent pas alors;

Considérant, ainsi qu'il a été observé plus haut, que le contrat de travail du 15 janvier 1952 a été conclu entre Chaussois et le président du conseil d'administration d'une société coopérative, que quoique réservant des avantages substantiels au directeur de Tabacoop de Bône, ses dispositions ne s'écartent pas du droit privé;

Considérant, certes, que Chaussois a passé un avenant avec le Préfet de Bône le 6 août 1963;

Mais considérant que ledit avenant passé dans la forme, selon le mode et suivant les données du droit privé, n'introduit aucune clause ou condition de caractère exorbitant et dérogoire au droit commun en matière contractuelle, susceptible de nover le contrat d'origine en un contrat de droit public...;

Considérant qu'il s'impose encore de relever qu'au jour (où) il a été mis fin au contrat, la Tabacoop de Bône et la Société des Tabacs d'Hippone avaient conservé chacune leur personnalité morale;

Qu'en effet elles n'étaient, à l'époque, que placées sous tutelle administrative, qu'elles l'étaient encore le 2 avril 1965, jour de la citation introductive d'instance, leur intégration dans «le secteur autogéré» du Ministère Algérien de l'Agriculture et de la Réforme Agraire datant du 6 mai 1965...;

Par ces motifs...:

Déclare le contredit recevable,

Dit n'y avoir lieu pour la Cour à surseoir à prononcer plus amplement;

Dit que l'exception tirée de l'immunité de juridiction rentre dans le cadre de l'application de l'article 169 du Code de Procédure civile;

Déclare le contredit bien fondé;

Infirmes en conséquence le jugement du 13 octobre 1965 par lequel le Tribunal d'Instance du XVI^e arrondissement de Paris s'est déclaré incompétent;

Dit que le Tribunal d'Instance du XVI^e arrondissement de Paris est compétent pour connaître du litige qui oppose Chaussois à la Société Tabacoop de Bône, la Société des Tabacs d'Hippone et à la Société Nationale des Tabacs et Allumettes ayant son siège social à Alger;

Renvoie la cause et les parties devant ledit Tribunal (Cour de Paris, 8^e Ch., 22 février 1966, *Chaussois c. La Tabacoop de Bône et autres*, inédit).

8. DÉCISION DE LA COUR DE CASSATION EN DATE DU 25 FÉVRIER 1969.
*Administration des Chemins de fer du Gouvernement Iranien c. Société Levant Express Transport*²⁷

Résumé des faits et du jugement:

Les Etats étrangers et les organismes agissant par leur ordre ou pour leur compte ne bénéficient de l'immunité de juridiction qu'autant que l'acte qui donne lieu au

²⁷ Reproduced from *Revue Générale de Droit International Public*, vol. 73 (1969), p. 883.

litige constitue un acte de puissance publique ou a été accompli dans l'intérêt d'un service public.

Cette immunité étant fondée sur la nature de l'activité, et non sur la qualité de celui qui l'exerce, la Cour d'appel, qui, sans dénier à l'administration des chemins de fer iraniens son caractère d'organe du pouvoir central iranien, a relevé que, selon la loi iranienne elle-même, le transport, même ferroviaire, entre dans la catégorie des actes de commerce qui ne sont pas subordonnés de manière nécessaire à l'intervention d'un acte de souveraineté, a justifié le rejet des conclusions par lesquelles cette administration, appelée en garantie dans un litige relatif à des avaries survenues en cours de transport, invoquait l'immunité de juridiction.

Pourvoi en cassation contre un arrêt de la Cour d'appel de Paris du 2 juillet 1966.—Arrêt:

LA COUR,—Sur le moyen unique pris en ses diverses branches:

Attendu que, selon les énonciations de l'arrêt attaqué, la Cie Générale d'Entreprises Electriques ayant expédié, à destination de l'Iran, des marchandises par l'entremise d'un commissionnaire, la Soc. Méditerranéenne de Porte-faitage et de Transit (Someport), a assigné celle-ci en réparation de diverses avaries que ladite société a appelé en garantie, notamment la Soc. iranienne Levant Express Transport plus spécialement chargée du transport terrestre entre Khorramshar el Téhéran, laquelle a appelé en intervention forcée et garantie l'administration des chemins de fer du Gouvernement iranien que l'arrêt infirmatif attaqué l'ayant déboutée de son exception d'incompétence fondée sur l'immunité de juridiction dont elle se prévalait, cette administration soutient qu'en tant qu'organe du pouvoir central et expression de son activité elle bénéficiait de l'immunité et fait grief à la Cour d'appel d'avoir « insuffisamment répondu » aux conclusions par lesquelles elle faisait valoir que les chemins de fer du Gouvernement iranien constituent une administration purement gouvernementale et totalement inassimilable à une société commerciale, même étatique, et d'avoir dénaturé et méconnu les justifications qui l'établissaient; qu'il est aussi prétendu que les juges d'appel se seraient contredits, en énonçant que le transport ferroviaire constituait, selon le droit iranien, une opération « fixée *ratione materiae* », qui ne saurait dès lors dépendre de la qualité de celui qui l'accomplit tout en admettant qu'un transport de cette nature « puisse faire intervenir un acte de souveraineté »;

Mais attendu que les Etats étrangers et les organismes agissant par leur ordre ou pour leur compte ne bénéficient de l'immunité de juridiction qu'autant que l'acte qui donne lieu au litige constitue un acte de puissance publique ou a été accompli dans l'intérêt d'un service public; d'où il suit qu'après avoir justement énoncé que cette immunité est fondée sur la nature de l'activité, et non sur la qualité de celui qui l'exerce, la Cour d'appel qui, sans dénier à la demanderesse au pourvoi son caractère d'organe du pouvoir central iranien, relève que, selon la loi iranienne elle-même, le transport, même ferroviaire, entre dans la catégorie des actes de commerce qui ne sont « pas subordonnés de manière nécessaire à l'intervention d'un acte de souveraineté » a sans contradiction ni dénaturé, et en répondant aux conclusions dont elle était saisie, légalement justifié sa décision;

Par ces motifs,—Rejette...

9. DÉCISION DU TRIBUNAL DE GRANDE INSTANCE DE PARIS EN DATE DU
16 JANVIER 1969. *Neger c. Gouvernement du Land de Hesse*²⁸

Résumé des faits et du jugement:

LE TRIBUNAL—Attendu que Jean Neger a, suivant exploit du 7 février 1968, assigné « le président du Conseil » représentant le Gouvernement du pays de la Hesse en payment des sommes de: 1° trois cent cinquante mille dollars (350 000), au cours du jour du paiement avec « les intérêts de droit»; 2° trente mille francs (30 000 F à titre de dommages-intérêts, en réparation du préjudice résultant de dégâts qui auraient été causés au tableau de Bonnard dénommé *le Plaisir* prêté au Musée de Darmstadt en vertu d'une convention en date du 1^{er} juin 1965;—Attendu que par acte du Palais signifié le 24 septembre 1968 le Gouvernement de l'Etat de Hesse a invoqué l'immunité de juridiction;—que Jean Neger a conclu le 17 octobre 1968 au rejet de l'exception d'immunité en soutenant essentiellement que le contrat intervenu entre les parties ne comporte aucune clause exorbitante du droit commun; qu'il ne constitue pas un acte administratif de gestion publique et qu'en conséquence les tribunaux judiciaires français seraient compétents pour connaître d'une demande introduite par un Français;—que l'Etat de Hesse a maintenu son exception par conclusions du 5 novembre 1968 en faisant notamment observer que, pour ce qui se rapporte à l'éducation nationale et aux affaires culturelles, ce Land, qui fait partie de la République fédérale allemande, exerce une activité souveraine; qu'en l'espèce, en signant le contrat dont s'agit, il se serait «livré à une opération liée directement à une activité étatique de gestion publique»;—que la convention présenterait un caractère administratif, même en l'absence de clauses exorbitantes du droit commun;—Attendu que l'immunité de juridiction n'existe qu'au profit des Etats souverains, c'est-à-dire qui possèdent le droit exclusif d'exercer les activités étatiques, de déterminer librement leur propre compétence dans les limites du droit international public;—que tel n'est pas le cas pour les Etats membres d'une Fédération, qui sont soumis à la tutelle de l'Etat fédéral;—Attendu qu'en l'espèce la Constitution de la République fédérale allemande accorde, dans l'ordre interne, une certaine indépendance aux Länder, membres de l'Etat fédéral, en leur confiant (article 30) «l'exercice des pouvoirs et les tâches de l'Etat», dans les domaines où la loi fondamentale n'en dispose pas autrement;—qu'il est toutefois prévu dans l'article 31 que «le droit fédéral prime le droit»;—Mais attendu que, sur le plan des relations internationales, l'article 32 de la «loi fondamentale» est ainsi conçu:—«La Fédération assure les relations avec les Etats étrangers. Avant la conclusion d'un traité affectant la situation spéciale d'un Land, ce Land doit être consulté en temps utile;—« Dans la mesure de leur compétence législative, les Länder peuvent, avec l'assentiment du Gouvernement fédéral, conclure des traités avec des Etats étrangers»;—qu'il en résulte que, dans les domaines où ils demeurent compétents en matière législative (v. les art. 72 et 74), les Länder ne peuvent signer de traités qu'après avoir recueilli au préalable l'accord du Gouvernement fédéral; qu'ainsi les Länder se trouvent soumis à la tutelle de l'Etat fédéral;—que d'ailleurs, aux termes de l'article 37 de la loi fondamentale, « si un Land ne remplit pas ses obligations de caractère fédéral qui lui incombent en vertu de la loi fondamentale ou d'une autre loi fédérale, le Gouvernement fédéral peut, avec l'approbation du Bundesrat, prendre les mesures nécessaires pour que le Land soit tenu, par voie de contrainte fédérale, de remplir ses obligations;—Pour assurer

²⁸ Reproduced from *Revue critique de droit international privé*, vol. 59 (1970), p. 99.

l'exécution de la contrainte fédérale, le Gouvernement fédéral ou son mandataire a le droit de donner des instructions à tous les Länder et à leurs autorités»;—Attendu, il est vrai, que le Land de Hesse invoque certaines opinions doctrinales suivant lesquelles les Länder, lorsqu'ils font usage de leur droit de conclure des traités, agissent non pas en qualité d' « organes de l'Etat fédéral, mais en leur propre nom » (v. rapport d'Alfred-Carl Gaedertz et Karlhanns Henn, p. 4; Menzel, commentaire de la loi organique de Bonn);—Attendu qu'il importe d'abord d'observer que les opinions relatives à la portée du 3^e alinéa de l'article 32 sont très divisées, qu'il résulte des simples extraits d'ouvrages versés aux débats que la majorité des auteurs allemands interprètent ce texte de façon restrictive; que la doctrine favorable à la thèse soutenue par le Land de Hesse se fonde essentiellement sur le fait que les traités conclus avec l'assentiment de l'Etat fédéral ne produisent d'effets que pour le seul Land; que cependant il n'existe pas de rapport direct entre l'effet produit et la qualité du contractant puisque les personnes morales de droit public soumises à une tutelle étroite passent fréquemment des conventions dont l'effet n'affecte pas la personne exerçant l'autorité de tutelle;—Attendu que le Land de Hesse invoque encore, à l'appui de son exception, deux conventions internationales conclues par les Länder, la première relative à un concordat signé le 1^{er} juillet 1965 entre le Land de Basse-Saxe et le Saint-Siège, la seconde concernant la protection du lac de Constance contre la pollution, conclue le 15 novembre 1961 entre le Land de Bad-Wurtemberg, l'Etat libre de Bavière, la République autrichienne et la Confédération helvétique;—Mais attendu, d'une part, qu'il résulte de l'extrait d'ouvrage doctrinal versé aux débats (Mangoldt-Klein, *La loi organique de Bonn*, 2^e éd., 1964) que « le Saint-Siège et les Eglises protestantes ne sont pas des « Etats étrangers dans l'esprit de l'article 3 » et que « par conséquent, les Länder peuvent, sous leur seule compétence, conclure ce genre de traités (les concordats) par opposition aux traités du droit international public conclus avec des Etats étrangers » (v. c. 6 p. 9 *in fine* et 10);—Attendu, d'autre part, en ce qui concerne la Convention du 15 novembre 1961, que l'article 3, alinéa 31 dispose que le Gouvernement de la République fédérale d'Allemagne peut envoyer des observateurs aux séances de la Commission internationale permanente pour la protection des eaux du lac de Constance, ce que démontre à l'évidence ce rôle de tutelle exercé par la République fédérale, conformément au texte de sa loi fondamentale;—Attendu que l'Etat de Hesse ne jouit donc, du point de vue des relations politiques internationales, d'aucune personnalité autonome qui lui soit propre; qu'il ne peut donc bénéficier de l'immunité de juridiction; que ce Tribunal est compétent par application de l'article du Code civil, invoqué par le demandeur;—Attendu que les conseils des parties ont été avisés avant la clôture des débats que le jugement serait rendu à l'audience du 15 janvier 1969;

Par ces motifs:—Se déclare compétent.

10. DÉCISION DU TRIBUNAL DE GRANDE INSTANCE DE PARIS EN DATE DU
14 MAI 1970. *Etat espagnol c. Société anonyme l'Hôtel George V*²⁹

Résumé des faits et du jugement :

Si un bail commercial est passé par un organisme dépendant d'un Etat souverain étranger, cette seule circonstance n'entraîne pas nécessairement l'application du décret du 13 ventôse an II assurant aux Etats étrangers le bénéfice de l'immunité de

²⁹ Reproduced from *Revue générale de droit international public*, vol. 75 (1971), p. 561.

juridiction. Il convient d'examiner le contrat litigieux lui-même quant à sa forme et à son contenu.

Lorsque la convention comporte toutes les stipulations habituelles en la matière et, en tout premier lieu, la référence expresse aux dispositions de la loi du 30 juin 1926 et aux lois subséquentes sur la propriété commerciale, ainsi que toutes les clauses normales en semblable sujet, notamment celles relatives à l'entretien des lieux, aux réparations, au paiement des loyers, aux assurances, à la cession du droit au bail, à la visite des lieux par l'architecte de la société propriétaire, à la révision triennale du prix du loyer par voie d'arbitrage, à l'élection de domicile dans les lieux loués, ainsi que la clause résolutoire de droit commun en cas de non-paiement des loyers ou d'inexécution d'une des conditions du bail; que la destination contractuelle donnée aux lieux loués vise, incontestablement, une activité commerciale, au moins pour partie, il se déduit de l'exposé qui précède que la convention litigieuse, loin de contenir des clauses exorbitantes du droit commun, renferme, au contraire, toutes les stipulations habituelles en la matière; ainsi, la direction générale du tourisme d'un Etat étranger a contracté, en l'espèce, dans la forme, selon le mode et suivant les données du droit privé, comme l'aurait fait un simple particulier, pour l'exercice d'une activité commerciale, sans recourir à l'exercice d'une parcelle de puissance publique; aucune circonstance n'indique qu'en agissant ainsi l'organisme de l'Etat précité ait accompli un acte mettant en cause la souveraineté de l'Etat étranger. L'exception d'immunité de juridiction soulevée par cet Etat étranger doit donc être rejetée.

LE TRIBUNAL—Attendu que la Soc. anon. Hôtel George V a saisi le tribunal de deux instances dirigées contre la Dirección General del Turismo Español, la première introduite par exploit du 18 octobre 1968, tendant à faire décider que la défenderesse n'exploite aucun fonds de commerce dans les lieux qui lui ont été loués, dans l'immeuble sis à Paris, 29, avenue George-V et 45, avenue Pierre-I^{er}-de-Serbie, et ne peut, de ce fait, bénéficier des dispositions du décret du 30 septembre 1953; la seconde, formée suivant exploit des 23 et 24 janvier 1969, ayant pour objet d'obtenir le paiement d'une indemnité d'occupation annuelle de 600 000 F;

Attendu que, sur les deux assignations sus-énoncées, l'Etat espagnol, se disant « assigné sous la dénomination Dirección General del Turismo » s'est constitué;

Attendu que les deux instances inscrites au rôle particulier de cette Chambre sous les n^{os} 75984 et 76693 sont étroitement complémentaires et qu'il y a lieu de les joindre, dans l'intérêt d'une bonne administration de la justice, pour être, sur l'ensemble, statué par un même jugement;

Attendu que, par actes du Palais des 13 février et 14 mars 1969, l'Etat espagnol demande acte de ce qu'il ne comparaît que par courtoisie pour le tribunal, soulève l'exception fondée sur l'immunité de juridiction, prie, en conséquence, le tribunal de juger qu'en vertu de l'immunité de juridiction dont jouissent les Etats étrangers le tribunal ne peut connaître des demandes formées par la Soc. anon. Hôtel George V de déclarer lesdites demandes irrecevables et de condamner la Soc. Hôtel George V en tous les dépens;

Attendu qu'il convient donc de statuer sur l'exception ainsi soulevée et avant tout examen au fond;

Sur les faits:—Attendu qu'aux termes d'un acte s.s.p., en date à Paris du 1^{er} décembre 1955, enregistré, la société dite Hôtel George V a donné à bail à la Direc-

ción General del Turismo, dont le siège est à Madrid, Meinaceli, n° 2, avec bureaux établis à Paris, 16, rue de la Chaussée-d'Antin, sous la dénomination Office Espagnol du Tourisme, représentée... par M. Roman de la Prasella, consul général d'Espagne, domicilié à Paris, 165, boulevard Malesherbes, ayant tous pouvoirs aux effets ci-après : divers locaux faisant partie d'un immeuble sis à Paris, 29, avenue George-V, et 45, avenue Pierre-I^{er}-de-Serbie, savoir : 578 m² environ, au rez-de-chaussée; 251 m² environ, au sous-sol, sur le devant de l'avenue George-V;

Attendu que la location est conclue pour une durée de 18 années, à compter du 1^{er} janvier 1951, étant précisé que « les Parties en cause entendent expressément se référer aux dispositions de la loi du 30 juin 1926, et des lois subséquentes, dites lois sur la propriété commerciale, dont le bénéfice est reconnu par la société propriétaire au locataire »;

Attendu, du reste, que la convention comporte toutes les stipulations habituelles à ce genre de contrat et, notamment, la possibilité de révision triennale du prix du loyer par une procédure d'arbitrage et la clause résolutoire de droit commun; qu'il est indiqué à la clause 7^o des conditions que le locataire a l'obligation « de ne pouvoir utiliser les lieux loués que comme agence de tourisme, toutes activités de transports aériens et de chemin de fer, toute publicité artisanale et, en général, toutes activités commerciales et publicitaires en rapport avec le tourisme en Espagne, y compris une succursale de banque »;

Attendu qu'aux termes d'un acte s.s.p., en date à Paris du 29 janvier 1959, enregistré, les locaux loués ont été réduits au seul rez-de-chaussée;

Attendu que, par acte extrajudiciaire du 16 décembre 1965, la Soc. Hôtel George V a donné congé à la Dirección General del Turismo, pour le 31 décembre 1968; que ce congé a été réitéré par exploit du 24 juin 1966, avec refus de renouvellement, sans offre d'indemnité d'éviction, au motif que le locataire n'exploite aucun fonds de commerce dans les lieux loués et ne peut, en conséquence, se prévaloir des dispositions du décret du 30 septembre 1953, spécialement de l'art. 1^{er} de ce texte;

Sur l'exception d'immunité de juridiction :—Attendu que l'argumentation de l'Etat espagnol, dans les conclusions précitées du 13 février et dans celles du 14 mars 1969, peut se résumer comme suit : Le décret de la Convention nationale du 13 ventôse an II interdit à toute autorité constituée d'attenter, en aucune manière, à la personne des envoyés des gouvernements étrangers; la jurisprudence a toujours fait de ce principe une très large application et les Etats étrangers jouissent de la même immunité qui s'étend à tous leurs services, qu'ils aient ou non une personnalité distincte; que la seule exception à cette règle vise les opérations commerciales ou strictement privées;

Attendu que l'Etat espagnol expose que le bureau dénommé Office National Espagnol du Tourisme n'a pas de personnalité juridique; qu'il n'est qu'un des bureaux ouverts dans les pays étrangers, par la Dirección General del Turismo qui est elle-même dépourvue de personnalité juridique et constitue un des services de l'Etat espagnol; que, suivant le demandeur à l'exception, ce service, ainsi dénommé par une loi du 8 août 1939; et d'abord rattaché au ministère espagnol de l'Intérieur, l'est depuis le décret du 19 juillet 1951, au ministère de l'Information et du Tourisme; qu'enfin, poursuit l'Etat espagnol, un décret du 31 octobre 1962 a unifié, sous l'appellation unique Office National Espagnol du Tourisme, les diverses appellations sous lesquelles fonctionnaient à l'étranger les bureaux du ministère de l'Information

et du Tourisme espagnol; que le demandeur à l'exception fait, en outre, valoir que les employés de l'Office sont tous nommés par le ministère de l'Information et du tourisme espagnol et sont rémunérés par l'intermédiaire de l'ambassade d'Espagne à Paris; que le directeur de l'Office a la qualité d'attaché à cette ambassade; qu'enfin l'Etat espagnol observe que le bail du 1^{er} décembre 1950 a été signé en son nom par le consul général d'Espagne à Paris, ayant reçu pouvoir à cet effet, après que le prix du bail des lieux dont il s'agit fut approuvé par le Conseil des ministres, réuni à La Corona, le 8 septembre 1950;

Attendu que le demandeur à l'exception estime que « contractant pour ses services administratifs par un mandataire accrédité auprès du Gouvernement français (il) a traité pour lui-même dans la plénitude de sa souveraineté; que la signature du bail du 1^{er} décembre 1950 constitue un acte de puissance publique qui échappe à la connaissance des tribunaux français »;

Attendu que, par voie de conclusions signifiées le 10 juin 1969, la société dite Hôtel George V répond en substance qu'à deux reprises, en janvier 1960 et en janvier 1963, l'Office Espagnol du Tourisme s'est soumis à la procédure de révision du prix du loyer, prévue par le décret du 30 septembre 1953; qu'à supposer qu'il soit établi que la Dirección General del Turismo, dont l'Office Espagnol du Tourisme est le bureau en France, soit un service de l'Etat espagnol, ce que conteste la défenderesse à l'exception, ladite Dirección en comparaisant à deux reprises devant la juridiction française, sans exciper de son immunité de juridiction, a dans la thèse de la Soc. Hôtel George V, renoncé à se prévaloir de cette immunité; qu'en second lieu la demanderesse au principal soutient que la Dirección General del Turismo et l'Etat espagnol, qui intervient en son lieu et place, ne peuvent prétendre, en l'espèce, à l'immunité de juridiction devant les tribunaux français; que, selon la Soc. Hôtel George V, il est admis en doctrine et en jurisprudence « que les actes de commerce accomplis par un Etat étranger, ou par un service qui en dépend, ne sont pas des actes de souveraineté et peuvent être appréciés par les tribunaux sans que ceux-ci s'immiscent dans l'administration de cet Etat »; qu'en l'espèce, poursuit la défenderesse à l'exception, il ne peut être contesté que la conclusion d'un bail commercial, réglé expressément par les lois sur la propriété commerciale et dont les locaux en faisant l'objet sont destinés à usage de commerce (vente de billets d'avion, de chemin de fer, exploitation d'une succursale de banque), est un acte de commerce, conclu et accompli en la forme du droit civil et commercial; qu'ainsi, en agissant comme elle le fait et en conformité avec les stipulations du bail, la Dirección General del Turismo, même si elle est un service de l'Etat espagnol, s'est comportée comme une personne de droit privé et est justiciable des tribunaux français; qu'explicitant ces moyens de défense à l'exception, dans des conclusions du 25 novembre 1969, la Soc. Hôtel George V prétend que la jurisprudence récente « tend à rapprocher la solution de ce problème (l'immunité de juridiction) de celle qui concerne la délimitation de compétence administrative et judiciaire en droit interne »; qu'appliquant ce qu'elle estime être les principes se dégageant de la jurisprudence récente, la société défenderesse à l'exception recherche si l'Etat espagnol a traité, en l'espèce, comme l'aurait fait un particulier, et veut trouver la preuve de ce fait dans un certain nombre de clauses du bail, qui, pour certaines d'entre elles, constitueraient même, selon la Soc. Hôtel George V, une renonciation à l'immunité de juridiction;

Attendu que, par acte du Palais du 4 décembre 1969, l'Etat espagnol réplique en soutenant que, d'après des thèses admises en jurisprudence, il y a lieu de consi-

dérer le but de l'acte et s'il a eu pour objet de satisfaire les besoins d'un service public, quel que soit le procédé juridique employé pour y parvenir; qu'alors, selon l'Etat espagnol, il y a lieu de considérer que l'immunité de juridiction doit être reconnue; qu'en l'espèce, la Dirección General del Turismo constituant un service public de l'Etat espagnol, le bail du 1^{er} décembre 1950 a pour objet, selon le demandeur à l'exception, l'exécution même d'un service public et qu'ainsi il y a lieu d'appliquer le principe de l'immunité de juridiction;

Attendu que l'Etat espagnol conteste la thèse soutenue par la Soc. Hôtel George V, d'après laquelle il y aurait eu, dans certaines clause insérées au contrat locatif (élection de domicile, clause d'arbitrage, référence à la législation française), renonciation au bénéfice de l'immunité; que, de même, le fait d'avoir accepté à deux reprises la juridiction du président de ce siège ne constitue pas, suivant le demandeur à l'exception, une renonciation audit bénéfice;

Attendu que, au vu des textes réglementaires et législatifs, produits aux débats par l'Etat espagnol ainsi que des documents communiqués, il est établi que la Dirección General del Turismo (Office Espagnol du Tourisme) est un service de l'Etat espagnol, rattaché au ministère de l'Information et du Tourisme; qu'il est constant, au surplus, que les employés dudit office sont nommés par le ministère de l'Information et du Tourisme et rémunérés par l'intermédiaire de l'ambassade d'Espagne à Paris, et que le directeur de l'Office a la qualité d'attaché à cette ambassade;

Attendu que le bail du 1^{er} décembre 1950 a été signé par le consul général d'Espagne à Paris, et que le prix du bail des locaux litigieux a été approuvé par le Conseil des ministres d'Espagne;

Attendu qu'ainsi le bail du 1^{er} décembre 1950 a bien été passé par un organisme dépendant de l'Etat espagnol, mais que cette seule circonstance n'entraîne pas le bien-fondé de l'exception d'immunité de juridiction; qu'il convient d'examiner le contrat litigieux lui-même quant à sa forme et à son contenu;

Attendu que cette convention comporte toutes les stipulations habituelles en la matière et, en tout premier lieu, la référence expresse aux dispositions de la loi du 30 juin 1926 et aux textes subséquents sur la propriété commerciale, ainsi que toutes les clauses normales en semblable sujet, notamment celles relatives à l'entretien des lieux, aux réparations, au paiement des loyers, aux assurances, à la cession du droit au bail, à la visite des lieux par l'architecte de la société propriétaire, à la révision triennale du prix du loyer par voie d'arbitrage, à l'élection du domicile dans les lieux loués, ainsi que la clause résolutoire de droit commun, en cas de non-paiement des loyers ou d'inexécution d'une des conditions du bail;

Attendu que l'utilisation des locaux est précisée à la clause 7^o des conditions et que la Dirección General del Turismo y contracte l'obligation « de ne pouvoir utiliser les lieux loués que comme agence de tourisme, toutes activités de transports aériens et de chemin de fer, toute publicité artisanale et, en général, toutes activités commerciales et publicitaires en rapport avec le tourisme en Espagne, y compris une succursale de banque »;

Attendu que telle est la destination contractuelle donnée aux lieux loués, laquelle vise incontestablement une activité commerciale, au moins pour partie, et d'ailleurs expressément indiquée; qu'une telle activité demeure, suivant la conception française complètement étrangère au principe de la souveraineté des Etats; qu'il est constant en

fait que les locaux du 29, avenue George-V ont abrité, durant plusieurs années, certains des services de la compagnie aérienne Iberia, qui y procédait à la vente de billets d'avion (n° de téléphone: 225-69-58 à l'annuaire de 1965);

Attendu qu'il se déduit de l'exposé qui précède que la convention litigieuse, loin de contenir des clauses exorbitantes du droit commun, renferme, au contraire, toutes les stipulations habituelles en la matière; qu'ainsi la Dirección General del Turismo a contracté avec la société dite Hôtel George V, dans la forme, selon le mode et suivant les données du droit privé, comme l'aurait fait un simple particulier, et ce pour l'exercice d'une activité, au moins commerciale pour partie, et sans recourir à l'exercice d'une parcelle de puissance publique; qu'aucune circonstance n'indique qu'en agissant ainsi l'organisme d'Etat précité ait accompli un acte mettant en cause la souveraineté de l'Etat espagnol;

Attendu qu'il y a donc lieu, pour le tribunal, de rejeter l'exception d'immunité de juridiction et d'ordonner la continuation du débat au fond, à la requête de la Partie la plus diligente;

Par ces motifs.—Le Tribunal joint les instances pour être statué sur l'ensemble par un unique jugement;—Reçoit, en tant que de besoin, l'Etat espagnol en son intervention;—Lui donne acte de ce qu'il ne comparaît que par courtoisie par-devant le tribunal;—Rejette, comme mal fondée, l'exception d'immunité de juridiction soulevée par l'Etat espagnol;—Ordonne la continuation du débat au fond à la plus prochaine audience utile et à la requête de la Partie la plus diligente;—Réserve les dépens en fin de cause.

J. GERMANY, FEDERAL REPUBLIC OF

1. DECISION BY THE FEDERAL CONSTITUTIONAL COURT ON 30 OCTOBER 1962. *X v. Yugoslavia*³⁰

Leading principles:

Article 100, Paragraph 2, and Article 25 of the Basic Law (Admissibility of submissions to the Federal Constitutional Court; domestic jurisdiction in respect of actions against a foreign State relating to its embassy premises).

1. Submissions under article 100, paragraph 2, of the Basic Law are admissible even where:

(a) The submitting court merely has doubts regarding the scope of a rule of international law; or

(b) The submitting court doubts whether any rule of international law exists but not whether a rule of international law is a general rule of international law; or

(c) The rule of international law, by reason of its substance, is not such as to directly create rights and duties for private parties but applies only to States and their organs.

2. A rule of international law under which domestic jurisdiction in respect of actions against a foreign State relating to its embassy premises is in all cases excluded does not form part of federal law.

³⁰ *Bundesverwaltungsgericht*, vol. 15, p. 25. (Translated by the Secretariat.)

In the case of actions against a foreign State seeking consent to rectification of the land register with respect to the ownership of its embassy premises, German jurisdiction is not excluded under a general rule of international law (Basic Law, art. 25).

Excerpts from the judgement:

A. I. The plaintiff in the original proceedings sold her property in 1946 to the Federal People's Republic of Yugoslavia (defendant in the original proceedings) and simultaneously handed over possession of the property to the defendant, which in 1953 was entered in the land register as owner of the premises. The defendant's military mission, accredited to the Allied Control Council, has its official seat in the premises.

The plaintiff considers the contract of sale and the handing over of the premises to be void, for a number of reasons. She brought an action seeking a court order requiring the defendant (1) to consent to rectification of the land register so that it would show the plaintiff as owner of the premises, and (2) . . .

The District Court granted the petition. The defendant's appeal was rejected by the Court of Appeal, which held that the Yugoslav military mission had the status of a diplomatic mission but that actions *in rem* the sole purpose of which was to determine the ownership of embassy premises did not constitute the kind of encroachment on an embassy that was inadmissible under international law. The ownership of the premises in which a diplomatic mission had its official seat was of no appreciable significance to its activities.

II.1. The defendant sought a review of the judgement of the Court of Appeal. In accordance with article 275 of the Code of Civil Procedure, the Federal Court of Justice ordered separate proceedings concerning, *inter alia*, the question of extraterritoriality.

On 25 February 1959, the Federal Court of Justice decided to obtain an advisory opinion from the Max Planck Institute for Foreign Public Law and International Law in Heidelberg concerning, *inter alia*, the question of extraterritoriality. After receiving the advisory opinion, the Federal Court of Justice eventually decided, on 13 January 1960, to obtain a ruling from the Federal Constitutional Court under article 100, paragraph 2, of the Basic Law on whether the following rule of international law forms part of federal law and whether it directly creates rights and duties for private parties:

“The extraterritoriality of an embassy building does not extend to an action relating to the embassy building and seeking consent to rectification of the land register.”

(There follows the statement of reasons presented by the submitting court and, in section A.III, the position of the Federal Government.)

B.I.1. . . . 2. The fact that the Federal Court of Justice merely has doubts regarding the scope of a rule of international law does not render the submission inadmissible. The importance which article 25 of the Basic Law ascribes to the general rules of international law requires that the courts should speak with one voice regarding their scope also.

It is true that the Federal Court of Justice, in its submission, has formulated a rule which certainly cannot be a general rule of international law. The Ministry of

Foreign Affairs has rightly pointed out that actions for rectification of the land register are peculiar to German law and perhaps a few other national legal systems and that, accordingly, there could not possibly be a general rule of international law dealing specifically with the admissibility of actions for rectification of the land register relating to embassy premises.

Nor is the subject of the submission that rule of international law whereby foreign States are not in principle subject to domestic jurisdiction. Furthermore, the submitting court is not concerned with the rule that State immunity does not apply in the case of actions *in rem* relating to property of a foreign State situated within the country.

The Federal Court of Justice states, in its submission, that it "hesitates to accept, with regard to the extraterritoriality of an embassy building, a rule of international law embodying the substance indicated in the advisory opinion [of the Max Planck Institute]". However, the Federal Court of Justice formulates the rule which is indicated in the advisory opinion and about which it has hesitations as saying that "the exercise of jurisdiction over embassy premises [is] inadmissible . . . only to the extent that it would impair the free exercise of the functions of the diplomatic missions within the premises", whereas the court itself clearly inclines towards the view that the extraterritoriality of embassy premises means that any action *in rem* in respect of such premises is excluded.

Thus, the Federal Court of Justice has doubts only regarding the scope of the rule of international law "Embassy premises are extraterritorial", and specifically as to whether that rule allows of exceptions and whether an exception is allowed in the case of actions for rectification of the land register.

3. The fact that the Federal Court of Justice doubts whether any rule of international law exists but not whether a rule of international law is a general rule of international law does not render the submission inadmissible.

The wording of article 100, paragraph 2, and article 25 of the Basic Law might suggest that submissions under article 100, paragraph 2, are to be deemed admissible only in cases where the status of an unquestionably valid rule as a general rule is in doubt. However, general rules of international law within the meaning of article 25 of the Basic Law are predominantly rules of customary international law of universal validity. The case before us also involves a rule of that kind. But where such rules of international law are concerned, the question of their validity is indissolubly bound up with the question of their general validity. Article 100, paragraph 2, of the Basic Law is intended to ensure that the courts speak with one voice on the question whether rules of international law form part of federal law. It would be contrary to the spirit and purpose of that provision if the Federal Constitutional Court could only decide whether a rule which is accepted as valid is to be termed a general rule of international law (see Lechner, BVerfGG (Act concerning the Federal Constitutional Court), note 3 to art. 13 (12)).

4. Submissions under article 100, paragraph 2, of the Basic Law are admissible even where the rule of international law, by reason of its substance, is not such as to directly create rights and duties for private parties but applies only to States and their organs. It is therefore immaterial whether the rule of international law in question here belongs to one category or the other.

A literal reading of article 100, paragraph 2, of the Basic Law and article 83,

paragraph 1, of the Act concerning the Federal Constitutional Court might suggest that a submission is admissible only where there is doubt as to whether a rule of international law directly creates rights and duties for private parties. However, this interpretation would not be in keeping with the spirit of article 100, paragraph 2.

The first sentence of article 25 of the Basic Law declares that the general rules of international law form part of federal law. The second sentence states that such rules take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory. It is generally agreed that the last part of the second sentence of article 25 is of a purely declaratory nature and serves only to provide emphasis. That a rule of international law directly creates rights and duties for private parties follows as a matter of course, once the rule in question is incorporated in federal law under the terms of the first sentence of the article (see Mangoldt-Klein, *GG* (Basic Law), note VI 1 to art. 25 of the Basic Law; Dahm, *Völkerrecht*, vol. 1, p. 67). Consequently, the last part of the second sentence simply means that the general rules of international law have the same legal effects for and against private parties as (other) internal law and thus—in so far as their substance allows—also create subjective rights and duties for private parties.

If, however, the wording “create rights and duties for the inhabitants of the federal territory” in the second sentence of article 25 of the Basic Law simply serves to reiterate and reinforce the incorporation of the general rules of international law in federal law already accomplished by the first sentence of the article, then the same significance must be attributed to the corresponding wording in article 100, paragraph 2, especially as the latter refers back to article 25. The words “and whether it directly creates rights and duties for private parties (Basic Law, art. 25)” in article 100, paragraph 2, are intended solely to circumscribe the status of the rule as a general rule of international law for the purpose of the effects which the second sentence of article 25 attributes to the general rules of international law. This interpretation of article 100, paragraph 2, of the Basic Law is entirely compatible with its wording.

II. There is no general rule of international law under which domestic jurisdiction in respect of actions against a foreign State relating to its embassy premises is in all cases excluded.

1.(a) The rule of international law involved in the case before us concerns the exemption of foreign States from domestic jurisdiction. Rules of this and similar technical substance are general rules of international law, within the meaning of article 25 of the Basic Law, if they are recognized by the overwhelming majority of States.

The rules of international law concerning State immunity in respect of actions relating to embassy premises can only be rules of customary international law. There are no conventional rules which have gained general recognition. Nor are there any recognized general legal principles which—as a supplement to customary international law—could serve as criteria for determining the scope of State immunity.

Again, there is no evidence of any long-standing custom observed by the overwhelming majority of States, in conscious fulfilment of a legal obligation, whereby a foreign State is in all cases exempt from domestic jurisdiction in respect of actions relating to embassy premises. The custom observed by States will—inasmuch as it involves the exercise of jurisdiction—be ascertainable mainly from the practice of their courts. Reference should also be made to the attempts to codify international law in this field and to the doctrines of recognized authors.

(b) According to general practice and doctrine, the inviolability and immunity of embassy premises precludes entry by the authorities of the receiving State, except with the consent of the head of the mission. Search, attachment and measures of execution within the premises are inadmissible, even for the enforcement of judicial decisions (see Verdross, *Völkerrecht*, 4th ed. (1959), p. 261; Oppenheim-Lauterpacht, *International Law*, vol. 1, 8th ed. (1955), para. 390, p. 795; art. 22 of the Vienna Convention on Diplomatic Relations of 1961). Opinions differ, however, on whether the exercise of domestic jurisdiction in respect of embassy premises is excluded even when measures of execution within the premises are not involved.

2. It cannot be deduced from the practice of the courts that States enjoy immunity in all cases involving actions in respect of embassy premises as a matter of custom observed by the overwhelming majority of States.

(a) In some judicial decisions, the courts have ruled outright that the foreign State has immunity in respect of actions relating to its embassy premises. The *Land* Court at Hamburg, in restitution proceedings against the United Mexican States, ruled out German jurisdiction. Mexico was the owner of a property which was still uninhabitable as a result of war damage and which it wanted to use for its consulate. The *Land* Court decided that German jurisdiction did not apply either to the claim for restitution of the property or to the application for permission to rectify the entry in the land register (NJW/RzW 53, 177). The fact that the same rules may not apply to consular premises as to embassy premises is immaterial for our purpose.

In *B. v. People's Republic of China*, The Supreme Court of Sweden, in its decision of 1 March 1957, ruled out Swedish jurisdiction on the ground of the immunity of embassy premises. The defendant, the People's Republic, had purchased a property which was subsequently used by its embassy in Sweden. The plaintiffs had sought to have the sale of the property to the People's Republic of China declared void (*International Law Reports 1957*, pp. 221 *et seq.*).

(b) In contrast to these decisions there are others which proceed on the assumption that, where actions relating to embassy premises are concerned, domestic jurisdiction is not excluded in all cases but only under certain conditions.

(aa) In a decision of 5 January 1920, the Austrian Supreme Court upheld the ruling of the *Land* Court at Vienna that the immunity of embassy premises was intended only for "protection of the mission", that accordingly it was not unlimited and that, in particular, it was "without effect as regards to jurisdiction in matters of real property" (Decisions of the Austrian Supreme Court in Civil and Administrative Cases (S.Z.), vol. II, p. 3 (4)). In a further decision of 11 September 1928, the same court ruled that ownership of its embassy premises rendered the Czechoslovak State subject—if the doctrine of limited State immunity was accepted—to Austrian jurisdiction in so far as the litigation related to that immovable property itself or to binding agreements concluded in connexion with it (S.Z.X, p. 427 (429)).

(bb) The following two cases point in the same direction:

In 1949, the Court of Appeal at Athens upheld Greek jurisdiction in connexion with an action against the Romanian State for the restitution of premises which had been occupied by the Romanian Ambassador under a rent contract. The court held that it had jurisdiction because private rights were at issue. That was so despite the fact that, if the petition was allowed, the Ambassador would be deprived of his rented premises and his diplomatic immunity would be violated. The court also con-

sidered it material that diplomatic relations between Romania and Greece had been broken off and that no member of the Romanian Embassy was present in Greece in an official capacity (*Annual Digest and Reports of Public International Law Cases 1949*, p. 291 *et seq.*).

The Tribunale civile at Rome decided in 1928 that the purchase of a property by a foreign State was a private-law transaction and was subject to domestic jurisdiction even if the property was to be used as embassy premises (see *Harvard Law School, Research in International Law, Supplement to the American Journal of International Law* (AJIL), vol. 26 (1932), p. 579 (Harvard Law School)).

The first of these cases concerned premises which were no longer being used for the purposes of an embassy, while the second concerned premises that were not yet being so used. A decisive factor for the courts, in arriving at their rulings concerning the immunity of the foreign State, was whether the premises were actually being used for diplomatic purposes. It is reasonable to conclude that, in the view of these courts, the immunity of States in respect of their embassy premises is not unlimited but is enjoyed by them only to the extent required by the spirit and purpose of diplomatic privileges and immunities.

(cc) The Supreme Restitution Court for Berlin,³¹ composed of judges of various nationalities, gave rulings in four judgements of 10 July 1959 on actions for restitution brought by former owners against foreign States (Latvia, Japan, Bulgaria and Hungary) concerning properties which had previously been used by those States as embassy premises in Berlin. The court rejected the objection to the exercise of domestic jurisdiction which had been lodged in all four cases on the ground that the properties in question were not entitled to immunity because for several years past they had not been used for diplomatic purposes (Supreme Restitution Court for Berlin 13, 36 *et seq.*, 53 *et seq.*, 199, 200—AJIL, vol. 54 (1960), pp. 165 *et seq.*, pp. 178 *et seq.*; see also NJW/RzW 59, 526 *et seq.*).

It is clear from the language of the judgement that, in the view of the court, the “special privileges and immunities” of embassy premises can indeed result in the exemption of the sending State from domestic jurisdiction. However, the court deduced limits on this immunity of embassy premises from the spirit and purpose of diplomatic privileges and immunities. As the court saw it, the justification for such privileges and immunities was that they ensured the free exercise of diplomatic functions.

In the case relating to the Japanese property, the Court of Appeal upheld the finding of domestic jurisdiction on the ground that the special protection of embassy premises subsisted only for such time as they were being used for diplomatic activities. A diplomatic agent was granted immunity so that he could carry out his duties freely and without hindrance. Consequently, in the view of the Court of Appeal, embassy premises enjoy immunity only to the extent necessary for the free and unhindered exercise of diplomatic activities (NJW/RzW 57, 185 *et seq.*).

3. The draft codifications which have been produced provide no support for the view that the immunity of embassy premises excludes domestic jurisdiction in all cases.

³¹ *Translator's note*: The official English title, if any, of this multinational court has not been verified.

(a) The efforts of the United Nations International Law Commission have not yet resulted in codification of the law of State immunity, but the Commission has codified the law of diplomatic privileges and immunities. (There follows a discussion of this in more detail.)

(b) Article 22 of the Vienna Convention on Diplomatic Relations of 1961, which is based on the work of the International Law Commission and has not yet entered into force, contains provisions on the inviolability of embassy premises which correspond to existing customary law. The measures of execution within the premises which are inadmissible under article 22, paragraph 3, also include measures for the enforcement of court orders. According to the International Law Commission's commentary to the corresponding provision of its draft articles, the inviolability of embassy premises is not the consequence of the inviolability of the head of the mission, but is an attribute of the sending State by reason of the fact that the premises are used as the headquarters of the mission (*Yearbook, 1958*, vol. II, p. 95). Thus, article 22 of the Vienna Convention is also apparently based on the idea that the immunity of embassy premises is justified by, but is also limited to, the purpose of providing protection for diplomatic activities.

4. Non-official institutions have also considered the question of State immunity:

(a) According to the 1954 resolution of the Institut de droit international on the immunity of foreign States (*Annuaire des Instituts, 1954*, vol. II, pp. 293 *et seq.* and 301 *et seq.*), domestic jurisdiction could be exercised if a dispute arose as to whether the ownership of premises used for diplomatic purposes had been effectively acquired under private law, because a dispute of that kind did not relate to an act of public authority (see arts. 1 and 3 of the resolution; for the inadmissibility of measures of execution and attachment, see art. 5). The general rules concerning State immunity proposed by the Institute were obviously considered adequate for embassy premises also, even though the special immunity of States in respect of such premises was hardly mentioned in the written observations of the members of the Institute or in their discussions (see *Annuaire des Instituts, 1952*, vol. I, pp. 5-136; vol II, pp. 424-431; 1954, vol II, pp. 200-227).

(b) According to the 1932 proposals of the Harvard Law School study group³² for regulating jurisdiction over foreign States (Supplement to AJIL, vol. 26 (1932), pp. 451 *et seq.*), State immunity in respect of embassy premises is justified only in so far as the exercise of domestic jurisdiction would impair the inviolability of the premises. Consequently, measures of execution within the premises were inadmissible. Judicial determination of the ownership of the premises did not constitute any impairment of diplomatic activities. Actions brought for the purpose should therefore be admissible (*op. cit.*, pp. 577 *et seq.*, and draft articles 9 and 23). The report of the study group cites several judicial decisions in support of this proposal, including the decision of the Austrian Supreme Court of 11 September 1928 mentioned above (S.Z.X, p. 427).

5. Nor is there anything in the doctrine of international law to indicate that the immunity of embassy premises excludes domestic jurisdiction in all cases.

³² *Translator's note*: English wording of proposals and title of group not verified.

In the literature, domestic jurisdiction is for the most part regarded as being excluded by reason of the immunity of embassy premises, but the scope of that immunity is not investigated (see, for example, Eleanor Allen, *The Position of Foreign States before National Courts* (1933), p. 17; Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, 2nd ed. (1947) vol. 2, p. 848; Gmür, *Gerichtbarkeit über fremde Staaten* (1948), p. 126, note 203; Cavaré, "L'immunité de juridiction des Etats étrangers", *Revue générale de droit international public*, vol. 58 (1954), pp. 177 *et seq.* and 189).

Zorn (*Deutsches Gesandtschafts- und Konsularrecht*, (1929) (= *Handbuch des Völkerrechts*, vol. 3, part 2), p. 43) takes the view that, where actions *in rem* are concerned, there is no exemption from German jurisdiction even in respect of embassy premises, since German law makes no exception in that respect from the exclusive jurisdiction of the courts in matters relating to real property (Judicature Act, art. 20; Code of Civil Procedure, art. 24). On the other hand, Dahm (*Völkerrecht*, vol. 1, p. 348, note 7) considers, without giving any precise reasons, that even actions *in rem* are excluded in relation to embassy premises.

In two highly regarded works on international law, however, the view is expressed that the immunity of embassy premises is intended only to ensure the performance of diplomatic functions. Verdross (*op cit.*, p. 261) regards the immunity of embassy premises as a *derived* immunity. This can only be taken to mean, in the context of the explanations he gives, that in his view the immunity of embassy premises is justified only for the purpose of ensuring the performance of the functions of the diplomatic mission. Oppenheim-Lauterpacht (*op cit.*, para. 390, pp. 795 *et seq.*) says more clearly that embassy premises are to be regarded as extraterritorial only in a certain sense and only to a certain extent. Their immunity is guaranteed only in so far as this is necessary in terms of the independence and inviolability of ambassadors and the inviolability of their official documents and archives. Thus, both Verdross and Oppenheim-Lauterpacht justify the immunity of embassy premises in terms of diplomatic functions. In this way—we may conclude—the limits of that immunity are also demarcated.

6. A comprehensive appraisal of the foregoing leads us to the conclusion that the existence of a general rule of international law under which domestic jurisdiction in respect of actions against a foreign State relating to its embassy premises is in all cases excluded cannot be established. Rather, the immunity of embassy premises extends only so far as is necessary for the exercise of the functions of the diplomatic mission.

III. The submission by the Federal Court of Justice raises the question whether German jurisdiction obtains in the case of an action against a foreign State seeking rectification of the land register in respect of its embassy premises. A decision is therefore required on this specific question also. German jurisdiction is not excluded in the case of such actions.

An action for rectification of the land register does not adversely affect the diplomatic mission in the exercise of its functions. A judgement allowing the petition would not alter the ownership of the property. It would merely establish that the entry in the land register relating to the ownership of the property was not in conformity with the true legal position (Civil Code, art. 894) and would accordingly oblige the defendant State to co-operate in having the land register rectified. Once the judgement became final, rectification of the land register could, in accordance with

article 894, paragraph 1, first sentence, of the Code of Civil Procedure, be effected without its co-operation; under that provision, if a party is ordered by the court to give his consent, it is deemed to have been given as soon as the judgement becomes final. The direct consequence of rectification of the land register would be that, in accordance with article 891 of the Civil Code, ownership of the property would be presumed to be vested in the plaintiff, while according to the same provision, pending any such rectification, the defendant State recorded in the land register is presumed to be the owner of the property. In addition, under the terms of article 892 of the Civil Code, once the land register had been rectified, no person could effectively acquire a right in the property through legal transactions with that State. There is nothing in all this that would adversely affect the mission in the exercise of its diplomatic functions. As far as the performance of its duties are concerned, it is immaterial whether the sending State or some other person is entered in the land register as owner of the embassy premises.

Comments on the above decision by Dr. Wilhelm Wengler, Berlin

Although that part of the decision which relates purely to international law is in my view essentially correct, there are a number of debatable points elsewhere in it.

The first point of interest, from a procedural standpoint, is the way in which the Federal Constitutional Court corrected the formulation of the question submitted by the Federal Court of Justice. One wonders whether it would not have been more proper for the Federal Constitutional Court to suggest to the Federal Court of Justice that it might wish to amend its submission in order itself to put forward the two questions which the Federal Constitutional Court then proceeded, in its decision, to answer in the negative, in the same way as the judge in a civil case may call on the parties to make relevant submissions. I could at least imagine a situation in which it would not be so simple to read the "correct" question into a question wrongly put by the submitting court.

The special task of the Federal Constitutional Court under article 100, paragraph 2, of the Basic Law is to answer the abstract question whether a rule, which is to be formulated by the submitting court, forms part of general international law within the meaning of article 25 of the Basic Law and as such, through the transforming effect of that article, constitutes federal law. The Federal Constitutional Court rightly takes the view that it also has to consider whether the rule in question does exist at all in positive international law and whether it is a rule of universal customary international law. On the other hand, I have serious doubts about the view that there is no need to consider whether "rights and duties of private parties" under German internal law arise from the rule in question, once it has undergone the process of transformation. It is certainly true that the possibility of such judicial review does exist even when the transformed rule creates duties only for organs of the State, for the fulfilment of which no private party has a right to sue but which the German courts must take into account in applying internal law (e.g., in disciplinary proceedings). However, a question of exceptional importance is whether an abstract rule of general international law binding on all States can, in its entirety, form part of internal law at all and, if so, whether that is to come about under article 25 of the Basic Law. The question becomes acute if, for instance, an alleged violation of general international law by another State produces consequences under German private law, such as non-recognition of a right of ownership created as a result of expropriation by another State contrary to international law. Leaving aside the question

whether a German court would be entitled to consider the conduct of foreign States as such under international law, even as a preliminary issue, it is nevertheless obvious that the abstract principle of international law prohibiting expropriation without compensation, in so far as it is binding on the German State, certainly becomes, under article 25 of the Basic Law, internal German law out of which rights and duties arise for German citizens or organs of the State, whereas this is doubtful, to say the least, in so far as *other* States incur liability under the abstract principle of international law. If, as the Federal Constitutional Court emphasizes, article 100, paragraph 2, of the Basic Law is closely interrelated with article 25, it can be argued that the special competence of the Federal Constitutional Court under article 100 is limited to precisely those cases where the abstract principle of general international law is binding on the German State and where the federal law created by transformation serves the purpose of fulfilling the resulting obligation. But the Federal Constitutional Court surely lacks competence under article 100 of general international law becomes relevant under internal law only by reason of a provision other than article 25 of the Basic Law—for example, if there exists unilateral legislation whereby certain persons are accorded certain treatment through the application by analogy of the provisions of international law relating to diplomats, or if in a legal transaction reference is made to general international law. Article 100 of the Basic Law does not mean that the abstract question of the existence and scope of a general principle of international law can be submitted to the Federal Constitutional Court in *every* context, but only in so far as this is necessary to ensure the smooth functioning of the *constitutional* norm of article 25 of the Basic Law, with particular reference to classifying a rule with a view to the fulfilment of an obligation of the Federal Republic under international law.

Perhaps the finest point about the proceedings is whether it was necessary at all to make a submission to the Federal Constitutional Court under article 100 of the Basic Law. Whereas the Federal Court of Justice simply took the view that the Yugoslav military mission in Berlin “has the status of a diplomatic mission”, the Federal Government has already indicated that the only issue may be whether the mission had been accorded the privileges and immunities of a diplomatic mission by the occupation authorities. If the case relates to a “military mission accredited to the Allied Control Council”, one must have serious doubts as to whether such a military mission really possesses in German territory the status of a diplomatic mission *on the basis of* a rule of general international law which, in accordance with article 25 of the Basic Law, forms part of federal law and for the violation of which the German State is liable under international law. Where a State has supposedly housed a mission with “diplomatic privileges” in its “embassy” building in the territory of another State, the latter State is obliged under *general* international law to show respect for extraterritoriality only if *its* Government has accepted the diplomatic mission in question. Such a State *may* be obliged by treaty to grant extraterritoriality to a diplomatic mission accredited to third Powers (as, for instance, in the case of Italy and the diplomatic missions to the Holy See, which have their seats in Rome outside the Vatican). The Federal Republic is certainly under no express treaty obligation towards the occupying Powers to grant diplomatic privileges to the Yugoslav military mission; yet a tacit *conventional* obligation would not be in keeping with the original four-Power status of Berlin maintained precisely by the Western Powers. If, therefore, the Foreign Ministry’s version is correct and the Yugoslav military mission enjoys diplomatic status only on the basis of the occupation law for Berlin created by the occupation authorities, there can be no question of an obligation on the German

authorities to respect its extraterritoriality by virtue of "transformed" international law, and least of all by virtue of general international law transformed under article 25 of the Basic Law.

It is somewhat strange that the lower courts did not assume that the special restrictions which occupation law places on German jurisdiction in West Berlin prevented them from even accepting the case seeking restitution against the Yugoslav State. If the "diplomatic" character vis-à-vis Germans of the military mission accredited to the Control Council actually derives from occupation law, it is hard to believe that the Allies would not have intended that German jurisdiction in this case also should be excluded under occupation law. If, however, that was not in fact their intention, as the lower courts believed from their interpretation of the regulations of the Allied Kommandatura issued in 1950, the conclusion could still have been drawn that full diplomatic immunity for the military mission under occupation law did not exist, since the Control Council to which it is supposedly accredited no longer exists and military missions no longer perform in any way their original function. The Federal Constitutional Court did not go into this question at all but simply decided that the Federal Court of Justice's view that the military mission enjoyed diplomatic privileges was not "manifestly untenable". It seems to me, however, that the competence of the Federal Constitutional Court under article 100 of the Basic Law depended precisely on whether the Federal Court of Justice considered that the extraterritoriality of the military mission *derived* from a principle of general international law binding on the Federal Republic and not from occupation law, and on whether that view was not manifestly untenable.

There is a final question which also went undiscussed, namely, whether the Federal Constitutional Court should have taken the case when it knew that its decision would have a significant impact on a civil proceeding relating to a West Berlin property. The view of the Western occupying Powers that constitutional jurisdiction is an exercise of governmental functions and that the Federal Constitutional Court therefore lacks competence with respect to West Berlin may or may not be correct. But if there is in fact a prohibition by the Allies, which the Federal Republic is bound to respect, on intervention by the Federal Constitutional Court in West Berlin matters, it must surely be assumed that this applies also to a decision under article 100 of the Basic Law. And it can scarcely be argued from article 106 of the Act concerning the Federal Constitutional Court, as interpreted by the court itself (NJW 57, 1273), that the Federal Constitutional Court cannot, in exercise of its power to review legislation, annul a Berlin law which is incompatible with general international law but that it is permissible for it simply to determine, under article 100, paragraph 2, of the Basic Law, the substance of a principle of general international law which, it is true, would not be valid "in Berlin" but, if possessing legal force (see art. 31 of the Act concerning the Federal Constitutional Court in conjunction with art. 13 (2)), would be binding in Karlsruhe on the Federal Court of Justice in respect of a Berlin lawsuit.

2. DECISION BY THE FEDERAL CONSTITUTIONAL COURT ON 30 APRIL 1963.

*X v. Empire of . . .*³³

Leading principles:

*Basic Law, Article 25 (Domestic jurisdiction over foreign States
in respect of non-sovereign activities)*

³³ *Bundesverwaltungsgericht*, vol. 16, p. 27 (translated by the Secretariat).

(a) *A rule of international law whereby domestic jurisdiction in respect of legal actions against a foreign State relating to its non-sovereign activities is excluded does not form part of federal law.*

(b)(1) *The decisive criterion for distinguishing between sovereign and non-sovereign State activities is the nature of the State activity.*

(2) *The determination of a State activity as sovereign or non-sovereign is in principle to be made according to national law.*

Excerpts from the judgement:

A. I.1. Company X brought a District Court action against the Empire of . . . seeking payment of DM 292.76 plus interest for repair work on the Embassy's heating plant done by the company at the request of the Ambassador.

The District Court declined to set a date for a hearing or to effect service of the complaint on the ground that the Empire, as a sovereign State, was immune from German jurisdiction under a general rule of international law. The plaintiff appealed against that decision.

2. The *Land* Court decided, in accordance with article 100, paragraph 2, of the Basic Law, to obtain a ruling from the Federal Constitutional Court on "whether, under the generally recognized rules of international law, the plaintiff may bring an action against the defendant State . . . before a court of the Federal Republic."

In the view of the *Land* Court, the issue raised by the appeal is whether the Empire is subject to domestic jurisdiction in respect of the action which has been brought. If so, the District Court must set a date for a hearing and effect service of the complaint. If, on the other hand, that is not the case, then the District Court was correct in declining to schedule a hearing and serve the complaint; if it did so, the summons to the hearing at least would be an "inadmissible sovereign act against an extraterritorial entity not subject to domestic jurisdiction".

The *Land* Court feels that whether the Empire is subject to domestic jurisdiction depends on whether "a rule of international law which has become part of federal law directly entitles a private party to bring an action against a sovereign foreign State before a court of the Federal Republic in respect of a purely private-law claim arising out of a purely private-law activity of the sovereign foreign State within the country". It considers that this question is open to doubt and therefore susceptible of submission to the Federal Constitutional Court.

. . . .
B. . . . C. There exists no general rule of international law whereby domestic jurisdiction in respect of actions against a foreign State relating to its non-sovereign activities is excluded.

I.1. Rules of international law relating to the immunity of foreign States from domestic jurisdiction are general rules of international law if they are recognized by the overwhelming majority of States, not necessarily including the Federal Republic of Germany (BVerfGE of 30 October 1962—2 BvM 1/60—p. 14 = NJW 63, 435).

The general rules of international law concerning State immunity can only be part of customary international law. There are no conventional rules that have gained general recognition. Nor are there any recognized general principles of law which—

supplementing customary international law—might serve as criteria for determining the scope of State immunity.

2. Until the time of the First World War, the clearly predominant practice of States was to grant foreign States absolute immunity or, in other words, to exempt them from domestic jurisdiction in respect of both their sovereign and their non-sovereign activities. Since then, however, State immunity has been “undergoing a process of contraction” (Dahm, *Festschrift für Arthur Nikisch* (1968), pp. 153 *et seq.*; its history has “become the history of the struggle over the number, nature and scope of exceptions” (Ernst J. Cohn, in Strupp-Schlochauer, *Wörterbuch des Völkerrechts*, vol. 1, p. 662). The increasing activity of States in the economic field, and particularly the expansion of State trading, seemed to make it necessary to except acts *jure gestionis* from State immunity. It was felt that private parties must be given greater legal protection through the courts than in the past, not only against their own States but also against foreign States. Mainly for these reasons, the trend in recent decades has led to a situation in which one can now no longer point to a long-standing custom observed by the overwhelming majority of States, in conscious fulfilment of a legal obligation, whereby foreign States are immune from domestic jurisdiction even in respect of actions relating to their non-sovereign activities.

The custom observed by States can—since what is involved is the exercise of jurisdiction—be seen mainly from the practice of their courts. Reference should also be made to other State practice, to the attempts which have been made to codify the international law in question and to the doctrines expounded by recognized writers (BVerfGE of 30 October 1962—2 BvM 1/60 = NJW 63, 435).

3. It cannot be deduced from judicial practice that foreign States continue under general international law to enjoy absolute immunity from domestic jurisdiction.

(a) Until 1945, Germany was among the States whose courts granted absolute immunity, which meant immunity in respect of claims under private law as well.

The Reich Court of Justice, in its precedent-setting decision of 12 December 1905 (RGZ 62, 165), ruled that foreign States enjoyed absolute immunity. It maintained that position not only in the Ice King case (judgement of 10 December 1921, RGZ 103, 274), but also in other cases (decisions of 1 July 1921, RGZ 102, 304), and 13 October 1925, RGZ 111, 375), and never departed from it up to 1945.

The rulings of the Prussian Court for the Settlement of Conflicts of Jurisdiction were also based on the view that foreign States were not subject to domestic jurisdiction even in matters of private law (decision in the Hellfeld case of 25 June 1910, JöR, vol. V (1911), p. 252; decision of 27 June 1925, JW 26, 402).

After the Second World War, German courts ruled that jurisdiction over a foreign State existed when that State was involved not as a sovereign entity but as a subject of private rights and duties (*Land* High Court at Hamm, NJW/RzW 51, 258; *Land* Court at Berlin, NJW/RzW 53, 368; *Land* Labour Court at Munich, *Arbeitsrechtliche Praxis* (1951), No. 114; *Land* Court at Kiel, JZ 54, 117). The *Land* High Court at Hamburg (MDR 53, 109) and the *Land* High Court at Schleswig (*Jahrbuch für Internationales Recht* (JIR), vol. VII (1957), p. 400) rules out jurisdiction over foreign States in respect of claims under private law on the ground that there had existed, in the cases before them, a connexion with the sovereign functions of the foreign State.

The Federal Court of Justice, in a decision of 7 June 1955 (BGHZ 18, I (9) =

NJW 55, 1435), left in abeyance the question whether the principle that a foreign State was ordinarily immune from domestic jurisdiction even in private-law suits continued to apply in times when "States are proceeding increasingly to involve themselves in commercial activities and such activities have no perceptible connexion with their sovereign functions".

The rulings of German courts since 1945 have not, therefore, been uniform. However, there is a noticeable trend towards restricting State immunity.

(b) The courts of a sizable number of States grant foreign States immunity only for acts *jure imperii* and not for acts *jure gestionis*.

This distinction was first adopted by Italian and Belgian courts, as long ago as towards the end of the nineteenth century, as the basis for their decisions. (There follows an account of judicial decisions in other States.)

The above survey of judicial decisions shows the following:

The courts of a considerable number of States, particularly Italy, Belgium, Switzerland, Austria, France, Greece, Egypt and Jordan, definitely allow foreign States immunity only in respect of sovereign acts. As regards judicial practice in other States, it is doubtful whether the courts continue to adhere to the doctrine of absolute State immunity. In Germany, there is a noticeable trend towards restricting State immunity. On the other hand, the courts of England and the United States in particular, but also those of Japan and the Philippines and of the Eastern European States, continue to hold that foreign States are entitled to immunity in respect of both sovereign and non-sovereign activities. However, especially in the United States and England, there is a noticeable trend away from absolute State immunity.

In view of this situation, it is impossible to deduce from the practice of the courts that the granting of absolute immunity can today still be regarded as a custom observed, in conscious fulfilment of a legal obligation, by the overwhelming majority of States.

4. The many bilateral and multilateral international treaties governing State immunity generally or in respect of specific types of property (e.g. State-owned merchant shipping) also confirm, upon careful scrutiny, that under general international law States can now claim immunity only for acts *jure imperii* and no longer for acts *jure gestionis*. (This point is made in particular on the basis of the Paris suburb treaties of 1919/1920, the Brussels Conventions of 1926/1934, the 1954 trade treaty between Germany and the United States and some trade agreements concluded by Russia.)

5.(a) The codification efforts of the League of Nations and the United Nations provide no support for the view that foreign States are entitled, under the general rules of international law, to absolute immunity from domestic jurisdiction. Rather, they confirm that States can now claim immunity only in respect of their sovereign acts.

The efforts of the Committee of Experts for the Progressive Codification of International Law,³⁴ established by the Assembly of the League of Nations show that

³⁴ *Translator's note*: The English terminology of the codifications, etc., referred to in sections 5 and 6, and even the official titles of some of the bodies concerned, have not been verified.

by 1926 there was already no longer a consensus among jurists that States were entitled to immunity even in respect of their activities under private law (see second report of the Committee to the Council of the League of Nations of 27 June 1928, League of Nations document A. 15. 1928. V (partially reproduced in *American Journal of International Law* (AJIL), vol. 22 (1928), Special Supplement, January 1928, pp. 117 *et seq.*).

In a report on the work of a sub-committee in 1926 (League of Nations document, *op cit.*, pp. 49 *et seq.* = AJIL, *loc. cit.*, pp. 118 *et seq.*), Matsuda pointed out that the general view was that States were entitled to immunity in respect of their sovereign acts. For the rest, he noted, opinions were divided. Many writers considered that States enjoyed absolute immunity, regardless of the nature of the activity. Others would recognize State immunity limited to sovereign acts only, thus denying States any immunity in respect of acts *jure gestionis*. In view of the extension of State activities into the commercial field, it could be considered just and reasonable to treat certain acts of States as acts of private parties. However, it was difficult to delimitate those acts in a way that could serve as the basis for treaty provisions.

In his comments on that report, Diena (League of Nations document, *op cit.* pp. 54 *et seq.* = AJIL, *loc. cit.*, pp. 128 *et seq.*) drew attention both to the provisions of the Paris suburb treaties and of the Brussels Convention of 1926 and to the practice of the Italian and Belgian courts, and declared emphatically that codification of the law relating to State immunity was not only desirable but also—contrary to the sceptical view taken by Matsuda—attainable. It was, of course, difficult to establish a clear dividing-line between the sovereign acts and the private-law activities of States. However, difficulties of that kind were frequently encountered in international law; they could not be allowed to stand in the way of drawing the distinction.

The United Nations International Law Commission's preparatory work for the codification of the law on diplomatic privileges and immunities and the law on consular relations was apparently based on the view that States were entitled to immunity only in respect of their sovereign acts.

On the question of limited immunity of States in respect of their embassy premises, see the decision of the Federal Constitutional Court of 30 October 1962 (2 BvM 1/60 = NJW 63, 435); see also paragraph 2 of the Commission's commentary to article 43 of its draft articles on consular relations, *Yearbook of the International Law Commission, 1961*, vol. II, p. 117.

(b) The Asian-African Legal Consultative Committee discussed the immunity of States at its first and second sessions (New Delhi, 1957, and Cairo, 1958) and concluded its work at its third session in Colombo (1960), which was attended by delegations of the Governments of Burma, Ceylon, India, Indonesia, Iraq, Japan, Pakistan and the United Arab Republic and by a representative of the Iranian Government. The final report of the Committee on the question of State immunity recommended that immunity should not be granted in respect of commercial activities and private activities of States. That recommendation was approved by all delegations except that of Indonesia (Asian-African Legal Consultative Committee, Third Session, Colombo, 20 January to 4 February 1960, issued by the secretariat of the Committee, New Delhi, undated, p. 58 (66 *et seq.*); see also Herndl, *Juristische Blätter*, 62, 15 (19)).

6. Three respected non-governmental institutions have come out clearly in favour of the restrictive theory of State immunity.

(a) The Harvard Law School study group's 1932 draft on jurisdiction over foreign States espoused the doctrine of limited State immunity and stated that, despite certain difficulties, it was time to establish in a convention the distinction between acts *jure imperii* and acts *jure gestionis* (see draft article 11, with background information and commentary, Harvard Law School, p. 451 (597, 606)).

(b) The International Law Association considered the question of State immunity at its forty-fifth session in Lucerne in 1952 and adopted a resolution stating that a foreign State should not be protected by immunity from jurisdiction in respect of acts of a private nature undertaken by that State. The preamble of the resolution emphasized that the expansion of State activities had caused the courts of various countries to impose limits on the principle of immunity by drawing a distinction between public and private acts of States. The principle of State immunity was becoming obsolete in cases where States engaged in commercial activities or other private transactions (International Law Association, Report of the Forty-fifth Conference (1952), pp. VI *et seq.*).

(c) The Institut de droit international dealt with the question of State immunity at its sessions in Siena (1952) and Aix-en-Provence (1954). The resolution adopted on 10 April 1954 in Aix-en-Provence is based on the restrictive theory of State immunity.

7. The international-law literature cannot be cited in support of the view that foreign States are entitled to absolute immunity. The Austrian Supreme Court rightly stated, in its decision of 10 May 1950 (SZ, vol. XXIII, p. 304 (322)), that one could not speak of a *communis opinio doctorum* on the subject.

Modern writers on international law largely, if not overwhelmingly, support the restrictive theory of State immunity (see, in particular, Dahm, *op cit.*, pp. 235 *et seq.* and "Völkerrechtliche Grenzen der inländischen Gerichtsbarkeit gegenüber ausländischen Staaten", in *Festschrift für Arthur Nikisch*, (1958), p. 153 (163 *et seq.*); Verdross, *Völkerrecht*, 4th ed. (1959), pp. 169 *et seq.*; Gamillsheg, *Internationales Arbeitsrecht* (1959), pp. 401 *et seq.*; Riezler, *op. cit.*, p. 396; Schnitzer, *Handbuch des Internationalen Privatrechts*, 4th ed., vol. II (1958), pp. 833 *et seq.*; Ch. Rousseau, *Rspr. a. d. Gebiet d. JPR* 66 (1962), 655, and Weiss, *Recueil des cours*, vol. I (1923), pp. 521 *et seq.*).

In view of the lack of uniformity in State practice, however it is also argued that customary international law contains no rule at all concerning State immunity (see, for instance, Lalive, *op cit.*, pp. 251 *et seq.*; Cavaré, *Le droit international public positif*, vol. II, (1951), p. 439; Gmür, "Zur Frage der gerichtlichen Immunität fremder Staaten und Staatsunternehmungen", in *Schweizerisches Jahrbuch für internationales Recht*, vol. VII (1950), p. 9 (74 *et seq.*).

Both groups of writers agree in any event that absolute State immunity must be rejected.

Lauterpacht takes the view that customary international law applies only to cases where a uniform practice has clearly evolved—for example, to the immunity of diplomats and heads of State and with reference to warships. In other cases, pending comprehensive international regulation, the granting of State immunity must be regarded as a matter for national law (Oppenheim-Lauterpacht, *International Law*, vol. I, 8th ed., (1955), para. 115 ad, p. 274, and *British Year Book*, p. 220 (236 *et seq.*)). E. J. Cohn (*op. cit.*, p. 662) similarly finds that the principle of State immu-

nity as such is part of international law but believes that the details of its form and substance should at present be left to national law.

Absolute State immunity is affirmed in the literature of the communist countries. A work entitled *International Law*, published by the Academy of Sciences of the Soviet Union in 1957 (German translation by Schultz, vol. 43 of the publications of the Institute for International Law at the University of Kiel, 1960), takes an especially strong stand in favour of the absolute theory. In that work (p. 215), Molodtsov claims immunity even for State-owned merchant vessels; Shurshalov maintains (p. 319) that, in order to justify encroachments on the rights and privileges of Soviet trade missions "bourgeois jurists invented the theory of 'the trading States' ". As regards Polish law, Lasok, ("Polish private international law", in *Studies in Polish Law (Law in Eastern Europe)*, No. 6 (1962), p. 121 (132)) asserts that the doctrine of State immunity encompasses every activity of the State and allows of no exceptions.

Otherwise, the view that States are entitled to immunity even in respect of their non-sovereign activities is hardly to be found in recent times in the international-law literature (see Lalive, *op. cit.*, p. 222, note 2).

A comprehensive appraisal of judicial practice, of some conventional instruments, of the efforts that have been made at codification and of the international-law literature reveals that absolute State immunity can no longer be regarded as a rule of customary international law. One cannot but agree with the finding of the Austrian Supreme Court, in its decision of 10 May 1950 (SZ, vol. XXIII, p. 304 (322)), that "it can no longer be said that, under recognized international law, so-called *acta gestionis* are excluded from domestic jurisdiction".

II.1. Although under general international law foreign States are not exempt from domestic jurisdiction in respect of acts *jure gestionis*, they are still, according to a legal consensus reflected in the practice of States, in draft codifications and in the international-law literature, entitled to immunity in respect of activities of a sovereign nature.

The fact that it is difficult to distinguish sovereign from non-sovereign State activities is no reason for abandoning the distinction. Similar difficulties are also encountered in other areas of international law. For instance, whether a given State activity abroad is admissible without the consent of the State affected by it depends on whether that activity is of a sovereign or non-sovereign nature (see Dahm, *Völkerrecht*, vol. 1, pp. 250 *et seq.*).

2. The distinction between sovereign and non-sovereign State activities cannot be based on the purpose of the State activity and on whether it bears a perceptible relation to the sovereign functions of the State; for, in the final analysis, most if not all State activities serve sovereign purposes and functions and will always bear a perceptible relation to them. Nor can the distinction depend on whether the State has engaged in commercial activities. Commercial activities of a State do not differ essentially from other non-sovereign State activities.

The distinction between acts *jure imperii* and acts *jure gestionis* can only be based on the nature of the act of the State or of the resulting legal relationship, not on the motive or purpose of the State activity. What is relevant is whether the foreign State acted in exercise of its sovereign power, and thus in the sphere of public law, or whether it acted as a private person, and thus in the sphere of private law.

The same or similar views are to be found in decisions of Italian, Belgian,

Swiss, Austrian and Egyptian courts, in the attempts at codification by the International Law Association and the Institut de droit international, and in Dahm, *Völkerrecht*, vol. 1, pp. 235 *et seq.*, and *Festschrift für Arthur Nikisch*, pp. 163 *et seq.*; Verdross, *op. cit.*, pp. 169 *et seq.*; Riezler, *op. cit.*, p. 400; Herndl, *op. cit.*, pp. 20 *et seq.*; Schnitzer, *op. cit.*, pp. 835 *et seq.*; Weiss, *op. cit.*, p. 346.

3. The determination of a State activity as sovereign or non-sovereign must in principle be made according to national law, since international law does not—or at least does not usually—embody any criteria for making this distinction (on the question of recourse to national law, see Herndl, *op. cit.*, pp. 20 *et seq.*, with references). The general rule of international law whereby foreign States are entitled to immunity from domestic jurisdiction in respect of their sovereign activities does not become nugatory and deprived of its character as a legal norm by reason of the fact that the distinction between acts *jure imperii* and acts *jure gestionis* is in principle to be made according to national law. Rather, the precise substance of the rule derives from the particular national law which is to be applied. Moreover, it is not unusual for norms of international law to make reference to national law (see Guggenheim, in Strupp-Schlochauer, *Wörterbuch*, vol. 3, p. 651 (658 *et seq.*); Scheuba-Lischka, in Strupp-Schlochauer, *Wörterbuch*, vol. 3, p. 586). For instance, certain rights and duties of States depend, under customary international law and international conventions, on the nationality of a person, but acquisition or loss of nationality is in principle governed by national law.

Lastly, the fact that reference to national law theoretically enables a national legislature to influence the scope of the rule of international law by manipulating national law cannot be a decisive consideration. The establishment under national law of the dividing-line between sovereign and non-sovereign State activities primarily serves other purposes than determining the scope of the immunity of foreign States. Moreover, any manipulation of the law by legislatures can be countered by the legal principle of good faith recognized in international law.

4. It must be conceded that making the nature of the State activity the criterion for distinguishing between sovereign and non-sovereign acts and allowing the determination to be made by national law renders the application of general international law more difficult and runs counter to the desirable uniformity of the law. However, this disadvantage is mitigated by the fact that the determination by national law of a State activity as an act *jure gestionis* is subject to limitations imposed by international law. National law may be applied for the purpose of distinguishing between sovereign and non-sovereign activities of a foreign State only with the proviso that such acts which, in the view of the overwhelming majority of States, fall within the sphere of State authority, in the narrow and true sense, may not be removed from the sphere of sovereignty and thus stripped of immunity. This generally recognized sphere of sovereign activity includes the activities of the authorities responsible for foreign and military affairs, legislation, the exercise of police power and the administration of justice (see Dahm, *Völkerrecht*, vol. 1, pp. 235 *et seq.*, and *Festschrift für Arthur Nikisch*, pp. 166 *et seq.*).

By way of exception, therefore, international law may require that an activity of a foreign State, because it pertains to the very core of State authority, shall be termed an act *jure imperii*, although under national law it would be considered a private-law and not a public-law activity.

5. The submitting court therefore rightly considered whether the conclusion of

the repair contract was to be regarded as a non-sovereign act of the foreign State, and correctly found in the affirmative. It is obvious that the conclusion of such a contract does not pertain to the core of State authority. Contrary to the view of the Federal Minister of Justice, the criterion is not whether conclusion of the contract was necessary for the orderly conduct of the Embassy's business and therefore bore a perceptible relation to the sovereign activities of the sending State. Whether a State is entitled to immunity does not depend on the purpose pursued by the foreign State in carrying on a given activity. The definition of a sovereign activity according to the nature of the act, and its determination according to national law, may not yet have gained the extensive recognition which is essential for a general rule of international law; it is, however, so common a practice that any granting of immunity which goes beyond it can no longer be regarded as being required under general international law.

3. DECISION BY THE DISTRICT COURT OF FRANKFURT ON 2 DECEMBER 1975. *Non-resident Petitioner v. Central Bank of Nigeria*³⁵

Summary of the facts:

In February 1975, the petitioner entered into a written contract with the Ministry of Defense of the Republic of Nigeria for the delivery of 240,000 tons of cement to Nigeria. The contract called for an irrevocable, transferable, divisible and confirmed letter of credit to be opened in favor of the seller. In March 1975, the respondent, the Central Bank of Nigeria, opened an irrevocable letter of credit in favor of the abovementioned seller, payable in Austria at the petitioner's bank. The letter of credit referred at the end to the uniform provisions and uses for letters of credit, 1962 edition (Brochure 222 of the International Chamber of Commerce). An enclosure to this letter of credit stated that in addition to the agreed purchase price, demurrage "without any limit" would be paid upon presentation of specified documents. The Deutsche Bank in Frankfurt informed the respondent that it would charge the countervalue of the amount of money in the respective letter of credit to respondent's Deutsche Mark account. The petitioner delivered almost 140,000 tons of cement, carried in 17 ships, which arrived in Lagos during the period 27 April to 1 September 1975. The purchase price for this partial delivery was paid on presentation of the documents. Because of heavy congestion which occurred in the meantime in the harbor of Lagos, the Nigerian Ministry of Transportation issued instructions on 9 August 1975 in accordance with which suppliers or carriers were to notify the Nigerian port authorities at least two months prior to the departure of ships to Nigeria and to provide them with extensive details; the port authorities were to authorize the shipments or to establish other dates. On 23 September 1975, the Deutsche Bank cabled the petitioner's bank that the respondent had discontinued demurrage payments against presentation of the prescribed documents and would make such payments only if the documents were first approved for payment by the respondent.

Petitioner submitted, among other things, that based on the letter of credit it has a claim against the defendant for the demurrage that had become due, and for future demurrage for the 10 ships that had not yet been unloaded. Its petition for an attachment of respondent's funds was granted. The respondent challenged the attachment

³⁵ Reproduced from *International Legal Materials*, vol. 16 (1977), p. 501.

order and, among other things, raised the defense of lack of jurisdiction and improper venue of the court. The District Court rejected these defenses.

Excerpts from the judgement:

The German court has jurisdiction, and venue was properly laid for the attachment. Contrary to respondent's contention, the respondent is not immune from the jurisdiction of German courts. According to Section 20 of the GVG, German jurisdiction does not extend to persons who, in accordance with customary rules of international law or on the basis of treaties or other provisions of the law, are exempt from it. In the instant case, these prerequisites for an exemption are not present. We need not decide whether, based on the responsibilities assigned to it, the respondent discharges sovereign functions, and whether, under Nigerian law, the respondent acts as a juristic person and carries out in whole or in part the authority of the state in fulfillment of responsibilities under public law. The petitioner correctly points out that in accordance with general case law, legal publications, and writings, on international law, separate legal entities of a foreign state enjoy no immunity (BGZ [Decision of the Supreme Court of the Reich in Civil Matters] 110, 315, 317; RGZ 157, 389, 395; BGHZ [Decision of the Supreme Court of the Federal Republic of Germany in Civil Matters] 18, 1 [9] = *NJW* [New Juristic Weekly Journal] 1955, 1435; Baumbach-Lauterbach, *ZPO*, 33rd edition [1975], Section 20 of the GVG, Note 1Aa; Stein-Jonas-Pohle, *ZPO*, 19th edition [1964], annotation to, Section 1, Note VB3; Wiczorek, *ZPO*, 1957 Section 19 of the GVG, annotation B II; Rosenberg-Schwab, *ZPO*, 11th edition [1974], p. 84; Riezler, *International Judicial Procedure*, 1949, p. 404; Dahm, *VölkerR.* [International Law], 1958, p. 228; compare further the supplementary comments in *Habscheid*, "Reports of the German Society for International Law", volume 8, p. 171, footnote 18, especially with reference to the decisions of foreign courts). We need not decide whether the respondent, who according to Article 3 II of the Central Bank Law of 1958 was established as a juristic person, and according to a written statement of the Director of the Banking Division can sue and be sued in its own name and, in furtherance of its functions may acquire, hold and sell moveable and immoveable property, can partake of the Government's immunity because it is bound by instructions issued by the government and because it implements the financial policies of the government, and thus, it is in reality a "juristically dependent agency" of the government (see Dahm, p. 228; *Habscheid*, p. 169ff). Even if the respondent were an integral instrumentality of the Nigerian Government, it could not claim immunity from the jurisdiction of German courts under the facts of this case.

According to the decisions of the BVerfG [Federal Constitutional Court] of 1962 and 1963 (BVerfG Decision 15, 25ff = *NJW*, 1963, [p.] 435; BVerfG Decision 16, 27ff = *NJW*, 1963, [p.] 1732), a foreign state is exempt from the jurisdiction of German courts only in regard to its governmental activity (*acta jure imperii*), but not in regard to its non-governmental activity (*acta jure gestionis*), because there exists no recognized rule of international law which deprives municipal courts of jurisdiction in suits against a foreign state drawing into issue its non-governmental activity. This principle of law, which has prevailed in the Federal Republic of Germany since the issuance of the abovementioned decisions and which restricts the immunity of foreign states to their sovereign activities, is not limited to claims which have a connection with Germany, as was the case in the decision of the BVerfG of 30 April 1963. The BVerfG did not so limit its decision when it found that there existed no rule of international law which mandated a total immunity of foreign states.

The earlier holdings of the Supreme Court of the Reich that immunity was to be denied to a foreign state only in cases of waiver or in cases of actions involving disputes in land located within the state (see RGZ 62, 165 [167]), are no longer valid according to the decisions of the BVerfG. In the absence of a contrary rule of international law, foreign states are, therefore, not exempted from the jurisdiction of municipal courts under Section 20 of the GVG in suits involving their non-governmental activities. Moreover, in the present case there exist contacts with Germany based on respondent's promise to make payment in Frankfurt under the letter of credit from assets on deposit here.

The restrictive immunity of the foreign state which applies to a suit on a debt in Germany applies also to the petition for a preliminary attachment which is sought by the petitioner (see Habscheid, p. 249ff and 264ff; Riezler, p. 402). If exercise of jurisdiction is permissible, attachment on the local assets of a foreign state is also admissible. Only those assets which are dedicated to the public service of the state are exempted from forcible attachment and execution. In the present case, petitioner's attachment seeks to reach respondent's cash and securities accounts, i.e., assets which are not "in the public service" of the respondent (see Riezler, p. 401; Habscheid, p. 266). A possible use of these assets in the future to finance state business cannot serve to establish their present immunity.

Petitioner's claims do not arise from sovereign activities of the respondent, but from the latter's private law transactions, viz., the establishment of letter of credit at a bank. The circumstance that the respondent did this on instruction from the Ministry of Defense of Nigeria in execution of the sales contract of 12 February 1975 is of no relevance to a characterization of the transaction as a non-governmental activity of the state, since the difference between governmental and non-governmental activity cannot be determined by a reference to the purpose of the activity or whether the activity is connected with a recognizable sovereign business. Since every activity conducted by a state, and also the respondent's activity here in implementation of its contract, serves largely sovereign purposes and has a direct connection with such purposes, the purpose test cannot be used in distinguishing between activities *jure imperii* and activities *jure gestionis*; rather the test is "the nature of the transaction or the ensuing jural relationship." What is of importance is "whether the foreign state in exercising its sovereign power has acted under public law or like a private person, that is, entered into a relationship governed by private law (see BVerfG Decision 16, 27 = NJW, 1963, [p.] 1732 for reference to identical or similar decisions rendered by the courts of Italy, Belgium, Switzerland, Austria and Egypt). The characterization of a state activity as governmental or non-governmental is to be made under domestic law, except where a rule of international law provides otherwise; the characterization of an activity of a foreign state as an act *jure imperii* is an intrinsic part of the exercise of the power of the state (BVerfG Decision 16, 27 = NJW, 1963, [p.] 1732).

The court concludes that the BVerfG intended that German law should be applicable; otherwise, there would have been no need to refer to international law exceptions if the domestic law of the defendant state were to govern the characterization. The court considers that the contrary opinion expressed by Canaris in an expert opinion submitted by the respondent is not justified under the present circumstances. Since German law determines the jurisdiction of German courts, the characterization of an act of a foreign state must therefore, in accordance with the cited decision of

the BVerfG, and in the absence of limitations imposed by international law, be made under German Law (to the same effect, see BGHZ 40, 197 [203]—*NJW*, 1964, [p.] 203; OLG [Court of Appeals, Munich], *NJW*, 1975, [p.] 2144. Assuming Nigerian law were to apply to the characterization of respondent's activity in opening a letter of credit, and assuming further that Nigerian law were to regard such activity as a governmental activity, such an attempted expansion of the concept of immunity to cover a private law activity carried out in Germany would run afoul of the legal principle of good faith dealings, which is fully recognized in international law (see expressly BVerfG Decisions 16, 27 = *NJW*, 1963, [p.] 1732). The principles of reciprocity and lack of a direct German interest cannot—contrary to the opinion expressed by Canaris—furnish a sufficient reason for the recognition of immunity here; this is especially so since in the present case there were payments under the letter of credit in Frankfurt, which are governed by German law, and because the domestic jurisdiction of a German court is invoked with respect to the attachment. Accordingly, pursuant to German law which governs the characterization, the execution of a sales contract and payment thereunder by the Nigerian Ministry of Defense by means of a letter of credit are not activities *jure imperii* in any sense of the term. The court rejects the contention that, in view of the different characterization of the activity under Nigerian law, as claimed by the respondent, international law requires that the court regard respondent's purchase of building materials for construction of military installations and its assumption of a payment obligation vis-a-vis the petitioner as an activity *jure imperii*. The respondent is, therefore, according to applicable German law, not exempt from the jurisdiction of German courts.

Since the accounts were maintained by the respondent at the Deutsche Bank in Frankfurt, venue is properly laid in the court according to Section 23 of the ZPO, and the court is competent to hear the case. Pursuant to these provisions, suits involving property claims brought against non-residents are to be brought in the district where the property is located. This provision also applies to attachments, because the same jurisdictional basis empowers the court to hear the merits of the case (see OLG Frankfurt, *NJW*, 1959, [p.] 1088 [1089]; OLG Stuttgart, *NJW*, 1952, [p.] 831; OLG Munich, MDR [Monthly Journal for German Law], 1960 [p.] 146). The bringing of a suit by the petitioner and a judgment on the merits are not foreclosed—contrary to respondent's contention—because international recognition would be denied to a judgment grounded on such jurisdictional basis. Such recognition would not be required, in any event, to the extent that the petitioner could satisfy any ensuing judgments from assets located in Germany. The manifest applicability of the unambiguous venue provisions of Section 23 of the ZPO cannot be limited through a restrictive interpretation based on its legislative history, as urged by the respondent. According to the weight of authority, Section 23 of the ZPO fully applies to foreign juristic entities (see Rosenberg-Schwab, p. 158; Baumbach-Lauterbach, Section 23, note I; Wieczorek, Section 23, note A 11) and to foreign states (see RGZ 62, p. 165ff; Wieczorek, Section 23, note II A; Habscheid, p. 165ff, 184ff). It is also generally held that Section 23 of the ZPO also applies to cases where the plaintiff is an alien (Stein-Jonas, Section 23, note I 2, with further comments in footnote 5). The petitioner, moreover, correctly points out that there are similar provisions in the procedural laws of a number of foreign countries, and that there is no reason not to apply Section 23 of the ZPO to the respondent here (see Habscheid, p. 165ff, 184ff). The court is not persuaded by the contrary arguments advanced by Canaris in his expert opinion.

4. DECISION BY THE LAND HIGH COURT OF FRANKFURT ON 30 JUNE 1977
*X v. Spanish Government Tourist Bureau*³⁶

Summary of facts:

The defendant, the Spanish State, maintains "Spanish tourist bureaux" in several cities in the Federal Republic of Germany as subordinate and non-independent establishments without legal personality of their own. The question in dispute between the parties is the plaintiff's claim for damages or remuneration for the unauthorized performance of copyrighted film scores.

The defendant's "Spanish tourist bureau" in Frankfurt am Main operates a shop where posters showing tourist resorts in Spain, maps and travel articles of all kinds are obtainable free of cost. In addition, this tourist bureau rents out display material showing Spanish scenes for use in advertising by travel agencies and airlines. It also advertises Spain as a tourist country on radio and television and in newspapers and magazines. The plaintiff's claim was allowed.

Leading principles:

1. Foreign States are subject to German jurisdiction if they carry on business under private law within the country. Their immunity extends only to sovereign activities.
2. The activities of Spanish Government tourist bureaux are of a private-law nature, even if such bureaux are organized as official agencies.
3. The use of copyrighted film scores in publicity films of the Spanish tourist bureaux without the permission of GEMA does not constitute a permissible public use within the meaning of article 52, paragraph 1 (1), of the Copyright Act, since showings of such films serve at least indirectly the "gainful purposes" of the Spanish State.

Excerpts from the judgement:

. . . Under international law, [the defendant] does not enjoy in the Federal Republic unlimited immunity from the jurisdiction of the German courts. Rather, the defendant is entitled only to limited immunity, in respect of its sovereign activities.

In the first place, there is no international treaty between the defendant and the Federal Republic of Germany which might accord unlimited immunity to the defendant (see art. 59, para. 2, of the Basic Law; Berber, *Lehrbuch des Völkerrechtes*, 2nd ed., vol. I, p. 61; von Münch (editor)/Rojahn, *GG* (Basic Law), vol. II, art. 25, No. 8; see also previous decision of the Federal Constitutional Court of 30 April 1963—2 BvM 1/62—BVerfGE 16, p. 27; Giese/Schunck/Winkler, *Verfassungsrechtsprechung*, art. 25, No. 8, with additional references).

The fact that [the defendant] indicates its readiness to accord to the Federal Republic unlimited immunity in Spain does not affect the legal position. It would do so only if a treaty on the matter had been concluded between the two subjects of international law concerned.

Nor is there any general rule of international law which, in accordance with article 25 of the Basic Law, would form part of federal law. That could be assumed to

³⁶ *Recht der Internationales Wirtschaft* (1977), p. 720 (Translated by the Secretariat).

be the case only if such a rule were recognized by the overwhelming majority of States (BVerfGE, *loc. cit.*; von Münch, *op. cit.*, art. 25, No. 6, with additional references; in particular, Berber, *op. cit.*, pp. 40 *et seq.*; see also the compilation of applicable principles in Berber, *op. cit.*, pp. 71 *et seq.*).

Such is not the case, however. The Federal Constitutional Court, in its decision of 30 April 1963 (*loc. cit.*), notes that the Reich Court of Justice (RGZ 62, p. 165; 103, p. 274; 102, p. 304; 111, p. 375) did in fact rule that foreign States had unlimited immunity. However, that ruling was not upheld after 1945. Although at the time of the Federal Constitutional Court's decision of 30 April 1963 (*loc. cit.*) it could not yet be said that the German courts were unanimous in finding that immunity was not unlimited, there was even then a discernible trend towards limited immunity, in which the Federal Constitutional Court joined with its above-mentioned decision of 30 April 1963 (*loc. cit.*) (see the compilation of precedents in the decision of the Federal Constitutional Court, reproduced also in NJW 1963, pp. 1732-1733). The Federal Constitutional Court had already taken this view in principle in its decision of 30 October 1962³⁷ (NJW 1963, pp. 438, 439 ...; see also von Münch, JZ 1963, p. 164; also Steinmann, MDR 1965, pp. 795-796). The Federal Court of Justice, which in the first instance, in an earlier decision, had left this question open (BGHZ 18, p. 1³⁸ = NJW 1955, p. 1435), agreed with the Federal Constitutional Court in a subsequent decision of 31 January 1969 (WM 1969, pp. 940-941; see also BGHZ 40, pp. 197 *et seq.*³⁹ In the meantime, Land High Courts have also followed the lead of the Federal Constitutional Court (Land High Court at Coblenz, OLGZ 1975, p. 379; Land High Court at Munich, RIW/AWD 1977, p. 49).

Foreign courts also—at least as far as can be seen—accord to foreign States only limited immunity in respect of acts *jure imperii*. The Federal Constitutional Court was already able to note this with respect to a number of foreign States in its decision of 30 April 1963 (*loc. cit.*). This trend in foreign judgements has no doubt become more pronounced (see in the case of the United Kingdom, for instance, the references in Magnus, RIW/AWD 1976, pp. 179 and 382, concerning Poland and the Republic of the Philippines). Although Berber (*op. cit.*, pp. 222 *et seq.*) proceeds on the assumption that the question of limited immunity is still in dispute, the theory of limited immunity has nevertheless continued to gain ground. As he sees it, the mandatory distinction in international law between sovereign acts of State and acts of the State under private law is open to "certain objections". This Chamber cannot, however, agree with that argument, in view of the position taken by the Federal Constitutional Court (decision of 30 April 1963, (*loc. cit.*), with which the Federal Court of Justice essentially concurred in its decision of 23 October 1963 (BGHZ 49, p. 197) and in the further decision of 31 January 1969 (WM 1969, pp. 940-941).

As the Federal Constitutional Court has ruled (decision of 30 April 1963, *loc. cit.*), the question of the distinction between the determinant fields of activity is to be resolved according to internal law. The fact that differentiating between the two fields may lead to difficulties, as Berber (*op. cit.*, p. 222) pointed out and as the Federal Constitutional Court already took into account in its decision of 30 April 1963 (*loc. cit.*), is no impediment to the view taken here, especially as this differen-

³⁷ Federal Constitutional Court, 30 October 1962, BB 1963, p. 7.

³⁸ Federal Court of Justice, 7 June 1955, BB 1955, p. 747.

³⁹ Federal Court of Justice, 23 October 1963, BB 1964, p. 13 (leading principles).

tiation has been further clarified and spelt out in the internal law of the Federal Republic since the time of the Federal Constitutional Court's decision (Federal Court of Justice, WM 1969, pp. 940-941; Land High Court at Coblenz, *loc. cit.*; Land High Court at Munich, *loc. cit.*; see also Steinmann, MDR 1965, pp. 975-976; von Münch, JZ 1964, p. 164).

Berber's objections (*op. cit.*, p. 232) are also countered by the legal views advanced by the non-official institutions (Harvard Law School study group, International Law Association, Institut de droit international) cited in the Federal Constitutional Court's decision of 30 April 1973 (*loc. cit.*). Even Berber himself (*op. cit.*, p. 222), despite his objections, finally has to admit that the modern doctrine of international law increasingly accepts the so-called "differentiation theory", which distinguishes between acts *jure imperii* and acts *jure gestionis*.

According to this view, foreign States enjoy immunity for activities which are of a sovereign nature. In the case before us, there is no such activity. The decisive consideration in distinguishing between sovereign acts (*jure imperii*) and non-sovereign activities of the State (*jure gestionis*) is the nature of the State act or of the legal relationship which arises, and the criteria of internal law must be applied in judging this question (Federal Constitutional Court, decision of 30 April 1963, *loc. cit.*; Federal Court of Justice, 30 January 1969, *loc. cit.*).

In the case before us, the defendant made use of film scores written by a number of composers. If in such a case a contractual relationship exists between two parties, that relationship is normally a matter of private law. In particular, related rights of use are the subject of private legal transactions which do not fall within the sphere of State sovereignty (see Federal Constitutional Court, 30 April 1963, *loc. cit.*, repair contract; 30 October 1962—NJW 1963, p. 435—sales contract;³⁷ Federal Court of Justice, WM 1969, pp. 940-941, real estate sales contract; Land High Court at Coblenz, *loc. cit.*, brokerage contract, and Land High Court at Munich, *loc. cit.*).

The fact that the defendant was making unauthorized use of the film scores is immaterial, since for the purpose of classifying an activity as sovereign or non-sovereign the question is how the use of such material normally comes about. In the case of copyrighted material—and indeed in the case before us as between the parties up to the year 1961—the answer is on the basis of contracts under private law. Consequently, where the use of copyrighted material is concerned, the activities of a State are assimilated under German internal law to activities of private parties. In view of this, the purpose of and motive for use become a secondary consideration (see Federal Constitutional Court, decision of 30 April 1963, *loc. cit.*). But even if the motives of the defendant and the aims it was pursuing were taken into account in this connexion, there could be no finding of sovereign activities, because...the defendant's activities, consisting of the showing of films at fairs, publicity events and the like, [are aimed] at improving its income from tourism. Through its subordinate tourist bureaux, it pursues primarily commercial interests which are equivalent to the activities of private travel agencies. We are not overlooking the fact that the activities of foreign embassies, for instance, include providing information on the country which they represent. However, a clear distinction between this and the activities which the defendant caused to be carried on is apparent simply from their external characteristics. Thus, it is beyond dispute that the defendant's tourist office in Frankfurt am Main is organized along the lines of a travel agency, where advertising and publicity material for holiday travel can be found in exactly the same way as at such agencies. . .

II . . . III. The defendant has, through these performances, unlawfully and culpably violated the rights of the composers, and the plaintiff can therefore claim damages (Copyright Act, art. 97). In so far as its claim to damages is statute-barred, it has a claim on the ground of unjust enrichment, since the defendant was spared the cost of paying the plaintiff's fees (as a necessary expenditure) . . .

Nor can these performances be considered to constitute a permissible public use within the meaning of article 27 of the Literary Copyright Act or article 52, paragraph 1 (1), of the Copyright Act, since the film showings aimed at attracting tourists served at least indirectly the "gainful purposes" of the defendant. Commercial activity by private enterprises is not a prerequisite for such a finding. On the contrary, the promotion of "gain" for the defendant constitutes an adequate basis. In the first place, the defendant derives an indirect gain from the actions of its tourist bureaux in the form of increased budgetary resources resulting from an improvement in government revenue; there is also a direct promotion of "gain" because of the German currency which the publicity film showings bring in for the defendant. Apart from this, the income of the defendant's State airlines and State railways is increased as a result of the advertising for tourists (see BGHZ 58, p. 262 = NJW 1972, pp. 1273-1274—*Land* insurance institution; see also decision of this Chamber, NJW 1968, p. 1146; for a concurring opinion, see Mestmäcker/Schulze, *Kommentar zum Urheberrechtsgesetz*, art. 52, note 2 (b), with further references).

Lastly, even as a film producer, the defendant also has no right to reproduce the film score. This is so even where the composers wrote the music expressly for a particular film. Under article 89, paragraph 3, of the Copyright Act, the copyright in works used for the production of a film (particularly the film score) remains intact. Film scores retain their separate legal existence even if they were composed expressly for a particular film, because as a rule they can also be utilized for their own sake (see Mestmäcker/Schulze, *Kommentar zum Urheberrechtsgesetz*, art. 82, No. 3; also art. 89, No. 4). (*Land High Court at Frankfurt am Main*, judgement of 30 June 1977—6 U 184/74; subject to appeal)

5. DECISION BY THE FEDERAL CONSTITUTIONAL COURT ON 13 DECEMBER 1977. *X v. Republic of Philippines*⁴⁰

Summary of facts:

In 1975 the judgement creditor in the original proceedings obtained from the *Land* Court at Bonn a judgement by default against the Republic of the Philippines for the payment of DM 95,231.86 plus interest and costs. The action at trial arose from a rent contract concluded between the creditor and the Republic of the Philippines in 1966 for a house which the Republic of the Philippines had leased for use as offices by its Embassy in the Federal Republic of Germany. On the basis of the enforceable judgement by default, the creditor obtained from the District Court at Bonn an attachment and assignment order against the Republic of the Philippines under which the reputed claim of the Republic of the Philippines against the "Bonn-Bad Godesberg branch of the D Bank AG. . .—the garnishee—for payment of the present

⁴⁰ *Bundesverwaltungsgericht*, vol. 46, p. 342. (Translated by the Secretariat.)

and all future surpluses (balances) due to the debtor, upon establishment of the balance, from existing transactions on current account, and in particular through accounts Nos. . . . , and all reputed claims and demands... arising from transfers through the aforementioned accounts to and for the crediting of all future receipts, the continued repayment of balances and the execution of transfers to third parties" was attached and assigned to the creditor for collection in the amount attached.

The Republic of the Philippines made a written submission to the District Court at Bonn objecting to the attachment and assignment order on the ground that the Embassy's account was not subject to German jurisdiction.

The District Court at Bonn suspended the proceedings in accordance with article 100 (II) of the Basic Law and submitted the question which appears in leading principles 8 and 11 to the Federal Constitutional Court for a ruling.

Excerpts from the judgement:

The submission is admissible.

1. The question submitted relates essentially to the existence and scope of general rules of international law for the purposes of article 100 (II) and article 25 of the Basic Law.

2. The submitting court has adequately presented its doubts as to the existence and scope of possible general rules of international law and the necessity of a ruling on the question submitted for the purpose of the original proceedings, in accordance with articles 84 and 80 (II) of the Act concerning the Federal Constitutional Court (BVerfGE 4, 319 (321); 15, 25 (30) = NJW 1963, 435; BVerfGE 16, 27 (32 *et seq.*) = NJW 1963, 1732).

The submitting court notes that German domestic law provides for no restrictions on execution against foreign States over and above those which may derive from the general rules of international law which are in question here. Articles 18 to 20 of the Judicature Act, as amended on 9 May 1975 (BGB I 1, 1077) do not cover cases in which the foreign State itself is cited as the defendant in trial proceedings or as the debtor in execution proceedings (for the earlier text of para. 18 of the Judicature Act, see Habscheid, "Die Immunität ausländischer Staaten nach deutschem ZPR", in *Berichte der Deutschen Gesellschaft für Völkerrecht* (BerDGVR), No. 8 (1968), pp. 159 *et seq.*, 167 *et seq.*). At present, therefore, any exemption of foreign States from German jurisdiction in respect of execution can only derive, under article 25 of the Basic Law, from general rules of international law. It is this interpretation of the law by the submitting court, which is not manifestly untenable, that the Federal Constitutional Court must take as its starting-point (BVerfGE⁴¹ 15, 25, (31) = NJW⁴² 1963, 435; BVerfGE 16, 27 (32) = NJW 1963, 1732).

(a) The submitting court determined in a constitutionally unexceptionable manner that the general procedural requirements for its proceedings were fulfilled, particularly German international jurisdictions. Its submission also leads to the conclusion that there was no express waiver of immunity from execution by the Republic of the Philippines; such a waiver cannot be inferred simply because judgement was rendered by default. For the purpose of determining the admissibility of the sub-

⁴¹ *Bundesverwaltungsgericht.*

⁴² *Neue Juristische Wochenschrift.*

mission, there is no need to consider whether—as there may be good reasons for supposing—article 882(a) of the Code of Civil Procedure is to be applied *mutatis mutandis* in cases such as the original proceedings here, since its application presupposes German jurisdiction in respect of execution proceedings against foreign States and results in restrictions at least on the manner in which execution is levied. The substance of the question submitted, however, is not merely whether general international law embodies restrictions on the manner of execution, but whether in principle it prohibits measures of execution against foreign States in the first place.

(b) German jurisdiction is a general procedural requirement for execution proceedings, in the same way as for any other judicial proceedings. Its existence and its limits must be examined and taken into consideration by the court, of its own motion, as legal issues at every stage of the proceedings. In the opinion of the submitting court, the Philippine Government's submission must be accepted and the attachment and assignment order revoked if the levying of execution against a foreign State in respect of a bank account of that State maintained within the country for the purposes of covering the official costs and expenses of its embassy is totally inadmissible by virtue of a general rule of international law. This is sufficient to establish the necessity of a ruling on the question submitted.

(c) The necessity of a ruling at the present time is not diminished by the fact that the submitting court, in giving an affirmative answer to its alternative question—i.e., whether execution against such a bank account is inadmissible only if it impairs the ability of the embassy to function as a diplomatic mission—none the less considers it necessary to take evidence (concerning the intended purpose of the attached funds) before rendering a decision on the Philippine submission. There is no need to consider in this case whether, and to what extent, in the context of the submission procedure under article 100 (I) of the Basic Law, court orders for the taking of evidence are to be regarded as decisions within the meaning of that provision of the Basic Law. In the context of the submission procedure under article 100 (II) of the Basic Law, such orders must be regarded as decisions for which a ruling on the question submitted is necessary, at least where the proposed taking of evidence involves the risk of a violation of international law vis-à-vis the foreign State. Such is the case here, since the taking of evidence on what transactions are effected through the bank account of the embassy of a foreign State might constitute interference, in contravention of international law, in the internal affairs of the foreign State and a breach of the rules of international law relating to missions. Principles of judicial procedure must yield precedence to those rules. One of the purposes of the submission procedure under article 100 (II) of the Basic Law is to obviate the risk of violations of the general rules of international law by courts of the Federal Republic of Germany.

...

3. Submissions under article 100 (II) of the Basic Law are admissible even where the rule of international law, by reason of its substance, is not such as to directly create rights and duties for private parties but applies only to States and their organs as "addressees" of the provision (BVerfGE 15, 25 (33 *et seq.*) = NJW 1963, 435; BVerfGE 16, 27 (33) = NJW 1963, 1732). Except where minimum human rights standards are concerned, contemporary general international law only rarely contains provisions whereby specific rights or duties of private parties are established directly at the level of international law; essentially, its scope of application embraces sovereign international relations between States and associations of States,

while as a general rule rights or duties of private parties are established or affected only indirectly through domestic law. When article 25, second sentence, and article 100 (II) of the Basic Law state that the general rules of international law directly create rights and duties for private parties, this is intended only to refer to those cases in which a general rule of international law itself, by reason of its substance and its range of "addressees", already establishes directly—i.e., without further normative action in the form of domestic legislation or regulations—specific rights or duties of private parties at the level of general international law. However, it follows from the aims and purposes of articles 25 and 100 (II) that, in addition to general rules of that kind, those general rules of international law which, by reason of their substance and the range of their "addressees", do not establish or alter any specific rights or duties of private parties at the level of international law but are at that level addressed exclusively to States or other subjects of international law are also susceptible to the submission procedure. In accordance with the peremptory provision establishing the universal applicability of the law contained in the first sentence of article 25 of the Basic Law, any such general rule of international law is also to be regarded by all legislative and law-enforcement organs of the Federal Republic of Germany to the extent of its individual scope as a part of federal law taking precedence over the laws, as a norm of abstract law and to be applied according to the facts of the case and the substance of the rule in question. Within the territory of the Federal Republic of Germany, procedural law allows private parties—like foreign States—to "invoke" these general rules of international law in the same way as any other abstract law, although it also requires the court, if they are not so invoked, to take them into account of its own motion. As abstract law, they may—according to their individual substance, and usually as a preliminary question—affect the private party's legal petition and thus require a ruling. In this sense, they may also have legal consequences, favourable or unfavourable, for the private party. To exclude this type of general rule of international law from the submission requirement under article 100 (II) of the Basic Law would be to frustrate the purpose of ensuring the application of the general rules of international law which article 100 (II) (i) (V) and article 25 of the Basic Law are intended to serve, precisely, in relation to the great majority of those rules (see also BVerfGE 23, 288 (317) = NJW 1968, 1667). In this connexion, it can remain an open question whether, and in what cases, the second sentence of article 25 of the Basic Law broadens at the domestic level the range of "addressees" of such general rules, which at the level of international law are addressed exclusively to States or other subjects of international law but not directly to private parties also, by establishing or altering, in addition, specific rights or duties of private parties (see *Doehring, Die allgemeinen Regeln des völkerrechtlichen Fremdenrechts und das deutsche Verfassungsrecht* (1963), pp. 54 *et seq.*). The admissibility of the submission does not depend on this.

There exists the following general rule of international law:

Forced execution of judgement by the State of the forum under a writ of execution against a foreign State which has been issued in respect of non-sovereign acts (*acta jure gestionis*) of that State, on property of that State which is present or situated in the territory of the State of the forum is inadmissible without the consent of the foreign State if, at the time of the initiation of the measure of execution, such property serves sovereign purposes of the foreign State. Claims against a general current bank account of the embassy of a foreign State which exists in the State of the forum and the purpose of which is to cover the embassy's costs and expenses are

not subject to forced execution by the State of the forum. This rule forms part of federal law.

1.1. The Federal Constitutional Court has ruled that, under general international law as it stands at present, a State is not obliged to grant a foreign State immunity from jurisdiction in respect of trial proceedings against the State, relating to its non-sovereign acts (BVerfGE) 16, 27 *et seq.* = NJW 1963, 1732). The number of States and courts adhering, as regards trial proceedings, to the doctrine of functionally restricted immunity on which that ruling is based has in the meantime increased (see United States Foreign Sovereign Immunities Act of 1976, Public Law 94-583 of 21 October 1976, which entered into force on 19 January 1977, 28 United States Code, sects. 1602 *et seq.*, 1605; Supreme Court of the United States in *Dunhill v. Republic of Cuba*, 96 S. Ct. 1854, 1861 *et seq.* (1976); Privy Council in *Philippine Admiral v. Wallem Shipping, (Hong Kong) Ltd.* (1976), 1 All E.R. 78, *International Legal Materials* (ILM) XV (1976) 133—for actions *in rem*; English Court of Appeal in *Trendtex Trading Corp. Ltd. v. Central Bank of Nigeria*, (1977) 2 W.L.R. 356, ILM XVI (1977) 471 *et seq.* (13 January 1977—subject to further appeal); a similar aim is pursued with regard to trial proceedings in the European Convention on State Immunity of 16 May 1972, *European Treaty Series* No. 74, to which the Federal Republic of Germany is a signatory and which entered into force on 11 June 1976, arts. 4 *et seq.*; see *Explanatory Reports on the European Convention on State Immunity and the Additional Protocol*, Council of Europe, Strasbourg (1972), pp. 9 *et seq.*).

2. Where forced execution is concerned, however, many States continue to adhere to the rule that a foreign State is in principle accorded absolute immunity for the evolution of State practice in that respect, (see E. W. Allen, *The Position of Foreign States before National Tribunals* (1933), pp. 47 *et seq.* and *passim*); in the practice of a number of States, there are limitations on preventive measures or measures of execution against immovable property situated in the State concerned in respect of claims, founded on titles, to such property (see, for example, Supreme Court of Czechoslovakia, decision of 26 April 1928, *Annual Digest (and Reports) of Public International Law Cases* (AD) 4 (1927-1928), No. 111, except in the case of premises used for diplomatic purposes, decision of 28 December 1929, AD 4 (1927-1928), No. 251), on preventive measures or measures of execution against property situated in the State concerned which has passed by inheritance to the foreign State, and on preventive measures or measures of execution against assets of State-owned or State-controlled commercial enterprises in respect of claims arising out of acts performed by them in private trade (see Court of Appeal at The Hague, decision of 28 November 1968 in *N. V. Cabolent v. National Iranian Oil Co., Netherlands Yearbook of International Law* (1970), p. 225); there are further limitations on preventive measures or measures of execution against State-owned merchant vessels in respect of claims connected with the private trading operations of such vessels within the territories of the Contracting Parties to the Brussels Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels of 10 April 1926 (RGB1 1927 II, 483; Additional Protocol of 24 May 1934, RGB1 1936 II, 303) under the terms of that Convention, whereas other States generally waive the right to invoke immunity in that connexion (e.g., the United States of America; see Hackworth, *Digest of International Law*, 2 (1941), 438 *et seq.*). In the case of those States which in principle accord absolute immunity at the preceding trial stage, this usually follows as a matter of course, because that kind of immunity makes it impos-

sible, if the foreign State does not submit to jurisdiction, to obtain a writ of execution. However, even among those States that grant a foreign State immunity from their jurisdiction in trial proceedings only in the case of actions relating to sovereign acts (acts *jure imperii*), there are many which adhere in principle to the rule that forced execution against the foreign State is precluded, regardless of whether the judgement which may be executed in the State of the forum relates to a non-sovereign act of the foreign State or whether the property on which execution may be levied serves non-sovereign or exclusively commercial purposes, of the kind which private parties also pursue (see, for example, Swedish Supreme Court, decision of 13 April 1944, AD 12 (1943-1945), No. 31; Supreme Court of Norway, decision of 12 November 1949, AD 17 (1950), No. 42; for general references, see Lauterpacht, "The problem of jurisdictional immunities of foreign states", BYB 28 (1951), 220 *et seq.*, 250 *et seq.*; Schaumann, BerDGVR, *loc. cit.*, pp. 130 *et seq.*; Habscheid, BerDGVR, *loc. cit.*, p. 251; Vennemann, "L'immunité d'exécution de l'Etat étranger", in *L'immunité de juridiction et d'exécution des Etats* (1971), pp. 119 *et seq.*). This practice is in keeping with international law, since general international law does not preclude the grant of absolute immunity to foreign States either in trial proceedings or with respect to execution. It does not follow, simply because general customary international law embodies a minimum obligation in the case of trial proceedings, namely, the granting of immunity in respect of acts *jure imperii*, that it also demands only relative immunity in the case of execution, since preventive measures and measures of forced execution generally have a much more direct and drastic impact on the exercise of sovereignty by the foreign State than do judicial judgements. It is therefore necessary to consider separately whether and to what extent general rules of international law preclude forced execution.

3. In order for the existence of a general rule of international law within the meaning of article 25 of the Basic Law to be demonstrated, the practice of many States, as referred to above, with regard to forced execution would have to be an established practice which States in general follow in the belief that they are obligated to do so under international law (see Statute of the International Court of Justice, Art. 38, para. 1 (b); *P.C.I.J.*, Series A, No. 10, p. 28—*Lotus case*; *I.C.J. Reports 1950*, 276—*Diplomatic asylum case*; *I.C.J. Reports 1951*, 131—*Norwegian fisheries dispute*; *I.C.J. Reports 1969*, pp. 41 *et seq.*—*Continental Shelf case*; BVerfGE 15, 25 (35) = NJW 1963, 435; BVerfGE 16, 27 (52) = NJW 1963, 1732; Verdross, *Die Quellen des universellen Völkerrechts* (1973), pp. 95 *et seq.*; Geck, "Das Bundesverfassungsgericht und die allgemeinen Regeln des Völkerrechts", in *Bundesverfassungsgericht und Grundgesetz II* (1976), pp. 125 *et seq.*, 132 *et seq.*

In order to identify norms of customary international law, one must focus primarily on the acts relevant to international law of those State organs which are responsible, under international law or domestic law, for representing the State in international relations. In addition, however, such practice may also be ascertained from the acts of other State organs, like the legislature or the courts, at least in so far as their actions are of direct relevance to international law because they may serve, for example, to fulfill an obligation under international law or to close an organizational gap in the field of international law. In the case of decisions by national courts, this applies in particular where, as in the field of jurisdictional immunity of foreign States, domestic law permits national courts to apply international law directly.

4. In the field with which we are concerned, there is as yet no custom which is sufficiently general and is backed by the necessary legal consensus to constitute a general rule of customary international law whereby the State of the forum is debarred outright from taking measures of forced execution against a foreign State. An examination of relevant State practice shows that quite a significant number of States permit preventive measures and measures of execution against foreign States, although such measures are subject to certain conditions and limitations as regards the legal nature of the material right on which the writ of execution is based, the property on which execution may be levied and the manner in which the measures of execution are carried out.

(a) For many years the Italian courts have permitted measures of execution against foreign States in respect of acts *jure gestionis*. As early as 1887, in *Hampohn c. Bey di Tunisi ed Erlanger* (American Journal of International Law (AJIL) 26 (1932), Supplement, pp. 713 *et seq.*), the Court of Appeal at Lucca held that an order for the attachment of funds kept by the Tunisian State in Italy was admissible. In 1926, in *Stato di Rumania c. Trutta* (AJIL 26 (1932), Supplement, pp. 711 *et seq.*), the Court of Cassation of the Kingdom of Italy gave a similar ruling on the ground that, with the exception of property that was essential to the functioning of the public administration of the foreign State, all public property was subject to execution. Under Decree-law No. 1621 of 30 August 1925 (*Raccolta Ufficiale delle Leggi e dei Decreti del Regno d'Italia* (1925), VIII, p. 8109), which, in revised form, was incorporated in Act No. 1263 of 15 July 1926 (*ibid.*, (1926), III, p. 2930), preventive measures and measures of execution against property of foreign States are admissible only with the prior approval of the Minister of Justice, which suggests that such measures are to be regarded as totally contrary to international law.

In connexion with *Amministrazione del Governo Britannico e Comune di Venezia c. Guerrato*, the Italian Constitutional Court considered the question of the constitutionality of the above Act. The issue was the admissibility of execution against an exhibition building in Venice owned by the United Kingdom Government. The Tribunale di Venezia (decision of 25 August 1959, *Rivista di Diritto Internazionale* XLII (1959), 618), doubted whether any absolute immunity for foreign States in execution proceedings could be established on the basis of international law and submitted the question of the constitutionality of the Act of 15 July 1926 to the Constitutional Court. As Venice court saw it, if under the international law there was an outright prohibition on forced execution against foreign States, the Act constituted a violation of article 10 of the Italian Constitution, which provided that '*l'ordinamento italiano si conforma alle norme di diritto internazionale generalmente riconosciute*'. In its decision of 13 July 1963 (*Sentenze de Ordinanze della Corte Costituzionale* II (1963), 572 (579)), the Constitutional Court ruled that there was no violation of article 10 of the Constitution because legislation, judicial precedents and doctrine in the various countries showed no uniformity of thinking or of systems with regard to immunity from preventive measures and measures of execution against the property of foreign States which was not intended to be used for functions forming part of the exercise of their sovereignty.

(b) The Swiss courts have also for many years permitted distraint proceedings against foreign States in connexion with private-law claims (*jure gestionis*) against property which is not used for the sovereign purposes of the foreign State. Distraint

proceedings (*Arrestverfahren*) are abbreviated trial proceedings which allow provisional measures to be taken for protection of the claim.

In *K.k. Österreichisches Finanzministerium gegen Dreyfus*, the Swiss Federal Court held, in its judgement of 13 March 1918 (Decisions of the Swiss Federal Court, Official Compilation (Schweiz, BGE) 441, p. 49 *et seq.*, that the levying of distraint on funds of the Austrian State deposited with a Swiss bank in order to obtain redemption of treasury bonds was admissible. The Austrian Ministry of Finance had acted *jure gestionis* in issuing the treasury bonds; consequently, "as regards legal action against the State, including related preventive measures such as distraint", Swiss jurisdiction was not precluded. In a statement of its position on the case, the Federal Justice and Police Department noted that "whether, and to what extent, a foreign State can be subjected to domestic jurisdiction when acting not as a holder of sovereign rights but as a subject of private law is a highly controversial question". There were cases where such an assumption could be made even against the will of the foreign State; on the other hand, jurisdiction over a foreign State was precluded at least where acts of State authority were involved. In any event, if forced execution or distraint was levied, the foreign State could not simply be treated as any private party would be. The case before the court concerned State funds used for the performance of State functions; the levying of distraint on them was therefore inadmissible, quite apart from the absence of any link connecting them with Swiss national territory (see Guggenheim, *Répertoire suisse de droit international public*, 1 (1975), No. 3.12).

On 12 July 1918, in reaction to the above judgement, the Swiss Federal Council made use of its wartime emergency powers for the defence of the country and the maintenance of neutrality to issue an order prohibiting the levying of distraint or execution on the property of foreign States (*Amtliche Sammlung der Bundesgesetze und Verordnungen der Schweizerischen Eidgenossenschaft* (AS), vol. 34, p. 775; Gmür, "Zur Frage der gerichtlichen Immunität fremder Staaten und Staatsunternehmungen", *Schweizerisches Jahrbuch für Internationales Recht*, VII (1950), pp. 9 *et seq.*, 47 *et seq.*). In 1923 it introduced a bill on the subject the preamble of which stated that no State was subject to the jurisdiction of another State or might be subjected to measures of execution by another State. However, the Federal Assembly refused to consider the bill because, in its view, respect for the limits imposed by international law was adequately guaranteed when execution was levied by the Swiss courts (See *Répertoire suisse . . .*, *op. cit.*, Nos. 3.17-3.19). The order of the Federal Council of 12 July 1918 was revoked on 8 July 1926 (AS, vol. 42, p. 285).

In its reply of 29 April 1928 to an inquiry by the League of Nations on the question of jurisdiction over foreign States, Switzerland declared that in principle it was opposed to the admissibility of preventive measures and measures of execution; however, the memorandum from the Department of Justice also noted that that was not a generally recognized principle (*Répertoire suisse . . .*, *op. cit.*, pp. 403 and 400).

In *Hellenische Republik gegen Walder u.a.*, the Swiss Federal Court, in its judgement of 28 March 1930 (SchweizBGE 56 I, 237 *et seq.*), maintained its view that preventive measures in the form of distraint were admissible in connexion with claims relating to acts *jure gestionis*, but ruled that Switzerland lacked international competence in the particular case in question (in the absence of an adequate connecting link between the matter at issue and Swiss national territory).

In its decision of 30 September 1937 (AD 10 (1941-1942), No. 60), the Zurich

High Court held that the levying of distraint on funds of the Romanian State deposited with the Swiss National Bank was admissible. There was nothing in Swiss law or in the practice of Swiss courts to prevent distraint and subsequent forced execution.

On 24 October 1939, following the outbreak of the Second World War, the Federal Council once again issued an order, pursuant to its order concerning the defence of the country and the maintenance of neutrality, under which distraint or execution could be levied on property belonging to a foreign State only with the consent of the Federal Council (see art. 2 of the order, AS, vol. 55, p. 1296); this regulation was revoked after the end of the war by the Executive Council's order of 3 September 1948 (AS 1948, p. 962).

In *Royaume de Grèce c. Banque Julius Bär et Cie*, the Swiss Federal Court, in keeping with its previous rulings, decided in its judgement of 6 June 1956 (SchweizBGE 82 I, 75 *et seq.*) that the sequestration of all accounts and assets of the Greek State and its Ministries at various Geneva banks was not inadmissible for lack of jurisdiction. The court expressly rejected the view that, under international law, absolute immunity from measures of execution must be accorded. On the contrary, the whole trend in international law was increasingly towards permitting execution in the case of acts *jure gestionis*.

In *République arabe unie c. dame X*, the Swiss Federal Court held, in its judgement of 10 February 1960 (SchweizBGE 86 I, 23 *et seq.*), that the levying of distraint on funds and letters of credit of the United Arab Republic held by a Swiss bank was admissible. Since at the time of distraint the assets seized had no longer been intended for a specific purpose, the preventive measure was not inadmissible under international law.

(c) For many years, the Belgian courts adhered without exception to the principle of the absolute immunity of foreign States from measures of execution (see references in Suy "Immunity of States before Belgian courts and tribunals", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (ZaöRV) 27 (1967), 660 (684 *et seq.*), and "L'immunité des Etats dans la jurisprudence belge", *L'immunité de juridiction et d'exécution des Etats*, p. 279 (305 *et seq.*). However, in *Socobelge c. Etat hellénique* (*Journal du droit international* (Clunet) 79 (1952), 244; *International Law Reports* (ILR) 18 (1951), No. 2), the Brussels Civil Court ruled, in its decision of 30 April 1951, that the attachment of funds of the Greek State and of the Bank of Greece held by banks and enterprises in Belgium was admissible. The debt-claims involved related to promissory notes issued by the Greek Government under a contract of 27 August 1925 with the Belgian company Socobelge for the construction and improvement of railway installations and the supply of railway equipment; any disputes were to be submitted to binding arbitration. The Greek Government having suspended the servicing of its State debts in 1932, Socobelge obtained two arbitral awards, the second of which ordered Greece to pay the sum of \$US 6,771,868 in gold, plus 5 per cent interest. When Greece continued to refuse payment of most of this amount and the dispute could not be settled through the diplomatic channel, Belgium referred the case to the Permanent Court of International Justice, which ruled in its judgement of 15 June 1939 that the arbitral awards were final and binding (*Société Commerciale de Belgique, P.C.I.J.*, Series A/B, No. 78, p. 22). In 1950 Socobelge obtained, on the basis of the arbitral awards, the provisional attachment of funds which the Greek Government and the Bank of Greece had on deposit with

banks and enterprises in Belgium. The Brussels Civil Court held that neither international law nor *comitas gentium* prevented it from confirming the measures of attachment (Colliard, *Revue critique de droit international privé* 41 (1952), p. 124, states that the funds attached derived from Marshall Plan aid to Greece and were subsequently released for other reasons).

(d) In *Société européenne d'études et d'entreprises en liqu. vol. (SEEE) c. Yugoslavia*, the Netherlands Supreme Court (decision of 26 October 1973, *Netherlands Yearbook* . . . 1974, 290 *et seq.*; ILM XIV (1975), 71 *et seq.* upheld the ruling of the Court of Appeal at the Hague (decision of 8 September 1972, *Netherlands Yearbook* . . . 1973, 390) that execution of an arbitral award concerning a claim in respect of acts *jure gestionis* by a foreign State would be contrary to international law only if international law prohibited any levying of forced execution on property of a foreign State; however, no such rule of international law existed (the levying of execution was subsequently declared inadmissible by the Court of Appeal for other reasons; decision of 25 October 1974, *Netherlands Yearbook* . . . 1975, 374 *et seq.*).

(e) In its judgement of 13 January 1954 (Judgements and decisions of the Administrative Court, new series 9, (1954), first half-year, section on financial law, No. 869), the Austrian Administrative Court, in an administrative proceeding relating to the confiscation of illegally marketed spirits originating from a company which was under the management of the Soviet Union, rejected the appeal on the ground of immunity against the tax authorities' confiscation order for the following reasons: "It is, of course, a generally recognized principle of international law that foreign States, when acting as sovereign entities, are not subject to either domestic judicial jurisdiction or domestic administrative jurisdiction. But neither in the doctrine or practice of international law nor in the judicial practice of State organs of the members of the international community is it generally recognized that a foreign State exercising private rights within the territory of another country, and in particular maintaining commercial enterprises in that country, is to be exempted from domestic jurisdiction in matters relating to such private-law relationships and such commercial enterprises." In the view of the Administrative Court, such jurisdiction must include administrative jurisdiction.

(f) Recent decisions by the French courts also suggest that they no longer regard preventive measures and measures of forced execution against foreign States in respect of claims relating to acts *jure gestionis* as totally inadmissible under international law. Whereas in earlier years both the French Government and the French courts quite overwhelmingly subscribed to the doctrine of absolute immunity from execution (see the numerous references in Kiss, *Répertoire de la pratique française en matière de droit international public*, III (1965), Nos. 315 *et seq.*) and departures from that practice were doubtless regarded as exceptions which in no way changed that basic position (for examples of such exceptions, see *Etat roumain c. Pascalet et Cie.*, Commercial Court at Marseilles, decision of 12 February 1924, Kiss, *op cit.*, No. 366; *USSR c. Association France Export*, Court of Cassation, judgement of 19 February 1929, AD 5 (1929-1930), No. 7; *Procureur général près la Cour de Cassation c. Vestwig et al.*, Court of Cassation, judgement of 5 February 1947, AD 13 (1946), No. 32), the decisions rendered by the Court of Cassation in *Englander c. Statni Banka Ceskoslovenska* (judgement of 11 February 1969, Clunet 96 (1969), 923 *et seq.*) and *Clerget c. Représentation commerciale de la République démocratique du Viet-Nam* (judgement of 2 November 1971, Clunet 99 (1972), 267 *et seq.*) suggest that the Court of Cassation does not regard preventive measures and meas-

ures of execution against property of a foreign State of its organs as being prohibited by general international law where the origin and intended use of the property in question can be ascertained during the proceedings to be of a private commercial nature.

(g) Greek courts have authorized measures of execution against foreign States where private-law claims were involved; for example, the Court of Justice at Athens did so in 1928 (AD 4 (1927-1928), No. 109, upheld on appeal by the Supreme Court) with regard to the attachment of property of the Soviet Government in respect of a claim arising out of a purchase contract—in addition, the court regarded conclusion of the contract as signifying submission to Greek jurisdiction—and the Athens Court of Appeal did likewise in connexion with an action for eviction (decision No. 1690/1949, *Revue hellénique de droit international* 3 (1950), 331). As in the case of Swiss and Italian legislation, the Greek law of 17 December 1938 (Emergency Law 1519/1938, art. 1, para. 1) made the domestic admissibility of measures of execution against foreign States subject to the prior approval of the Minister of Justice.

(h) The new approach to the question of immunity of foreign States recently adopted by the United States with the enactment of the Foreign Sovereign Immunities Act of 1976 is significant. In the United States as elsewhere, execution involves a question of jurisdiction (see Alexy, *Die Immunität fremder Staaten vor amerikanischen Gerichten*, thesis, Heidelberg (1960), p. 186). Leaving aside the process of attachment, which strictly speaking is not execution but rather a means of establishing local jurisdiction for certain types of proceedings (see *Weilamann v. Chase Manhattan Bank*, 192 N.Y.S. 2d 469 (S.Ct.N.Y. 1959)), the American courts continued, even after the Department of State shifted to the doctrine of absolute immunity in trial proceedings following the Tate letter of 19 May 1952 (Department of State Bulletin 26 (1952), 984; see BGVerfGE 16, 27 (48 *et seq.*) = NJW 1963, 1732) and up to the entry into force of the Foreign Sovereign Immunities Act of 1976, to adhere to the principle of the absolute immunity of foreign States, at least as regards execution in the strict sense (see *Dexter and Carpenter, Inc. v. Kunglig Järnvägstyrelsen*, 43 F. 2d 705 (1930), cert. den. 282 U.S. 896 (1930); *New York and Cuba Mail Steamship Company v. Republic of Korea*, 132 F. suppl. 684 (1955); *Weilamann v. Chase Manhattan Bank*, *loc. cit.*, 473; statement of position by the Department of State in *Industria Azucarera Nacional S.A. v. Empresa Navegación Mambisa*, ILM XIII (1974), 120 *et seq.*, 139; Whiteman, *Digest of International Law*, 6 (1968), 709 *et seq.*; but see also *Harris and Co. Advertising Inc. v. Republic of Cuba*, 127 So. 2d 687, 692 *et seq.* (1961); *Berlanti Construction Co. Inc. v. Republic of Cuba*, 145 So. 2d 256, 258 (1962)). From now on, under the Foreign Sovereign Immunities Act of 1976, foreign States will, in the case of execution also, no longer enjoy absolutely unrestricted immunity before United States courts. It is true that sections 1604 and 1609 establish the principle of the immunity of foreign States in trial and execution proceedings; however, sections 1605 *et seq.* and 1610 *et seq.* provide for extensive exceptions to that principle. Where trial proceedings are concerned, the exceptions include, in particular, proceedings:

“in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States” (Sec. 1605 (a)(2))

and, in principle, actions brought against a foreign State for damages for tortious acts (including endangerment) by the foreign State, its officials or employees, where they are acting in performance of their official duties (sect. 1605 (a) (5)).⁴³

The exceptions to immunity for foreign States in execution proceedings are laid down in section 1610 (a), which reads as follows:

“(a) the property in the United States of a foreign state, as defined in section 1603 (a) of this chapter, used for a 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 court of the United States or of a State after the effective date of this Act, if—

“(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

“(2) the property is or was used for the commercial activity upon which the claim is based, or

“(3) the execution relates to a judgement establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

“(4) the execution relates to a judgement establishing rights in property—

“(A) which is acquired by succession or gift, or

“(B) which is immoveable and situated in the United States; *Provided* that such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

“(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgement.”

Section 1610 (b) widens these exceptions to immunity from execution, in the case of an “agency or instrumentality” of a foreign State, by removing the requirement under section 1610 (a) (2) for a connexion between the property, the commercial activity and the claim upon which the action is based.

The provisions of the Act thus demonstrate the shift made by the United States to the doctrine of relative immunity of foreign States in trial and execution proceedings, including actions *in personam*, where the foreign State is cited directly as a party to the proceedings or as a debtor in execution proceedings. No matter that it is not entirely clear to what extent the earlier practice of United States courts is to be regarded not merely as *comitas gentium* but also as an expression of submission to *international law* (see Alexy, “Der Einfluss der Exekutive und innerstaatlicher Rechtsgrundsätze auf die amerikanische Rechtsprechung zur Immunität fremder Staaten”,

⁴³ *Translator's note:* Indirect quotations from the Act have not been verified but are retranslated from German. Direct quotations appear in English in the original and are presumed to be accurate.

ZaöRV 22 (1962), 670 *et seq.*); so far as the rules now laid down in the Foreign Sovereign Immunities Act of 1976 are concerned, there is every indication that they were deliberately adopted in order, *inter alia*, to take into account the minimum obligations imposed by general international law, even though the Act sometimes goes further and places the foreign State on a more favourable footing than is required under international law. For instance following the entry into force of the Act, it is now exclusively a matter for the courts to rule on questions relating to immunity in accordance with legal criteria. Another indication is given in the statements made by the Department of State, the Department of Justice and the congressional committees in the *travaux préparatoire* to the Act. It is stated there that the most important point about the Act is that decisions concerning claims to immunity by foreign States are best taken by the courts on the basis of a statute incorporating criteria which are recognized under international law (see Section-by-Section Analysis, introduction and commentary on section 1602, annexed to the letter of transmittal from the Department of Justice and the Department of State to the President of the Senate and the Speaker of the House of Representatives of 31 October 1975, ILM XV (1976), 88 *et seq.*, 102, 104; United States Congress, House of Representatives, 94th Congress, 2nd Session, Report No. 94-1487 (Judiciary Committee), ILM, *loc. cit.*, pp. 1398 *et seq.*, 1401 *et seq.*).

(i) Prior to 1945, the German courts in principle accorded foreign States absolute immunity from execution also, on the ground that a rule of customary international law made it obligatory to do so (see Royal Prussian Court of Justice for the Settlement of Conflicts of Jurisdiction, judgement of 25 July 1910, JbÖffR V (1911), 252 *et seq.*—*Hellfeld* case; Court of Justice for the Settlement of Conflicts of Competence, judgement of 29 May 1920, JW 1921, 773 *et seq.*; judgement of 4 December 1920, JW 1921, 1480 *et seq.*; and judgement of 12 March 1921, JW 1921, 1481 *et seq.*; otherwise, *obiter*, only the *Land* High Court at Hamburg, judgement of 30 May 1923, LZ 1923, 615 *et seq.*). That view derived not least from the fact that absolute immunity was in principle accorded in the case of trial proceedings (see references in BVerfGE 16, 27 (34 *et seq.*) = NJW 1963, 1732).

The decisions rendered since 1945, in so far as they have been published, relate almost without exception to questions of immunity in trial proceedings (see BVerfGE 15, 25 *et seq.* = NJW 1963, 435; BVerfGE 16, 27 *et seq.* = NJW 1963, 1732, in each case with references) or to the personal immunity of individuals within the meaning of articles 18 and 19 of the Judicature Act prior to its amendment (e.g., District Court at Bonn, decision of 10 June 1960, ArchVölkR 9 (1961-1962), 485).

...

In its judgement of 2 December 1975 (NJW 1976, 1044 *et seq.*; ILM XVI (1977), 501 *et seq.*), the *Land* Court at Frankfurt affirmed German jurisdiction for the issue of a distraint order against property of the Central Bank of Nigeria. It left aside the question whether the defendant was to be regarded as a legally dependent authority of the Nigerian State or as an independent legal person. As the plaintiff's claim which required protection arose out of a legal transaction by the Bank, the defendant could not successfully claim immunity from German jurisdiction even as a dependent authority of the State of Nigeria. The *Land* Court held that the restrictive immunity possessed by a foreign State when it was cited as a debtor in the State of the forum also applied in connexion with the determination by a court of the admissibility of distraint proceedings, as summary trial proceedings, and with the execution of the court order sought by the creditor. According to how far jurisdiction extended,

distrain against property of a foreign State in the State of the forum was admissible to the same extent. Only property which was used as such for purposes of the public service of the foreign State could be exempted from execution of a distraint order. In the case before the court, however, the application for distraint was directed against cash and security accounts maintained by the defendant in the Federal Republic of Germany or, in other words, against property which was not "in the public service" of the defendant. The fact that the property in question might be used in the future to finance State functions could not serve to establish any material immunity.

5. The treaty practice of quite a number of States suggests that forced execution against property of foreign States by the State of the forum is not regarded as totally incompatible with general international law. A number of multilateral treaties and many bilateral treaties contain provisions concerning jurisdiction, including jurisdiction relating to execution, with regard to State-owned or State-operated merchant vessels, State-owned or State-controlled commercial enterprises, with or without legal capacity of their own, and State trade missions. Such provisions generally permit execution against property of the debtor not used for sovereign purposes, on the basis of writs issued as a result of trial proceedings concerning claims on the State-owned or State-controlled debtor arising from private commercial activities. In some cases, a material connexion between the right, founded on title, and the property on which execution is to be levied, is required; sometimes there are limitations on preventive measures, if they are ordered without prior regular trial proceedings.

(a) The International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels of 10 April 1926, which was ratified by Germany (RGBI 1927 II, 484, with additional Protocol of 24 May 1934, RGBI 1936 II, 303, binding on Germany under international law as from 8 January 1937, published on 11 September 1936, RGBI 1936 II, 303) and is in force for 21 States (see *supp.* to BGBI II, cross-reference B, 31 December 1976, p. 168), differentiates between State-owned merchant vessels and other State-owned vessels. Under article 1 of the Convention, seagoing vessels owned or operated by States, cargoes owned by them and cargoes and passengers carried on government vessels, and the States owning and operating such vessels, or owning such cargoes, are subject in respect of claims relating to the operation of such vessels or the carriage of such cargoes, to the same rules of liability and to the same obligations as those applicable to private vessels, cargoes and equipments. Under article 2, for the enforcement of such liabilities and obligations there shall be the same rules concerning the jurisdiction of tribunals, the same legal actions, and the same procedure as in the case of privately owned merchant vessels and cargoes and of their owners. Preventive measures and measures of execution are thus admissible in that connexion.

The Geneva Convention on the High Seas of 29 April 1958, which was binding on 55 contracting parties as at 31 December 1976 (BGBI 1972 II, 1089, binding on the Federal Republic of Germany under international law as from 25 August 1973, published on 15 May 1975, BGBI 1975 II, 843), and the Convention on the Territorial Sea and the Contiguous Zone of 29 April 1958 (United Nations Treaty series (UNTS), vol. 516, pp. 205 *et seq.*) also make the distinction between State-owned merchant vessels and other State-owned vessels. Under article 9 of the Convention on the High Seas, ships owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State; thus, rules of international law and domestic rules are not affected so far as other State-owned vessels are concerned.

Article 21 of the Convention on the Territorial Sea makes it clear that, in the case of government ships operated for commercial purposes, immunity from admissible measures taken by States in connexion with the regulation of innocent passage cannot be claimed. The Federal Constitutional Court has expressed the view that these provisions reflect the widespread conviction that States are now entitled to immunity only in respect of their sovereign acts (see BVerfGE 16, 27 (52 *et seq.*) = NJW 1963, 1732). In principle, the same applies in this context to the area of forced execution.

Articles 1 to 14 of the European Convention on State Immunity exclude claims of immunity from trial proceedings in respect of a wide range of acts *jure gestionis*; no preventive measures or measures of execution against the property of a contracting State may be taken in the territory of another contracting State without the acquiescence of the State concerned in accordance with article 23. However, this provision does not constitute the expression of a legal consensus among the contracting parties that such measures are prohibited under general international law. Rather, the explanation for it is to be found in the special arrangement provided for in the Convention. Under articles 20 *et seq.*, contracting States have an obligation to give effect to judgements given against them in trial proceedings by courts of other contracting States; if they fail to do so, an affected party to a case can bring a special legal action for obtaining a declaratory judgement before a court of the Contracting State against which the judgement has been given or before the European Tribunal in matters of State immunity to be established under the Additional Protocol to the Convention (art. 21 of the convention and arts. 4 *et seq.* of the optional Protocol). The exclusion of forced execution must therefore be regarded in the light of that special arrangement (see Sinclair, "The European Convention on State Immunity", *The International and Comparative Law Quarterly* 22 (1973), 254 *et seq.*, 273 *et seq.*; Kraff, "La Convention Européenne sur l'Immunité des Etats et son Protocole Additionnel", *Schweiz. Jb. für IntR* 31 (1975), 11 (20 *et seq.*)); it does not, however, provide proof of a legal consensus among the signatory States that measures of execution are inadmissible under general international law. Further evidence of this is the optional provision in article 26 of the Convention whereby, notwithstanding the provisions of article 23, a judgement rendered against a contracting State in proceedings relating to "an industrial or commercial activity, in which the State is engaged in the same manner as a private person", may be enforced in the State of the forum against property of the State against which judgement has been given, used exclusively in connexion with such an activity, if both States have made declarations under article 24.

(b) Many bilateral treaties provide that State-owned or State-controlled commercial enterprises may not claim jurisdictional immunity, including immunity from execution, in respect of their private commercial activities and of their property used for private commercial purposes. A few examples may be cited:

Article 18 (2) of the Treaty of Friendship, Commerce and Navigation between Japan and the United States of America of 2 April 1953 (*United States Treaties and Other International Acts Series* (TIAS), No. 2863);

Article 18 (2) of the Treaty of Friendship, Commerce and Navigation between the Federal Republic of Germany and the United States of America of 29 October 1954 (BGBl 1956 II, 488 *et seq.*; entered into force on 14 July 1956, published on 28 June 1956, BGBl II, 763); the provision reads as follows:

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

The Treaties of Friendship, Commerce and Navigation concluded by the United States with Italy on 2 February 1948 (TIAS, No. 1965), with Ireland on 21 January 1950 (TIAS, No. 2155) and with Israel on 23 August 1951 (TIAS, No. 2948) contain similar provisions.

Treaties concluded by the Soviet Union and Eastern European States with other States provide that State trade missions may not claim jurisdictional immunity from either trial proceedings or execution measures—occasionally excluding interim preventive measures—in respect of their private commercial activities and their property used for private commercial purposes. For instance, article 7 of part II of the Treaty between the German Reich and the Union of Soviet Socialist Republics of 12 October 1925 (RGBI 1926 II, 2) provided as follows:

“Legal acts of the Trade Delegation consummated in Germany which are binding on the U.S.S.R., and the economic effects of these acts, shall be subject to German law and German jurisdiction. Measures of compulsory execution may also be applied to the property of the U.S.S.R. in Germany, except in so far as regards objects which, according to the general rules of international law, are required for the exercise of sovereign rights or are intended for the use of diplomatic or consular representatives in their official capacity.”

Article 2 of the annex to the Agreement between the Federal Republic of Germany and the Union of Soviet Socialist Republics concerning General Matters of Trade and Navigation of 25 April 1958 (BGBI 1959 II, 222), which entered into force on 24 April 1959, was published on 30 April 1959 (BGBI II, 469) and was extended by Protocol of 31 December 1960 (BGBI 1961 II, 1085), regulates the legal status of the Trade Delegation of the Soviet Union in the Federal Republic of Germany. It provides that the Trade Delegation shall form an integral part of the Soviet Embassy and enjoy corresponding privileges. With regard to immunity, article 4 provides as follows:

“The rights, immunities and privileges accorded to the Trade Delegation under article 2, first paragraph, of this annex shall extend to its commercial activities, with the following exceptions:

“(a) Disputes arising out of commercial contracts concluded or guaranteed in the territory of the Federal Republic of Germany under article 3 of this annex by the Trade Delegation shall, in the absence of agreement regarding arbitration or any other jurisdiction, be subject to the jurisdiction of the courts of the Federal Republic of Germany; in these disputes the defendant or plaintiff shall be the Trade Delegation of the Union of Soviet Socialist Republics in the Federal Republic of Germany. No interim orders may, however, be made against the Trade Delegation;

“(b) Final judicial decisions against the Trade Delegation in the disputes referred to in paragraph (a) hereof which have become legally valid may be enforced by execution. Such execution may be levied on all State property of the Union of

Soviet Socialist Republics in the Federal Republic of Germany, in particular property, rights and interests arising out of contracts concluded or guaranteed by the Trade Delegation, with the exception of property belonging to the organizations referred to in article 3, third paragraph, of this annex.

“Property and premises intended solely for the exercise in the Federal Republic of Germany of the political and diplomatic rights of the Union of Soviet Socialist Republics, in accordance with international practice, and also the premises occupied by the Trade Delegation and the moveable property situated therein, shall not be liable to execution measures.”

Similar provisions are contained in the Trade Agreement between the Soviet Union and France of 3 September 1951 (UNTS 221, 92; art. 10), the Treaty of Trade and Navigation between the Soviet Union and Austria of 17 October 1955 (UNTS 240, 304; art. 4 of the annex) and other Soviet treaties, for example with Sweden, Greece, the United Kingdom and Japan (see AJIL 26 (1932), Suppl., pp. 707 *et seq.*; Boguslavskij, *Staatliche Immunität* (1965), p. 153).

For the relevant Swiss treaty practice, see the references in the decision of the Federal Court of Justice in *Royaume de Grèce c. Banque Julius Bär et Cie* (SchweizBGE 82 I, 75 (86 *et seq.*)). Although such treaty provisions can also be interpreted as an express conventional waiver of immunity, they nevertheless reflect the general development in international law of the understanding about immunity in fields in which States carry on non-sovereign, and particularly commercial, activities.

(c) The Asian-African Legal Consultative Committee considered the question of State immunity in 1960. The report of the Committee on Immunity of States in respect of Commercial and Other Transactions of a Private Character stated that, with regard to forced execution, all delegations had recognized that a decision against a foreign State could not be enforced against the public property of that State. However, the property of a State trade organization possessing legal capacity of its own could not be exempted from execution (see Asian-African Legal Consultative Committee, Third Session, Colombo, Ceylon, 20 January-4 February 1960, *Final Report of the Committee on Immunity of States in respect of Commercial and Other Transactions of a Private Nature*, pp. 66 *et seq.*; Whiteman, *Digest of International Law*, 6 (1968), 572 *et seq.*). The fact that the report speaks only of public property makes it impossible to deduce that the Committee held the legal view that measures of execution against foreign States were totally prohibited under international law, otherwise than in respect of such property.

6. The above survey shows that there is no custom which is sufficiently general and is backed by the necessary legal consensus to constitute a general rule of customary international law whereby the State of the forum is debarred outright from taking measures of execution against property of a foreign State situated in the State of the forum. The number of States which, as evidenced by their judicial practice, legislation or treaty practice, do not exclude preventive measures and measures of execution against foreign States, at least when such measures are based on writs issued in respect of an act *jure gestionis* of the foreign State and execution is to be levied on property which does not serve sovereign purposes, is so preponderant that one cannot at present speak of any *general* custom of regarding execution as being precluded under international law, no matter how one defines the requirement that a custom, in order to constitute a rule of customary international law, must be a gen-

eral one. The point is not simply that there are certain kinds of conduct which a State, acting from the outset in conformity with the law, can cite in opposition to the application of an existing general rule of international law, (as in connexion with the judgement of the International Court of Justice in the Norwegian fisheries case, *I.C.J. Reports 1951*, 131); rather, the existence of any relevant general rule of international law cannot at present be assumed.

7. This view of the legal situation has also been expressed by recognized learned associations and scholars in the field of international law:

(a) The Institut de droit international, which as early as 1891, at its Hamburg session, had shown support, in its draft articles on the international regulation of jurisdiction in respect of disputes with foreign States, for extensive exceptions to immunity in trial proceedings (resolution of 11 September 1891, *Annuaire* 2 (1928), 1215), noted at its Aix-en-Provence session the new questions which had since arisen and which required a solution and accordingly stated, in its resolution of 10 April 1954 on the admissibility of preventive measures and measures of execution:

“Neither forced execution nor preventive attachment may be levied on property of a foreign State if such property is used for the exercise of its governmental activities not connected with any economic operation.”⁴⁴

(art. 5 of the resolution, *Annuaire* 45 II (1954), pp. 293 *et seq.*, 295).

The fact that coercive measures against property used for sovereign purposes are excluded under the resolution suggests that measures of execution were not regarded as being otherwise prohibited by general international law. The discussions on this article dealt mainly with the question of delimitating the kind of property on which execution might not be levied.

Article 22 of the 1932 Harvard Law School draft convention on the competence of courts vis-à-vis foreign States (*AJIL* 26 (1932), Suppl., pp. 451 *et seq.* (Harvard draft)) is based on the assumption that execution against foreign States is in principle excluded, under article 23, however, execution would be admissible against immovable property or property used in connexion with a commercial enterprise of the foreign State. According to the commentary (*loc. cit.*, p. 707), the seizure of bank accounts should be admissible when they are maintained by the foreign State to meet private obligations.

The second study group of the German International Law Association adopted on 26-27 April 1967, on the basis of the Schaumann and Habscheid reports, principles relating to State immunity (*BerDGVR* 8 (1968), 1 *et seq.*, 159 *et seq.*, 283 *et seq.*). They provided that, in accordance with existing international law, foreign States should be entitled to only relative immunity even in respect of judicial and administrative measures of execution (principles 30, 62). For the levying of judicial execution, the jurisdiction of the State of the forum must be established in respect of both the claim on which the writ of execution is based and the property on which execution is to be levied (principle 34). The State of the forum should have no power to levy execution against a foreign State if the property on which execution would be levied was intended to be used for acts *jure imperii*. Certain property would, in accordance with international law, be exempt from execution—for instance, premises and articles used by diplomatic missions, foreign warships and government-owned

⁴⁴ Translated from French text quoted in original.

vessels, and the equipment of foreign armed forces (principles 37, 38); the same would apply to execution against funds in bank accounts and other receivables which were to be used for the performance of acts *jure imperii* (principle 67).

(b) A considerable number of recognized writers on international law also take the view—although the arguments advanced and the conclusions drawn differ on points of detail—that customary general international law does not prohibit the levying of preventive measures and measures of execution against foreign States by the State of the forum under a judicial writ, in respect of acts *jure gestionis* of the foreign State, on property which is not used for sovereign purposes of the foreign State; even where the existence of a rule of customary general international law prohibiting such measures is not totally rejected, its existence is at least described as doubtful. Suffice it to mention as examples from the literature on the subject the following: van Praag, *Jurisdiction et droit international public* (1915), pp. 340 *et seq.*; van Praag, “La question de l’immunité de juridiction des Etats étrangers et celle de la possibilité de l’exécution des jugements qui les condamnent”, in *Revue de droit international et de législation comparée* (1935), pp. 100, 129; Quadri, *La giurisdizione sugli stati stranieri* (1941), pp. 57 *et seq.*; Gmür, *Gerichtbarkeit über fremde Staaten* (1948); Riezler, *Internationales Zivilprozessrecht und prozessuales Fremdenrecht* (1949), pp. 400 *et seq.*; Lauterpacht, “The problem of jurisdictional immunities of foreign States”, *BYB* 28 (1951), pp. 220 *et seq.*; Sibert, *Traité de droit international public*, vol. 1 (1951), pp. 272 *et seq.*; Lémonon, “L’immunité de juridiction et d’exécution forcée des Etats étrangers”, in *Annuaire de l’Institut de Droit International* 44 (1952) 1, 5, 28 *et seq.*; Lalive, “L’immunité de juridiction des Etats et des organisations internationales”, in *Recueil des Cours* 84 (1953) III, 205, 272 *et seq.*; Schnitzer, *Handbuch des Internationalen Privatrechts*, II, 4th ed. (1958), pp. 836 *et seq.*; Sørensen, “Principes de droit international public”, in *Recueil des Cours*, 101 (1960) III, 1, 172; Dahm, *Völkerrecht* I (1958), pp. 238 *et seq.*; Wengler, *Völkerrecht* II (1964), p. 951; Cohn, “Gerichtbarkeit über fremde Staaten”, in *Wörterbuch des Völkerrechts* I, 2nd ed. (1960), pp. 661 *et seq.*; Suy, “Immunity of States before Belgian courts and tribunals”, *ZaöRV* 27 (1967), 690 *et seq.*; Suy, “L’immunité des Etats dans la jurisprudence belge”, in *L’immunité de juridiction et d’exécution des Etats* (1971), 279, 311; Deak, in Sørensen, ed., *Manual of Public International Law* (1968), p. 440; Leigh, in Monroe, “New departures in the law of sovereign immunity”, *Proceedings of the American Society of International Law* (1969), pp. 187 *et seq.*; Seidl-Hohenveldern, *Völkerrecht*, 3rd ed. (1970), No. 1115; Giuttari, *The American Law of Sovereign Immunity* (1970), pp. 254 *et seq.*

II. While general rules of international law thus impose no outright prohibition on execution by the State of the forum against a foreign State, they do impose material limits on execution.

1. There is an established general custom among States, backed by a legal consensus, whereby the State of the forum is prohibited by international law from levying execution, under judicial writs against a foreign State, on property of the foreign State which is situated or present in the State of the forum and is used for sovereign purposes of the foreign State, except with the latter’s consent. It is true that complete agreement is lacking in State practice concerning the extent of the property which, by its nature, is protected by State immunity; whereas, under the United States Foreign Sovereign Immunities Act of 1976, only property which is or was used for a commercial activity of the foreign State upon which the material claim

that is asserted is based is in principle subject to execution (see sect. 1610 (a) (2)), the Italian and Swiss courts lay stress on whether the property on which execution is to be levied is actually used or is intended to be used for non-sovereign or sovereign purposes of the foreign State. For the purposes of the present submission proceedings, there is no need for us to take a conclusive position, as regards German law, on these distinctions and their legal consequences, since there is at least a general agreement and an established custom among States to the effect that, under general international law, property in the State of the forum which is actually used for sovereign purposes of the foreign State is not subject to execution. Occasional doubts—such as those which are mentioned in the statement of position by the Federal Government concerning the levying of execution on embassy accounts, but which the Federal Government itself does not share—cannot alter the fact that a general rule of international law does exist on that point. State practice, as evidenced in treaty practice, in legislation and in the decisions of national courts, and the international law literature are unanimous on this question, as can be seen from the evidence cited in section C I above.

2. As regards trial proceedings, the Federal Constitutional Court has ruled that the determination of whether a State activity is, by its legal nature, a sovereign or a non-sovereign act will in principle have to be effected according to the national law applicable in each case, since international law, at least as a rule, contains no criteria for establishing that distinction (BVerfGE 16, 27 (62 *et seq.*) = NJW 1963, 1732). The court acknowledged that making the determination of that point a matter for the national law applicable in each case rendered the application of general international law more difficult and worked against the desirable uniformity of the law. However, that disadvantage was mitigated by the fact that international law placed limits on the determination, according to national law, of a State activity as an act *jure gestionis*. Under international law, national law could be applied in that connexion only with the proviso that State acts which, in the view of the overwhelming majority of States, fell within the sphere of State authority in the narrow and true sense could not be taken out of the sphere of sovereignty and thus could not be stripped of immunity. In exceptional cases, international law might require that an activity of a foreign State should be regarded as an act *jure imperii* because it pertained to the very core of State authority, even though it would have to be regarded under national law as a private-law and not a public-law activity (BVerfGE 16, 27 (63 *et seq.*) = NJW 1963, 1732).

In the case before us, where only the admissibility of measures of execution in respect of claims arising out of the general current account of the embassy of a foreign State is at issue, there is no need for a ruling on whether the determination that an item of property is used for sovereign purposes must generally be made on the basis of appropriate principles; for in the case of property used for the performance of the official functions of the diplomatic mission of a foreign State in the State of the forum, that determination involves special rules of international law which, notwithstanding the fact that they have been partially codified in the Vienna Convention on Diplomatic Relations, constitute general rules of international law within the meaning of article 25 of the Basic Law. They derive both from the principle of the inviolability of diplomatic missions and from the jurisdictional immunity of the foreign State in respect of the official functions of its diplomatic mission.

3. According to the established view, which began to emerge even before Grotius (*De jure belli ac pacis*, L. II, c. XVIII, 9) and Bynkershoek (*Foro Lega-*

torum, sec. ed. (1744), Cap. XVI, XXIII), preventive measures or measures of execution against a foreign State may not, under international law, be levied on property which at the relevant time was being used by its diplomatic mission for the performance of its official functions (see, with references in each case, van Praag, *Juridiction et droit international public* (1915), pp. 357 *et seq.*; C. E. Wilson, *Diplomatic Privileges and Immunities* 1967), pp. 1 *et seq.*; Gmür, *Gerichtbarkeit über fremde Staaten* (1948), p. 134; Verdross, *Völkerrecht*, 5th ed. (1964), pp. 338 *et seq.*; Habscheid, *BerDGVR*, *loc. cit.*, pp. 264 *et seq.*). The principle of international law *ne impediatur legatio* precludes such measures where they might impair the exercise of diplomatic duties, thus, the Federal Constitutional Court has ruled that German jurisdiction in respect of trial proceedings against a foreign State in which consent is sought to rectification of the land register regarding the ownership of premises used for diplomatic purposes is not precluded by any general rule of international law, because this would not impair the ability of the diplomatic mission to function (BVerfGE 15, 25 (43) = NJW 1963, 435).

Because of the difficulties of delimitation involved in judging whether that ability to function is endangered, and because of the potential for abuse, general international law makes the area of protection enjoyed by the foreign State very wide and refers to the typical abstract danger, but not to the specific threat to the ability of the diplomatic mission to function posed by measures on the part of the receiving State (see Habscheid, *BerDGVR*, *loc. cit.*, p. 206). For instance, article 22, paragraph 3, of the Vienna Convention on Diplomatic Relations of 18 April 1961, which codifies general international law on the subject, provides that the premises of the missions, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution. However, this rule of inviolability is not exclusive in the sense that these and other items of property might not also enjoy immunity under international law by reason of the protection afforded to the official functions of the diplomatic mission of the sending State. It is true that, so far as can be seen, this question was not further discussed from the standpoint of inviolability... in the United Nations International Law Commission, whose draft articles constituted the basis for the Vienna Conference... However, the preamble to the Vienna Convention affirms that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the Convention... This and similar treaty provisions confirm the general rule of international law that property used by the sending State for the performance of its diplomatic functions in any event enjoys immunity even if it does not fall within the material or spatial scope of the inviolability provision in article 22 of the Vienna Convention (as agreed by Schaumann, *BerDGVR*, *loc. cit.*, p. 148, who deduces this from the general immunity of States, although "supported" by diplomatic immunity; see also article 23 of the Harvard draft, *loc. cit.*, AJIL 26 (1932), Suppl., p. 707).

4.(a) The question whether, under general international law, claims arising out of a general current bank account which the sending State maintains for its diplomatic mission in the receiving State for the purpose of covering and paying the embassy's costs and expenses share the special protection afforded to diplomatic missions is answered by reference to the special purpose of the international-law protection in favour of diplomatic missions. The purpose of both inviolability and immunity in this field is to ensure the unimpeded functioning of the diplomatic mission of the sending State in the receiving State as regards the performance of its dip-

diplomatic duties (see C. E. Wilson, *Diplomatic Privileges and Immunities*, pp. 19 *et seq.*, with many examples from State practice). Under article 3 of the Vienna Convention on Diplomatic Relations, which circumscribes general international law on this point, the functions of a diplomatic mission include:

- “(a) representing the sending State in the receiving State;
- “(b) protecting in the receiving State the interest of the sending State and of its nationals, within the limits permitted by international law;
- “(c) negotiating with the Government of the receiving State;
- “(d) ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
- “(e) promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.”

Obviously, the use of funds is essential for the performance of these functions. The maintenance of such funds in connexion with these functions, and the organization and administration of the financial settlement of the diplomatic mission's costs and expenses by the sending State, belong directly to the area of the functions and duties of a diplomatic mission (see also Cahier, *Le droit diplomatique contemporain* (1962), p. 210, where funds in an embassy's bank account are expressly stated to be covered by the inviolability rule).

It is immaterial for our purposes whether the receiving State is obligated under general international law to allow the sending State the possibility of maintaining bank accounts in the receiving State in order to pay the costs and expenses of its embassy. If, however, the receiving State does afford this possibility and the sending State makes use of it in accordance with the laws of the receiving State, the immunity of the sending State in respect of its claims and other rights arising out of such an account is not extinguished simply because, and to the extent that, the legal relationship between the sending State and the bank is to be regarded under the laws of the receiving State as non-sovereign. Yet it must be borne in mind that the sending State is not in principle in a position, by virtue of its own sovereign authority, to attribute sovereign status, with binding effect on the laws of the receiving State, to property or rights which directly serve the purposes of the exercise of its diplomatic functions or of the continued operation of its diplomatic mission, for instance by declaring that certain property is public property within the meaning of the laws of the receiving State. In this respect, the sending State is largely bound by the laws of the receiving State. Nevertheless, if those laws enable it, for instance, to act only under private law, that must not be allowed to abridge the immunity afforded by international law with an eye to the ability of its diplomatic mission to function. The financial settlement of the costs and expenses of an embassy through a general current account of the sending State maintained with a bank in the receiving State pertains directly to the continued discharge of the diplomatic functions of the sending State, notwithstanding the fact that some transactions through such an account may, as regards relations with the bank or with third parties, be effected in the context of legal relationships or forms of activity which can, by their legal nature, be termed acts *jure gestionis*. Claims of the sending State on the bank arising out of such an account therefore enjoy, under general international law, at least the immunity afforded to diplomatic missions in respect of measures of execution.

Taking any other view of the matter would mean that the executing authorities

of the receiving State might have to ascertain the existence of funds in such an account and the purposes for which the sending State intended such funds or parts of them to be used. In the case of a general current account, it may be doubtful for the purposes of German law, even from the standpoint of the adequate availability of the property to be attached, whether criteria for determining that some of the assets may be liable to attachment can be arrived at in this way (similar doubts were expressed with regard to French law by the Court of Justice of Aix-en-Provence, judgement of 14 February 1966, in *Statni Banka et Banque d'Etat tchécoslovaque c. Englander*, Clunet 1966, 846, reversed by the Court of Cassation in its judgement of 11 February 1969, Clunet 1969, 923; in *Clerget c. Représentation commerciale de la République démocratique du Viet-Nam*, judgement of 2 November 1971, Clunet 1972, 267, the Court of Cassation refused to allow the attachment of a bank account because the origin and intended use of the funds had not been established during the proceedings); but even if this should be possible in isolated cases with respect to claims arising out of such an account, the danger of intrusion into the internal sphere of operation of the diplomatic mission of the sending State is usually evoked and, except with the consent of the sending State, that is prohibited outright under international law relating to embassies. Moreover, for the executing authorities of the receiving State to require the sending State, without its consent, to provide details concerning the existence or the past, present or future purposes of funds in such an account would constitute interference, contrary to international law, in matters within the exclusive competence of the sending State. On the other hand, general international law does not prohibit asking the sending State to substantiate the fact that a given account is one that is used for the continued performance of the functions of its diplomatic mission. As regards the substance and form of such substantiation, the State of the forum must of course, in accordance with international law, be satisfied with due assurances from a competent authority of the sending State.

(b) No radical objections to this finding can be deduced from the practice of State authorities responsible for foreign affairs, from the rulings of national courts or from the international-law literature. As far as can be seen, the levying of execution on claims arising out of a general current account maintained with a bank by a foreign State on behalf of its embassy for the payment of costs and expenses has never yet been allowed, although there have been isolated decisions—relating for the most part, it is true, to other types of account not opened specially for embassy purposes—which suggest that a distinction according to whether the origin and intended purpose of funds or of an account are sovereign or non-sovereign is not excluded...

Schaumann (BerDGVR, *loc. cit.*, p. 145) considers that a foreign State can obtain immunity even in terms of general State immunity in the case of a *general* bank account, and also to a limited extent in respect of other property, simply by declaring some sovereign purpose, since it will seldom be possible to prove the opposite. In his opinion, this conclusion, which is based on diplomatic immunity, is unavoidable if State immunity is viewed as being designed to protect the sovereign functions of the foreign State. For example, if instead of the *intended use* of certain property for a sovereign purpose, proof of its *actual use* for that purpose were to be demanded, then the protection afforded to the sovereign functions of the State in foreign affairs would be incomplete. According to Habscheid (BerDGVR, *loc. cit.*, pp. 266 *et seq.*), the important point is the specific purpose for which the funds to be attached are intended. Indications of this might include, for example, which ministry is designated as the account-holder.

(c) This Chamber fully appreciates that the immunity accorded to claims arising out of a general current account of the embassy of a foreign State might in some cases be used as a shield for financial transactions through such an account which were not directly related to the functions of a diplomatic mission. Should such a case occur—and there is no indication of this in the original proceedings—it would be for the competent authorities of the Federal Republic of Germany to counter a “non-functional” use of the immunity of diplomatic missions by diplomatic and other means admissible under international law. There is nothing to prevent a private party wishing to enter into private business relations with a foreign State from protecting his interests as much as possible, for instance through agreements on the manner in which business is to be transacted, the procedure in case of dispute—particularly waiver of immunity, which is in principle irrevocable (see also the relevant provision of the United States Foreign Sovereign Immunities Act of 1976, sect. 1610(a) (1))—or the furnishing of guarantees.

(d) This case does not require a ruling on whether, and according to what criteria, claims and other rights arising out of other accounts of a foreign State with banks in the State of the forum, such as special accounts in connexion with procurements purchases or the granting of loans, or general-purpose accounts, are to be considered sovereign or non-sovereign property, and what limits, if any, imposed by international law are to be observed when it comes to obtaining evidence in that respect.

5. Where the question of immunity of the sending State for the benefit of its diplomatic mission is concerned, the financial position of the sending State—for instance, whether it would be in a position, despite the attachment of claims arising out of a general current account of its mission, to continue the operation of the embassy through financial allocations or remittances provided in some other way—is immaterial. The only relevant consideration is the abstract danger posed by measures of execution of this kind. Such a danger exists by reason of the adverse legal consequences which an attachment and assignment order entails under German law for the judgement debtor and the garnishee. Moreover, differentiation according to the financial position of the sending State could lead to differential treatment of foreign States in the field of diplomatic immunity, in contravention of the international-law principle of sovereign equality of States. It is immaterial for our purposes whether that legal principle, as set forth in Article 2, paragraph 1, of the Charter of the United Nations (BGBI 1973 II, 430), applies in the United Nations context only to relations between Member States; the principle of sovereign equality of States is also a fundamental principle of contemporary general international law which, at least in the field of diplomatic intercourse among States, demands formal equality of treatment on a broad scale (see, with regard to the principle of sovereign equality, the United Nations Declaration of 24 October 1970, General Assembly resolution 2625 (XXXV), ILM IX (1970), 1292 *et seq.*, 1296). Any differential treatment of States in the field of diplomatic immunity according to their respective financial capacities would be incompatible with that.

III. I. The general rule of international law established under section C above forms part of federal law (Basic Law, art. 25, first sentence; Act concerning the Federal Constitutional Court, art. 83 (I)).

2. That rule establishes rights and duties only in relations between States under international law; it does not establish or alter any specific rights or duties of private parties within the territory of the Federal Republic of Germany, even pursuant

to the second sentence of article 25 of the Basic Law. A private party derives from it no specific right to have execution levied, to the extent permitted under general international law, against foreign States within the territory of the Federal Republic of Germany, nor does it establish a specific duty to refrain from seeking execution against a foreign State where it is prohibited under general international law. The most that can be said is that any rights and duties of such substance arise at present out of other areas of domestic law.

3. As has been noted, a distinction must be made between the foregoing and the fact that, in accordance with the first sentence of article 25 of the Basic Law, the general rule of international law the existence of which has been established forms part, as such and to the extent of its individual scope under international law, of the abstract law in force in the territory of the Federal Republic of Germany and may, according to the facts of the case, have legal consequences, favourable or unfavourable, for private parties; for instance, according as German jurisdiction does or does not exist, execution proceedings sought by such a party, or the manner of levying a measure of execution, may be admissible or inadmissible. In such cases, the judgement of the Federal Constitutional Court under article 83 (1) of the Act concerning the Federal Constitutional Court is limited to determining that the general rule of international law forms part of federal law.

6. DECISION BY THE FEDERAL COURT OF JUSTICE ON 26 SEPTEMBER 1978 *X v. The Head of Scotland Yard*⁴⁵

Summary of the facts:

The plaintiff, a religious community duly registered as an association, in addition to propagating its creed, seeks under the terms of its constitution to promote acceptance and recognition of the aims and beliefs of the Church of S of California in Germany; the headquarters of the mother church is in England. There are affiliated churches in several countries. In October 1969, Interpol in London transmitted to the Bundeskriminalamt, at its request, a report by New Scotland Yard on the S movement, according to which the plaintiff had been guilty of dishonest dealings with its members. In 1973, the Bundeskriminalamt passed this information on to all *Land* Criminal Investigation Offices and to the German Centre for the Prevention of Fraudulent Business Practices. The plaintiff, which according to its submission was not founded until 15 October 1970, alleges that the defendant, who has indisputably been the head of New Scotland Yard only since 1972, sent the 1969 report to the Bundeskriminalamt. The plaintiff seeks an injunction restraining him from making certain allegedly false accusations, which the plaintiff recites.

The *Land* Court dismissed the case for lack of German jurisdiction. An appeal was rejected but leave was granted to apply for a review of the case, which also proved unsuccessful.

Leading principles:

Article 25 of the Basic Law (Immunity in respect of sovereign acts extends to the official agents of sovereign States)

⁴⁵ *Neue Juristische Wochenschrift* (1979), p. 1101.

With respect to sovereign acts (acts *juris imperii*), sovereign States enjoy in accordance with customary international law, which under article 25 of the Basic Law is binding on German courts, absolute immunity, which also extends to their official agents.

Excerpts from the judgement:

The appeals court agrees with the *Land* Court that German jurisdiction is not applicable in the case in question. This opinion is correct, at least as regards the outcome.

I. The appeals court correctly first considered whether the defendant was subject to German jurisdiction, in view of his official position and according to the facts of the case on which the action was based. If this requirement is not met, no German court may render a decision on the case because it would thereby be exceeding the limits of State authority prescribed for its activities and encroaching, in violation of international law, on the sovereignty of the other State, namely, the United Kingdom (see Habscheid, *Berichte des Deutschen Gesellschaft für Völkerrecht* No. 8, p. 174, foot-note 32, and pp. 179 *et seq.*, with foot-notes 52 and 59). The fact that this question of whether jurisdiction may be exercised at all has to be settled first means that, at least when a legal action is brought, the civil court dealing with the case can and must answer it, even if the public-law nature of the dispute as such indicates that it is properly a matter for the administrative courts. Also pointing in this direction is the consideration that German jurisdiction could be found to apply here only if the dispute arises out of a non-sovereign act, as is asserted. Thus, from the point of view of relevance also, the civil court is competent to decide the case.

I. The application for review correctly points out that the appeals court wrongly based its decision on the second sentence of article 18 of the Judicature Act. By Act of 25 March 1974 (BGBl I, 761) that provision was superseded by the amended version of article 20 now in force, the wording of which is essentially the same and which is applicable retroactively (BGHZ 34, 372 (373) = NJW 1961, 1116). The application also rightly observes that immunity for the defendant in the case before us cannot be deduced from article 20 of the Judicature Act. That provision serves to supplement the provisions of articles 18 and 19 of the Act, which exempt certain specified categories of persons from German jurisdiction, and constitutes a kind of general clause designed to supply omissions by referring to the general rules of international law and to international agreements. However, the defendant in this case does not claim any such immunity derived from his person; rather, he maintains that the act on which the plaintiff bases its claim is a sovereign act of State which can only be attributed to the British State and not to him or any other official acting on behalf of that State, because the State is always to be considered the actor when one of its functionaries performs acts which are incumbent on it. The application for review rightly questions whether this *material* State immunity in respect of sovereign acts (acts *juris imperii*) claimed by the defendant can be derived from article 20 of the Judicature Act (see also Habscheid, p. 167). However, this question can be left open because, as the plaintiff agrees, the answer is to be found, via article 25 of the Basic Law, in the general rules of international law. But as the Federal Constitutional Court stated in its decision of 30 April 1963 (BVerfGE 16, 27 (33) = NJW 1963, 1732 *et seq.*), those rules can only be rules of customary international law, because there are no generally recognized conventional rules and no legal principles concerning State immunity to supplement customary law.

2. The Federal Constitutional Court (BVerfGE 16, 27 (33) = NJW 1963, 1732 *et seq.*) has noted the evolution of State practice on the question of State immunity. In contrast to the view of the absolute immunity of States—i.e., immunity in respect of both sovereign and non-sovereign acts—which prevailed up to the time of the First World War, there has occurred a “process of contraction” (Dahm, in *Festschrift für Nickisch* (1958), pp. 153 *et seq.*), the eventual result of which is that one can no longer speak of there being any customary international law, inasmuch as domestic jurisdiction is excluded in the case of actions against a foreign State with regard to its non-sovereign acts. However, there is no doubt that State immunity continues to prevail where judgements relating to sovereign acts are concerned. The application for review is unable to point to even the slightest traces of a change in this rule in recent times. On the contrary, its reference to new trends in the progressive development of State immunity under international law noted in the legal opinion submitted by the applicant at best indicates that even the United States and, in particular, the United Kingdom, which have probably maintained the doctrine of absolute State immunity for the longest time in their legal practice (see BVerfGE 16, 27 (33) = NJW 1963, 1732 *et seq.*; Dahm, particularly pp. 157-158 with foot-notes 10, 11 and 16; Verdross *Völkerrecht*, 5th ed., p. 232 with foot-note 3), are prepared to accept limitations with respect to non-sovereign acts.

3. In order to determine that the rule of State immunity with respect to sovereign acts is binding on the Federal Republic under article 25 of the Basic Law, this Chamber need not obtain a ruling from the Federal Constitutional Court in accordance with article 100 (II) of the Basic Law. There is no obligation to make a submission to the Constitutional Court simply because the parties to a case hold conflicting opinions and one of them expresses doubts as to the binding nature of customary international law; rather it is the submitting court that must have such doubts (see BVerfGE 4, 358 (369) = NJW 1956, 97; Federal Finance Court, JZ 1965, 21 (22) = BStBl 1964 III, 253). There is no reason for such action in this case. Nowhere in the international-law literature is any doubt expressed as to the immunity of foreign States in cases involving a judgement of sovereign acts (see Verdross, pp. 227 *et seq.*; Dahm, *Völkerrecht* I, pp. 224 *et seq.*; Schaumann-Habscheid, pp. 41 *et seq.*, 64 *et seq.*; Schwenk, MDR (1958), 805; also further references in BVerfGE 16, 59 (60)). This principle also forms the basis for the much-noted decision of the Austrian Supreme Court of 10 May 1950 (GRUR 1950, 531 *et seq.*, cited by Dahm, p. 156, foot-note 7; Verdross, p. 231, foot-note 3; Habscheid, p. 170, foot-note 17).

II. The application for review asserts that the Scotland Yard report on the S movement does not constitute a sovereign act; rather, under English law, the defendant's acts must be judged in accordance with private law, so that the question of State immunity does not arise. This view is incorrect.

1. The applicant's very detailed and abundantly referenced argument that under English law the activities of Scotland Yard and its organization are divorced from the exercise of State authority in the true sense and are established in accordance with principles of private law is irrelevant, because whether a State act is sovereign or non-sovereign is normally to be determined according to the *lex fori*, which, in this case, means German law; the nature of the particular State act to be judged is the decisive factor in making such a distinction (BVerfGE 16, 27 (63, 64) = NJW 1963, 1732 *et seq.* Under German public law, the exercise of police power unquestionably forms part of the sovereign activity of the State; indeed, it is so intrinsic a part of State authority that it must be termed an act *juris imperii* and may not, there-

fore, be excluded from immunity even if, under English law, it is treated as a private-law activity (Federal Constitutional Court, NJW 1963, 1732 (1735)).

2. The Scotland Yard report contested by the plaintiff was transmitted in response to a request from the Bundeskriminalamt. This is stated as an incontestable fact in the judgement of the appeals court, and indeed in the earlier judgement of the *Land* Court. The plaintiff did not dispute this, and in particular did not seek a correction of the factual findings (Code of Civil Procedure, art. 320), so that it must allow its evidential value to tell against it (Code of Civil Procedure, art. 314). The request by the Bundeskriminalamt was made in accordance with the 1961 Agreement between the Federal Republic of Germany and the United Kingdom providing for reciprocal assistance in criminal matters (BGBI II, 275).

(a) The application for review wrongly asserts that the Scotland Yard report cannot be regarded as "assistance in criminal matters" because no German request has been established, no preliminary proceedings were pending and the plaintiff was not yet in existence at that time. The wording of the Agreement does not admit of the interpretation that, in order for assistance in criminal matters to be granted, if requested by the Bundeskriminalamt, preliminary proceedings must already have been initiated against a specific defendant (Code of Criminal Procedure, arts. 158 *et seq.*). On the contrary, the request from the German police authority and the reply from Scotland Yard constitute an operation which is in keeping with the letter and spirit of the Agreement between the British and German Governments. In this case, the treaty partner of the Federal Republic acted in fulfilment of an obligation under an international treaty as the holder of police power. But that alone is sufficient ground, as was stated above, for classifying its action as an act *juris imperii* (see also Dahm, *Völkerrecht* I, p. 235).

(b) The opinion expressed in the application that the limits laid down in the German-British Agreement were exceeded in view of the plaintiff's status as a religious society is incorrect. What was involved was not surveillance of religious activities, but whether representatives of the S movement, under the guise of pursuing religious ends, profited in a criminal manner and exerted undue influence on members of their movement.

III.1. Contrary to the applicant's contention, Scotland Yard—and consequently its head—was acting as the expressly appointed agent of the British State so far as performance of the treaty in question between the United Kingdom and the Federal Republic was concerned. The acts of such agents constitute direct State conduct and cannot be attributed as private activities to the person authorized to perform them in a given case (see Dahm, *Festschrift*, p. 168). Any attempt to subject State conduct to German jurisdiction by targeting the foreign agent performing the act would undermine the absolute immunity of sovereign States in respect of sovereign activity. The way in which the police laws of the United Kingdom classify the defendant's official status has no bearing on the judgement which must be made in accordance with international law.

2. There is nothing to support the applicant's contention that the act contested by the plaintiff was entirely unrelated to the official activities of the agency concerned or the task entrusted to it; consequently, there is no doubt that the act in question must be placed within the ambit of State conduct (see Dahm, *Völkerrecht* III, p. 182).

IV. The applicant claims that service of the writ through the Senior Master is

evidence of a waiver of State immunity by the United Kingdom of Great Britain and Northern Ireland. This claim is also rejected. In the first place, it fails simply because the British State is not named as a party in the writ and the defendant himself was not in a position to influence the decision of the Senior Master, which means that the latter's action cannot be attributed to the defendant. Secondly, while the plaintiff correctly refers to the German-British Convention regarding Legal Proceedings of 20 March 1928 (RGBI II, 623), that Convention simply provides for the possibility of refusing to effect service and does not justify any interferences as to a waiver of immunity in case of such refusal. Furthermore, the predominant principle in the international-law literature (see Dahm, *Völkerrecht* I, pp. 245 *et seq.*; Habscheid, pp. 216 *et seq.*, in each case with additional references) is that the question of waiver of immunity must in all cases be given careful consideration; in the case before us, it leads to the conclusion that no waiver of immunity was intended. So extreme an example of self-abnegation (see Dahm) is not to be expected. The steps taken by the defendant in connexion with the proceedings do not permit any inference of a waiver of immunity; rather, they suggest a contrary intention. The defendant did not put in an appearance and arranged to be represented in court only in order to assert his material immunity.

K. ITALY

1. DECISION BY THE COURT OF CASSATION ON 14 AUGUST 1953 *Borga v. Russian Trade Delegation*⁴⁶

Summary of the facts:

Article 3 of the Treaty of Commerce and Navigation concluded between Italy and the Union of Soviet Socialist Republics on February 7, 1924, provides, *ad fin.*, that goods imported for commercial purposes from Russia into Italy "shall not be subject to judicial measures in the nature of an arrest". Article 4 of the Annex to the Treaty of Commerce of December 11, 1948, between the two States was to the same effect, and provided further that commercial contracts entered into or guaranteed on Italian territory by the Russian Trade Delegation were subject, in the absence of an arbitration clause, to the jurisdiction of the Italian courts.

In the present case, the facts of which do not appear from the report, the Russian Trade Delegation appealed from the judgement of an inferior court that, in respect of its commercial activities, it was subject to the jurisdiction of the Italian courts.

Excerpts from the judgement:

A foreign State, and therefore an organ of a foreign State such as a trade delegation, does not enjoy any exemption from local jurisdiction for its commercial activities.

The Court said: "In the first place, it must be observed that it is not true to say, as was held by the Court below, that there could have been on the part of the Rus-

⁴⁶ Reproduced from *International Law Reports* (1955), p. 235. Reported originally in *Giurisprudenza Italiana* (1954), p. 440.

sian Trade Delegation a tacit renunciation of its right to be exempted from Italian jurisdiction; we know that the jurisdictional immunity of the foreign State derives from its sovereignty, and therefore any renunciation of such immunity can only be in a form which is recognized in the State of the *forum* under its own internal legal system, [so far as Italy is concerned], that is to say, tacit renunciation is not such a form.

“In the second place, it is contended that, in the present case, the derogation from the principle of the jurisdictional immunity of the foreign State depends on the fact that the dispute on which the Court has been required to adjudicate arose in connection with the commercial activity in Italy of the Russian Trade Delegation; but, so far as Russia is concerned—according to the appellant—one cannot make any distinction between private law and public law activities, since, owing to the peculiar social organization of Russia, the exercise of foreign commerce is closely linked with that of sovereignty; therefore the commercial acts of the Delegation cannot be regarded as acts performed *jure privatorum*.

“In the third place, it must be remarked that in order to show that the Delegation has no immunity from jurisdiction, it is not sufficient to refer, as the Court below has done, to Article 3 of the Treaty of Commerce between Italy and the U.S.S.R. of 1928, which provides that goods coming into Italy from the U.S.S.R. for commercial purposes cannot be seized; this provision, far from giving the Italian Court jurisdiction in all matters other than those connected with seizure, was clearly inserted in the Treaty for the sole purpose of dealing with one point on which disputes might arise. On the other hand, it would be implicit that Italian nationals who had claims against the Delegation arising out of commercial transactions with it, would have to seek a remedy in the Soviet, and not the Italian, courts.

“Lastly, it must be added that it is irrelevant to the new Treaty of Commerce of December 11, 1948, concluded between Italy and the U.S.S.R. Nor is it correct to assert either that the present Delegation must be regarded as an organ different from the Delegation established by the 1924 Treaty, which came to an end at the outbreak of war, or that the jurisdiction of the Italian courts [over the Delegation]—which has been granted to a limited extent by the new Treaty—can be exercised only in respect of new contracts concluded in pursuance of the 1948 Treaty, and not in respect of those made by the pre-war Delegation.

“The contentions of the appellant must, however, all be rejected.

“The question whether the U.S.S.R. can be subjected, through its Trade Delegation in Italy, to the jurisdiction of the Italian courts for disputes connected with contracts entered into by the Delegation, has already been decided in the affirmative by this Court, and the present case could be decided by simply referring to existing precedents. But the ample exposition which Counsel for the Delegation has given to the case, both in the written and in the oral defence, makes a further examination of the problem advisable. It cannot, however, lead to a solution different from that already given by this Court.

“The arguments in favour of the immunity of a foreign State from the jurisdiction [of the Italian courts] are well known. It has been said that such an immunity is the result of long-established custom formed in the reciprocal relations of States, who have constantly behaved in such a way as to show that they are conscious that they are complying with an international legal obligation in exempting other States

from their jurisdiction. It has also been said that this exemption would be justified by the fundamental principles of equality and independence of States.

“As far as international custom is concerned, this Court observed in its decision of September 21, 1948, that the existence of such a custom is to be doubted because the international acts from which it is said to derive are few and not recent. In more recent times we find declarations of several States which are clearly contrary to it and to the international obligation which would derive from it if it existed. Such obligations can only have their basis in generally accepted legal doctrine.

“Secondly, as far as the principle of equality and independence of States is concerned, that principle would not be violated by submitting a foreign State to the jurisdiction of our courts so long as we make the distinction between those activities of the foreign State which involve the exercise of public power, on the one hand, and mere private law activities, on the other.

“As regards acts of public power, it is right that a foreign State, for all controversies which derive from them, should be exempt from our jurisdiction in regard to disputes which arise out of such acts; the exercise of jurisdiction in those cases would interfere with public law relations and constitute a limitation of the sovereignty on which they are based. This Court applied that principle when it held that the Italian courts were incompetent to determine disputes between the Russian Trade Delegation and members of its staff, even if the contract of employment was made in Italy and with Italian nationals.

“On the other hand, the position of foreign States with respect to private law activities is quite different. When a foreign State, in order to obtain a result of an economic nature, performs in the territory of another State an activity which any citizen of the latter State could perform, it becomes for this reason alone a *subditus temporarius*. Of its own free will it becomes subject, like a private person, to all those rules of the legal system [of that other State] which regulate and guarantee, through *ad hoc* judicial bodies, legal activities connected with economic interests.

“As a result, a foreign State which acts like a private person is in effect deprived of any attribute of supremacy or of public power; it acts in the same way as the Italian State would act if it found it necessary to establish contractual relations with private individuals for economic purposes. Seeing that there can be no doubt that in such a case, should any dispute arise between the parties, the Italian State could be brought before our courts, there would be no reason whatsoever for not applying the same principle in regard to a foreign State.

“It has been rightly observed that the theory which would deny the possibility of submitting a foreign State to our jurisdiction in the field of private law activities is still influenced by the old conception of the absolute State. According to that conception, it was not regarded as consonant with the dignity of a State that it should be sued in its own courts even in matters connected with its private law activities. Therefore, as such a submission was not to be tolerated at home, it was all the more strongly denied in regard to a foreign jurisdiction.

“Today, however, the theory is generally accepted that the State has a private law capacity, and not only is it bound by the rules which it itself makes to regulate the legal activity of private individuals, but it can also be summoned before its own courts, within the limits provided by law, to answer for the breach of its obligations. It follows that, since the Italian State could be sued before the Italian courts, it

would be no derogation from the independence and sovereignty of a foreign State if it were sued in respect of its private law activities before an Italian court. On the basis of these principles, it is easy to see how irrelevant are the arguments put forward by the appellant in order to defend the principle that the Italian courts would have no competence in the case under discussion.

“It is superfluous to ask whether the Russian Trade Delegation has or has not renounced jurisdictional immunity; when a foreign State carries out, in the territory of another State, an economic activity which could be performed by a private person, it thereby divests itself of its public law personality and it cannot claim immunity from the jurisdiction of that other State. No express waiver of immunity is necessary.

“It cannot be seriously contended—as does the appellant—that in the particular case of the Russian Delegation the commercial activities performed by it constitute an exercise of sovereignty because for Russia, in view of its social organization, the exercise of commerce is to be regarded as a sovereign function. In the first place, we could point out that when a State, because of the collectivist nature of the organization of its economy, undertakes the exercise of activities aiming at producing or exchanging goods, such an undertaking does widen the limits of the competence of the State, but it does not necessarily imply exercise of sovereignty—at least, not if the idea of sovereignty is to retain its traditional meaning as the supreme function, in the political sense, of the State power as an *imperium*.

“Apart from this, the legal character of the activity performed by the foreign State from the point of view of whether or not it constitutes a submission to the jurisdiction of the State in which the activity is carried out, cannot be decided according to the nature of the internal organization of the foreign State, but only according to the general principles of law which would regulate that activity if it were performed by the ‘home’ State. On the basis of these legal principles there is no doubt, for the above-mentioned reasons, that the commercial activity performed in Italy by Russia, through the *ad hoc* Delegation, must be classified as the economic activity of a State-owned enterprise. Therefore, a dispute arising out of the contractual relations of the Delegation with third persons cannot, as with analogous activities of Italian State-owned enterprises, be regarded as exempt from the jurisdiction of the Italian courts.

“It is now clear that there is no need, in order to affirm the jurisdiction of the Italian courts over such disputes, to refer to Article 3 of the old Treaty of Commerce between Italy and the U.S.S.R. and Article 4 of the Annex to the new Treaty of Commerce concluded between the same Parties in 1948. In any event, and contrary to the contentions of the appellants, the provisions of those Treaties concur in reaffirming the principle of the existence of Italian jurisdiction [over such disputes].

“The penultimate Article of the old Treaty of Commerce provided, in effect, that goods imported into Italy from the U.S.S.R. for the exercise of its commercial activity could not be subject to judicial measures in the nature of arrest. It is obvious from this provision that if the contracting States excluded Italian jurisdiction where conservatory measures were concerned, they thereby admitted that such jurisdiction might be exercised to adjudicate on disputes connected with the commercial activity performed in Italy by the Russian Trade Delegation.

“Article 4 of the Annex to the new Treaty of Commerce, after a clause similar to that in the old Treaty, expressly provides that disputes concerning commercial

contracts entered into or guaranteed on Italian territory by the Commercial Delegation are, in the absence of an arbitration clause, subject to the jurisdiction of the Italian courts. It is true that the new clause refers to new contracts entered into by the Delegation, but it cannot be denied that it gives a criterion of interpretation also for contracts entered into under the old Treaty. It shows, through a direct and formal manifestation of will of the U.S.S.R., that the U.S.S.R. does not consider (as is contended in the present case) that it is impossible for itself to be subject to Italian jurisdiction for the commercial activity carried out in Italy by its Trade Delegation.

“Finally, there is no need to spend more time than necessary on the distinction put forward by the appellant—always for the purpose of denying Italian jurisdiction in the present case—between the Trade Delegation established by the U.S.S.R. under the old Treaty and that governed by the new Treaty.

“This Court has already decided that the Russian Trade Delegation is an organ of the Soviet State; therefore, in order to establish the conditions and the limits of its existence in Italy, it is not its own declarations but the declarations of the State which it represents in its particular commercial activity, that are relevant. Therefore, as there has never been a declaration on the part of the Soviet State bringing its Delegation to an end, and as, on the contrary, its existence has been recognized in the Commercial Treaty of 1948, it cannot be denied that the Delegation continued to exist during the period between the conclusion of the two Commercial Treaties.

“Nor can it be said that the existence of the Delegation was terminated *de jure* in 1941 owing to the outbreak of war between Italy and Russia. War, while it suspends international relations between the belligerent States, does not of itself bring about the extinction of the organs through which those relations are carried out, which organs again perform their functions as soon as normal international relations are resumed between those States . . .

“It is the internal legal system of the State which actually determines the legal effects that the outbreak or the termination of war produces with regard to relationships of substantive or of procedural law which were established on its territory before such events.”

2. DECISION BY THE TRIBUNAL OF ROME ON 30 JANUARY 1955 *La Mercantile v. Kingdom of Greece*⁴⁷

Summary of the facts:

The Kingdom of Greece entered into a contract with the plaintiff firm for the purchase of copper and other metal scrap. The plaintiff sued the Kingdom of Greece in an action arising out of that contract. The defendant raised the plea of sovereign immunity from the jurisdiction of the Italian courts. The defendant also pleaded that as the contract had been executed at the Greek Embassy in Rome and therefore not within Italian territory, the Court had in any event no jurisdiction to hear the case.

Excerpts from the judgement:

The Greek State was subject to the jurisdiction of the Italian courts in proceedings arising out of its commercial transactions; and the fact that the contract was concluded at a foreign embassy did not deprive the Court of jurisdiction.

⁴⁷ Reproduced from *International Law Reports* (1955), p. 240. Reported originally in *Rivista di Diritto Internazionale* (1955), p. 377.

The Court said: "The defendant (the Kingdom of Greece) raises the objection that Italian courts cannot have jurisdiction in this case, for the following reasons: (1) the defendant being a foreign State, it is not subject to Italian jurisdiction; (2) in this case, Article 4 of the Code of Civil Procedure, on the basis of which Italian courts exercise jurisdiction over a foreign defendant, does not apply [because the contract was not concluded in Italy].

"On this point we must observe that the Supreme Court of Cassation has long affirmed the principle, which has been adhered to by writers on international law of the highest authority, that a foreign State is subject to the jurisdiction of Italian courts, within the limits of the [municipal] rules regarding their competence (see the judgment of the Court of Cassation of September 24, 1948, No. 1631). This principle is not, as the defendant contends, affected by Article 10 of the Constitution of the Republic, which provides for the incorporation of the rules of international customary law into Italian law; that provision presupposes that those rules are generally recognized.

"The principle that foreign States enjoy absolute jurisdictional immunity for all their activities, including acts of a private law nature, is admitted by some legal systems but not by all, and not by Italy. Therefore the rules which derive from that principle cannot be recognized as having that general character which is required by the above-mentioned constitutional principle for the incorporation of international law in our legal system.

"The enquiry which we must carry out in regard to the principle affirmed by the Supreme Court, that a foreign State may be made subject to Italian jurisdiction, is based on two grounds. On the one hand, we must ascertain whether the activity in respect of which the Greek State has been sued in the present case has a private law character. On the other hand, we must see whether in this case there exists one of the criteria which give the Italian court jurisdiction.

"On the first point, it does not seem possible to doubt that the supply of metal scrap by a State to private persons under a contract made with it, constitutes a manifestation of a private activity of that State. The defendant contends otherwise, arguing that the contract for the supply of metal scrap and copper, which forms the subject matter of the present proceedings, having been entered into in pursuance of the Greco-Italian Agreement for Economic Collaboration signed on August 31, 1949, which both contracting States had brought into operation by their own laws, does not constitute a form of private activity. Such a contention, however, is clearly unfounded in so far as the Agreement mentioned—although it was intended to regulate all matters connected with reparations due, under Article 74 (b) of the Peace Treaty of 1947 between Italy and the Allied and Associated Powers, from Italy to the Greek State, and therefore contained clauses which are binding on the political activity of the two States—provides for Greece to deal in Italy (within the limits of the Agreement) with private persons, *i.e.*, to enter directly with such persons into contracts for the supply of raw materials necessary for the production of goods to be imported into Greece on the reparations account. It is evident, therefore, that whenever the Greek State, even in pursuance of the above-mentioned Agreement, enters into contractual relations with private citizens and deals with them on a basis of parity, it is performing an activity which, for its object, must be regarded as purely private and as being distinct from those activities which the State performs *jure imperii*. On the second point, we must observe that in the present case the jurisdictional competence of the Italian courts depends on the fact that the subject-matter of this litigation is a contract

made by the Greek State in Italy. The contract was entered into in Rome on August 6, 1952, between the plaintiff and the Greek Ambassador to Italy. The circumstance that the contract was concluded in the building of the Greek Embassy does not alter the fact that it was concluded in Italy. The contention of the defendant to the contrary is unfounded; it is based on the theory that the seat of a diplomatic mission enjoys so-called extritoriality. A series of immunities and limitations of the normal powers of the [receiving] State are a part of the privileges which the foreign diplomat enjoys. However, we cannot believe that these immunities extend to the place in which the diplomatic official performs his mission, so that that place is regarded as being outside the territory of the [receiving] State and that as a consequence the acts performed by him [in an Embassy in Rome] must be deemed to be performed outside the territory of the Republic. This is in keeping with the most modern opinion which, for the very purpose of eliminating any doubt on this point, has rejected the fiction of extritoriality to which earlier authorities referred in order to explain the basis of the immunities.

“Therefore we must conclude that in the present case Italy has jurisdiction over the Greek State, the defendant in this action.”

3. DECISION BY THE COURT OF CASSATION ON 24 MAY 1956 *Hungarian People's Republic et al. v. Onori*⁴⁸

Summary of the facts:

The plaintiff (respondent herein) brought an action against the Hungarian People's Republic (appellants herein) for damages for wrongful dismissal. For some years she had been employed on general administrative and domestic duties at the Hungarian Academy in Rome. The Academy was a cultural institute established in Rome in pursuance of the Italo-Hungarian Cultural Agreement of February 16, 1935, and was originally a private establishment known as the “Hungarian Academy of Painting and Sculpture”. It was later taken over by the Hungarian Government. The latter claimed immunity from the jurisdiction of the Italian courts on the ground that the contractual relationship between the parties was one which involved the exercise of “sovereign functions” by the Hungarian Government. The lower Court overruled the plea to the jurisdiction, and the Hungarian Government appealed.

Excerpts from the judgement:

The contractual relationship between the parties was not one involving the exercise of “sovereign functions” by the Hungarian Government but was of a private character, and the tasks performed by the respondent were not such “public functions” as would entitle the Hungarian Government to claim immunity from the jurisdiction of the Italian courts.

The Court said: “The appeal is based on an alleged violation of Article 360, in conjunction with Article 37, of the Code of Civil Procedure and the Royal Decree of February 25, 1935 (No. 272), which gave the force of law to the Cultural Agreement between Italy and Hungary signed on February 16, 1935. It also alleges a violation of Article 10 of the Constitution of the Republic of Italy and of customary rules of international law. More particularly, the appellants attack the judgment of the Court of Appeal of Rome because that Court held that the Italian courts had jurisdiction

⁴⁸ Reproduced from *International Law Reports* (1956), p. 203. Reported originally in *Rivista di Diritto Internazionale* (1956), p. 190.

over the State of Hungary and its organs concerning the dispute with the respondent, which arose out of a contract of employment between them and the respondent. They say that the Court of Appeal did not take into account that this relationship between them and the respondent, which is of a sovereign character, arose out of and in the execution of the above-mentioned Agreement and was therefore outside the competence of the Italian courts. They also say that the Court of Appeal failed to consider that the Hungarian State had and has sovereign power to organize, in every respect, the [Hungarian] Academy in Rome where the respondent rendered services inherent in the public purposes of that institution. In resolving the problem before the Court we must, above all, bear in mind the rule that a State is entitled to immunity from the jurisdiction when as the holder of sovereign power it acts within the sphere of its own Constitution. In addition, such immunity is granted where it is expressly provided for in an Agreement between subjects of the international community even if the legal relationship governed by such Agreement is not of a sovereign character. In the Italo-Hungarian Agreement referred to above, which was designed to develop cultural relations between the two States in the scientific, literary and artistic spheres, the Contracting Parties, while undertaking, on the one hand, to establish an Italian Institute in Budapest and, on the other hand, a Hungarian Institute [Academy] in Rome, and providing for the management of these Institutes and fiscal concessions for the construction and repair of their respective buildings, made no reference, for the purpose of the exercise of jurisdiction by their respective courts, to contracts of employment and service which would ensure adequate personnel to run the two Institutes. It follows that in the present case the Court must have recourse to the general principles of international law and must ascertain whether within the framework of the above-mentioned relationship the foreign State has exercised a sovereign activity as a sovereign body within the scope of its own Constitution, or whether it has acted as a private individual within the internal Constitution of the other State. Where this Court has to examine the prerequisites of jurisdictional competence it is not precluded from an enquiry into the facts. The immunity of the Hungarian State from the local jurisdiction could certainly not be denied if the Hungarian State had entrusted the respondent with the performance of official functions, because in that case the functions of the respondent could be identified with the will and activity of the [foreign] State. In such a case, where the appointment is made in pursuance of a measure having a sovereign content and relating to the organization and functioning of the State, no interference by another State could be permitted. As far as the contract of employment with the respondent is concerned, these conditions are not satisfied. The respondent was originally employed by a private enterprise in Rome [the Hungarian Academy of Painting and Sculpture]. Subsequently, a change of employer took place and the Hungarian State became the respondent's employer. The private character of the employment, however, remained unchanged in that the Hungarian State did not then act in a sovereign capacity since the work of the respondent, while performed in the interests of that State, had no legal connection with the latter's sovereign tasks. The records show that no public functions relating specifically to the cultural tasks of the Academy were entrusted to the respondent. She performed tasks ancillary to the internal services of the Academy, such as looking after the hostel annexed to the Academy, the canteen, the collection of debts, the payment of suppliers and the domestic staff, the guest rooms and the general cleanliness of the premises. The letter of July 7, 1949, from the Hungarian Ministry of Education and Fine Arts to the respondent, who had contested the legality of the notice given to her by the management of the Academy, shows that the Ministry justified the notice which it

had authorized to be given by saying that there was no need for any particular notice to be given by that State authority because the respondent 'always received her salary, not direct from the Ministry but, like all the other servants, from the special fund administered by the Academy for its purposes'. This letter, in so far as it refers to the work entrusted to the respondent, contradicts the contention of the appellants that the relationship between themselves and the respondent falls within the scope of the sovereignty of the Hungarian State, which is vested with the *potestas imperii* to perform its functions. As had been held by this Court in a recent case (No. 1996) decided on June 14, 1954, subjects of international law can, if they do not invoke their position of supremacy, have recourse to relations of a private law character. This implies waiver of immunity and therefore acceptance of the jurisdiction of the Italian courts in respect of legal transactions entered into in that manner. This is the case with regard to the relationship between the Hungarian State and the respondent. The appeal is therefore ill-founded. . . ."

4. DECISION BY THE COURT OF CASSATION ON 17 OCTOBER 1956 *Paver v. Hungarian People's Republic*⁴⁹

Summary of the facts:

The appellant (plaintiff in the Court of first instance) brought an action against the Hungarian People's Republic for certain sums of money owing to him by the Hungarian General Credit Bank which, together with all other Hungarian banks, had been nationalized by a Hungarian law. He contended that as the Hungarian People's Republic had substituted itself for the Hungarian General Credit Bank, it was liable to repay the debt. The Court of first instance upheld a plea of the Hungarian People's Republic to the jurisdiction, and the appellant now asked for a reversal of that decision. He contended that the effect, as between himself and the Hungarian People's Republic, of the nationalization of the Hungarian General Credit Bank was not a matter arising out of the performance of the sovereign functions of the Hungarian People's Republic and that the latter was accordingly not immune from the jurisdiction of the Italian courts.

Excerpts from the judgement:

"The appellant submits three grounds of appeal against the judgment of the Tribunal of Rome: That the Court below declined to exercise jurisdiction on the ground that international law grants immunity from jurisdiction to a foreign State; that it declined to exercise jurisdiction on the ground that the criteria for which Article 4 of the Code of Civil Procedure provides were not present; that it failed to determine the question of its territorial competence, from which the determination of the question of jurisdiction could have been inferred. The first ground of appeal is put in this way: The appellant is a creditor of the Hungarian General Credit Bank, against which he obtained a judgment holding the Bank liable as guarantor to repay moneys owed by another bank. The appellant says that as the Hungarian People's Republic has nationalized all banks, the Hungarian General Credit Bank has ceased

⁴⁹ Reproduced from *International Law Reports* (1957), p. 211. Reported originally in *Rivista di Diritto Internazionale* (1957), p. 248.

to exist as a separate entity and that there was substituted for it the Hungarian State, which must therefore be held liable to repay the debt. He accordingly brought an action against that State asserting the competence of the Italian courts on the ground that the cause of action is not concerned with the public measure of nationalization of banks—a measure which the defendant State admits and on which it relies—but with the effect of such measure, which is said to be of a private nature. Therefore, he contends, the question of the immunity of the foreign State from the jurisdiction does not arise because this question would presuppose a dispute concerning the performance of sovereign functions of that State. This argument is without merit.

“It is well known that the relations arising from the acts of a foreign State in its capacity as a subject of international law and those in respect of which it acts as the holder of sovereign power are exempt from the operation of municipal law. A rule of international law deriving from the principle of respect for and autonomy of foreign States requires such exemption. Italian law, by virtue of Article 10 of the Constitution, conforms to that rule. The Italian courts are agreed that a foreign State cannot be sued in respect of relations of public law, which bring into operation the concept of immunity from the jurisdiction. On the other hand, the courts assume jurisdiction against a foreign State where the latter has created legal relations of a private nature, viz., has acted *more privatorum*. The application of these principles shows that the decision of the Court below is correct. The Hungarian People’s Republic became the successor of the [Hungarian General Credit] Bank and took its place, as far as the contractual relationship between the Bank and the appellant is concerned, by virtue of the legislative enactment providing for the nationalization of banks, that is, in the performance of a sovereign function. Although the legal relationship between the appellant and the Bank is of a private character, the relationship between the appellant and the Hungarian People’s Republic is certainly not of a private character. The People’s Republic succeeded the original debtor by virtue of a sovereign act of the Hungarian State, which was performed in the exercise of the latter’s sovereign functions. We can have regard only to this latter act, because it is only by virtue of that act that the State can become liable. If the succession had come about as the result of a private act, such as that whereby an estate devolves upon the State, the latter would have been substituted without being able to rely on the exercise of its sovereign power, and there would in that case be no reason to regard the State as immune from the jurisdiction. It would be likewise if a contract had been made by the State to take over the liabilities of the Bank. In this case, however, we are concerned with a Law which had nationalized banks in the public interest, in accordance with the policy pursued by the State concerned. It may be added that the contention of the appellant according to which the effect and scope of the Nationalization Law are not in issue is ill-founded, because the Hungarian People’s Republic has shown that this Law did not diminish the legal personality and organizational autonomy of the Bank of Hungary and other banks, but confined itself to nationalizing the shares in them which were Hungarian-owned. The Court must therefore deny the competence of the Italian courts, and this makes it unnecessary to consider the second ground of appeal, namely, the question of jurisdiction from the point of view of municipal law according to Article 4 of the Code of Civil Procedure—a question which the Court below decided *ad abundantiam*.”

5. DECISION BY THE COURT OF CASSATION ON 14 JULY 1960
*Hungarian Papal Institute v. Hungarian Institute (Academy)*⁵⁰

Summary of the facts:

The appellant, the Hungarian Papal Institute (Pontificio Istituto Ecclesiastico Ungherese), claimed that it was joint owner, with the respondent Hungarian Academy in Rome, of a library in a building where both parties had premises. The appellant claimed that one effect of the joint ownership was that its members were entitled to use the library. They had used it until 1951, when the Director of the Academy closed the library to them. After fruitless attempts to obtain access for its members, the Institute brought a petition asking that its rights of possession should be restored or upheld by an order to the Director of the Academy to re-open the library. The case first came before the Praetor of Rome. The Academy entered an appearance but contended, *inter alia*, that the Court had no jurisdiction on the ground of sovereign immunity, because the Academy was an instrumentality of the Hungarian State. The Praetor and, on appeal by the Institute, the Rome Tribunal, upheld this contention. The Institute appealed to the Court of Cassation on grounds which are fully set out in the judgment.

Excerpts from the judgement:

...
 In their action brought before the Praetor of Rome on 26 February 1952, the Pontifical Hungarian Ecclesiastical Institute claimed that it had always been the joint owner, with the Hungarian Academy in Rome, of the library in the Palazzo Falconieri at No. 1 Via Giulia, where both the aforesaid Institute and Academy have premises. The Institute claimed that it exercised its rights of joint ownership by means of its power—acknowledged to be exercisable by its directors, students and scholarship holders—to enter and remain in the library and to consult works there and to borrow books from it. The Institute alleged that in the second half of 1951 the Director of the Academy, taking advantage of the summer holidays, arbitrarily closed the library. When invited, by means of a registered letter sent to him by the Director of the Institute, to specify the days and times when the library could be used, the Director of the Academy did not reply. Further, after a notice served on him on 18 December 1951, the Director of the Academy let it be known that the library would be closed temporarily. In view of the above, and since the conduct of the Academy deprived the Institute of and was prejudicial to its rights of ownership, the Papal Institute by its petition to the Praetor asked that its rights of possession should be restored or upheld by means of an order to the Director of the Academy to re-open the library and enable the Institute to enjoy its use.

The Hungarian Academy entered an appearance but contended that the Institute had no cause of action and no right to bring the present action; further, that the Italian courts had no jurisdiction, and that the Institute's claim was unfounded. The Praetor in a judgment of 3 to 19 July 1955 held that the Italian courts had no jurisdiction.

The institute appealed. The Tribunal of Rome rejected the appeal (judgment of 31 July 1957)

⁵⁰ Reproduced from *International Law Reports*, vol. 40, p. 59.

In a single motion of appeal, which, however, includes a number of separate points, the Pontifical Hungarian Ecclesiastical Institute puts forward the following grounds in support of its appeal:

(a) The Court below was wrong in declining jurisdiction, since a foreign State has rights of a private property nature in property which is the subject of an action brought for the restoration of property rights; it follows therefore that the law to be applied is the law of the place in which the property is situated, that is to say, Italian law, by virtue of Article 22 of the Laws dealing with such property.

(b) The Court below was wrong in holding that if the action had been brought against the Italian State the case could not have proceeded, and in inferring from this that a foreign State has immunity in such a case from the jurisdiction of the Italian courts. For an action for the restoration of property rights can be brought against the Public Administration in a case where the latter has acted in a way completely outside its powers, as the Hungarian Academy acted outside its powers in the present case.

(c) The Court below gave no decision on the point, raised by the Institute, that a foreign State can only be the owner and possessor *jure privatorum* of property situated in Italian territory.

(d) The Court below considered matters which went beyond the subject-matter of the Institute's claim that as owner it was entitled to enter the premises. For once it was established that the Pontifical Hungarian Ecclesiastical Institute had a right to possession of the library, the right of possession came before every other question of the status of the Hungarian Academy and before the questions of the relationship of the Academy with the Institute and the position of both with respect to the library.

(e) The Court below was wrong in holding that the Hungarian Academy is an organ of the Hungarian State; the true position is that the Academy is a confraternity of a private nature, as may be seen from its origins and its objects.

(f) The Court below did not take into account the fact that the Pontifical Institute has as a foundation a right of property and of enjoyment of property in respect of the library.

It must first of all be pointed out that the Tribunal of Rome did not fall into the error alleged in paragraph (c) of the motion of appeal, for the Tribunal expressly stated that there could be no question here of State public property, as the Praetor had held, since by Article 822 of the Civil Code only the Italian State can own public property of that nature in Italian territory. Thus the Tribunal recognized the fact that any rights of the Hungarian State in the library could only be rights of a private nature.

Having disposed of that, the next point to note is that the question whether or not the Italian courts have jurisdiction cannot be answered by invoking Article 22 of the general law, according to which the law governing possession, property and other rights in property is the law of the place in which the property is situated. This rule cannot be prayed in aid to resolve the question of a foreign State's immunity from jurisdiction, for this question has to do not with the law to be applied but with the scope of the jurisdiction of the Italian courts.

Following principles of the highest authority, the United Chambers of this Court have on many occasions held that among those rules of international law which are

universally accepted, and with which Italian law must conform according to Article 10 of the Constitution of the Republic, there is the rule which accords to foreign States exemption from jurisdiction with respect to relationships which have no connection with the municipal legal system, either because those States act as subjects of international law or because they act according to powers which are theirs as sovereigns. This is so in that the State which undertakes activities in the territory of another State cannot be subjected to the jurisdiction of the courts of the forum, according to the principle that *par in parem non habet imperium*. But if the foreign State's activities are not connected with the exercise of its powers as a sovereign, so that it acts on the same plane as a private citizen, the courts of the forum may have jurisdiction, for the foreign State is then acting within the jurisdiction of those courts.

That lack of connection between the relationship in question and the legal system of the forum must be understood to include not only procedural matters but also questions of substantive law, in the sense that the municipal courts will not proceed to make any examination of such a relationship. It is precisely in connection with these principles that these United Chambers have held that the question of a foreign State's immunity from jurisdiction takes precedence over all others, in accordance with Articles 2–5 of the Code of Civil Procedure (see the judgment of 8 June 1957, No. 2144).

On the basis of the principles discussed above, the central point in issue in the present case was and is whether the act in question, assuming that it constituted an invasion of property rights, is attributable to the Hungarian State; and if it is so attributable, whether the Hungarian State was, in acting in that way, acting as a sovereign or in a private capacity. The Tribunal of Rome considered the first of the above questions in the proper manner. It found, on the basis of the documents which were produced in the action, that the Hungarian Institute, or Hungarian Academy, was directly under the control of the Hungarian Ministry of Religion and Public Education, a Ministry which has complete power over the running of the Academy and which directs it through the officers it appoints.

The Cultural Agreement between Italy and Hungary of 16 February 1935, which became part of Italian law by Legislative Decree No. 272 of 25 February 1935 (later changed to Law No. 1385 of 3 June 1935), allows the Hungarian State to undertake, through the Hungarian Academy in Rome, activities with cultural objects, which are set out in the Agreement, aimed at publicising Hungary and various aspects of Hungarian life. In view of this it is impossible to hold that the Hungarian Academy is not an organ of the Hungarian State. It is worth noting that even if it were held that, on the contrary, the Academy was a public body with no connection with the Hungarian State, this would not affect the answer to the question in this case, for the principles of the jurisdictional immunity of foreign States apply also to foreign public bodies. (See Judgment No. 841 given by the United Chambers of this Court on 13 March 1957.)

The Tribunal also answered the second question correctly. The rules of the Foundation provide that the library is to be so organised as to further the cultural objects for which it was created. Thus the act of the Director of the Academy regulating entry to the library—the act which the appellant claims is an invasion of its property rights—has as its purpose the putting into effect of the aims of the Academy itself. It is therefore an act of the Hungarian State, through its officials, within the scope of its publicising activities connected with the spreading of culture.

As is well known, the characterization as public or private of a legal relationship created by a foreign State, a characterization which is necessary for the purposes of deciding whether there is immunity from jurisdiction, can give rise to uncertainties. One way of overcoming these uncertainties has been to consider the analogous principles which govern the jurisdiction of Italian courts over the Italian State. In the present case, however, there is no difficulty in reaching a conclusion, for the state of affairs in question originated in an act which a foreign State performed in accordance with an international agreement. That agreement authorizes the Hungarian State to engage in cultural activities in Italy through the Hungarian Academy, and so by necessary implication authorizes the Hungarian State to organize its activities in whatever way, in its discretion, it considers opportune. Thus the above analogies can be left out of account here, and indeed the Tribunal only took them into account *ad abundantiam*.

From what has been said above it follows that paragraphs (a), (b) and (e) of the motion of appeal are without foundation as reasons for reversing the decision of the Tribunal of Rome.

As for paragraphs (d) and (f) of the motion of appeal, this Court holds that there was nothing that went beyond the limits of the Institute's case and no failure to take into account the rights of the Pontifical Hungarian Ecclesiastical Institute in the library. For the Tribunal did not find that the Hungarian Academy's act was lawful nor did it say that the Pontifical Institute had no rights in the library. The Tribunal went no further than to hold that the act in question was attributable to the Hungarian State and that, since the act was public in nature, it gave rise to a state of affairs which could not be subjected to examination by an Italian court, seeing that the Italian courts must hold such acts and such a state of affairs to be outside the scope of the Italian legal system.

The appeal is therefore dismissed, and this Court declares that the Italian courts have no jurisdiction (Article 382 (1) of the Code of Civil Procedure).

L. JAPAN

1. DECISION BY THE SUPREME COURT ON 28 DECEMBER 1928 *Matsuyama et al. v. Republic of China*⁵¹

Summary of the facts and the judgement:

The plaintiff claimed payment for the promissory note issued by Chargé d'Affaires of the defendant State. The courts of the first and second instances decided that, since the defendant had not waived its immunities, no service of writ from the Court could be done. The (former) Supreme Court upheld the conclusion of these decisions of the lower Courts, stating that "the service undertaken by the Court and its designation of the date of subpoena is tantamount to the exercise of Japan's sovereign power, and therefore, they cannot be enforced upon a foreign State which is not to be subjected to our sovereignty". The Court further stated:

"Since a State is not to be subject to another State except by the former's self-

⁵¹ *Daishin' in Minji-hauneishu* (former Supreme Court Civil Reports), vol. 7, No. 12, p. 1128 f. (Translated by the Secretariat.)

restraint, a foreign State does not, in principle, come under Japan's jurisdiction with regard to civil procedures excepting suits concerning immovable property. However, it is an established rule of international law that, only in case the foreign State in question voluntarily submits itself to our jurisdiction, it will be an exception. Such an exception could be stipulated for in a treaty or could be made as an *ad hoc* expression of its jurisdictional submission with regard to a specific suit in question. However, such an expression should always be made vis-à-vis the State of Japan by the said foreign State. Even if there is an agreement between the foreign State and a Japanese subject according to which the former agrees to submit itself to the jurisdiction of Japan, this does not automatically give effect to oblige the said foreign State to actually submit to our jurisdiction."

2. DECISION BY THE DISTRICT COURT OF TOKYO ON 9 JUNE 1954
*Limbin Hteik Tin Lat v. Union of Burma*⁵²

Summary of the facts:

The claimant filed with the Court an application for provisional disposition to determine the provisional status of a piece of land to which he claimed title. The land in question, situated next to the premises of the Burmese Consulate-General in Tokyo, was actually purchased in 1944 by A. (third party in the present case), father-in-law of the claimant and the then Burmese Ambassador to Japan. The claimant purchased the land in question in 1953 from the wife and daughter of A., who were his joint legal successors under Burmese law. He came to Japan, obtained delivery of the land then in the possession of the administrator, and completed the registration of the transfer on the ground of purchase.

The respondent, the Government of the Union of Burma, was of the view that the purchase of the land in question was made by A. in his capacity as agent of the respondent, so that the title to the land belonged to the latter. The respondent sought a provisional disposition for striking out of the registration, which the Court granted. The claimant thereupon filed with the Court the present application for provisional disposition in order to prevent disturbance to his title and possession of the land.

The point at issue before the Court was whether a Japanese court had jurisdiction in a case in which the respondent was a foreign State.

Excerpts from the judgement:

The respondent, the Union of Burma, is known to the Court to have achieved independence a few years ago; it has a Government and controls a certain territory and its people, and has its consuls stationed in this country. In the absence of proof of the existence of special circumstances, such as the fact that the Union does not exercise exclusive control over its territory and its people, the Union must be recognised as a foreign State for the purposes of civil proceedings, even if Japan has not recognised it.

A State is not subject to the exercise of power by another State, and therefore is not subject to the jurisdiction of another State in the matter of civil proceedings. This is to be admitted as a principle of international law recognised in general However, it need hardly be added that in cases where a foreign State has consented by

⁵² Reported from *International Law Reports*, vol. 32, p. 124. Reported originally in *Kakyusaibansho Minji Saibanreichu*, vol. 5, p. 836.

agreement to submit to the jurisdiction of another State, or where a State has waived as against another State its privilege, based on this principle, to submit to the jurisdiction of the latter, a foreign State may be subject to the jurisdiction of another State. Again, in an action concerning immovables, it is widely admitted that jurisdiction belongs exclusively to the State of the *situs*, and consequently it must be said that a foreign State may be subject to the jurisdiction of another State.

In general, there is as yet no clearly recognised principle of international law on the question of jurisdiction in international cases, so that each State has to determine the extent of its jurisdiction. Consequently, such a determination, even if not respected by foreign States, is none the less valid in the sphere of municipal law of the State making the determination, and as a result clearly gives a basis for the exercise of jurisdiction against a foreign State. However, there is in our law no provision determining the extent of such jurisdiction, and the question must be judged by international customs and other factors. In this respect, there is no denying the fact that an immovable is an object *par excellence* of territorial sovereignty of the State of its *situs* and this fact has been regarded as worthy of respect as a matter of international comity; hence it has come to be recognised for a long time that an action directly concerning immovables comes within the exclusive jurisdiction of the State of the *situs*. It has to be admitted, therefore, that, judging from its motive and its history, this principle has been recognised as applicable in actions in which a foreign State is a party, as well as where a private person is a party.

Accordingly . . . it has to be concluded that Japan has jurisdiction, and the present Court has competence, over the present proceedings in which the Union of Burma is designated as respondent.

With regard to the designation of the Burmese Consul-General as an agent of the respondent, the Court said: "Although in principle a Consul-General is considered according to international law not to have authority to represent his State at the diplomatic level, whether he is endowed with authority to represent his State in civil proceedings is a matter to be decided solely by reference to the legal system of the Union of Burma." The Court concluded from the evidence that he was endowed with such authority.

On the question of the propriety of serving the writ of summons on his person, the Court admitted that such service was not in general permissible if the Consul-General enjoyed diplomatic privileges and immunities. The Court continued: "In cases where the Union of Burma, as respondent, should be subjected to our jurisdiction, the exercise of jurisdiction has to that extent to be recognised, and it cannot be regarded as contrary to international custom to serve the writ on his person, even when he has privileges as head or a member of the diplomatic mission and inviolability with regard to his residence, etc."

3. DECISION BY THE DISTRICT COURT OF TOKYO ON 23 DECEMBER 1955 *Republic of China v. Chuka Newspaper Co., Ltd., et al.*⁵³

Summary of the facts:

The defendant, Kabushiki-Kaisha Chuka-Kokusai-Shimbun-Sha (hereinafter referred to as "the defendant Company"), a corporation established under Japanese

⁵³ Reproduced from *International Law Reports* (1956), p. 210.

law by Chinese nationals, was on June 1, 1950, granted a loan of 7,200,000 yen by the Delegation of the Republic of China to the Allied Council for Japan (hereinafter referred to as "the Chinese Delegation"). The defendant Lin Hei-shuo agreed to stand surety for the loan.

This was an action to recover the amount of the loan. It was brought by Mr. Tung Hsien-kuang, the Ambassador of the Republic of China to Japan, as the representative of the plaintiff Republic, against the defendant Company and Lin Hei-shuo. The defendant Company objected to the jurisdiction of the Court and to the claim of the Ambassador to represent the Republic of China, contending "that under customary international law a State cannot exercise jurisdiction over another except where the latter State expressly waives this immunity and consents to submit to the jurisdiction of a foreign court, that plaintiff gave no such express consent, and further, that there is no clear basis enabling the Ambassador, Tung Hsien-kuang, to represent the plaintiff Republic in this litigation." The defendant Company contended also that the Chinese Delegation was not a governmental agency of the Republic of China.

Excerpts from the judgement:

Under customary international law a State is immune from the jurisdiction of foreign courts, unless it voluntarily submits to the jurisdiction of the court concerned. Such exception is generally made by a treaty or by express consent of the State concerned (*Daishin-in* (former Supreme Court) decision (*Ku*) No. 218 of December 28, 1928) In the instant case, plaintiff waived this privilege by appearing voluntarily before this Court. Therefore the Court may properly exercise jurisdiction over the case.

According to Mr. Kisaburo Yokota (an expert witness), the powers delegated to the Chinese Delegation by the Republic of China may be deemed to have passed to the Ambassador of the Republic of China in Japan by the coming into effect of the Treaty of Peace between Japan and the Republic of China on August 5, 1952. . . . And where a State brings an action in a foreign court, its customary representative is its foreign envoy unless a special representative is designated for that purpose.

According to Mr. Kisaburo Yokota, the Chinese Delegation was sent to Japan by the Republic of China to participate in the Allied Council for Japan during the occupation of that country. Although the Chinese Delegation was not sent to represent the plaintiff Government, it had been conducting various activities for the protection and supervision of Chinese nationals resident in Japan and their commercial affairs, and on February 13, 1951, it acted for the Republic of China in certain diplomatic matters between Japan and the Republic. The Court recognized the Chinese Delegation as a Governmental Agency of the Republic of China and that the loan in question was made to protect Chinese nationals in Japan. Mr. Yokota had further testified that the Chinese Delegation was recognized by the Supreme Commander for the Allied Powers and the Japanese Government as having diplomatic functions besides the responsibility of protecting and supervising Chinese nationals in Japan.

The Court found that the loan made by the Chinese Delegation created a legal right in favour of plaintiff, and held that the defendant Newspaper Company and Lin Hei-shuo were jointly liable to the Government of the Republic of China as a result of the said loan.

M. MADAGASCAR

1. DECISION BY THE COURT OF APPEAL ON 27 JANUARY 1965

*Mahe v. Agent Judiciary du trésor français*⁵⁴

Summary of the facts:

The plaintiff, Mahe, was the owner of a plot of land in Tananarive (Madagascar). On 16 December 1963, the French Permanent Mission of Aid and Co-operation, "MINAICOOP", in Madagascar, offered to buy part of the plot to make a car park next to the house of the Chief of the Mission. The plaintiff, having refused the offer, later learned that the Mission, which had rented a plot from a neighbouring owner, had encroached to the extent of 127 metres on his property. By writ dated 28 May 1963 the plaintiff asked for an order that the French State pay him 1,305,950 frs. by reason of the fact that the Chief of the French Permanent Mission of Aid and Co-operation had laid out a car park on his, the plaintiff's, plot of land, without authority, making substantial alterations thereto and causing the plaintiff irreparable damage.

On appeal from a judgment of the Tananarive Court of First Instance.

Excerpts from the judgment:

The appeal must be dismissed. Diplomatic agents and, *a fortiori*, States accredited these agents were immune from any actions concerning real property.

The Court, having stated the facts, said:—

"As the competence of the *ratione loci* or *materiae* or *personae*, as laid down by the Franco-Malagasy Agreement of 27 June 1960, is not here in dispute, nor is the legal immunity of diplomatic agents, the chief of the 'MINAICOOP' Mission is not summoned. The question is whether or not the French State can deny the competence of the Malagasy tribunal in respect of the act of force, namely, the alleged encroachment.

"It is accepted by the jurisprudence of most countries, and in particular by France and Madagascar, that the rules of international comity concerning foreign sovereignty are opposed to a foreign State being judged, unless it waive its privilege, by the courts of another sovereign State.

"Of course, certain authors, like Niboyet, consider that in regard to all matters concerning immovables which a sovereign State has been able to acquire in a foreign country, that State cannot take advantage of any immunity. This view could be given effect to, with difficulty, in cases of disputes regarding, for example, easements, the State in question being regarded as having, in that foreign country, waived the immunity in acquiring an immovable.

"This theory does not seem to have achieved international acceptance. The result, in fact, of Article 31 of the Vienna Convention of 18 April 1961 on diplomatic relations (published in the *Journal Officiel de la République Malgache* of 20 July 1963, p. 1673) is that diplomatic agents enjoy immunity in all actions affecting real property at the time when these agents are in possession, for the purposes of their mission, of the subject-matter of the action on behalf of the sending State.

"Of course this arrangement concerns diplomatic agents, but it is easy to infer

⁵⁴ Reproduced from *International Law Reports*, vol. 40, p. 80.

from it that the States accrediting these agents cannot, *a fortiori*, be taken before the courts of the receiving State in any action concerning real or personal property.

“The judgment appealed from must be affirmed.”

2. DECISION BY THE SUPREME COURT ON 12 MAY 1965
*Ramiandrisoa v. The French State*⁵⁵

Excerpts from the judgement:

2. *On the objection to the jurisdiction:*

In its oral submissions the French State again raises the objection to the jurisdiction of the Court advanced by it in its submissions at first instance and rejected by the Judge below. It pleads, in this respect, that the Civil Tribunal of Tananarive was not competent to take cognizance of a legal dispute between a Malagasy national and the French State.

Academic and judicial opinion is agreed that a State cannot be impleaded before the courts of another State and that it enjoys in every case the right to refuse to submit to the jurisdiction of foreign courts. This immunity rests both on a rule of international courtesy and on the principle of State sovereignty, which is inconsistent with one State being forced against its will to submit to the judicial authority of another.

According to the most recent decisions, the principle of immunity from jurisdiction admits of exception only when the defendant State has been summoned before a foreign court to perform deeds and commercial contracts entered into by it. Certain authors, such as Niboyet, have also sought to limit immunity in the case of actions affecting real property, but this has remained an isolated view. In all other cases, the rule of State immunity retains its full force; in particular, and without prejudice to diplomatic agreements on this point, a member of a foreign armed force cannot be sued in the courts of the receiving State by reason of damage arising from his presence as a member of an armed force officially accepted in that territory.

Owing to the fact that the French State has been sued for payment of damages for the delay caused in the execution of a judgment delivered on 18 May 1960 by the Civil Tribunal of Tananarive, it is proper to mention that notice of this decision was given to the French State on 5 July 1960, *i.e.* subsequent to 26 June 1960, the date on which Madagascar became independent. In other words, the present appellant's possible claim in damages arose, according to his own declaration, only at a date when France and Madagascar constituted two sovereign, independent States.

The question then is, as the appellant himself pointed out in his conclusions, one of litigation between France and a Malagasy national. The latter's possible claim does not arise out of the performance or non-performance of a commercial contract. The defence of the French State, based on immunity from jurisdiction, is well founded.

In any case, the appellant has submitted that the plea to the jurisdiction should not be accepted, on the ground that it was raised by the French State after the submissions on the merits instead of being raised at the outset of the proceedings.

In actual fact, until recently writers tended to consider that immunity comprised

⁵⁵ Reproduced from *International Law Reports*, vol. 40, p. 81.

the features of a relative incompetence and that the defendant State tacitly waived this immunity when it entered appearance and joined issue without pleading the said incompetence. But by the terms of Article 32 of the Vienna Convention of 18 April 1961 on diplomatic relations, waiver of immunity from jurisdiction must henceforth be express. This Convention, to which the Republic of Malagasy has adhered (*Journal Officiel de la République Malgache*, 20 July 1963, p. 1673), relates to the jurisdictional immunity of diplomatic agents. One would not, however, imagine that the State enjoys before foreign jurisdictions a standard of legal treatment less favourable than its accredited agents. It is, then, advisable to consider that, since the coming into force of the Vienna Convention, waiver of jurisdictional immunity must be express and that this waiver issues from the diplomatic agent or the accrediting State.

In the present case, not only has the French State not expressly waived its immunity from jurisdiction, but, on the contrary, has pleaded it, and there is no good ground for distinguishing thereafter whether the plea to the jurisdiction should be raised *in limine litis* or in the course of the proceedings. It is proper, therefore, to accept this plea, which can be raised for the first time on appeal as being by nature a matter of *ordre public*, and making Article 11 of the *Code de Procédure Civile* inapplicable in this case.

For these reasons, the Court accepts the plea of incompetence based on the immunity from jurisdiction of the French State, and quashes the judgment appealed from in all its aspects and sets it aside . . .

N. NETHERLANDS

1. DECISION BY THE COURT OF APPEAL OF THE HAGUE ON 28 NOVEMBER 1968. *N.V. Cabolent v. National Iranian Oil Company*

Summary of the facts:

This suit was brought by N.V. Cabolent, the Netherlands subsidiary of Cabol Enterprises Ltd. of Toronto, Canada, to enforce an arbitration award against the National Iranian Oil Company (NIOC).

NIOC did not appear in the arbitration proceedings. The arbitrator, Judge Pierre Cavin of Lausanne, rendered an award in favour of Sapphire Petroleums Ltd., a subsidiary of Cabol Enterprises, which had made an agreement with NIOC for exploration for and production of oil in southern Iran. Sapphire later assigned its rights under the award to N.V. Cabolent.

Cabolent initiated the present action through service of process in the Netherlands upon NIOC and its Dutch subsidiaries. NIOC claimed sovereign immunity as the Iranian governmental body for developing the nationalized petroleum industry.

Excerpts from the judgement:

*Judgement of the District Court*⁵⁶

Preceding to all other pleas the defendant—hereinafter to be called NIOC—argued, that on the strength of the rule of unwritten international law mentioned by it

⁵⁶ The judgement was given on 15 April 1965. Reproduced with permission from the English translation prepared by M. P. Bloemsa from *International Legal Materials*, vol. 5 (1966), p. 477.

in its statements it can, with respect to the present claims, only be taken into the competent Iranian Court, so that this Court has no jurisdiction with respect to the claims.

It may be premised that it is generally recognized in international law, that in principle a sovereign state cannot be submitted to the jurisdiction of a foreign state against its will. However, a tendency can be shown in jurisprudence and case law to limit this immunity of the state, that is to the so-called "acta iure imperii".

If such an act of the foreign state "iure imperii" has to be deemed to exist in the present case, the Court then ought to refuse to entertain jurisdiction in pursuance of art. 13a of the "Wet houdende Algemene Bepalingen der Wetgeving van het Koninkrijk" (Statute containing General Provisions of the legislation of the Kingdom). Together with the learned authors and the case law, who reject unlimited immunity, the Court holds that the acceptance of unlimited immunity cannot be justified any longer at this present time, when a great number of states take it to be their public responsibility to interfere actively and drastically with the regulation of the economic life in particular and thus participate in economic life in nearly the same way as a private person. This active responsibility and activity of the state in the economic field, specifically to be seen in countries like Iran where the exploitation of the natural resources is by far the most important source of revenue, is considered to be of equal importance for life and well being of country and people as compared with e.g. the care for the military defence, which of old is part of the responsibility of the state. This actual development of the function and the activity of the state had as a result that the state, for the sake of a well-balanced and efficient execution of same, started to use forms of organization other than the public law ones that were customary before. Whether the foreign state chooses to use one or the other form of organization to reach its goals is naturally to be left to its discretion. It is not incumbent upon the Dutch Courts to pass judgement on this choice.

This course of events with respect to the economic activity of the state entails, however, that, whenever a foreign defendant invokes the immunity to which it is allegedly entitled under international law, the Court will have to examine whether with respect to the issue brought before the Court this defendant has acted "iure imperii" as an organ of the foreign state, which has to be identified with that state.

After Iran had nationalized, by Statute of March 15th and 20th, 1951, the entire oil industry, i.e. the exploration, winning and exploitation of oil on its territory, NIOC was established as "a commercial joint-stock company" by Iranian legislative decree of April 30th, 1951. The by-laws of NIOC were drawn up by a commission, composed of five members of the Iranian Senate and five members of the Iranian Parliament, and the Minister of Finance. They were subsequently approved by both Chambers of the Iranian Parliament. According to their unofficial English translation—of which, however, during the speeches of counsel both parties declared that they accepted this translation as correct—the by-laws stipulate i.a.:

- (a) all NIOC-shares are property of Iran and are not transferable (sect. 3);
- (b) at the general shareholders' meeting the shareholders—the state of Iran—are represented by three Ministers, to wit the Minister of Finance, who also acts as Chairman, the Minister of Industry and Mining and a third Minister appointed by the Cabinet Council (sect. 14);

(c) the "High Council"—its function as an organ of NIOC is described in section 24 of the by-laws—is composed of seven members chosen from and by the Iranian Parliament, the Minister of Finance who acts as Chairman at the meetings of the Council, the Minister of Industry and Mining and the Attorney-General with the Iranian Court of Cassation (sect. 21);

(d) the by-laws can be amended by the general shareholders' meeting; each amendment, however, has to be approved by the Iranian Parliament (sect. 19, sub a);

(e) NIOC is responsible for the preservation of the natural resources in the soil and the Iranian continental shelf; wherever this responsibility has been entrusted to others than NIOC by statute, NIOC has the supreme control (sect. 58).

According to sections 1 and 2 of the Petroleum Act of July 31st, 1957 all activities pertaining to exploration and winning of oil and oil products, wherever in Iran and in the Iranian continental shelf—with the exception of those territories, with respect to which a concession has been granted to an international consortium—and all activities pertaining to refining, transport and sale of oil and oil products belong to the sphere of actions of NIOC. NIOC also has the right to negotiate with third parties and to enter into agreements with respect to the above mentioned activities. These agreements have to be submitted to the Iranian Parliament for approval. The agreement will be effective from the day of approval by the Parliament only.

On the strength of the above mentioned provisions of statute and by-laws the Court holds, that NIOC is an organization of the company-type, wholly controlled and managed by the Iranian Government, subject to parliamentary control and promoting the primordial economic and social interests of the state of Iran in the oil industry on her territory, which promotion that state has made part of its public responsibility as appears from the nationalization in 1951. Whether the state of Iran gives effect to its self-imposed responsibility in the official departmental form or in the form of a "commercial joint stock company" which meets the demands of modern economic intercourse in a better way, and whether NIOC, when acting, is also now and then participating in this intercourse on the same footing as a private person, the Court does not deem to be decisive for the question whether immunity has been invoked rightly or not. The basis of this suit is the agreement—governed by Iranian law—of June 16th, 1958 concluded between NIOC and Sapphire Petroleum Limited, a Canadian Company, pertaining to the exploration for and possible exploitation of oil on part of the Iranian territory as specified in the Agreement. This agreement, granting a concession to the Canadian company, has been concluded in compliance with the provisions of the Petroleum Act of 1957. It has been approved by the Iranian Government and the Iranian Parliament and was promulgated by the Shah of Iran in compliance with section 27 of the Iranian constitution, by Imperial Decree of July 23rd, 1958.

On the strength of the preceding the Court holds, that NIOC, when entering into this agreement, was acting as an organ of the central government which has to be identified with that government, and that it acted thereby "iure imperii", so that NIOC like Iran itself, cannot be submitted against its will to the jurisdiction of the Dutch Courts.

Neither the fact that arbitration has been agreed to in that agreement, which has no connection with Dutch Sphere of jurisdiction, nor the fact that NIOC has argued the case on its merits can be construed as a waiver of the right to invoke immunity.

Thus it has to be decided as follows:

The Court declares itself without jurisdiction to take cognizance of the claims.

It gives judgement against the plaintiff for the costs of the proceedings in this suit and in the incident, estimated at the side of the defendant up till this verdict at Dfl. 2.650,—(Two thousand six hundred and fifty Guilders).

Judgement of the Court of Appeal⁵⁷

The appellant—Cabolent—has summoned the defendant—NIOC—to appear before the District Court at The Hague by writ dated September 4, 1963, and has made the following statements:

(1) On or about June 16, 1958, NIOC has entered into an agreement with SAPPHIRE PETROLEUMS LIMITED, a Canadian company, domiciled at Toronto, concerning the exploration and possible production of petroleum in an area further specified in that agreement.

(2) Only on or about August 25, 1958, all rights and obligations which SAPPHIRE PETROLEUMS LIMITED could possess pursuant to said agreement have been transferred to SAPPHIRE INTERNATIONAL PETROLEUMS LIMITED, also a Canadian company, domiciled at Toronto.

(3) On March 15, 1963, Pierre Cavin, domiciled at Lausanne, judge in the “Tribunal Federal Suisse”, appointed as arbitrator by the President of the “Tribunal Federal Suisse” pursuant to the provisions of said agreement of June 16, 1958, delivered an arbitral award on the controversies which had arisen between Sapphire International Petroleum Limited and NIOC, as described in that award. Pursuant to that award, NIOC must pay to Sapphire International Petroleum Limited:

- (1) an amount of \$350,000—together with interest thereon at the rate of five per cent per annum from January 24, 1961 until the date of payment;
- (2) an amount of \$2,650,874—together with interest thereon at the rate of five per cent per annum from September 28, 1960 until the date of payment;
- (3) an amount of Sw.fr. 40,000;
- (4) an amount of Sw.fr. 280,000.

(4) Sapphire International Petroleum Limited has assigned to Cabolent—copy of which assignment has been served on NIOC—all rights which it could derive from a) said agreement of June 16, 1958 and b) said arbitral award dated March 15, 1963.

(5) No payment of the amounts specified under (3) could be obtained from NIOC out of court.

On those grounds Cabolent has sued for the amounts specified under (3) and for a declaratory judgment that the three attachments against NIOC are valid.

⁵⁷ Reproduced with permission from the English translation prepared by T. M. C. Asser from *International Legal Materials*, vol. 9 (1970), p. 152.

By writ dated October 17, 1963, Cabolent has sued for a judgment that a fourth attachment is valid. By judgment of December 10, 1963, the District Court has ordered the joinder of both cases.

Thereafter, NIOC has submitted primarily that the District Court has no jurisdiction to entertain the claims.

By judgment of April 15, 1965, the District Court upheld this exception and denied jurisdiction—on the basis of the following considerations:

1. Before submitting its other pleas, the defendant—hereinafter to be called NIOC—has argued that, pursuant to the unwritten rule of international law mentioned in its writs, only the competent courts in Iran can entertain jurisdiction over the present claims, so that this District Court has no jurisdiction to entertain the claims.

2. Under international law a sovereign state is in principle not subject against its will to the jurisdiction of a foreign state. In doctrine and case law, however, there is a tendency to restrict such state immunity to so-called *acta jure imperii*.

3.(a) If in the present case there is question of such acts committed *jure imperii* by a foreign state, the District Court will be forced to deny jurisdiction to entertain the claims on the ground of the provision of Article 13a of the Law containing General Provisions of Legislation of the Kingdom.

(b) The District Court follows writers and courts in holding that in present times when numerous states reckon to their high public duty the active occupation with and regulation of economic life and participation therein often in nearly the same way as private individuals, it is no longer justified to accept an unrestricted immunity.

(c) Such active role and activities of the state in the economic field, as may be witnessed particularly also in countries like Iran where the exploitation of mineral resources is by far the most important source of income, are considered to be equally important to life and well-being of land and people as e.g. the age-old duty to defend the country.

(d) This factual development of public duty and public activities has caused the state, for the purpose of an equal and efficient performance thereof, to employ forms of organization which differ from public forms employed before. The choice by a foreign state of one or the other form of organization to attain her goals must be reckoned to be within its discretion. It does not belong to the task of the Netherlands courts to pass judgment on such choice.

4. This state of affairs concerning the economic activities of the state entails, however, that whenever a foreign defendant pleads that it is entitled to immunity under international law, the District Court shall have to examine whether such defendant has, in respect of the case submitted to the court, acted *jure imperii* as an organ of the foreign state which is to be held equivalent to that state.

5. After Iran had nationalized in 1951 by law of March 15 and 20, 1951 the whole petroleum industry, i.e. the exploration, mining and exploitation of petroleum within its territories, NIOC was established as "a commercial joint/stock company" pursuant to an Iranian legislative measure of April 30, 1951. The Articles of Incorporation of NIOC were drafted by a committee consisting of five members of the Iranian Senate and five members of the Iranian House of Representatives, and the min-

ister of finance. They were consequently approved by both houses of the Iranian Parliament. As appears from the unofficial English translation, which, however, during pleadings both parties have accepted as true, the Articles provide *inter alia*:

- a. all shares in NIOC are owned by Iran and cannot be transferred (Art. 3);
- b. the shareholders—the state of Iran—are represented in the general meeting of shareholders by three ministers, namely the minister of finance, who also acts as chairman, the minister of industry and mines, and a third minister to be appointed by the council of ministers (Art. 14);
- c. the “High Council”, whose task as organ of NIOC is defined in Article 24 of the Articles, consists of seven members chosen from and by the Iranian Parliament, the minister of finance who chairs the meetings of the Council, the minister of industry and mines, and the attorney-general of the Iranian Supreme Court (Art. 21);
- d. the Articles may be amended by the general meeting of shareholders; however, all amendments are to be approved by the Iranian Parliament (Art. 19 (a));
- e. NIOC is responsible for the conservation of the country’s mineral resources including those under the Iranian continental shelf; in cases where such responsibility has been entrusted to others, NIOC has supervisory powers (Art. 58).

6.(a) Pursuant to Articles 1 and 2 of the Petroleum Act of July 31, 1956, all activities which relate to the exploration and production of petroleum and petroleum products in all of Iran and the Iranian continental shelf, excluding, however, the areas in respect of which a concession has been granted to an international consortium, and all activities which relate to the refinery, transport and sale of petroleum and petroleum products, belong to the operating field of NIOC.

(b) NIOC is also authorized to conduct negotiations and to enter into agreements with third parties concerning the above-mentioned activities. Such agreements must be submitted to the Iranian Council of Ministers and consequently be submitted to the Iranian Parliament for its approval. The agreements shall only become effective on the date of parliamentary approval.

7.(a) On the ground of the above-mentioned statutory and legislative provisions, the District Court holds that NIOC is a corporate organization totally controlled and directed by the Iranian government and submitted to parliamentary control and that it serves the primordial socio-economic interests of the State of Iran in the petroleum industry within its territories, interests which that state, as follows from the nationalization in 1951, has added to its high public duty.

(b) For the question whether the plea of immunity is justified or not, the District Court does not in the present case regard as decisive whether such duty accepted by the State of Iran is performed in a public departmental form or in the form of a “commercial joint-stock company” which better meets the needs of modern economic life, or whether NIOC participates in economic life in the same manner as a private individual.

(c) The agreement concerning the exploration and possible production of petroleum in the area within the territories of Iran as specified in the agreement, concluded by NIOC and Sapphire Petroleums Limited, a Canadian corporation, in Iran

on June 16, 1958 and governed by Iranian law, is the basis for this case. That agreement, pursuant to which a concession was granted to said Canadian corporation, was entered into in accordance with the provisions of the Petroleum Act of 1957. The agreement was approved by the Iranian Government and the Iranian Parliament, and was made public by the Shah of Iran by Imperial Decree of July 23, 1958, in accordance with Article 27 of the Iranian Constitution.

(d) On the basis of the foregoing, the District Court holds that NIOC in concluding that agreement acted as an organ of the central government which is to be regarded as equivalent to that government, and that, in doing so, NIOC acted *jure imperii*, so that NIOC as Iran cannot in respect of that agreement be subjected against its will to the jurisdiction of the Netherlands courts.

8. Neither the fact that said agreement, having no connection with the Netherlands legal sphere, provided for arbitration in the events therein specified, nor the fact that NIOC has appeared in court to defend itself against the present claims can be construed as a waiver of its right to invoke immunity.

By two writs served on June 28, 1965, Cabolent has appealed from the judgment. By judgment of January 13, 1966 the Court of Appeal has ordered the joinder of the two cases.

Cabolent has submitted 19 grievances against the judgment and NIOC has argued against them. The case has been pleaded for Cabolent by its procureur, for NIOC by Mr. J. C. Schultsz, advocate at Amsterdam. Thereafter, the parties have requested a decision. The documents submitted in both instances, including the memoranda of pleadings and documented evidence, shall be regarded as incorporated in this judgment.

Having regard to the law:

In the joined cases:

1. In the oral pleadings before this Court the question has been raised on behalf of the National Iranian Oil Company (N.I.O.C.) whether the appellant, the limited liability company N.V. Cabolent, has a valid existence; it was argued that a company is a form of association organized for the purpose of profit making, whereas Cabolent—a tool of a single legal person, Sapphire International Petroleums Ltd.—was formed in order to create jurisdiction in the Netherlands under the rules of Netherlands internal law of procedures.

2. This latter objective, however, is not illicit, nor is it incompatible with the object of profit making. The Court has found no grounds for doubting the valid existence of Cabolent.

3. According to grievance I, the District Court was at error in denying jurisdiction to entertain the claims brought by Cabolent. Cabolent further elucidates this, *inter alia*, in grievances II-XVIII, which it calls “grievances on points of detail”, and which are directed to some of the grounds on which the District Court based its judgment; grievance XIX contests the ruling at the end of that judgment that N.I.O.C. has not waived its right to invoke immunity.

4. We hold with regard to grievance I: the present dispute concerns “debt claims” within the meaning of Article 2 of the Law on the Organization of the Judiciary. Cabolent is domiciled at The Hague and N.I.O.C. at Teheran. Under Netherlands law—Article 2 in conjunction with Article 53 of the Law on the Organization

of the Judiciary and Article 126(3) of the Code of Civil Procedure—the District Court at The Hague has jurisdiction to entertain Cabolent's claims. However,—as appears, *inter alia*, from Section 13a of the Law containing General Provisions of Legislation of the Kingdom—the jurisdiction of the Netherlands Courts is limited by the exceptions recognized under international law. The District Court held that such an exception was applicable in the present case.

5. We hold in this respect that it was for a long time accepted as an unwritten rule of international law that a sovereign State cannot against its will be subjected to the jurisdiction of another State. The Court of Appeal agrees with the District Court, however, that in this day and age such an unqualified immunity of States can no longer be regarded as a rule of international law. The rule which now prevails is more limited and can be stated thus: a State is not subject to the jurisdiction of another State only in respect of *acta jure imperii*—pure acts of State—and not in respect of other acts, in judicial decisions and literature often referred to collectively as *acta jure gestionis*. However, for jurisdiction over such acts, a so-called “Binnenbeziehung”—a more or less close connection between the act and the country of the forum—is not required.

6. Therefore, in answering the question whether or not there is jurisdiction under international law in the present case, the decisive factor is whether the claims brought by Cabolent concern pure acts of State by the State of Iran. Such jurisdiction does not follow automatically from the mere fact that it is not the State of Iran itself which is a party but a company, N.I.O.C., domiciled in that State; for it is possible—as N.I.O.C. contends—that its acts here at issue are to be judged as acts of the State of Iran.

7. Cabolent is suing for payment of the amounts which a Swiss arbitrator ordered N.I.O.C. to pay. According to Cabolent's contentions hereinbefore reproduced under the “facts”, an agreement concluded with N.I.O.C. on or about June 16, 1958, by Cabolent's predecessor-in-law, Sapphire Petroleums Ltd., a Canadian company domiciled in Toronto, underlies the arbitral award.

8. The question is, therefore, whether N.I.O.C., in concluding this agreement—hereinafter referred to as “the Agreement”—was acting *jure imperii*.

9. With regard to N.I.O.C., the party that entered into the Agreement on the Iranian side: it has a corporate structure of a private law nature, being a commercial joint-stock company (Article 1 of its Articles of Incorporation); it possesses legal personality, pursuant to Section 1 of the Petroleum Act of July 31, 1957, and Article 1 of its Articles of Incorporation; it must act in accordance with the rules laid down in that Act, in the Articles of Incorporation and in the Commercial Code; and for those acts only the assets of N.I.O.C. are liable, not those of the State of Iran. Pursuant to Articles 4 and 5 of its Articles, N.I.O.C.'s purpose is the exploration and exploitation of petroleum and natural gas in Iran and the development of the Iranian oil industry. To that end, it may engage in numerous commercial activities as enumerated in those Articles, including the conclusion of agreements for co-operation with Iranian and foreign enterprises. One such agreement for co-operation is the Agreement; and it is an established fact that N.I.O.C. prospects for and produces oil in large quantities and markets oil and oil products.

10. According to paragraph 7a of its judgment, the District Court was of the opinion that N.I.O.C. is “totally” controlled and directed by the Iranian Govern-

ment. This is not correct, however; "totally" goes too far. For, as appears from Articles 38 and 39 of the Articles of Incorporation, the Management of N.I.O.C. can act very independently; and N.I.O.C. does not deny that it is not financed out of public funds but has to make ends meet with its own resources. Moreover, pursuant to Article 40ff. of its Articles of Incorporation, the company's financial operations are primarily audited by one of its own organs, the High Board of Auditors, while, pursuant to the provisions of the Petroleum Act, parliamentary control over agreements such as the one here at issue is confined to approval or disapproval.

11. With regard to the Agreement: as required by Section 2 of the Petroleum Act, the Agreement was approved by act of Parliament, which act was subsequently made effective by the Imperial Decree of July 23, 1958.

12. The preamble and many articles of the Agreement mention both parties. The preamble states that N.I.O.C. is desirous of expanding the production and exportation of Iranian petroleum, thereby increasing the benefits accruing to Iran, and that it wishes to achieve this objective as quickly as possible. With regard to the other party, Sapphire Petroleum Ltd.—hereinafter called "Sapphire"—it is stated that it has the capital, technical resources and managerial ability required to perform the activities specified in the Agreement, and that it particularly also commands the necessary markets for oil. According to the preamble, it is the intention of the parties to carry out the provisions of the Agreement in a spirit of good faith and good will. In Article 38 (1) they undertake to carry out the terms and provisions of the Agreement in accordance with principles of mutual good will and good faith, and to observe both the spirit and the letter of those terms and provisions.

13. The oil defined in Articles 2 (3) and 24 (1) of the Agreement is to belong to each party to the extent of one-half each. According to Articles 5 (1), 6 (1) and 8 (2), each party shall participate for 50% in the capital of a joint-stock company to be formed by them and to be known as Iran Canadian Oil Company 8 Ircan. In various other articles the parties undertake similar mutual obligations, *inter alia*, in the eight paragraphs of Article 13.

14. During the time that no oil will have been struck, Sapphire shall carry all exploration costs, and N.I.O.C. is to reimburse half of those costs to Sapphire only after an exploitable oilfield will have been struck (Article 12 (1) (b) and Article 15 (8ff.)). Article 16 indicates the period within which Sapphire must start drilling, under penalty of termination of the Agreement by N.I.O.C. and payment of \$350,000 (Article 43 (2)).

15. Article 38 (3) provides that no general or special legislation, administrative measures or other acts by, or emanating from, the Government of Iran or from any governmental authority (central or local) or from N.I.O.C. shall have the effect of cancelling the Agreement, supplementing or modifying its provisions, or preventing or impeding the proper execution of the Agreement.

16. Notable is also the arrangement embodied in Articles 39–41 of the Agreement for the settlement of disputes arising between the parties as required by Section 14 of the Petroleum Act. According to Article 39, disputes concerning the execution or interpretation of the Agreement shall be submitted to a conciliation committee, as referred to in that Article, consisting of four members, two members to be appointed by each party. The committee's decision is only binding if arrived at by the unanimous vote of its members; failing an unanimous decision, arbitration pursuant to Article 41 shall follow. Article 40 provides a procedure for the settlement of disputes

on technical and accounting questions for experts. Article 41, finally, contains an arbitration clause and provides procedural rules for arbitration; according to the sixth paragraph of that Article, the parties must comply in good faith with the award of the arbitral tribunal or arbitrator.

17. Under 7c. the District Court states that Sapphire was granted a "concession" under the Agreement.

18. The meaning of the term "concession" is uncertain; the Petroleum Act, the Articles of Incorporation and the Agreement speak only of an "agreement", and words such as "concession" and "subconcession" do not appear therein. The District Court does not indicate what it understands under "concession"; in the present case, however, this term is in any case incorrect if the District Court refers to a permit to be granted, and in fact granted, by the Iranian Government on terms already determined and/or to be determined by that Government.

19. The Court of Appeal has investigated the character of N.I.O.C.—the party which concluded the Agreement and invokes immunity in the present proceedings. It has also examined the principal provisions of the Agreement, including those not mentioned in the present judgment.

20. This investigation may lead to no other conclusion than that the Agreement contains mainly provisions of a private law nature and that it was concluded between two parties who in entering into that Agreement were equal, or at least of equivalent status.

21. Accordingly, when N.I.O.C. concluded the Agreement it did not act *jure imperii*, i.e. it did not perform an act which *ex jure* must be regarded as a pure act of State on the part of the State of Iran.

22. This is further confirmed by Cabolent's unrefuted statement that private petroleum companies governed by private law have on a number of occasions concluded agreements with foreign enterprises which are similar to the Agreement concluded between N.I.O.C. and Sapphire Petroleums Ltd.

23. All other matters established and submitted by the District Court and the parties concerning the structure and authorities of N.I.O.C., its ties with the State of Iran and the significance of petroleum for that country are irrelevant. The fact that the Iranian oil industry was nationalized by Law of March 15 and 20, 1951; that N.I.O.C. was established by Law of April 30, 1951; that all its shares are owned by the Iranian State and cannot be transferred; that the Government of Iran can influence N.I.O.C.'s management; that N.I.O.C. has certain powers of a public law nature, including the power to expropriate land against compensation—all these and similar facts do not detract from the motivations set forth in paragraphs 9–18 of this judgment, nor from the conclusion drawn therefrom in paragraph 20.

24. It will be evident from the foregoing that the District Court erred in deciding, under 7d. that in concluding the Agreement N.I.O.C. was acting *jure imperii*. It was therefore on incorrect grounds that the District Court denied jurisdiction to take cognizance of Cabolent's claims.

25. N.I.O.C. further contends that it is contrary to international law to enforce a judgment of a forum other than that of a sovereign State against properties of that State or of a governmental body equivalent to that State, so that the Netherlands courts have no jurisdiction, at least not to decide on the validity of the attachments.

26. In this respect, we have ruled above that in the present case the immunity of sovereign States under international law does not bar the jurisdiction of the Netherlands courts. A judicial award is, by its nature, enforceable; and if immunity constitutes no bar to jurisdiction, it can in principle neither constitute a bar to enforcement.

27. However, it is possible—as appears *inter alia* from section I3a of the Law containing General Provisions of Legislation of the Kingdom—that a rule of international law limits the enforceability.

28. The only rule of international law that could possibly be applied here is the rule which states that public service assets are exempt from measures of execution in another country. The question is, therefore, whether any assets dedicated to the public service of Iran have been attached.

29. The President of the District Court at The Hague provisionally evaluated Cabolent's claim against N.I.O.C., including interest and costs, at fls. 15,000,000. To secure recovery of that claim, Cabolent has caused to be attached under four oil companies domiciled at The Hague "all moneys and/or goods of N.I.O.C. which they—the companies—have in their possession and/or may subsequently acquire and/or may now or in the future owe to N.I.O.C.".

30. Therefore, assets of N.I.O.C., not of the State of Iran, have been attached; only later during proceedings to establish the validity of the attachments, it can be determined whether, and if so what, assets of N.I.O.C. the garnishees have in their possession.

31. During the oral pleadings on behalf of N.I.O.C. before this Court, Section 4 of the Act implementing the Nationalization Act of 1951 has been invoked. According to that Section, in the English translation submitted by N.I.O.C., "all revenues from oil and oil products are the unquestioned right of the Iranian nation". These words—representing a subordinate and explanatory clause in a section dealing with the auditing of the books of the Anglo-Iranian Oil Company—by no means constitute evidence that any attached assets of N.I.O.C. are dedicated to the public service of Iran.

32. In respect of one of the garnishees—Nederlands-Iraanse Aardolie Handel-Maatschappij N.V. (Netherlands Iranian Oil Trading Company)—N.I.O.C. submitted to the Court below an affidavit, dated April 28, 1964, as having been executed and delivered on behalf of the Iranian Minister of Finance by a senior official in his Ministry.

33. In that affidavit the Minister declares that both the so-called "stated payments" of 12-1/2%, payable by the Netherlands Iranian Oil Trading Company under Article 22 of the so-called Oil Agreement of 1954 as well as income tax of 50% due to the State of Iran, accrue to the Imperial Treasury as "beneficiaire" (beneficiary) and are paid into that Treasury in favour of the "destinataire" (ultimate beneficiary) i.e. the Imperial Government of Iran; and that the amounts so paid are used for the benefit of the public service as further indicated in said affidavit.

34. Also according to the affidavit, Iranian income tax is not payable to N.I.O.C. but to the State of Iran, so that the income tax payable by the Netherlands Iranian Oil Trading Company is not affected by the attachment. The "stated payments" of 12-1/2%, however, are not payable to the State of Iran but to N.I.O.C., as appears from Article 54 of N.I.O.C.'s Articles of Association and from Article 22

of the Oil Agreement of 1954. "Stated payments" owed to N.I.O.C. by the garnishee cannot be regarded as dedicated to the public service of Iran, even though it were N.I.O.C.'s practice to arrange for the payment of such amounts into the Imperial Treasury.

35. There is in fact no evidence of the attachment of any assets dedicated to the public service of Iran.

36. Therefore, there are no grounds for holding that the Netherlands courts have no jurisdiction to decide on the validity of the attachments.

37. During the oral pleadings before this Court, N.I.O.C. has offered to prove all facts considered to be relevant which might be disputed in respect of N.I.O.C., the Oil Agreement 1954, the Sapphire Agreement, etc.; however, if only because of its vagueness, this offer cannot be accepted.

38. The court has found no grounds which would constitute a bar to jurisdiction.

39. The main grievance having been found valid, the contested judgment cannot be upheld and the other grievances need not be further examined.

40. Since the District Court denied jurisdiction on the ground that the Netherlands courts had no jurisdiction to entertain the case, its judgment must be regarded as final and not as a "judgment awarded in incidental proceedings" within the meaning of Article 356 (2) of the Code of Civil Procedure. The Court of Appeal is accordingly not entitled to refer the case back to the District Court but must itself decide the issue.

Delivering judgment on appeal:

In the joint cases:

Annuls the judgment delivered between the parties by the District Court at The Hague on April 15, 1965;

And deciding instead:

Holds that the District Court had jurisdiction to entertain the claim of the appellant;

Decrees that the cases will be called at the session of this Court and Chamber on Thursday, January 9, 1969;

Orders the defendant to pay the costs of first instance, including those of the joinder, estimating such costs at the side of the appellant at an aggregate amount of F.2,650 (two thousand six hundred and fifty guilders);

Postpones any further decision.

2. DECISION BY THE SUPREME COURT ON 26 OCTOBER 1973. *Société Européenne d'Etudes et d'Entreprises en liquidité volontaire (SEEE) v. Socialist Federal Republic of Yugoslavia*⁵⁸

Summary of facts:

The Hague Court of Appeal had rejected SEEE's application for the grant of execution of a Swiss arbitral award, considering *inter alia*: ". . .

⁵⁸ Reproduced from *Netherlands Yearbook of International Law*, vol. V (1974), p. 290.

“(a) Under Article I (1), the Convention applies to arbitral awards made in the territory of a State other than the State where their recognition and enforcement are sought, and to arbitral awards not considered as domestic awards in the latter State;

“(b) In conformity with a declaration made by the Netherlands under Article I(3), the Convention shall, in the Netherlands, be applied only to the recognition and enforcement of awards made in the territory of another Contracting State;

“(c) Whatever the discretion left to the parties in respect of the composition of the arbitral tribunal and the regulation of the arbitral procedure, the Convention is based on the assumption that the arbitral award is subject to the law of a specific State, since,

“(d) Under Article V (1) (e) of the Convention, recognition and enforcement of an arbitral award should be refused *inter alia* where the award has been set aside by a competent authority of the country in which, or under the law of which, that award was made;

“(e) The reservation provision, Article I (3), to the effect that the Convention will be applied only to arbitral awards made in the territory of another Contracting State, also assumes that an arbitral award is subject to the law of that State;

“(f) Given the fact that the parties to the 1932 agreement have not stipulated that an arbitral award under Article XVII of that agreement must be made under a law other than that of the Swiss Canton of Vaud, it follows that the award made by MM. Ripert and Panchaud at Lausanne, that is, within the territory of the Canton of Vaud, on 2 July 1956, must qualify as an arbitral award according to the law of the Canton of Vaud if the Convention is to be applicable to it in the Netherlands;

“(g) The Cantonal Tribunal of Vaud, in proceedings instituted by the respondent challenging the award made by MM. Ripert and Panchaud on 12 February 1957 and unsuccessfully contested by the appellant before the Swiss Federal Court, has decided that the act dated 2 July 1956 and signed by the two gentlemen in question is not an arbitral award within the meaning of Article 516 CPC of Vaud and that the Registrar of the District Tribunal of Vaud should return this act to the person who had deposited it at the Registry of the Tribunal;

“(h) Therefore, the act dated 2 July 1956 and signed by MM. Ripert and Panchaud is not an arbitral award made within the territory of a Contracting State other than the Netherlands within the meaning of the Convention; . . .”

(Decision of 8 September 1972) Subsequently, on appeal to the Supreme Court, SEEE contended *inter alia* that the decision of the Court of Appeal was not in accordance with the provisions of the Convention. Yugoslavia contested the appeal. In the incidental appeal instituted by Yugoslavia against the decision of the Court of Appeal refusing immunity from jurisdiction and execution, it was argued as follows:

I.(a) A foreign State cannot be obliged to submit to the jurisdiction of another State.

(b) Jurisdiction over a foreign State can be exercised only where the activities in question have a definite link with the territory of the State where jurisdiction is invoked.

(c) The Court has only examined the question whether Yugoslavia's action was a “purely governmental act”, and not whether Yugoslavia had acted as a pri-

vate person. If the latter is what the Court had in mind then its decision is contestable: Yugoslavia acted in accordance with an enabling Act and the railway had a military character.

(d) If immunity from jurisdiction can be granted only in respect of purely governmental acts, the finding of the Court without more that the private law transaction for the construction of a railway was not a purely governmental Act, goes too far, in the light of the enabling Act and the military character of the railway.

II. The term "legal person" in Article I (1) of the Convention does not include States acting as private persons.

III. To apply for the grant of enforcement of an arbitral award is an act of execution [and, as such, contrary to Yugoslavia's immunity from execution].

IV. The fact that Yugoslavia is not a party to the Convention entails that the Convention cannot be applied to an arbitration agreement to which Yugoslavia is a party, nor to an arbitral award made under such an agreement.

The Supreme Court rejected the incidental appeal of Yugoslavia, allowed SEEE's appeal in the main action, and referred the case to the Hague Court of Appeal.

Excerpts from the judgement:

. . . With regard to subsections (a) and (b) of Section I of the incidental appeal:

In subsection (a) it is argued that as an exception, recognised under international law, to the exercise of jurisdiction by municipal courts, it should be accepted that a foreign State cannot be obliged to submit to the jurisdiction of another State;

However, no rule of international law involves taking the jurisdictional immunity to which foreign States are entitled so absolutely, as is suggested in this subsection;

Clearly, there is a tendency apparent in the international practice of treaties and in literature, as well as in the case law of national courts, to limit the extent to which a State may invoke immunity before a foreign court;

That this trend has been induced by, *inter alia*, the fact that in many States the government has increasingly engaged in activities in areas of society where the relations are governed by private law and where, consequently, the State enters into a legal relationship on an equal footing with individuals;

It is considered reasonable in such cases to grant a similar legal protection to the opposing party of the State concerned as would be granted if that party had dealt with an individual;

That on these various grounds it has to be assumed that the immunity from jurisdiction to which a foreign State is entitled under the prevailing international law does not extend to cases in which a State has acted as set out above;

Subsection (b) purports to contend that, if the rule as stated in (a) cannot be accepted, nevertheless jurisdiction over a foreign State which has acted as set out above can be exercised only where the activity in question of that State has an obvious link with the territory of the State where jurisdiction is invoked; this requirement is said not to be fulfilled in the present case;

Neither the case law of national courts nor the literature, as being a reflection of

prevailing views, provide any evidence that such a link is, in international law, a condition for the exercise of jurisdiction in respect of disputes to which a foreign State is a party; therefore no rule of international law as stated in subsection (b) can be assumed;

Consequently, the arguments raised in subsections (a) and (b) fail;

With regard to subsections (c) and (d) of section I:

The Court of Appeal has established . . . that the Kingdom of Yugoslavia has, in the present case, concluded a private law transaction whereby a private legal person was to construct a railway with delivery of materials against payment;

From this it follows that the Kingdom of Yugoslavia has entered into a legal relationship on an equal footing with SEEE; it makes no difference that the transaction has been concluded under an enabling Act nor that the railway, as contended by Yugoslavia, has a military or strategic character;

Therefore, Yugoslavia cannot invoke immunity from jurisdiction.

Consequently, these arguments also fail;

With regard to section II:

This point is raised against an *obiter dictum* and cannot, therefore, lead to cassation;

With regard to section III:

To apply for a grant of enforcement of the present award could be deemed to be contrary to the immunity from execution to which a foreign State is entitled under international law only if international law is opposed to any execution against foreign State-owned property situated in the territory of another State;

However, such rule of international law does not exist;

Consequently, this point, whatever the relevant considerations of the Court of Appeal, cannot lead to cassation;

With regard to section IV:

It follows from the fact that Yugoslavia is not a party to the Convention referred to in this section that Yugoslavia is not a Contracting State within the meaning of that Convention and, in particular, is not therefore subject to the obligations which the Contracting States have undertaken under Articles II and III of the Convention; but the above-mentioned fact does not bar applicability of the Convention to arbitral awards to which Yugoslavia is a party; consequently the argument concerning section IV also fails;

Therefore, the incidental appeal is dismissed;

With regard to the principal appeal:

From the decision rendered by the Cantonal Tribunal of Vaud to the effect that "the act dated 2 July 1956 and signed by MM. Ripert and Panchaud" is not an arbitral award within the meaning of Article 516 CPC of Vaud, the Court of Appeal [of The Hague], which relied upon this decision in its judgment, has deduced that the act "is not an arbitral award made in the territory of a Contracting State other than the Netherlands, within the meaning of the Convention"; on this ground the Court has refused to grant enforcement;

As appears from the [above-mentioned] Court's arguments in (c)-(f) this finding is based on the premise that for an arbitral award to be eligible for recognition and enforcement under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed by both Switzerland and the Netherlands, such award must be an arbitral award according to the law of a specific State; in the present case, in the view of the Court, that could only be the law of the Canton of Vaud;

This view, however, is not supported by the text of the Convention nor is it in accordance with the procedure for the judicial inquiry preceding recognition and enforcement, as prescribed by the Convention;

According to Articles I (2) and II (1) of the Convention, the term "arbitral awards" includes all awards made by arbitrators under an agreement under which the parties undertake to submit to arbitration all or any differences that have arisen or that may arise between them in respect of a defined legal relationship whether contractual or not;

Article IV imposes on the party applying for recognition and enforcement of such an award no other obligations than to supply,

- (a) the duly authenticated original award or a duly certified copy thereof, and
- (b) the original agreement referred to in Article II or a duly certified copy thereof;

Under Article V (1) recognition and enforcement for which that party applies may be refused only if the party against whom the award is invoked furnishes proof of the impediments stated in (a)-(e) of the first section of this Article; according to the second section recognition and enforcement may be refused also if the competent authority in the country where recognition and enforcement is sought finds that (a) the subject matter of the difference is not capable of settlement by arbitration, or (b) the recognition or enforcement of the award would be contrary to the public policy of that country;

There is no indication, either in the text or in the history of the Convention, that, apart from invocation of the impediments stated in Article V (1) of the Convention, the competent authority in the country where recognition and enforcement of an arbitral award made in the territory of another State is sought, must examine before making a decision what link connects that award and the law of the country where it was made or any other country, and failing such link may refuse recognition and enforcement;

The link between the award and the law of a specific country will only become relevant in an investigation resulting from invocation of the impediments stated in Article V (1), in particular those stated in (a), (d) and (e), when questions may arise that can only be answered by reference to the law of a specific country;

For that purpose the relevant treaty provisions contain a number of rules referring to the law of a specific country, which should be observed in answering these questions;

Consequently, the Court reached its decision on faulty grounds when, without investigating the impediments stated in Article V (1) and invoked by Yugoslavia, and without observance of the rules contained therein, it refused recognition and enforcement of the "act of 2 July 1956 signed by MM. Ripert and Panchaud" and sub-

mitted to the Court as an arbitral award, on the ground that this act has not been recognised by the Cantonal Tribunal of Vaud as an arbitral award within the meaning of Article 516 CPC of Vaud; . . .

O. PHILIPPINES

1. *Syquia v. Almeda Lopez*. DECISION BY THE SUPREME COURT ON 17 AUGUST 1949⁵⁹

Summary of the facts and the judgement:

For the purposes of this decision, the following facts, gathered from and based on the pleadings, may be stated. The plaintiffs . . . are the undivided joint owners of three apartment buildings situated in the City of Manila

About the middle of the year 1945, said plaintiffs executed three lease contracts, one for each of the three apartments, in favour of the United States of America The term or period for the three leases was to be "for the duration of the war and six months thereafter, unless sooner terminated by the United States of America". The apartment buildings were used for billeting and quartering officers of the U.S. armed forces stationed in the Manila area.

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

⁵⁹ Reproduced from *Decisions of the Philippine Supreme Court on Jurisdictional Immunities of the State and its Properties* (1979), p. 75. Hereafter cited as *Decisions of Philippine Supreme Court*. This publication was transmitted by the Philippine Government to the Secretariat.

isfied with the order, plaintiffs appealed to the Court of First Instance of Manila, where the motion to dismiss was renewed.

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

The plaintiffs as petitioners have brought this case before us on a petition for a writ of mandamus seeking to order the Municipal Court of Manila to take jurisdiction over the case.

. . .

On the basis of this petition and because of the return of the . . . apartment houses to the owners, counsel for respondents . . . filed a petition to dismiss the present case on the ground that it is moot. Counsel for the petitioners answering the motion claimed that the plaintiffs and petitioners accepted possession of the . . . apartment houses, reserving all of their rights against respondents including the right to collect rents and damages; that they have not been paid rents since January 1, 1947; that respondents admitted that there is a total of P109,895 in rentals due and owing to petitioners; that should this case be now dismissed, the petitioners will be unable to enforce collection; that the question of law involved in this case may again come up before the courts when conflicts arise between Filipino civilian property owners and the U.S. Army authorities concerning contracts entered into in the Philippines between said Filipinos and the U.S. Government. Consequently, this Court, according to the petitioners, far from dismissing the case, should decide it, particularly the question of jurisdiction.

On June 18, 1949, through a "petition to amend complaint", counsel for the petitioners informed this court that petitioners had already received from the U.S. Army Forces in the Western Pacific the sum of P109,895 as rentals for the three apartments, but with the reservation that said acceptance should not be construed as jeopardizing the rights of the petitioners in the case now pending in the courts of the Philippines or their rights against the U.S. Government with respect to the apartment houses. In view of this last petition, counsel for respondents, alleging that both respondents had long left the Islands for other Army assignments, and now that both the possession of the three apartments in question as well as the rentals for their occupation have already been received by the petitioners, renew their motion for dismissal on the ground that this case has now become moot.

...

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

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

...

With respect to defendant General Moore, when he assumed his command in Manila, these lease agreements had already been negotiated and executed and were in actual operation. The . . . apartment buildings were occupied by army officers assigned thereto by his predecessors in office. All that he must have done was to assign or billet incoming army officers to apartments as they were vacated by outgoing officers due to changes in station. He found these apartment buildings occupied by his Government and devoted to the use and occupancy of army officers stationed in Manila under his command, and he had reason to believe that he could continue holding and using the premises theretofore assigned for that purpose and under contracts previously entered into by his Government, as long as and until orders to the contrary were received by him. It is even to be presumed that when demand was made by the plaintiffs for the payment of increased rentals or for vacating the three apartment buildings, defendant Moore, not a lawyer by profession but a soldier, must have consulted and sought the advice of his legal department, and that his action in declining to pay the increased rentals or to eject all his army officers from the three buildings must have been in pursuance to the advice and counsel of his legal division. At least, he was not in a position to pay increased rentals above those set and stipulated in the lease agreements, without the approval of his Government, unless he personally assumed financial responsibility therefor. Under these circum-

stances, neither do we believe nor find that defendant Moore can be held personally liable for the payment of back or increased rentals and alleged damages.

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

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

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

2. *Philippine Alien Property Administration v. Castelo*

DECISION BY THE SUPREME COURT ON 30 JULY 1951⁶⁰

Summary of the facts and the judgement:

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

Petitioner is an agency of the United States of America created by Executive Order No. 9818 with authority to vest enemy owned properties in the Philippines. On July 7, 1949, respondents Pedro C. Hernaez and Asuncion de la Rama Vda. de Alunan, in her own behalf and as administratrix of the estate of her deceased husband Rafael R. Alunan, filed a complaint in the Court of First Instance of Manila against petitioner wherein it was alleged that Pedro C. Hernaez and the late Rafael R. Alunan were the owners of eight (8) parcels of land with the improvements thereon situated in the city of Manila, which were vested by the petitioner on April 22, 1947, in the United States of America and that, because of petitioner's refusal to release them to the respondents, the latter have suffered damages amounting to P5,000 a month. Respondents prayed that petitioner be ordered to vacate the properties in question and to restore them to the respondents and to pay damages . . . with the costs of action . . .

. . .

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

"Plaintiffs Pedro C. Hernaez and Asuncion de la Rama Vda. de Alunan, in her own behalf and as judicial administratrix of the estate of the deceased Rafael R. Alunan, are the legal owners of the property under litigation and the defendant is hereby ordered to return the same to plaintiffs;

"Defendant Philippine Alien Property Administration is hereby ordered to pay to plaintiffs the sum of P3,375 a month from May, 1947 until the possession of the property in litigation is restored to plaintiffs;

"The mortgage on the property aforesaid in favor of Nicanor Jacinto is declared cancelled and the claim of the said intervenor is hereby dismissed;

"The claim of the intervenor Republic of the Philippines is ordered dismissed;

"Defendant's counterclaim is dismissed;

"Costs against defendant."

Copy of the decision was received by petitioner on May 11, 1950, and before the expiration of the period to appeal, or on May 25, 1950, the plaintiffs, now respondents, filed a motion asking that, notwithstanding the appeal interposed by petitioner, an order of execution be issued as regards that part of the judgment which orders the petitioner to pay the respondents the sum of P3,375 a month from May, 1947, until the possession of the property in litigation is restored to them. Petitioner objected to this motion, but, on June 22, 1950, the court granted the motion stating, among other things, that counsel for petitioner did not deny that petitioner may cease to exist before the final termination of this case in the appellate court, and that peti-

⁶⁰ Reproduced from *Decisions of Philippine Supreme Court*, p. 95.

tioner "submitted itself voluntarily to the jurisdiction of this court by filing its answer to the complaint and appearing at the trial without questioning the jurisdiction of the court." Petitioner filed a motion for reconsideration, and the same having been denied, it instituted the present proceedings imputing abuse of discretion to his Honour, the respondent Judge.

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

...

The reason advanced by the Court of origin in issuing the writ of execution as regards the payment of damages is justifiable, considering that its purpose is to enable the respondents to collect from petitioner the rents to which they are entitled in case the decision is affirmed by the appellate court, which matter is solely addressed to the discretion of the court. However, we find the action taken legally untenable considering certain fundamental principles which cannot be disregarded, one of which is the immunity of the United States Government from suit unless it gives its express consent thereto. If the order is entertained as we are urged, its ultimate effect would be to allow the United States Government to be sued without its consent, because its main purpose is to enforce that part of the judgment regarding damages which is disputed because of the alleged lack of jurisdiction of the court to entertain it. It is true that this question is involved in the case on the merits, which is now pending appeal, but the same cannot be brushed aside in this proceeding because of the inescapable fact that on that fundamental issue hinges the determination of this incident. In other words, it is imperative to determine if the issuance of the writ of execution is proper even if the respondent Judge finds good reason justifying such action considering the fact that the party against which the writ is to be enforced is an agency of the Government of the United States.

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

Petitioner admits consent to sue the United States in proper cases through the Philippine Alien Property Administration in the courts of justice in the Philippines has been granted. Such consent is found in section 3 of the Philippine Property Act of 1946. And we presume that the action that has given rise to this incident was instituted under the provisions of said section 3, and it is one of those authorized under the Trading with the Enemy Act, as amended [section 9(a)], which refers to actions

instituted by the persons who are neither enemies nor allies of enemies for the purpose of establishing their right, title or interest in vested properties, and of recovering their ownership and possession.

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

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

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

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

The preliminary injunction issued is hereby declared final.

3. *Parreño v. McGranery*. DECISION BY THE SUPREME COURT
ON 12 MARCH 1953⁶¹

Summary of the facts and the judgement:

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

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

It is a widely accepted principle of international law, which is made a part of the law of the land (Article II, section 3, of the Constitution), that a foreign state may not be brought to suit before the courts of another state or its own courts without its consent. This principle was expressly recognized by the courts of the Philippines in various cases.

[That a] suit against the Attorney General of the United States to establish a claim under the Trading with the Enemy Act of October 6, 1947, falls within the rule of government immunity to suit is not open to question.

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

⁶¹ Reproduced from *Decision of Philippines Court*, p. 107.

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

As a general proposition, the right of the Government to withdraw its consent to be sued cannot seriously be challenged. In the particular case at bar, there was the circumstance that the continuation of the Trading with the Enemy Act in the Philippines after July 1, 1946, was agreed upon by the United States and the Philippine Governments, and Section 34 was implicitly if not expressly accepted by the latter. At the time there remained a large amount of Japanese property in the Philippines which had not been vested or liquidated and which, according to the desire of both Governments, was to be transferred to the Philippine Government after settlement of all claims against it and its former owners and in line with international obligations; and it was believed and agreed that the only Government which could vest such property and should have jurisdiction in this field was that of the United States. See Joint Statement of President Roxas and Ambassador McNutt printed in House (U.S.) Report No. 2296; Press Release August 22, 1946, Statement by United States Ambassador Paul V. McNutt; Philippine Property Act of 1946; Proclamation of (Philippine) Independence; Statement of President Roxas contained in Senate (U.S.) Report No. 1578; Joint Statement of President Roxas and United States Commissioner Paul V. McNutt quoted in House (U.S.) Report No. 2296 and Senate (U.S.) Report No. 1578.

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

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

4. *Johnson v. Turner, et al.* DECISION BY THE SUPREME COURT
ON 26 APRIL 1954⁶²

Summary of the facts and the judgement:

This is an appeal by the defendants from a decision of the Court of First Instance of Manila ordering them or their successors or representatives to return to plaintiff or his authorized representative the confiscated Military Payment Certifi-

⁶² Reproduced from *Decisions of Philippine Supreme Court*, p. 114.

cates (Scrip Money) in the reconverted or new series, amounting to \$3,713. For purposes of the present appeal the pertinent facts not disputed are as follows:

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

The defendants through counsel moved for the dismissal of the complaint on the ground of lack of jurisdiction over their persons and over the subject-matter for the reason that they were being sued as defendants in their respective official capacities as officers of the U.S. Air Force and the action was based on their official actions, and that the U.S. Government had not given its consent to be sued. The motion for dismissal was denied and the case was heard, after which the trial court found and held that it had jurisdiction because the claim was for the return of plaintiff's scrip money and not for the recovery of a sum of money as damages arising from any civil liability of the defendants; and that the confiscatory act of the defendants is contrary to the provisions of the Philippine Constitution prohibiting deprivation of one's property without due process of law.

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

and to assure that the economy of the Republic of the Philippines will be duly protected.

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

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

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

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

In conclusion, we find and hold that the present action because of its nature is really a suit against the Government of the United States, and because said Government has not given its consent thereto, the courts, particularly the trial court, have no jurisdiction to entertain the same. Because of this, we deem it unnecessary to discuss and rule upon the propriety and legality of the confiscation made by the defendants, particularly Capt. Wilford H. Hudson, of the scrip money from the plaintiff, and whether or not the latter's filing of his claim with the U.S. Government through its Claims Division, constitutes an abandonment of his claim or suit with the Philippine court.

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

5. *Baer v. Tizon*. DECISION BY THE SUPREME COURT ON 3 MAY 1974⁶³

Summary of the facts and the judgement:

There is nothing novel about the question raised in this certiorari proceeding against the then Judge Tito V. Tizon, filed by petitioner Donald Baer, then Com-

⁶³ Reproduced from *Decisions of Philippine Supreme Court*, p. 154.

mander of the United States Naval Base, Subic Bay, Olongapo, Zambales, seeking to nullify the orders of respondent Judge denying his motion to dismiss a complaint filed against him by the private respondent, Edgardo Gener, on the ground of sovereign immunity of a foreign power, his contention being that it was in effect a suit against the United States, which had not given its consent.

...

The doctrine of immunity from suit is of undoubted applicability in this jurisdiction. It cannot be otherwise, for under the 1935 Constitution, as now, it is expressly made clear that the Philippines "adopts the generally accepted principles of international law as part of the law of the Nation". As will subsequently be shown, there was a failure on the part of the lower court to accord deference and respect to such a basic doctrine, a failure compounded by its refusal to take note of the absence of any legal right on the part of petitioner. Hence, certiorari is the proper remedy.

The facts are not in dispute. On November 17, 1964, respondent Edgardo Gener, as plaintiff, filed a complaint for injunction with the Court of First Instance of Bataan against petitioner, Donald Baer, Commander of the United States Naval Base in Olongapo. It was docketed as Civil Case No. 2984 of the Court of First Instance of Bataan. He alleged that he was engaged in the business of logging in an area situated in Barrio Mabayo, Municipality of Morong, Bataan and that the American Naval Base authorities stopped his logging operations. He prayed for a writ of preliminary injunction restraining petitioner from interfering with his logging operations. A restraining order was issued by respondent Judge on November 23, 1964. Counsel for petitioner, upon instructions of the American Ambassador to the Philippines, entered their appearance for the purpose of contesting the jurisdiction of respondent Judge on the ground that the suit was one against a foreign sovereign without its consent. Then, on December 12, 1964, petitioner filed a motion to dismiss, wherein such ground was reiterated. It was therein pointed out that he is the chief or head of an agency or instrumentality of the United States of America, with the subject matter of the action being official acts done by him for and in behalf of the United States of America. It was added that in directing the cessation of logging operations by respondent Gener within the Naval Base, petitioner was entirely within the scope of his authority and official duty, the maintenance of the security of the Naval Base and of the installations therein being the first concern and most important duty of the Commander of the Base. There was, on December 14, 1964, an opposition and reply to petitioner's motion to dismiss by respondent Gener, relying on the principle that "a private citizen claiming title and right of possession of certain property may, to recover possession of said property, sue as individuals, officers, and agents of the Government, who are said to be illegally withholding the same from him, though in doing so, said officers and agents claim that they are acting for the Government." That was his basis for sustaining the jurisdiction of respondent Judge. Petitioner, thereafter, on January 12, 1965, made a written offer of documentary evidence, including certified copies of telegrams of the Forestry Director to Forestry personnel in Balanga, Bataan dated January 8, and January 11, 1965, directing immediate investigation of illegal timber cutting in Bataan and calling attention to the fact that the records of the office show no new renewal of timber license or temporary extension permits. The above notwithstanding, respondent Judge, on January 12, 1965, issued an order granting respondent Gener's application for the issuance of a writ of preliminary injunction and denying petitioner's motion to dismiss the opposition to the application for a writ of preliminary injunction.

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

1. The invocation of the doctrine of immunity from suit of a foreign state without its consent is appropriate. More specifically, insofar as alien armed forces is concerned, the starting point is *Raquiza v. Bradford*, a 1945 decision. In dismissing a *habeas corpus* petition for the release of petitioners confined by American army authorities, Justice Hilado, speaking for the Court, cited from *Coleman v. Tennessee*, where it was explicitly declared: "It is well settled that a foreign army, permitted to march through a friendly country or to be stationed in it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place." Two years later, in *Tubb and Tedrow v. Griess*, this Court relied on the ruling in *Raquiza v. Bradford* and cited in support thereof excerpts from the works of the following authoritative writers: Vattel, Wheaton, Hall, Lawrence, Oppenheim, Westlake, Hyde, and McNair and Lauterpacht. Accuracy demands the clarification that after the conclusion of the Philippine-American Military Bases Agreement, the treaty provisions should control on such matter, the assumption being that there was a manifestation of the submission to jurisdiction on the part of the foreign power whenever appropriate.

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

2. There should be no misinterpretation of the scope of the decision reached by this Court. Petitioner, as the Commander of the United States Naval Base in Olongapo, does not possess diplomatic immunity. He may therefore be proceeded against in his personal capacity, or when the action taken by him cannot be imputed to the government which he represents. Thus, after the Military Bases Agreement, in *Miquiabas v. Commanding General and Dizon v. The Commanding General of the Philippine-Ryukus Command*, both of them being *habeas corpus* petitions, there was no question as to the submission to jurisdiction of the respondents. As a matter of

fact, in *Miquiabas v. Commanding General*, the immediate release of the petitioner was ordered, it being apparent that the general court martial appointed by respondent Commanding General was without jurisdiction to try petitioner. Thereafter, in the cited cases of *Syquia*, *Marquez Lim*, and *Johnson*, the parties proceeded against were American army commanding officers stationed in the Philippines. The insuperable obstacle to the jurisdiction of respondent Judge is that a foreign sovereign without its consent is haled into court in connection with acts performed by it pursuant to treaty provisions and thus impressed within governmental character.

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

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

P. SOUTH AFRICA

1. *Lendlease Finance (Pty.) Ltd. v. Corporacion de Mercadeo Agricola and Others*. DECISION BY THE APPELLATE DIVISION OF THE SUPREME COURT ON MAY 24, 1976⁶⁴

The facts and the judgement:

Appeal from a decision in the Cape Provincial Division (De Kock, J., and Baker, J.). The facts appear from the judgment of Corbett, J. A.

A. Suzman, Q.C. (with him Clive Cohen, S.C.), for the appellant: The applicant is an *incola* and the contract, an ordinary commercial contract, was concluded

⁶⁴ Reproduced from *South Africa Law Reports*, No. 4 (1976), p. 464.

in Johannesburg. As the respondent is a *peregrinus*, in order to give the Court jurisdiction, it was necessary that the property of the respondent be attached *ad fundandam jurisdictionem*. See *Thermo Radiant Oven Sales (Pty.) Ltd. v. Nelspruit Bakeries (Pty.) Ltd.*, 1969 (2) S.A. at p. 300. The Cape Court had jurisdiction to order attachment, notwithstanding that the contract was entered into in the Transvaal. See *Frank Wright (Pty.) Ltd. v. Corticas "B.C.M." Ltd.*, 1948 (4) S.A. at p. 460. The respondent, relying on *C.I.R. v. Isaacs N.O.*, 1960 (1) S.A. 125, contended that the jurisdiction of the South African Courts was ousted by virtue of the provision in the shipping contract. This case is clearly distinguishable, since it provided for the exclusive jurisdiction of the Rhodesian Courts and expressly excluded the jurisdiction of the South African Courts. Incidentally, in dealing later with the question as to what law governs the shipping contract, clause K relates solely to jurisdiction and does not purport to deal with choice of law. A *prima facie* cause of action is sufficient to grant attachment, see *Bradbury Gretorex Co. (Colonial) Ltd. v. Standard Trading Co. (Pty.) Ltd.*, 1953 (3) S.A. at p. 533. There is no discretion in the Court to refuse attachment, see *Sowry v. Sowry*, 1953 (4) S.A. at p. 633; *Airways Corporation v. Vickers Armstrong Ltd.*, 1956 (2) S.A. at p. 494; Herbststein and Van Winsen, *Civil Practice of Superior Courts*, 2nd ed., p. 708; Pollak, *The South African Law of Jurisdiction*, p. 64. It was questionable (a) whether a Cape Court had jurisdiction, at the instance of an *incola* of the Transvaal, to attach the property of a *peregrinus* situate in the Cape to found jurisdiction; and (b) whether a Transvaal Court had jurisdiction to order the attachment of the property belonging to a *peregrinus* situate in the Cape to found jurisdiction in an action to be instituted in the Transvaal. See *Bock & Son (Pty.) Ltd. v. Wisconsin Leather Co.*, 1960 (4) S.A. 767; *Curbera v. S.A. Pesquera Industrial Gallega*, 1969 (3) S.A. 296; *Ex parte Gerald B. Coyne (Pty.) Ltd.*, 1971 (1) S.A. 624; *Ex parte Boshoff*, 1972 (1) S.A. 521. To overcome these possible jurisdictional difficulties, Raphaely ceded its claim to applicant. In *Hill & Paddon v. Borchardt*, (1883) 2 H.C.G. 253, the Full Bench held that an attachment could be based on a ceded debt. The Court *a quo* misdirected itself in accepting that international law, as applied by the English Courts, represents international law to be applied by South African Courts. In any event, in purporting to apply the traditional view initially adopted by the English Courts (in particular the decision in the *Baccus* case, (1956) 3 All E.R. 715, the correctness of which has been seriously questioned) the Court not only disregarded the inroads which have been made by English Courts themselves on the traditional view, but ignored the overwhelming weight of authority as evidenced by certain international conventions; the judicial decisions of virtually every European country (apart from Soviet Russia) and virtually every recognised writer on international law. In short, the Court applied a now discredited and virtually discarded doctrine of sovereign immunity. Before dealing with the misdirections, the following general propositions should be noted. International law forms part of our common law: *South Atlantic Islands Development Corporation v. Buchan*, 1971 (1) S.A. at p. 238B-E. The Courts take judicial notice of international law, it is not "foreign law", which has to be proved. See *Buchan's* case, *supra* at p. 348; O'Connell, *International Law*, 2nd ed., 1970, vol. 1, p. 53. The sources of international law are listed in art. 38 (1) of the Statute of the International Court of Justice (to which both South Africa and Venezuela are parties). International law is far from a static body of law. The Court, in applying international law, must apply not merely its own prior judicial decisions but must have regard to all the *recognised sources* of international law. In particular, it would be tantamount to a misdirection if the Court were to apply judicial decisions which no longer bear

“the hallmarks of general assent and reciprocity”. The international law on the subject of sovereign immunity has indisputably undergone radical changes over the past 50 years, more especially since the last World War, with the emergence of socialist states, nationalisation and the intrusion of State-owned trading corporations into commerce. Apart from the United Kingdom and Soviet Russia, most legal systems have now abandoned the principle of absolute immunity in relation to commercial transactions and distinguish between *acta jure imperii* and *acta jure gestionis* and restrict immunity to the former. Apart from judicial decisions and the writings of international jurists, brief reference will be made to three notable landmarks, viz. (i) The Brussels Convention, 1926 (and its Protocol) 1934; (ii) the Tate Letter, 1952; and (iii) The European Convention on State Immunity, 1972. Thus, e.g., in 1926 the Brussels Convention on the Unification of Certain Rules Relating to Immunity of State-owned Vessels (as amended by a Protocol on 25 May 1934)—provided that *commercial vessels and cargoes* should be justiciable to the same extent as if privately owned. As at 1 January 1966, the following 19 States were parties to the Convention: Belgium, Brazil, Chile, Denmark, Estonia, France, Germany, Greece, Holland, Hungary, Italy, Netherlands, Norway, Poland, Portugal, Romania, Sweden, Switzerland, Turkey. See Cheshire, *Private International Law*, 5th ed., p. 97; Friedman *et al.*, *International Law Cases and Materials*, 1969, p. 653. Great Britain, however, signed, but did not ratify the Convention. The U.S.A. (which was not a party to the Brussels Convention) subsequently announced and has since followed a policy of not claiming immunity for its publicly owned or operated merchant vessels. In 1952 a letter, known as the Tate Letter, was issued by the Department of State in which it was officially announced that henceforth it would be the Department’s policy to follow the restrictive theory of sovereign immunity in the consideration of requests by foreign governments for a grant of sovereign immunity. See 26 Dep’t State Bull. 984, 1952, cited in Friedmann *et al.*, *International Law Cases and Materials*, 1969 at p. 660. In 1965, the Committee of Ministers of the Council of Europe appointed a committee of experts “to examine the problem relating to state immunity”. The Committee succeeded in elaborating the “European Convention on State Immunity and Additional Protocol” which was opened for signature at Basle on 16 May 1972. The United Kingdom, together with six other member States of the Council of Europe (Austria, Belgium, Federal Republic of Germany, Luxembourg, Netherlands and Switzerland) have now signed the Convention. The fact that the United Kingdom has signed the Convention, the overall trend of which is to relax the strict doctrine of absolute immunity, is an indication that the United Kingdom is seriously reconsidering its approach. See Sinclair “The European Convention on State Immunity”, *International and Comparative Law Quarterly*, vol. 22, 1973, pp. 254-283. See, too, F. A. Mann, “New Developments in the Law of Sovereign Immunity”, *Modern Law Review*, vol. 36, 1973, p. 18 at pp. 20-24. The whole problem is reviewed by Prof. H. Lauterpacht in a comprehensive and authoritative review: *The Problem of Jurisdictional Immunity of Foreign States*, *B.Y.I.L.* 1951, pp. 220-272. In particular, several eminent English Judges (including Singleton, L.J., Lord Maugham, Lord Thankerton, Lord MacMillan and Lord Denning) have strongly criticised the extension of the doctrine of sovereign immunity to so-called “corporate immunity”, i.e. the extension of immunity from Sovereign States to State-owned corporate entities engaged in commercial enterprise, albeit on behalf of the State.

In view of the fact that the Court *a quo* accepted that international law, as applied by the English Courts, represented international law which should be applied

by our Courts, it is proposed to deal firstly with the English law on the subject. Shortly after the judgment in the present matter was delivered, two important cases relating to sovereign immunity were decided in England. Both cases lend strong support to the restrictive theory as being more consonant with justice: *Thai-Europe Tapioca Service Ltd., v. Government of Pakistan etc.*, *The Harmattan*, (1975) 1 W.L.R. 1485; (1975) 3 All E.R. 961; *Philippine Admiral (Owners) v. Wallem Shipping (Hong Kong) Ltd.*, (1976) 1 All E.R. 78. A foreign sovereign has no immunity in respect of debts incurred in England for services rendered to its property in England.

A review of the more important cases reveals the vicissitudes which the doctrine of sovereign immunity has undergone in England during the past century. In the *Charkieh*, (1873) L.R. 4 A.E. 59, the Court rejected a claim to immunity partly on the grounds that the ship, although owned by the Khedive of Egypt, was chartered to a British subject and was engaged in a commercial venture. In *The Parlement Belge*, (1879) 4 P.D. 129, the Court refused immunity to a mail packet owned by the king of the Belgians and officered by commissioned officers of the Belgian Navy, on the ground that the vessel was partly engaged in commerce. This decision was however reversed on appeal, (1880) 5 P.D. 197. In *The Porto Alexandre*, 1920 P. 30, the Court of Appeal accorded immunity to a foreign State-owned vessel engaged in trading activities. This decision, however, was expressly disapproved and not followed by the Privy Council in the *Philippine Admiral*, *supra*. In *The Cristina*, 1938 A.C. 485, where a privately owned vessel had been requisitioned by the Spanish Government on the high seas, the claim to immunity was upheld. The question whether immunity should be accorded to State-owned or State-controlled trading corporations arose in *Krajina v. Tass Agency*, (1949) 2 All E.R. 274, where it was held that the evidence did *not* establish that the Tass Agency had the status of a legal entity but it was proved that it was a Government department and as such entitled to immunity. In the *Baccus* case, (1957) 1 Q.B. 438 (C.A.), a Spanish company, the Servicio Nacional del Trigo, was proved to be a separate legal entity and at the same time a department of the State of Spain formed for the importing and exporting of grain for the Spanish Government in accordance with the directions of the Spanish Ministry of Agriculture. The plea of immunity was upheld. The correctness of the decision in the *Baccus* case has been severely criticized not only in subsequent cases but also by numerous writers on international law (see *infra*). In the *Nizam of Hyderabad* case, (1957) 3 W.L.R. 884, Lord Denning (at p. 909) disapproved of the majority decision in the *Baccus* case and approved of the dissenting judgment of Singleton, L.J. In *Mellenger and Another v. New Brunswick Development Corporation*, (1971) 1 W.L.R. 604, an action claiming commission was instituted against the New Brunswick Development Corporation. It was accordingly entitled to immunity from suit. In *Swiss Israel Trade Bank v. Government of Salta & Another*, (1972) 1 Lloyd's Law Reports 497, MacKenna, J. granted immunity to the Government of Salta but declined to set aside a writ against the Bank on the ground that it was an independent corporation and not a department of State. The status of the bank, its constitution, management and functions were analysed by the learned Judge and appear to be similar to those of the CMA in the present matter.

Virtually every modern writer of repute on international law has criticised the doctrine of absolute immunity; and, since the decision in the *Baccus* case, the extension of the doctrine to State-owned corporations engaged in commercial transactions. As to text writers, see Dr. A. Pearce Higgins, as editor of the 8th ed. of Hall, *Treatise on International Law*, 1924; Cheshire, *Private International Law*, 9th ed., 1974

at pp. 105-106; O'Connell, *International Law*, vol. 2, 1970 at p. 844; Martin Wolff, *Private International Law*, 1945 p. 56; Sorenson, *Manual of Public International Law*, 1968, pp. 430-437; Akehurst, *Modern Introduction to International Law*, 1970, pp. 137-140. The English doctrine of absolute immunity and, in particular, of corporate immunity, is likewise criticised in the following publications by leading writers on International Law. Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States" 1951, *British Year Book of International Law*, pp. 220-272; W. Friedmann, "Some Impacts of Social Organisation of International Law", 1956, vol. 50, *American Journal of International Law*, pp. 475-486; Manuel R. Garcia-Mora, "The Doctrine of Sovereign Immunity of Foreign States and its Recent Modifications", vol. 42, 1956, *Virginia Law Review*, pp. 335-359; E. J. Cohn, "Immunity of Foreign Trading Government Departments", vol. 73, 1957, *Law Quarterly Review*, pp. 26-29; K. W. Wedderburn, "Sovereign Immunity of Foreign Public Corporations", vol. 6, 1957, *International and Comparative Law Quarterly*, pp. 290 to 330; Clive M. Schmitthoff, "The Claim of Sovereign Immunity in the Law of International Trade", vol. 7, 1958, *International and Comparative Law Quarterly*, pp. 452-467; F. A. Mann, "Sovereign Immunity", vol. 27, 1964, *Modern Law Review*, pp. 81-83; Dunbar, "Controversial Aspects of Sovereign Immunity in the case law of some States", *Recueil des Cours, Collected Courses of the Hague Academy of International Law*, 1971 (1), vol. 132, pp. 266-362; L. M. Sinclair, "The European Convention on State Immunity", vol. 22, 1973, *International and Comparative Law Quarterly*, pp. 254-283; F. A. Mann, "New Developments in the Law of Sovereign Immunity", vol. 36, 1973, *Modern Law Review*, pp. 18-24.

A brief résumé of the development of the doctrine of sovereign immunity in the United States will demonstrate the radical extent to which the American Courts have departed from the absolute theory. The starting point—as mentioned by Lord Cross in *The Philippine Admiral*, *supra* at p. 85H—is the historic judgment of Marshall, C.J., in which it was held that a vessel of war of a foreign State with which the United States was at peace and which the Government of the United States had allowed to enter its harbours, was exempt from the jurisdiction of the Courts. See further *The Pesaro*, (1925); *The Navemar*, (1938); *Republic of Mexico v. Hoffman*, (1945); *The Tate Letter*, 1952.

It remains to consider two important decisions dealing specifically with so-called corporate immunity, in both of which the basic facts were virtually identical with those in the present matter and in both of which a claim to sovereign immunity was denied, viz: *Victory Transport Incorporated v. Comisaria General*, (1968), United States Court of Appeals (Second Circuit): 336 Federal Reporter, 2nd Series 354; 35 International Law Reports, p. 110; *ADM Milling Co. v. Republic of Bolivia*, (1975), U.S. District Court for the District of Columbia; International Legal Materials, (1975), vol. 14, p. 1279.

Canada: In *Government of the Democratic Republic of the Congo v. Venne*, (1972) 22 D.L.R. (3rd) 699, a plea of sovereign immunity was upheld in an action by an architect against the Republic of the Congo relating to fees in respect of plans for the construction of a national pavilion at "Expo '67".

The following are some examples of decisions by foreign tribunals where sovereign immunity has been denied in relation to commercial transactions by or on behalf of a Sovereign State: (i) *Borg v. Caisse Nationale D'Epargne Française*, (1925-1926), 3rd Annual Digest of Public International Law Cases, at p. 171; (ii) *Egyptian*

Delta Rice Mills Co. v. Comisaria General de Abastecimientos Y Transportes de Madrid, Annual Digest and Reports of 1943. (Egypt, Commercial Tribunal of Alexandria); (iii) *Dralle v. Republic of Czechoslovakia*, (1950) 17 International Law Reports, (Austria, Supreme Court), (iv) *Passelaignes v. Mortgage Bank of Norway*, (1955) 22 International Law Reports, 1955 (France, Tribunal Civil de la Seine); (v) *Decision of Second Chamber of Federal Constitutional Court*, April 30, 1963, (Germany). Reported in *American Journal of International Law*, vol. 59, 1965, p. 654; (vi) *Societe Europeene d'Etudes et d'Entreprises v. Yugoslavia*, Netherlands Supreme Court, 1975, *International Legal Materials*, vol. 14, 1975, p. 71. South African cases: see *De Howorth v. The S.S. India*, 1921 C.P.D. 451; *Ex parte Sulman*, 1942 C.P.D. 407; *Kavouklis v. Bulgaris*, 1943 N.P.D. 190; *Parkin v. Government Republique Democratique du Congo*, 1971 (1) S.A. 259; *Leibowitz v. Schwartz*, 1974 (2) S.A. 661. Of the above cases, the only one which considers the subject in any depth is the *S.S. India* and even that case nowhere considers the application of the doctrine of sovereign immunity to State-owned or State-controlled autonomous entities. Moreover since the Privy Council has now overruled *The Porto Alexandre*—on which the judgment of Gardiner, J., was largely based—the decision in *S. S. India* would probably no longer be regarded as good law. From a review of all the reported South African decisions on the subject of foreign immunity, there is no authority on the issue presently under consideration, in particular on the issue whether a State-owned trading corporation having a separate legal entity is immune from suit in a South African Court. The matter is accordingly at large and must therefore be determined in accordance with the present practice of nations as reflected by the decisions of the Courts of all nations and as reflected by the general *consensus* of international jurists. The topic shows that the overwhelmingly preponderate practice of nations is that sovereign immunity is not accorded to State-owned corporations carrying out commercial transactions, even though in pursuance of State policy. It is a fundamental principle that every sovereign State has unlimited and unrestricted jurisdiction over all persons and property within its own territory. The doctrine of sovereign immunity is a self-imposed limitation on this principle. The extension of the doctrine to what may be termed “corporate immunity” (i.e. to State-owned and/or controlled corporate bodies) is an unwarranted extension of the original doctrine—at any rate in the case of corporations engaged in trade and commerce. It is an extension which is now virtually peculiar to English law and which reached its high-watermark in the *Tass Agency* and *Baccus* cases. This extension finds no basis or justification in the doctrine of sovereign immunity as expounded by *Bynkershoek* and other Roman-Dutch writers. Nor does it find support in the Civilian writers. See Bar, *Private International Law*, 1892, 2nd ed. at pp. 1101-1103 (*Gillespie's* translation). In determining whether the extended doctrine of “corporate immunity” should be applied by our Courts, it is of fundamental importance to bear in mind that our Courts must apply international law, not solely as interpreted by the English Courts, but as reflected in the general practice of all Nations. See O’Connell, *International Law*, 2nd ed., vol. 1, 1970, p. 58. There is no authority in South African law which has sanctioned the extension of the doctrine of sovereign immunity to so-called “corporate immunity”. See *The Cristina*, 1938 A.C. 485. To apply the doctrine of “corporate immunity” would be to run counter to the overwhelming body of the present-day practice of nations and would import what is now a virtually discredited doctrine, even in English Law. The Court cannot be satisfied that the extended doctrine of corporate immunity as applied to State-owned and/or State-controlled trading corporations has “the hallmarks of general assent and

reciprocity"—on the contrary. What has inhibited the English Courts from finally abandoning the rigid doctrine of absolute immunity is the doctrine of *stare decisis* as appears from the judgments of Lawton, L.J. (at p. 1493), and Scarman, L.J. (at pp. 1493 and 1495), in the *Harmattan*, *supra*. This Court is, in the absence of any binding decision, not thus inhibited. In any event, as Gardiner J., pointed out in *S.S. India*, *supra* at p. 448, the decisions of English Courts are not binding authority but merely guides. The Court below therefore misdirected itself in blindly accepting the decision in the *Baccus* case as representing modern international law and in ignoring the overwhelming weight of judicial decisions and recognised writers on international law in virtually every other country in the western world. It remains to apply what are the applicable principles of international law to the facts of the present case. This involves a consideration of two separate but related matters, viz.: (A) *the nature of the transaction involved*, i.e., whether it was a transaction *jure gestionis* or a transaction *jure imperii*; and (B) *the juridical status of CMA*. The shipping contract was an act *jure gestionis*. This submission is furthermore supported, *inter alia*, by three decisions previously referred to, where in respect of virtually identical transactions, a plea of sovereign immunity was rejected, viz.: the *Egyptian Delta Rice Mills* case, 1943; the *Victory Transport* case, 1965; the *A.D. Milling* case, 1975. Even if the maize had been purchased directly by the Government of Venezuela and not by CMA, a plea of sovereign immunity could not have been raised. It follows, *a fortiori*, that CMA itself was not entitled to plead sovereign immunity. The applicant contended that CMA was neither a Department of State nor an organ of the State. It could, however, by a specific agreement between the State and itself, act as an *agent* of the State. The precise status of CMA is not a matter of which the Court can take judicial notice. The *onus* lies upon the respondent corporation to satisfy the Court as to its status under the law of Venezuela. The mere allegation that the corporation is a Department of State is not conclusive and the Court must decide the question upon all the evidence before it. See Cheshire, *Private International Law*, 9th ed., 1974, p. 108; *Juan Ysmael*, 1955 A.C. at pp. 87-90; *Nizam* case, 1957 A.C. at pp. 415-416; *O'Connell*, *op cit.*, at pp. 848-9.

The question of the ownership of the maize involves two separate but related issues, viz: (A) In whom did ownership in the maize vest (in CMA or the State of Venezuela) once ownership passed from the Maize Board? (B) At what stage did ownership pass; in particular, did ownership pass immediately the maize was placed on board the vessel? (A) When ownership in the maize passed from the Maize Board, it vested in CMA. Even though the maize may have been subject to the ultimate control of the State, it was not subject to its immediate control. Even if the maize was subject to the immediate or ultimate control of the State this, of itself, cannot render the maize immune from attachment, once it is accepted that the underlying transaction was *jure gestionis*. Even according to English law, a State-owned ship engaged in commerce is not immune from attachment. *A fortiori*, an asset, the subject of a transaction *jure gestionis*, which is merely subject to control by the State, is not immune.

The question when ownership passed must be determined according to South African law, the *lex loci contracti* and the "proper law" of the contract. According to S.A. law, in a credit sale ownership passes on delivery, i.e. when the maize was placed on board. The maize contract, properly interpreted, was a sale on credit. The fact that the purchaser was obliged to establish letters of credit which became payable only after delivery supports this submission. The effect of the letter of credit

was that payment would be *secured* but did not operate to convert the transaction into a cash sale. *Laing v. S.A. Milling Co.*, 1921 A.D. at pp. 395-6; *International Harvester v. A.A. Cook & Associates*, 1973 (4) S.A. 47; Mackeurtan, *Sale of Goods in South Africa*, 4th ed., 1972, p. 176. In a contract providing for delivery f.o.b. the ownership passes to the purchaser on delivery to the carrier in terms of the contract. *Anderson & Coltman Ltd. v. Universal Trading Co.*, 1948 (1) S.A. at pp. 1280, 1281. The shipping contract was *ex facie* a binding and concluded contract and contained no reference whatsoever to the necessity for its approval or ratification by any third party before it became binding on CMA. On the well established principle of the rule in *Turquand's* case, it is not open to CMA to allege that an unconditional contract duly executed by it never came into force because it lacked authority to conclude a binding contract. Alternatively, the applicant submits that the respondent is estopped from so alleging. In proceedings before our Courts CMA—according to the *lex fori*—would not be entitled to plead that the unconditional written contract was subject to the approval by some other body and therefore conditional only. Cf. Hoffman, *South African Law of Evidence*, 2nd ed., 1970, p. 220. Further, and in any event, the law governing the formal validity of the shipping contract and the law governing the capacity of CMA to contract is the *lex loci contractus* and/or the proper law of the contract, both of which are South African law. Cheshire, *Private International Law*, 9th ed., 1974, pp. 225-229; Hahlo and Kahn, *The Union of South Africa. The Development of its Laws and Constitution*, 1960, p. 749. According to South African law, the shipping contract would be regarded as a valid and binding contract and not subject to approval or ratification by any third party.

According to our law, in a contract of sale—where credit is given—the ownership in the goods sold passes from the seller to the buyer on delivery of the *res vendita* to the buyer, or to the buyer's agent authorised to receive delivery. An agreement to give credit is implied where the buyer gives security for the payment of the price, or where payment will necessarily be effected on a date subsequent to delivery. Mackeurtan, *Sale of Goods in South Africa*, 4th ed., 1972, para. 243, p. 176; Norman, *Purchase and Sale*, 3rd ed., 1961, p. 194. In the present matter in terms of the maize contract, security for the purchase price was in fact provided by the establishment of an irrevocable confirmed banker's letter of credit and furthermore payment would necessarily be made some days after delivery. In a contract f.o.b. the carrier is the agent of the buyer and the ownership passes to the buyer when the goods sold are delivered to the carrier in terms of the contract. *Anderson & Coltman Ltd. v. Universal Trading Co.*, 1948 (1) S.A. at pp. 1280-1281. In a contract f.o.b., delivery to the carrier takes place when the goods are placed on board the vessel, or, more accurately, when they cross the ship's rail. See *Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd.*, (1954) 2 Q.B. at pp. 414, 419. In the present matter, the whole of the cargo of maize had been placed aboard the vessel and therefore delivery of the maize to the buyer's agent to receive delivery had been effected. *Prima facie*, therefore, at the time of the proposed attachment, the ownership in the maize had passed to the buyer, i.e. CMA. The only question remaining, is whether the bill of lading in any way operated to suspend or revert the passing of ownership. The master of the vessel is required to sign a bill of lading within a reasonable time of the completion of the loading. In a sale f.o.b. the presumption is that ownership passes to the purchaser when the goods sold are placed on board the vessel. This presumption may, however, be displaced by a contrary intention of the parties as evidenced by the bill of lading. Where the bill of lading is taken out in the name of the buyer, the pre-

sumption that the seller intended to pass ownership on delivery of the goods is reinforced and it will be presumed that the seller intended that the bill of lading is to be held merely as security for payment of the purchase price—more particularly, where payment of the price has been secured by an irrevocable bankers' letter of credit payable against presentation of the bill of lading. Even where the bill of lading is taken out in the name of the seller, the presumption will not be displaced where the evidence shows that the seller merely intended to retain the bill of lading as security for the purchase price until payment. See *Standard Bank v. Carter*, (1902) 19 S.C. at p. 304; *Knight Ltd. v. Lensveldt*, 1923 C.P.D. 444; *Standard Bank of S.A. Ltd. v. Efroiken & Newman*, 1924 A.D. 171; *Mercantile Bank of India Ltd. & Another v. Davis*, 1947 (2) S.A. 723; *Anderson & Coltman Ltd. v. Universal Trading Co.*, 1948 (1) S.A. 1277; *Ambassador Factors Corporation v. K. Koppe & Co.*, 1949 (1) S.A. at p. 318; *Gravelli & Figli v. Gollach and Gomperts (Pty.) Ltd.*, 1959 (1) S.A. 816; *Hochmetals Africa Ltd. v. Otavi Mining Co. Ltd.*, 1968 (1) S.A. at p. 573A. The question is discussed by the following text-writers on South African law: Wes-sels, *Law of Contract*, 2nd ed., 1951, vol. II, paras, 4521, 4522; Norman, *Purchase and Sale in South Africa*, 3rd ed., 1961, pp. 201-206; Mackeurtan, *Sale of Goods in South Africa*, 4th ed., 1972, p. 295; Bamford, *The Law of Shipping and Carriage in South Africa*, 2nd ed., 1973, p. 87.

Individual decisions under English law relating to the passing of ownership under an f.o.b. contract must be approached with caution, by reason of the radical difference between the two systems relating to the passing of ownership under a sale of goods. Cf. *Mackeurtan, loc cit.*, p. 295. According to English law it would appear that if the bill of lading is in the buyer's name the property in the goods will normally pass on shipment; while if it is in the seller's name ownership will pass only when the bill of lading is transferred to the buyer and the price is paid or tendered, unless it was intended that the bill of lading was to be held merely as security. The whole topic is discussed by Carver, *Carriage by Sea*, 12th ed., 1971, vol. II, paras. 1064-1066; Benjamin, *On Sale*, 6th ed., 1930, chap. VI at pp. 448-450; Benjamin, *Sale of Goods* (Common Law Library Series No. 11), 1974, Ch. 20 "F.O.B. Contracts" paras, 1641-1703; Halsbury, *Laws of England*, 3rd ed., 1961, vol. 34, paras. 91, 302; vol. 35, paras, 492 *et seq.*; Schmitthoff, *The Export Trade, The Law and Practice of International Trade*, 5th ed., 1969, pp. 19, 20. The American law on the subject (which is partially governed by statute) supports the propositions here contended for. Williston, *On Contract* (revised ed.), vol. 4, 1936, para. 1134; Williston, *On Sales* (revised ed.), 1948, chap. 11, paras. 282, 283, 284, 285, 291. The holding of the bill of lading by the seller operated as a *quasi-lien* but did not affect the ownership, which had already passed when the goods were delivered to the buyer's agent. The subsequent "clausing" of the bill of lading to the master is irrelevant to the question as to whether the ownership in the maize had already passed when it was placed on board. In relation to the application to attach the bill of lading (which in effect was the key to the floating warehouse in which the maize was stored), as the bill of lading was in effect issued in favour of CMA this was a species of property belonging to CMA which the applicant was entitled to attach. The mere attachment of the property does not confer any preferential right on the party who attaches. The property so attached still remains available to satisfy the claims of all creditors. See *Mercantile Bank of India and Another v. Davis*, 1947 (2) S.A. 723; *Ambassador Factors Corporation v. K. Koppe & Co.*, 1949 (1) S.A. at pp. 318-319; *Ex parte Gregory*, 1956 (1) S.A. 215; *Hymore Agencies v. Gin*, 1951 (1) S.A. 180.

J. Browde, S.C. (with him *F. J. Bashall*), for the respondents: The question now before this Court is academic and the appellant's only interest relates to costs. In terms of sec. 19 of Act 59 of 1959 the Court will not exercise its discretion to enquire into matters of abstract or intellectual interest only. *Ex parte Van Schalkwyk, N.O. and Hay, N.O.*, 1952 (2) S.A. at p. 411C; *Trustees J.C. Poynton Property Trust v. Secretary for Inland Revenue*, 1970 (2) S.A. 618; *Durban City Council v. Association of Building Societies*, 1942 A.D. at p. 33. In this regard an analogous situation exists in matters in which plaintiffs ask for orders of specific performance. The Court will not order specific performance where such performance is impossible or unenforceable. *Wessels, Law of Contract in South Africa*, 2nd ed., vol. 2, p. 831, paras. 3122, 3124. Where the decree for specific performance would be valueless or nugatory the Court will not issue it. The Court never issues idle orders. *Wessels, loc cit.*, para. 3129. At the root of an attachment *ad fundandam jurisdictionem* is the doctrine of effectiveness. *Thermo Radiant Oven Sales (Pty.) Ltd., v. Nelspruit Bakeries (Pty.) Ltd.*, 1969 (2) S.A. at pp. 309E-310C. As there is no asset of the first respondent available for attachment, no order can be made effective against the first respondent and therefore the only relief being sought by the appellant pertains to the order of costs. The appellant must obviously have realised that this was the only real issue remaining between the parties and should then have asked for leave to appeal in terms of sec. 21 (2) (a) of Act 59 of 1959, read with sec. 20 (1) (a) and 20 (2) (b). The present appeal is of no importance to the parties (apart from the award of costs) and in considering whether leave to appeal should be granted it is the importance of the matter to the parties, not its importance as an abstract legal question to legal practitioners or the public, which must be considered. *Haine v. Podlashuc and Nicholson*, 1933 A.D. 104; *Abromowitz v. Jacquet*, 1950 (3) S.A. at p. 381A-H. In assessing how important the question of sovereign immunity is it is significant that the only reported cases in South Africa are the five referred to by the appellant. The attitude of this Court to academic matters, the only real issue in which is one of costs, was laid down in *African Guarantee and Indemnity Co. Ltd. v. Van Schalkwyk and Others*, 1956 (1) S.A. at pp. 328H-329C. The appeal should be dismissed with costs alternatively struck off the roll with costs, for the further reason that the Maize Board was not joined in the proceedings. The Maize Board had an interest so indivisible that the judgment must affect them even if it is *res inter alios acta*. *Collin v. Toffie*, 1944 A.D. 456; *Home Sites (Pty.) Ltd. v. Senekal*, 1948 (3) S.A. at p. 521. As it was not made a party to the application, the Maize Board, irrespective of the outcome of the application, could have brought its own application against the Master of the ship for delivery of the bill of lading and on the facts would have been entitled to such an order. As the matter could not have been held to be *res judicata* this could have left two orders which were mutually incompatible. This, too, demonstrates that the Maize Board should have been joined. *Amalgamated Engineering Union v. Minister of Labour*, 1949 (3) S.A. at p. 661; *Henri Viljoen (Pty.) Ltd. v. Awerbuch Bros.*, 1953 (2) S.A. at p. 167F-H. Therefore, as the Maize Board had a direct and substantial interest in the application, the Court would have been justified in dismissing the application because of the non-joinder of the Maize Board. *Amalgamated Engineering Union, supra* at p. 659. The question of non-joinder was raised *mero motu* by the Appellate Division in *Collin v. Toffie, supra*; *Home Sites (Pty.) Ltd. v. Senekal, supra*. The Court will not permit a cessionary in the position of the appellant to attach *ad fundandam jurisdictionem*. History shows that the procedure of attachment *ad fundandam jurisdictionem* was unknown to Roman law and was incorporated in our law from Germanic custom which permitted of the arrest of

the person to give *incolae* an advantage over *peregrini*. *Thermo Radiant Oven Sales* case, *supra* at pp. 305C-306A. The remedy has been referred to as "peculiar and unusual", Wessels, *History of the Roman-Dutch Law*, p. 687, and as a "special privilege...contrary to the usual practice of the Courts (of Holland)". Wessels, *loc. cit.*, p. 692. In modern times it has been referred to as an exceptional remedy which should be applied with care and caution. *Ex parte Acrow Engineers (Pty.) Ltd.*, 1953 (2) S.A. at p. 321G-H; *Thermo Radiant Oven Sales* case, *supra* at p. 302C-D. Therefore, to grant the right of attachment to a cessionary even if the cession is *bona fide* (which we submit this cession is not) is an extension of the remedy which should not be countenanced. In the present case, particularly, the effect of an attachment would have been to the advantage of a *peregrinus* (Raphaely) and not to the advantage of the *incola* (appellant). Further, granting the order would be putting the cessionary in a better position than the cedent for the following reasons: (a) The Court will not entertain an application by a *peregrinus* against another *peregrinus* for damages arising out of breach of contract unless the contract was entered into within the area of jurisdiction of the Court or the breach was committed there. *Taborski v. Schweizer and Apirion, N.O.*, 1917 W.L.D. 152; *Frank Wright (Pty.) Ltd. v. Corticas "BCM" Ltd.*, 1948 (4) S.A. 456; *Chattanooga Tufters Supply Co. v. Chenille Corporation of S.A. (Pty.) Ltd.*, 1974 (2) S.A. 10. (b) The contract on which the first respondent was to be sued was entered into and the alleged breach thereof, namely the failure to provide the letter of credit, was committed in Johannesburg, alternatively Venezuela. (c) It therefore follows that Raphaely, which is a *peregrinus* in the Cape, could not have succeeded in the application against the first respondent in the Cape Provincial Division. For this reason the claim of Raphaely was ceded to the appellant. (d) the question therefore arises whether again the cessionary (i.e. the appellant) was not placed in a better position than the cedent (i.e. Raphaely) since in law this will not be permitted. *Voet* 18.4.13 (*Gane's* translation, vol. 3, pp. 325-327); Grosskopf, *Die Geskiedenis van die Sessie van Vorderingsregte*, 1960; *Van Zyl v. Credit Corporation of S.A. Ltd.*, 1960 (4) S.A. at p. 588F-G (e) The advantage which the appellant has in the Cape is the right to attach the first respondent's property there. Whether Raphaely could have obtained such an order in the Witwatersrand Local Division, attaching the maize in Cape Town, is doubtful. *Stateline Clothing (Pty.) Ltd. v. Cheeseman*, 1967 (1) S.A. 337; *Ex parte Gerald B. Coyne (Pty.) Ltd. In re Gerald B. Coyne (Pty.) Ltd. v. Sinco Trading Co. Ltd.* 1971 (1) S.A. 624; *Bock & Son (Pty.) Ltd. v. Wisconsin Leather Co.*, 1960 (4) S.A. 767; *Curbera v. S.A. Pesquera Industrial Gallega*, 1969 (3) S.A. 296. In this regard the correct view is that while secs. 36 (1) and 26 of the Supreme Court Act, 59 of 1959, make an order of any Division of the Court enforceable in the Republic, those provisions do not extend the territorial jurisdiction of any such Division. *Ex parte Boshoff*, 1972 (1) S.A. 521. If this submission is correct then the appellant obtained an advantage by the cession and was placed in a better position than that occupied by Raphaely. Therefore the cession was *mala fide*, and in this regard see *LTA Engineering Co. Ltd. v. Seacat Investments Ltd.*, 1974 (1) S.A. at pp. 769E-H, 771E-F; *Mannesmann Engineering & Tubes (Pty.) Ltd. v. LTA Construction Ltd.*, 1972 (3) S.A. at p. 775. In so far as *Hill and Paddon v. Borchert*, (1884) 2 H.C.G. 253, held that the Court would order attachment at the instance of an *incola* cessionary, the facts of the instant case render it distinguishable, alternatively, the case was wrongly decided. Therefore the Court will not assist the cessionary to bring an action against the first respondent which the cedent could not have done and that the appeal should be dismissed on this ground. At the time when the application was made the owner-

ship of the maize vested in the Maize Board. The *onus* of proving that the maize sought to be attached was the property of the first respondent rested upon the appellant. *Jackson v. Parker*, 1950 (3) S.A. at p. 27H; *Anderson and Coltman Ltd. v. Universal Trading Co.*, 1948 (1) S.A. at p. 1284; *Hochmetals Africa Ltd. v. Otavi Mining Co. Ltd.*, 1968 (1) S.A. at p. 581D-H. Appellant failed to discharge the *onus*, for the following reasons: (i) If the sale by the Maize Board was a cash sale then ownership had not passed from the Maize Board, as the Maize Board had not been paid at the time of application. *Sadie v. Standard Bank*, 7 S.C. at p. 91; *Crockett v. Lezard*, 1903 T.S. at pp. 592-593; *Lilienfeld & Co. v. Rivera*, 1908 T.S. at p. 41. It is clear from the maize agreement that the Maize Board, in order to obtain payment for the maize pursuant to the letter of credit, had to present to the bank, *inter alia*, a clean bill of lading made out to order and endorsed in blank. It was clearly intended that the Maize Board would, on delivery of the maize, be given the documents of title which would enable the Board to obtain payment at will from the bank. There is no distinction between this arrangement for payment and payment by means of a cheque which is not post-dated. As to the effect of such payment, see *Grosvenor Motors (Potchefstroom) Ltd. v. Douglas*, 1956 (3) S.A. at pp. 423H-425A; *Nowell v. Franzen*, 1956 (4) S.A. at p. 38C-D. The appellant relies on *Laing v. S.A. Milling Co. Ltd.*, 1921 A.D. 387. The case is also distinguishable since it was there held that the postponement of payment to a definite date after delivery—or for a substantial period—makes the sale a credit transaction. In the instant case there is no valid reason for suggesting that the Maize Board gave credit to the first respondent or that it was precluded from obtaining payment as soon as the delivery on board was completed. *Anderson & Coltman Ltd. v. Universal Trading Co.*, 1948 (1) S.A. at pp. 1280-1281, is also distinguishable. Where the price has not been paid or credit given ownership remains in the seller. The mere fact that the contract refers to F.O.B. is of no significance in this regard. *Sassoon, C.I.F. and F.O.B. Contracts*, vol. 5, *British Shipping Laws*, pp. 291-294. It follows, therefore, that *pari passu* with the delivery of the maize on board the ship, the Maize Board would insist upon receiving from the master the signed bill of lading required in terms of the agreement. If that is so, then it could not have been the intention of the Board to pass ownership of the goods on mere loading of the maize on board since possession of a bill of lading would entitle it to have the goods delivered to it to the exclusion of other persons. The Board would be in the same commercial position as if the goods were in its physical possession. *McIntosh & Co. v. English, Scottish and Australian Bank Ltd.*, 1921 N.L.R. at p. 91; *Garavelli & Figli v. Gollach & Gomperts (Pty.) Ltd.*, 1959 (1) S.A. at p. 821A; *Standard Bank of S.A. Ltd. v. Efroiken & Newman*, 1924 A.D. at p. 190; *Wille, Principles of South African Law*, 6th ed., p. 179; *Wessels, Law of Contract in South Africa*, 2nd ed., vol. 2, paras. 4583, 4584. The effect of the Maize Board being issued with a bill of lading to its order is that while risk passes to the buyer on shipment, possession and title are retained by the seller until payment has been received. In that case ownership passes simultaneously with payment. *McKeurtan, supra*, 4th ed., p. 295, para. 417. If the submission that the sale was a sale for cash is not correct and the Court holds that it was a sale on credit, then (a) the sale was conditional upon delivery to the Maize Board of a clean bill of lading. This constitutes non-fulfilment of the condition and the sale should therefore be treated as one for cash. *Phillips v. Hearn & Co.*, 1937 C.P.D. at pp. 64-65; *Wille, op. cit.*, p. 404. (b) Prior to the drawing of the bills of lading there was no delivery inasmuch as the bills of lading have to be presented by the shipper (i.e. the Maize Board) to the Master for his signature, without which the purchaser (i.e. the first re-

spondent) would not have been able to obtain control of the maize nor even to get possession of the goods at their destination. *Halsbury*, 3rd ed., vol. 34, p. 179, paras. 309 and 310. In any event this case, having reference as it does to a bill of lading, involves the application of Act 8 of 1879 (C), secs. 2 and 3, and accordingly the law of England as at 1879. According to such law, ownership passes in accordance with the intention of the parties. *Halsbury, Laws of England*, 1st ed., vol. 26, para. 231, and authorities there cited. In South Africa it has been held that the stage at which ownership passes depends upon the intention of the parties to the sale. The delivery required to pass ownership is such which comprises the transference of possession coupled with the mutual intention to transfer ownership, i.e. to transfer effective control over the maize. *Knight Ltd. v. Lensvelt*, 1923 C.P.D. at p. 447. The fact that the Maize Board had not yet obtained the clean bill of lading must mean that it had not transferred nor intended to transfer ownership in the maize to the purchaser. In a case having reference to a bill of lading, such as the present with the establishment of an irrevocable letter of credit, the time at which the purchaser becomes the owner of the goods is when the bills of lading are finally given into its possession. The first respondent could have had no effective control over the maize until such time as it was in possession of the bills of lading. *London & South African Bank v. Donald Currie & Co.*, 1875 Buch. at p. 33; *Knight Ltd. v. Lensvelt*, *supra* at pp. 447-448. Appellant therefore failed to prove that ownership in the maize had passed from the Maize Board at the time of the application.

If ownership passed from the Maize Board it passed to the Government of Venezuela, not to the first respondent. Alternatively, by reason of clause K of the shipping agreement, the "proper law" of the contract was fixed and that the common intention of Raphaely and the first respondent was that it should be Venezuelan law. Dicey and Morris, *The Conflict of Laws*, 8th ed., p. 698. Therefore the appellant should have proved the Venezuelan law in regard to the passing of ownership. The application should in any event have been dismissed because of the strong balance of convenience against the appellant. The court *a quo* was correct in holding that sovereign immunity was properly claimed. The concept of sovereign immunity is part of South African Law. *De Howorth v. S.S. India*, 1921 C.P.D. 451; *Parkin v. Government of the Republique Democratique du Congo and Another*, 1971 (1) S.A. 259; *Leibowitz and Others v. Schwartz and Others*, 1974 (2) S.A. 661. In the last-mentioned case it was held that the doctrine is recognised by the Courts of this country because of weighty considerations of public policy, international law and comity of nations. South African Courts have hitherto followed the English practice, namely, that if the property sought to be attached is that of a foreign sovereign state the Court will not order such attachment if such property was being used or to be used for public purposes. *Parkin's case supra* at pp. 260H-262A. If ownership passed from the Maize Board it is immaterial whether it passed to the Central Government *per se* or to an *alter ego* or arm of the Government, *Mellenger and Another v. New Brunswick Development Corporation*, (1971) 2 All E.R. at p. 598D-H, or to a department or to an equivalent of a department of the Government. *Per* Lord Cross of Chelsea, in the *Philippine Admiral*, (1976) 1 All E.R. at p. 87a-b. The first respondent is either the *alter ego* or a department of the Government of Venezuela. In view of the foregoing the Court *a quo* was correct in following the judgment in *Baccus v. Servicio Nacional Del Trigo*, (1956) 3 All E.R. 715. The position of the corporation in that case was, in our submission, indistinguishable from that of the first respondent. It is conceded that in recent times there has been a movement away from the absolute theory of immunity towards the restrictive theory, but in Eng-

land, at any rate, this applies only to actions *in rem*. Such actions are brought to establish a right to arrest property which is the subject-matter of the dispute and to enforce judgment against the property so arrested. Halsbury, *Laws of England*, 4th ed., vol. 1, p. 211, para. 305. A typical *in rem* action is provided for in sec. 339 of the Merchant Shipping Act, 57 of 1951. The high-water mark of England's movement away from the absolute theory of immunity is the judgment of the Privy Council in the *Philippine Admiral*. That judgment makes it clear that absolute immunity still pertains to actions *in personam*. Neither the *Harmattan* nor the *Philippine Admiral* decisions cited by the appellant has altered the position. See, too, *Tharros Shipping Corporation S.A. v. Owner of the Ship "Golden Ocean"*, 1972 (4) S.A. 316. In any event the *Philippine Admiral* merely decides that the doctrine of sovereign immunity should not apply in actions *in rem* to "ordinary trading transactions". In this regard it is not an ordinary trading transaction to ship maize destined for public use to a foreign country which has suffered a crop failure. The instant case is an example *par excellence* of an act *jure imperii* and is as much for public purposes as would be a South African Governmental decision to supply maize to a neighbouring state which had suffered a natural disaster. In *The International and Comparative Law Quarterly*, 1958 (vol. 7), at p. 455, the learned author (*Schmitthoff*), while he is in favour of the doctrine, points out the difficulty encountered in the doctrine of limited immunity of exactly defining what are transactions *jure imperii* and what are transactions *jure gestionis*. He points out that a comparison of the decisions of the Courts of various countries attempting to apply the test of what is the object of the transaction, indicates a bewildering variety and diversity of views. He submits that the only test which provides a practical and workable distinction is—what is the nature of the transaction? That test, however, he points out, goes further than the Courts of many countries applying the test of objects would admit. A further criticism of the restrictive policy is to be found in O'Connell, *International Law*, vol. 2, 2nd ed., 1970, at p. 845. In so far as the American practice is concerned, see O'Connell, *op. cit.* at p. 854. The learned Judge *a quo* correctly accepted that the claim of the Government of Venezuela to the maize in question cannot "be described as illusory or based on a title which is manifestly defective", and accordingly followed (correctly) *Juan Ysmael & Co. Inc. v. Government of the Republic of Indonesia*, (1954) 3 All E.R. 236. In *Schmitthoff's* article on Sovereign Immunity, *supra* at p. 461, he also makes reference to the attitude of various countries in regard to execution against the property of a foreign sovereign once judgment has been obtained. In South Africa full immunity against execution would be enjoyed by a foreign sovereign and therefore the effectiveness of any judgment would be rendered nugatory. See sec. 3 of State Liability Act, 20 of 1957.

Suzman, Q.C., in reply: The bill of lading issued was in fact a "clean" bill of lading. If there is no clause or notation in the bill of lading qualifying the statement that the goods "were shipped in good order and condition", the bill is known as a "clean" bill of lading. *Canadian and Dominion Sugar Co. Ltd. v. Canadian National (West Indies) Steamships Ltd.*, 1947 A.C. at p. 54; Carver, *Carriage by Sea*, 12th ed., 1971, vol. 1, paras. 82, 432; Scrutton, *Charterparties*, 18th ed., 1974, p. 173; *British Imex v. Midland Bank*, (1958) 1 Q.B. 542. The effect of "clausuing" did not operate to make the bill of lading not a "clean" bill of lading. The effect of sec. 2 of the Cape Act, 8 of 1879, is merely that in proceedings having reference to bills of lading the law administered by the High Court of Justice in England for the time being, should be the law to be administered by the Cape Supreme Court. Sec. 3 provides that this shall not have the effect of giving force to any statutory enactment

by the Imperial Parliament after the taking effect of the Act unless such enactment is re-enacted in the Cape. A bill of lading is not a contract between the shipowner and the shipper of goods. It is a receipt for the goods, stating the terms on which they were delivered to and received by the ship and may be evidence of the terms on which goods were shipped, but it is not a contract. The contract comes into existence before the bill of lading is signed. The bill of lading is signed by one party only—the master of the ship—and handed by him to the shipper, usually after the goods have been placed on board. See *Sewell v. Burdick*, (1884) App. Cas. at p. 105; *The Ardennes*, (1950) 2 All E.R. at pp. 519H-520A. A bill of lading is a symbol of the goods represented thereby; it evidences possession not property. It is not a symbol of the right of property, the passing of which depends upon the contract. Where the bill of lading is transferred to the buyer, the property passes by the contract and not by the transfer of the bill. *Sewell v. Burdick*, *supra* at p. 105; Halsbury, *Laws of England*, 1st ed., 1913, vol. 25, para. 325; 2nd ed., 1938, vol. 29, para. 112; 3rd ed., 1960, vol. 34, para. 309. A bill of lading is not a negotiable instrument. See Cowen, *The Law of Negotiable Instruments in South Africa*, 4th ed., 1966, p. 30 and the authorities cited in note 130.

Cur. adv. vult.

Postea (August 17).

Corbett, J.A.: On 5 June 1975 appellant, Lendalease Finance (Pty.) Ltd. (hereafter referred to as "Lendalease") made an urgent application to the Cape Provincial Division for the attachment *ad fundandam jurisdictionem* of a cargo of bulk maize aboard the ship "M.V. Mariannina", then in dock at the Cape Town harbour, and, if not already released to the shipper, of the full set of negotiable bills of lading relating to this cargo, together with certain ancillary relief. On 12 June 1975 the Court gave judgment (*per* De Kock, J., Baker, J., concurring) dismissing the application, and, save for some specific matters in respect of which special orders were made, ordering Lendalease to pay the costs. This judgment has been fully reported (see *Lendalease Finance Co. (Pty.) Ltd. v. Corporacion De Mercadeo Agricola and Others*, 1975 (4) S.A. 397 (C)) and it is, consequently, necessary to repeat only the salient facts and features of the matter.

In Venezuela maize is the staple food of the people. Large quantities of bread, particularly for persons in low income groups, are made from maize. The annual consumption of maize by the people of Venezuela greatly exceeds the annual production of the country and consequently this commodity is imported on a large scale. In March 1974 a Venezuelan trade mission, consisting of Government officials, visited South Africa in order to purchase maize for the State of Venezuela. As a result of this visit a contract for the purchase of approximately 250,000 tons of maize was concluded between the Maize Board of South Africa (hereafter referred to as "the Board") and first respondent, Corporacion De Mercadeo Agricola of Caracas, Venezuela (hereafter referred to as "CMA"). The reason for the purchase of so large a quantity was that there had been a maize crop failure in Venezuela. In October 1974 a second Venezuelan trade mission visited this country with the same objective, and in that month a second contract for the purchase of, this time, 130,000 tons of maize was concluded between the same parties. It is only this second contract (which I shall call "the maize contract") which is of relevance in this case.

It was provided in the maize contract, *inter alia*, that the maize was to be shipped f.o.b. by the Board in ten separate cargoes of approximately 13,000 tons

each. Two shipments were to take place in March 1975, four in April 1975 and four in May 1975. In each case the port of shipment was stated to be "East London and/or Cape Town". The contract obliged CMA to arrange for the necessary shipping to convey the maize to Venezuela. To this end it was made incumbent upon CMA to present "suitable tonnage" in respect of each cargo at the port of shipment nominated by the Board and to give the Board appropriate notification of the shipping periods in each month, of the actual chartering of freight, of the fitness and readiness of each individual vessel to receive and carry a full cargo of maize in bulk and of the readiness of the vessel to load. The contract further provided for the delivery of the maize in bulk into the ship's hold at an average rate of not less than 1,500 tons per day, or in bags to be provided by the purchaser and for the quantities delivered for shipment to the purchaser to be determined by mass certificates issued by the South African Railways Administration. (The cargo in question was loaded in bulk.) The relevant portions of the clauses of the contract relating to delivery and payment read as follows:

"7. Delivery: Delivery shall be free on board unstowed and untrimmed the vessel presented by the buyer . . . and bills of lading supported by mass certificates . . . shall be proof of delivery.

" . . .

"10. Risk: All risks after delivery shall be for the account of the buyer.

"11. Payment: (1) The buyer shall at least 10 days prior to the first day of the shipping period of each cargo furnish the seller with an irrevocable confirmed letter of credit issued by a bank acceptable to the seller, covering the value of the maize to be shipped calculated at the price mentioned in clause 3, and stipulating that the amount payable by the buyer in terms of this contract shall be paid in cash on presentation by the seller of the following documents duly stamped and signed by a consul of a country which is friendly to Venezuela:

(a) Charter party bill of lading (full set clean on board to 'order' and endorsed in blank) marked 'freight payable as per charter party'.

. . .

(d) Mass certificates issued by the South African Railways Administration.

. . ."

Shortly after the conclusion of the maize contract and also in October 1974, CMA concluded an agreement with a corporation known as Leo Raphaely and Sons (Pty.) Ltd. (hereafter referred to as "Raphaely"), of Johannesburg, whereby the latter undertook to convey the entire purchase of 130,000 tons of maize from South Africa to Venezuela and generally to take over "all the obligations and functions, rights and duties" of CMA pertaining to the maize contract, except those relating to the cost of the maize and the insurance thereof. This contract (which I shall call "the shipping contract") provided, *inter alia*,

(i) that payment of the agreed freight was to be effected by CMA by the provision of an irrevocable confirmed letter of credit 14 days prior to the month of loading and by payment against one non-negotiable "on board" bill of lading; and

(ii) that the "domicile of this contract" should be the city of Caracas, in the Republic of Venezuela, and that both parties accepted the jurisdiction of the Venezuelan courts in that city.

The shipping contract was never implemented. Raphaely made arrangements for the conveyance of the first March shipments but CMA, despite demand, failed to provide the necessary irrevocable letter of credit for these shipments on due date, i.e., 14 February 1975, or indeed at all. During the last week of February, a director of Raphaely, Mr. Gabriel Cutayar, was informed by Raphaely's representative in Venezuela that CMA was "not happy with" the freight rate fixed by the shipping contract and wished to re-negotiate this aspect of the agreement. Negotiations ensued, but to no effect. Thereafter CMA contracted with another company, Servicios Internacionales S.A., of Panama (hereafter referred to as "Servicios"), to undertake the conveyance of the maize to Venezuela and the performance of its (CMA's) obligations in that regard under the maize contract.

Raphaely claimed—and continues to claim—that CMA unlawfully repudiated the shipping contract and that as a result of such repudiation and breach of contract Raphaely suffered damages in an amount of R1, 970, 340. In view of CMA's status as a *peregrinus* in the Courts of South Africa, Raphaely found it necessary to obtain an attachment of assets belonging to CMA *ad fundandam jurisdictionem* in order to pursue an action for damages for breach of contract against CMA in a South African Court. During April 1975 attempts were made to effect the attachment of two cargoes of maize, one aboard the "Adamas" and the other aboard the "Kapitan Xilas" but, for reasons which need not be canvassed, neither attempt bore fruit.

Early in June 1975 loading of the last cargo under the maize contract, comprising approximately 13,000 tons of maize, on board the "Mariannina" was commenced in the docks at Cape Town. The "Mariannina" is owned by second respondent, Astro Venturoso Compania Naviera S.A. (hereafter referred to as "Astro"), and was then under a time charter to third respondent, Tramp Shipping Ltd. (hereafter referred to as "Tramp Shipping"). For the purpose of conveying this cargo from Cape Town to Venezuela in terms of its contract with CMA, Servicios had chartered the "Mariannina" from Tramp Shipping under a voyage charter party. On 5 June the aforementioned application was made on notice of motion for the attachment of this cargo to found jurisdiction in respect of the action for damages for breach of the shipping contract. The application was brought not by Raphaely but by Lendalease, to whom Raphaely had on 3 June 1975 ceded and assigned all its right, title and interest in its claims against CMA for breach of contract. Only CMA was cited as respondent but during the course of the initial hearing, on 5 and 6 June, Astro, Tramp Shipping and Captain Gregory Gregoriadis, in his capacity as master of the "Mariannina", sought and evidently obtained leave to intervene as additional respondents. Affidavits were filed opposing the application on behalf of all the respondents and they were represented by counsel. After the hearing the Court *a quo* issued a rule *nisi*, operating also as an interim interdict upon the ship leaving Cape Town, calling upon CMA and the master of the "Mariannina" to show cause on 10 June why the deputy-sheriff should not be directed to attach and remove from the vessel the entire cargo of maize then on board. On the return day (10 June) the parties were again fully represented. At this hearing, which appears to have occupied three days (10, 11 and 12 June) the Court heard and dealt with two preliminary applications and then proceeded to the merits of the matter. One of these applications, made on behalf of Astro, Tramp Shipping and the master, was for the dismissal of

the application on the ground that the cession of its right of action by Raphaely to Lendalease was not a *bona fide* one and that, therefore, Lendalease had no *locus standi in judicio*. In this connection it was emphasised that the admitted purpose of the cession was to overcome possible jurisdictional problems in regard to an *incola* of the Transvaal obtaining an attachment order in the Cape Provincial Division over property situated within the area of jurisdiction of that Court. This preliminary application, which entailed the hearing of certain oral evidence, was dismissed with costs.

In response to the rule *nisi* and between the granting thereof and the final judgment of the Court *a quo*, further affidavits were filed by the parties. These bring the factual situation up to date. It appears that the loading of the cargo, which was still in progress at the time of the original application, was completed at 9.40 a.m. on 11 June. The vessel was, therefore, then ready to proceed to sea on her voyage to Venezuela, subject to certain clearance and sailing formalities being completed. Shortly after the completion of the loading the agent of the Board approached the ship's agent, acting on behalf of Astro, Tramp Shipping and the master, and asked whether the master would sign the bill of lading in respect of the cargo of maize aboard his vessel. He (the Board's agent) was then informed that the master would do so only after he had claused the bill to record the possibility of attachment and removal of the cargo by order of the Court. The Board's agent thereupon declined to present the bill for signature. Subsequently, as a result of further communications between the agents, a photostatic copy of the unsigned bill, with the intended clausing placed thereon (annexure Y2), was conveyed to the Board's agent. This was evidently not acceptable to the latter and it would seem that this is how matters rested at the time when the application for attachment was finally adjudicated upon by the Court below.

There is included in the record an affidavit deposed to by Mr. H. F. B. Hickley, the general manager of the Board. Although this is not reflected in the record, we were informed by counsel that this affidavit, which was dated 12 June, was tendered by counsel for the Board who appeared at a late stage in the proceedings and made application to intervene. The Court apparently put it to counsel for the Board that his client would be interested in becoming involved in the application only if the Court intended granting the application; and, upon counsel affirming this, the Court advised him to await the judgment. Shortly thereafter judgment was delivered dismissing the application.

In the Court *a quo* the main defence to the application was based upon the contention that, by reason of the doctrine of sovereign immunity, the Court was precluded from granting an order for the attachment of the maize. Briefly, this contention was based upon the averments that CMA purchased the maize as agent on behalf of the State of Venezuela and that it was at all material times intended to become the property of the State of Venezuela. It was not purchased for purposes of trade in the generally accepted sense but in order to secure an adequate supply of maize for the people of Venezuela. Further, it was claimed that, in any event, CMA was a State-controlled buying and distributing body, the sole reason for whose existence was to secure in the national interest a State minimum pricing policy and a supply of agricultural products and implements for the people of Venezuela. Pursuant to these objects CMA acquired agricultural products and implements and sold the same only to the people of Venezuela at prices below the cost thereof to CMA, the consequent loss being absorbed by CMA. It acted only on directions from the Cabinet and in most instances from the President of Venezuela himself. Funds for the carrying out

of its functions were supplied by the State. All transactions had to be ratified by the State Comptroller. The CMA was exempt from fiscal legislation and other State charges and levies. Immunity was claimed by Mr. H. Gomez, the administrative manager of CMA, on behalf of CMA and, in accordance with authority conferred upon him by the Minister of Agriculture, on behalf of the State of Venezuela broadly on the ground that once ownership of the maize in question passed, it became the property of and subject to the control of the State of Venezuela and was, accordingly, in law exempt from attachment.

This claim to sovereign immunity was strenuously contested by Lendalease, both on the law and on the facts. Included among the affidavits filed on behalf of Lendalease is one deposed to by Mr. Mariano Arcaya, an attorney practising in Venezuela and someone having expert knowledge of Venezuelan law. According to Dr. Arcaya, CMA is "an autonomous institute" of the Republic of Venezuela and as such is a separate juridical entity, having its own assets and legal existence, separate and distinct from the Government of Venezuela. It was not deemed in law to be an agent acting on behalf of the State, though it might in specific circumstances contract to do so. In the absence of a clear, specific contract to that effect, CMA would be deemed to buy and sell produce, such as maize, on its own behalf and to take title to, and dispose of, such produce in its own name and on its own behalf. Dr. Arcaya's views (which were further elaborated in certain telex communications, dated 27 May and 6 June 1975 and annexed to a replying affidavit by Lendalease's attorney) were disputed, in various respects, by Gomez, who claims to be fully conversant with the powers and property rights of CMA, by a Dr. H. W. Quedo, the president and legal representative of CMA, who also filed an affidavit on behalf of CMA, and by Mr. C. C. Barboza, the Venezuelan Minister of Agriculture, who confirmed the correctness of Dr. Quedo's affidavit. The matters in dispute relate principally to (a) the juridical status of CMA and, more particularly, its relationship to the State of Venezuela; and (b) in whom the ownership in the maize was intended to vest after performance of the maize contract, i.e., whether in CMA or the State of Venezuela, which in turn depends to some extent upon the issues referred to in (a).

The Court *a quo* did not find it necessary to adjudicate upon many of these issues. It held that it appeared from all the evidence to be common cause that CMA was "a State-owned enterprise". In regard to the ownership issue the Court stated (at p. 402B-E):

"It will be apparent from what I have said so far that there is a dispute on the papers as to the ownership of the maize in respect of which the attachment order is sought. In a matter of this nature it must, I think, be clear that the property sought to be attached belongs to the *peregrinus* before the Court will grant the order

...

I have some doubt whether it can fairly be said that the applicant has discharged the *onus* of proving that the maize in question is the property of the respondent. On the evidence submitted by the respondent, CMA concluded the maize contract as agent for and on behalf of the State of Venezuela and it is the State of Venezuela who is the owner of the maize and not CMA. But even if I accept that it has been shown that the legal *dominium* of the maize vests in CMA as a separate juridical entity having its own assets and legal existence distinct from the Government or State of Venezuela, I do not think that an attachment order should be granted in the circumstances of this case. I say this because although CMA may

stricto sensu be the legal owner of the maize it seems clear that it is the State of Venezuela and not CMA who has the right of control in respect of the maize, and in these circumstances the maize is, in my view, immune from attachment.”

The judgment proceeds to state the reasons for the decision contained in the concluding words of the above-quoted passage. Reference is made to the general principles relating to the doctrine of sovereign immunity and a number of the leading cases in our law and in English law are cited and discussed. Particular reliance is placed on the English case of *Baccus S.R.L. v. Servicio Nacional de Trigo*, (1956) 3 All E.R. 715, a decision of the Court of Appeal, the facts of which were said to “show a marked resemblance to the facts of the present case”. Despite criticisms of this case, and other decisions to the same general effect, in certain minority judgments in later cases and by writers on international law, and declining the invitation of counsel appearing on behalf of Lendlease to follow this latter line of authority, the Court held (at p. 404E-F) that it—

“ . . . sitting as a Court of first instance, should adhere to the traditional view of granting immunity in respect of property which belongs to a sovereign foreign State or of which it is in possession or control”.

The order for attachment was accordingly refused and the rule *nisi* and interim interdict discharged. Lendlease was ordered to pay the costs, including the costs of the intervening parties, but not the costs of the Board.

By a notice dated 2 July 1975 an appeal was noted to this Court against the whole of the judgment and order of the Court *a quo*, including the order as to costs,

“save in so far as the Court ordered the intervenors to pay portion of the appellant’s costs”.

Although this does not appear from the record, it is to be inferred (as was confirmed before us by counsel) that by then the “Mariannina” had set forth for Venezuela and that by the time this appeal was heard the maize in question had in all probability been used to feed the people of Venezuela. In this Court it was, accordingly, conceded by counsel for Lendlease that effectively it was an appeal merely against that portion of the order of the Court *a quo* which ordered Lendlease to pay the respondents’ costs but it was submitted that the merits of the application for attachment had to be canvassed in order to determine whether the order for costs had correctly been made. In support of the submission that the Court below erred on the merits, counsel for Lendlease presented a comprehensive and well-documented argument upon the topic of sovereign immunity. For reasons which will become apparent later, it will not be necessary to make more than passing reference to this argument. At this stage, however, it is appropriate and convenient to consider certain preliminary points which were raised on appeal by counsel for the respondents.

The first point is that, because there is now nothing to be attached, the issue on appeal is, apart from the question of costs, an academic one and should not, therefore, be entertained by this Court; and, as a corollary to this, the further point was made that, since only costs were really in issue, leave to appeal should have been obtained from the Court *a quo*. In support of this first point respondents’ counsel referred to various decisions to the effect that even in the exercise of its discretionary powers, in terms of sec. 19 of Act 59 of 1959 (or in terms of the previous statutory provision—sec. 102 of Act 46 of 1935), to determine, *inter alia*, contingent rights, the Court refuses to enquire into matters of abstract or intellectual interest only. In

this connection counsel referred to *Durban City Council v. Association of Building Societies*, 1942 A.D. 27; *Ex parte Van Schalkwyk, N.O. and Hay, N.O.*, 1952 (2) S.A. 407 (A.D.); *Trustees, J.C. Poynton Property Trust v. Secretary for Inland Revenue*, 1970 (2) S.A. 618 (T). These cases are, however, distinguishable. They all dealt with the situation where the issue presented for decision to the Court of first instance was *at that stage* of abstract or intellectual interest only. The present case is different for the issue presented to the Court *a quo*, viz. whether or not to make an order of attachment, was by no means merely abstract or intellectual. On the contrary, it was then a very real, live issue in respect of which no resort to sec. 19 of Act 59 of 1959 was necessary. It is true that by now no effective order of attachment can be made and the only order asked for on appeal is one relating to costs but that is an inevitable consequence of the Court *a quo*'s refusal of an attachment order. Moreover, even at this stage the merits of the application are not wholly academic for dependent thereon is an order for what will, I imagine, amount to a substantial bill of costs. This kind of situation, i.e., where, owing to events supervening between the judgment of the Court of first instance and the hearing of an appeal, the merits of the dispute, apart from the question of costs, have become academic, is by no means unique yet I know of no authority—and appellant's counsel were unable to refer us to any—for the proposition that in such a case the Court of Appeal should refuse to entertain an appeal on the merits, aimed at achieving an alteration to the order as to costs. Indeed, the following general remarks of Watermeyer, C.J., in *Pretoria Garrison Institutes v. Danish Variety Products (Pty.) Ltd.*, 1948 (1) S.A. 839 (A.D.) at p. 863—a case which admittedly is not completely *in pari materia*—appear to me to run counter to any such proposition:

“Now, discarding for the moment the idea of discretion, in an appeal against an order for costs the Court of Appeal does not judge a party's right to his costs in the Court *a quo* by asking the question *was he the successful party* in that Court. It asks *ought he to have been* the successful party in that Court and decides the question of costs accordingly. It may or may not be necessary in such cases to deal with the order which was actually made on the merits; it may even be that no order on the merits was made in the Court *a quo* because by the time the matter came before that Court the necessity for an order was gone and the sole question was one of costs. This shows that the merits of the dispute in the Court below must be investigated in order to decide whether the order as to costs made in that dispute was properly made or not.”

The first preliminary point must, accordingly, be rejected.

With regard to the contention that leave to appeal should have been obtained, respondents' counsel referred to sec. 20 (1) (b) and 20 (2) (b) of Act 59 of 1959, which provide, in effect, that no judgment or order “as to costs only which by law are left to the discretion of the court” is subject to appeal to the Appellate Division unless leave to appeal is obtained from the Court which gave the judgment or made the order. The meaning of the words quoted, in the context of earlier legislation of similar import (viz. sec. 3 (b) of Act 1 of 1911), has been considered in a number of cases, although the precise point now raised does not appear previously to have been decided. Most of these cases are collected in the judgment of Dowling, J., in *O.D.T. Wholesalers (Pty.) Ltd. v. Franklin & Widman*, 1954 (3) S.A. 803 (T). One of the earliest decisions is one of this Court, *Kruger Bros. and Wasserman v. Ruskin*, 1918 A.D. 63. There the trial Court had found that the plaintiff had had a good cause of action but that after the commencement of litigation the defendants had discharged

their liability to him; it, accordingly, made an order merely awarding plaintiff costs against defendants jointly and severally. This Court held that an appeal against the trial Court's order as to costs required leave in terms of sec. 3 (b) of Act 1 of 1911. In the course of his judgment Innes, C.J., stated (at p. 69):

“As already pointed out, the rule of our law is that all costs—unless expressly otherwise enacted—are in the discretion of the Judge. His discretion must be judicially exercised; but it cannot be challenged, taken alone and apart from the main order, without his permission. The construction of the statute has, so far as I know, never been raised up to now before any South African Court; but its effect was taken for granted by Lord De Villiers, C.J., in *Oudaille v. Lewis*, 1914 A.D. 174, where he remarked that ‘the rule as to appeals on questions of costs is that the leave of the Court appealed from must be obtained before the appeal can be heard. If, therefore, this appeal had been only as to costs, or if the appeal had been brought on other points merely in order to raise the question of costs, the appeal could not proceed’.”

In the present case the facts are somewhat different. The Court *a quo* did give a judgment and make an order on the merits of the application, as also on the question of costs. The appellant seeks to attack the judgment on the merits and obtain a reversal of that decision. Such a reversal would automatically call for an alteration to the order as to costs. It is true that, owing to supervening events, no effective order could be made on the merits of the application, if reversal of the Court's judgment thereon were considered to be appropriate, but that does not alter the fact that it is substantially against the Court's judgment on the merits that the appeal is being prosecuted. The appellant is not seeking to attack the order for costs as a separate exercise of a judicial discretion. The order for costs is not being challenged ‘taken alone and apart from the main order’. The *dictum* of Lord De Villiers cited by Innes, C.J., in the above-quoted passage has reference to the situation where an appellant appeals on the merits merely in order to launch an attack upon the order for costs; in other words where the appeal on the merits is not *bona fide* (see *Oudaille's* case, *supra* at p. 175 *in fine*; cf. also *Wheeler v. Somerfield and Others*, (1966) 2 All E.R. 305 (C.A.)). It is, in my view, not applicable here. Generally I am in agreement with the remarks of Millin, J., in *Delmas Ko-operasie Bpk. v. Koen*, 1952 (1) S.A. 509 (T), when he stated, with reference to sec. 3 (b) of Act 1 of 1911 (at p. 510E-F):

“ . . . it seems to me the intention of the Legislature was to make the test: what is the appeal against? If you are appealing on a matter of costs only but in no way appealing against any part of the judgment on the merits of the case, then the Legislature wished to discourage such appeals, and the manner selected for limiting them was to say that the Full Court should not be approached without the leave of the Judge who made the order”.

And I consider that they are equally applicable to sec. 20 (2) (b). In the circumstances of this case I do not think that leave to appeal was necessary.

The second preliminary point taken by respondents' counsel was that the Board ought to have been joined in the proceedings and, in view of the appellant's failure to do so, the appeal should be dismissed or, alternatively, struck off the roll, with costs. The attempt made by the Board to intervene at a late stage in the proceedings has already been described. In his affidavit Mr. Hickley stated that the Board's attitude was that up to that date (12 June) it remained the owner of the cargo of maize and, therefore, opposed its attachment. The issue as to the ownership of the maize

was also raised in certain other opposing affidavits, as I shall show more fully later. In addition it will be recalled that the notice of motion claimed also an attachment of the bills of lading, if not already released to the Board. In the circumstances there seems little doubt that the Board had a direct and substantial interest in the original application which required its joinder in the suit. It may be that the initial omission to join was cured by the Board's own attempted intervention but it is not necessary to decide this point because it is clear that at this stage the Board no longer has any interest in the matter. No order is sought on appeal, either as to the merits of the matter or as to the costs, which could prejudicially affect the Board. Its interest now, if any, is purely academic. The point of non-joinder must, therefore, be dismissed.

Thirdly, it was submitted by respondents' counsel that the Court would not permit a cessionary in the position of Lendlease to bring such an application for attachment *ad fundandam jurisdictionem*. This submission was supported by a variety of arguments. Although some of these arguments may not have been addressed to the Court *a quo* the point appears in substance to be the same as the one raised by one of the preliminary applications, previously referred to. The application was dismissed by the Court *a quo* and in the absence of a cross-appeal it is at least open to doubt as to whether it is competent for the respondents to raise the point again in this Court. As this point, however, relates rather to the merits of the application than to the question as to whether this Court should hear the appeal and as there is another more fundamental reason why, in my view, the application was correctly dismissed, I do not propose further to consider this point.

I come now to the merits. It is clear law that an applicant seeking the attachment of his debtor's property *ad fundandam jurisdictionem* must satisfy the Court, on a balance of probabilities, that the property to be attached belongs to the debtor. The *onus* is upon the applicant to do so. The Court will not order the attachment of the property of another for the purpose of founding jurisdiction because to do so would be futile and of no effect. (See *Jackson v. Parker*, 1950 (3) S.A. 25 (E) at p. 27; *Bradbury Gretorex Co. (Colonial) Ltd. v. Standard Trading Co. (Pty.) Ltd.*, 1953 (3) S.A. 529 (W) at p. 531.) In this case the property which Lendlease sought to have attached was the corporeal asset consisting of the cargo of maize and it was conceded by counsel for Lendlease that if it (Lendlease) had failed to establish on a balance of probabilities that ownership of the maize vested in CMA, no order for attachment could have been made. It was averred by Lendlease, and submitted by its counsel, that ownership in the maize passed to CMA once it was loaded on board the "Mariannina". The attitude of respondents, on the other hand, and the general submission of their counsel, was that ownership in the cargo would not pass to CMA until the bill of lading and other documents relating to the cargo had been handed over to the bank acting on behalf of CMA in exchange for the payment of the price in cash; and that until then it remained vested in the seller, the Board. This, incidentally, was also the attitude of the Board itself, as reflected in Hickey's affidavit. As appears from the above-quoted passage from its judgment, the Court *a quo* adverted to the question of ownership but rather with reference to the issue as to whether CMA or the State of Venezuela would acquire the maize when the transaction was completely implemented.

The maize being the subject-matter of a contract of sale, the answer to this question must be sought in the principles concerning the passing of ownership from a seller (who is owner) to the purchaser under a sale of corporeal movables. Basically, those relevant are:

(1) According to our law, unlike certain other legal systems, ownership cannot pass by virtue of the contract of sale alone: there must, in addition, be at least a proper delivery to the purchaser of the contract goods (see *Crockett v. Lezard*, 1903 T.S. 590 at pp. 592-3; *Commissioner of Customs and Excise v. Randles Bros. and Hudson Ltd.*, 1941 A.D. 369 at p. 398; *Ambassador Factors Corporation v. K. Koppe & Co.*; *K. Koppe & Co. v. Accreylon Co. Inc.*, 1949 (1) S.A. 312 (T) at p. 318; *American Cotton Products Corporation v. Felt and Tweeds Ltd.*, 1953 (2) S.A. 753 (N) at pp. 756-7). Whether delivery alone will suffice depends in general upon the intention of the parties (see *Weeks and Another v. Amalgamated Agencies Ltd.*, 1920 A.D. 218 at p. 230; *Eriksen Motors (Welkom) Ltd. v. Protea Motors, Warrenton and Another*, 1973 (3) S.A. 685 (A.D.) at p. 694); and in this connection important considerations are (a) whether the contract contains conditions affecting the passing of ownership (see the *Randles Bros.* case, *supra* at p. 398) and (b) whether the sale is for cash or on credit.

(2) Assuming unconditional contracts, under a cash sale ownership is normally taken to have been intended to pass once there has been, in addition to delivery, due payment of the purchase price; whereas in the case of a credit sale the fact that credit has been granted by the seller to the purchaser is taken as a strong indication that ownership was intended to pass merely on delivery (see *Crockett v. Lezard*, *supra* at pp. 592-3; *Eriksen Motors (Welkom) Ltd. v. Protea Motors, Warrenton and Another*, *supra* at p. 694). Usually, delivery alone will also pass ownership where the seller has taken security for the payment of the purchase price, probably because in that event credit is regarded as having been given by implication (*Laing v. S.A. Milling Co. Ltd.*, 1921 A.D. 387 at p. 398; *Phillips v. Hearne & Co.*, 1937 C.P.D. 61 at pp. 63-4).

(3) A cash sale requires payment of the purchase price to be made against delivery of the goods. A credit sale is one in which the time for payment has been postponed for a substantial, i.e., non-negligible, period after delivery (*Laing's case*, *supra* at pp. 394-5, 400-1; *R. v. Salaam*, 1933 A.D. 318 at p. 320). Whether a sale be for cash or on credit is a matter of agreement between the contracting parties, either expressly or tacitly; and in the latter case must be judged from all the terms of the contract, the surrounding circumstances and the conduct of the parties (*Laing's case*, *supra* at p. 400). In the absence of an express term as to the sale being for cash or on credit there is a presumption that it is for cash. This may be rebutted in various ways but the giving of credit cannot be inferred from mere delivery by the seller without receiving the purchase price. (See *Laing's case*, *supra* at pp. 394-5, 398-9; *Newmark Ltd. v. Cereal Manufacturing Co. Ltd.*, 1921 C.P.D. 52 at p. 58; *Grosvenor Motors (Potchefstroom) Ltd. v. Douglas*, 1956 (3) S.A. 420 (A.D.) at p. 424). On the other hand, a sale which was expressly or presumptively for cash may by subsequent agreement, express or tacit, become one on credit (*Crockett v. Lezard*, *supra* at p. 593).

As I have already indicated, the cardinal question is whether, at the time when the Court *a quo* was asked to make an order of attachment, ownership in the cargo of maize was shown by Lendlease to have passed from the seller, the Board, to the purchaser, CMA. Counsel did not address argument to the question as to whether the critical time is when the application is launched or when the Court gives its decision. In a changing situation this may become a matter of some importance but that is not so in the present case. I shall assume, in favour of Lendlease, that it would be suf-

ficient if it were shown that ownership had passed when the Court gave its decision and I shall take the critical date as being 12 June 1975.

Applying the general principles stated above, the basic enquiry is whether it was established by Lendlease that as at 12 June the cargo of maize had been delivered to CMA with the intention of passing the ownership thereof to CMA. Bound up with this enquiry are the further questions as to whether the contract was unconditional as to the passing of ownership and whether it was a sale for cash or on credit. In this connection an important consideration is the fact that delivery by the Board to CMA necessarily, and by agreement, involved sea transit and a contract of affreightment with a carrier evidenced by the issue of a bill of lading. In this type of case our law, evolving in conformity with generally accepted mercantile law and custom, has recognised that a bill of lading, itself a product of the law merchant, may have certain special attributes in regard to symbolic delivery and the passing of ownership in goods sold and consigned by bill of lading to the purchaser. This was recognised more than 100 years ago in the case of *London and South African Bank v. Donald Currie & Co.*, 1875 Buch 29, wherein De Villiers, C. J., emphasised the role of a bill of lading, taken to the order of the shipper, as being a "symbol of property" which retained for the shipper the right of dealing with the goods put aboard the vessel. Referring to Roman-Dutch law and having said that the views expressed by him (which were based mainly on English decisions) were not inconsistent therewith, the learned Chief Justice proceeded (at p. 34):

"That law clearly recognises the validity of a constructive delivery to pass the property in goods as opposed to an actual delivery. It is laid down, for instance, that the owner of goods may make a good delivery to another person by handing over to him the keys of the warehouse in which the goods are stored (*Grotius*, 2.5.12). The key is the symbol of the property in the goods placed in the warehouse, in the same way as the bill of lading is the symbol of the property in the goods shipped on board."

The bill of lading taken to the order of the shipper figures prominently in the transaction known as a c.i.f. contract. This type of contract for the sale of goods, which today forms one of the corner-stones of sea-borne trade, appears to have been a product of English mercantile law. Our Courts have, nevertheless, been able to accommodate it within the principles of our law and give to it an effect which is broadly in conformity with its nature under English law. According to *Halsbury* the commercial reason for the evolution of, *inter alia*, the c.i.f. contract lies in the length of time taken in the carriage of goods by sea. It is to the advantage of neither party to the contract that the goods should remain *en dehors* commerce while they are in the course of shipment. The object and result of the c.i.f. contract is to enable sellers and buyers to deal with the goods while afloat and to transfer them freely by giving constructive possession thereof. The principal document which has enabled this to be achieved is the bill of lading (see generally *Halsbury*, 3rd ed., vol. 34, para. 277).

Under the c.i.f. contract, in its usual form, the seller is obliged to ship and insure the contract goods and to invoice them to the purchaser for an amount which includes the price of the goods, the cost of the insurance and the amount payable under the contract of affreightment. As soon as reasonably possible after shipment the seller must tender to the buyer or his agent, in proper form, the bill of lading, evidencing the contract of affreightment, the policy of insurance and the invoice, these

being collectively referred to as "the shipping documents". In the absence of some special agreement, this is all that the buyer can demand of the seller and normally his obligation to pay, or assume liability to pay, the invoice price arises upon such tender. The buyer is covered by the contract of insurance against the risk that at the time of tender, or subsequently, the goods themselves have become, or become, lost or destroyed. As it is put in *Halsbury, op cit.*, para. 278:

"The contract is thus in a commercial sense an agreement for the sale of goods to be performed by the delivery of documents . . ."

The most significant of the shipping documents is the bill of lading. This constitutes an acknowledgment by the master of the ship, on behalf of the shipowner, that goods have been delivered on board and evidences an undertaking to carry the goods to the stated place of destination. The person in whose name or to whose order the bill of lading is made out may by endorsement and delivery transfer his rights under the bill to another. The holder of the bill, i.e., the person in whose favour it was originally made out or the endorsee thereof, is entitled, to the exclusion of all others, to receive the goods from the ship at the place of destination. He is thus in the same commercial position as if he were in physical possession of the goods. The bill of lading is, accordingly, recognised as a symbol of the goods and the transfer of the bill is regarded as a form of symbolic delivery. It is usual under a c.i.f. contract for the seller to take the bill of lading in his own name, or to his order, and for the bill, duly endorsed, to be tendered, together with the other shipping documents, against payment of the invoice price, either in cash or by the acceptance of a draft. Ownership in the goods normally passes to the purchaser upon transfer of the bill of lading and concurrent payment. (See generally *Lockie Bros. v. Epstein*, 1921 E.D.L. 154; *Alli and Another v. Daniel Bros. and Co. Ltd.*, 1921 A.D. 292; *Thomas and Co. Ltd. v. Whyte and Co. Ltd.*, 1933 N.P.D. 413; *Knight Ltd. v. Lensvelt*, 1923 C.P.D. 444; *Standard Bank of South Africa Ltd. v. Efroiken and Newman*, 1924 A.D. 171 at pp. 189-90; *Frank Wright (Pty.) Ltd. v. Corticas "B.C.M." Ltd.*, 1948 (4) S.A. 456 (C) at pp. 463-5; *Garavelli and Figli v. Gollach and Gomperts (Pty.) Ltd.*, 1959 (1) S.A. 816 (W) at pp. 820-1.)

In clause 11 of the maize contract (quoted above) provision is made for the furnishing by the purchaser of an irrevocable confirmed letter of credit, which is to stipulate that the purchase price shall be paid in cash on presentation by the seller of, *inter alia*,

"a charter party bill of lading (full set clean on board to order and endorsed in blank)".

Although this procedure is expressed merely as a stipulation to be contained in the letter of credit, it is clearly implicit in clause 11 (which is headed "payment") that it was to be the agreed *modus operandi* as regards payment and delivery of the bill of lading. While not wishing (in the absence of a full enquiry) to express any final view on the meaning of clause 11, I am of the opinion that, *prima facie* at any rate, it would seem to contemplate the seller taking a bill of lading in respect of the cargo in its own name, or at any rate to its order, the seller endorsing that bill in blank in order to make it "negotiable" in the sense that the person to whom it was delivered would then become the holder thereof, entitled to receive the goods at their port of destination, and the seller delivering the bill in that condition to the buyer's bank (i.e., the bank providing the letter of credit) against payment by the latter of the purchase price in cash. It was submitted by appellant's counsel that, on the contrary, the

bill of lading was, in terms of clause 11, to be taken out in the buyer's name or to the order of the buyer. I can find no warrant for this submission. It is clear that the bill was to be issued to the seller and retained by it until the purchase price was paid in cash by the buyer's bank, at which point of time it was to be handed over. If the bill was to be in the buyer's name, it is difficult to understand the purpose of the provision for endorsement in blank. Endorsement by the seller would not be necessary to make the buyer the holder of the bill; nor would it be of any effect since the bill was not in the seller's name. And the idea of endorsement by the buyer, as suggested by appellant's counsel, is equally implausible in that the buyer would not receive the bill until after endorsement and, in any event, endorsement by the buyer would not be necessary if the bill were made out in the name of the buyer. It is, therefore, probable that it was endorsement by the seller that was intended, in which case it would follow that the bill was to be made out to the order of the seller.

If this interpretation of clause 11 be correct, then, in my view, delivery of the maize could not take place in terms thereof until the bill of lading was handed over, duly endorsed in blank, by the seller to the buyer's bank. Until this happened the seller, as holder of the bill, would retain control of the maize as effectively as if it were in a warehouse and the seller were in possession of the key. When it happened, the transfer of the bill of lading would symbolically represent delivery of possession of the maize to the buyer, the seller simultaneously divesting himself of control and relinquishing his *animus possidendi*. It follows, *a fortiori*, that prior to the issue of a bill of lading there could be no delivery of possession by the seller to the purchaser. It is true that upon the maize being loaded into the ship's hold the seller could be said to surrender custody thereof to the master of the ship but this would be on the understanding that within a reasonable time the master would issue to it a proper bill of lading, which would thereafter symbolise possession and control of the cargo. There would thus be no surrender at that stage of either *corpus* or the *animus possidendi*.

If in terms of the maize contract delivery or transfer of possession of the maize was not to take place until the handing over of the bill of lading by the seller, then prior to that occurring ownership in the maize could not pass to the purchaser, since delivery of possession is a minimum requirement for the passing of ownership. Furthermore, since the contract provided for payment of the purchase price in cash against delivery of the bill of lading, this was in truth a cash sale, with the result that the normal inference would be that the parties did not intend ownership to pass until there had been, in addition, due payment of the purchase price. In my view, there is nothing in the contract to displace this inference. In fact, the insistence upon cash against the bill of lading (and other documents mentioned in clause 11) and the provision for an irrevocable confirmed letter of credit evidence a clear intention that there should be no transfer of ownership or possession by the seller until it had been paid for the goods. Bearing in mind the general nature of the transaction, and more particularly the fact that the purchaser, CMA, was a foreign institution, a *peregrinus* in our Courts, this seems a probable and sensible attitude for the seller, the Board, to adopt.

The foregoing analysis is based upon the transaction proceeding in accordance with the contractual arrangements between the parties, as evidenced by the maize contract. It was, of course, open to the parties by subsequent agreement, express or tacit, to alter the position as to delivery or as to the sale being one for cash. In this context appellant's counsel placed some reliance on the fact that, according to an-

nexure Y2 in the papers, the goods were to be delivered at Puerto Cabello in Venezuela to "Banco Industrial De Venezuela for account of Corporacion De Mercadeo Agricola". It must, however, be pointed out that annexure Y2 was simply a photostatic copy of an unsigned bill of lading sent to the Board's agent to indicate the proposed clausing. No bill of lading had in fact been issued at the time when the Court *a quo* gave its judgment on the application. In the circumstances there can be no question of any tacit alteration of the contractual arrangements between the parties having taken place at that stage.

The main submission by appellant's counsel was that, since the maize contract was upon f.o.b. terms, delivery of the maize took place once it was loaded on board the vessel; that a substantial period of time would necessarily elapse between such delivery and payment of the purchase price; that, therefore, it was a credit sale; and that, consequently, the parties must be taken to have intended ownership to pass with delivery.

The maize contract does admittedly provide for delivery "free on board" but I do not think that it necessarily follows that delivery of possession from seller to buyer would take place when the maize was loaded aboard the vessel. Appellant's counsel relied upon the South African case of *Anderson and Coltman Ltd. v. Universal Trading Co.*, 1948 (1) S.A. 1277 (W), for the proposition that in an f.o.b. contract the carrier is the agent of the buyer and the ownership passes to the buyer when the goods sold are delivered to the carrier in terms of the contract. In my view, the case does not support so wide a proposition. The facts, briefly, were that goods were sold by an English seller, through its South African agent, to a buyer in South Africa. The agreement provided for confirmation and payment by the buyer's shippers in London and the terms were "F.O.B. U.K. Port". The goods were delivered on the seller's behalf aboard a ship at Southampton and the price was paid. On arrival in South Africa the goods were rejected by the buyer on the ground that certain false representations had been made in regard thereto. The buyer obtained an order attaching the goods *ad fundandam jurisdictionem* in a claim for a refund of the price. The seller applied to set aside the attachment on the ground that the goods were not his property. In defining the issues Clayden, J., stated (at pp. 1280-1):

"Since the contract provided for delivery F.O.B. and the price has been paid the goods would have become the property of the buyer when delivered into the ship if the goods were in accordance with the contract. There is an intention of the seller to transfer ownership, there is delivery to the agent of the buyer, and there can be inferred the intention of the buyer to acquire ownership. If delivery of the goods to the buyer's agent is not in accordance with the contract as to time or place ownership does not pass . . ."

The learned Judge then went on to consider the issue upon which the case turned, viz. whether ownership had failed to pass on the ground that the goods did not conform to the contract. It is important to note that it does not appear from the judgment what form the bill of lading took and that, in any event, at the time of the attachment proceedings the price had been paid and, presumably, the bill of lading handed over. The decision is in no way relevant to the present case where the contract, although f.o.b., provides for the bill of lading to be taken to the order of the seller and the attachment application is made at a stage prior even to the issue of a bill.

On both sides counsel cited a number of English decisions relating to the passing of property under an f.o.b. contract, and, in particular, some dealing with the sit-

uation where the contract provides for payment against the bill of lading. Comparison with English decisions on this topic cannot, however, be undertaken without due recognition of the important differences which here exist between English law and our law. Foremost of these is the acceptance in English law of the principle that in a sale of goods the property, or ownership, may pass without possession of the goods having been delivered by the seller to the buyer. Basically and stated briefly, the relevant rules in English law (which are to be found in the common law and in the Sale of Goods Act of 1893 which codified the common law) are (i) that the intention of the parties, as shown by the terms of the contract, the conduct of the parties and the circumstances of the case, determine the time when the property in the goods is to be transferred; (ii) that in the case of an unconditional sale of specific goods in a deliverable state, unless a different intention appears, the property passes when the contract is made and it is immaterial whether the time of payment or the time of delivery or both is postponed; and (iii) that, in the case of a sale of unascertained goods, no property is transferred unless and until the goods are ascertained and then only if the parties have agreed that the property in the goods should pass when ascertained; but, unless a different intention appears, when goods answering the contract description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property thereupon passes to the buyer. (See generally Sale of Goods Act of 1893, secs. 16, 17 and 18; Halsbury, *Laws of England*, 3rd ed., vol. 34, paras. 86-9, 98 and 99.) Although, in particular circumstances, delivery to the buyer may constitute the appropriation (see *Halsbury*, para. 91), there may be an appropriation in terms of rule (iii) without delivery having taken place (see the examples quoted by Benjamin on *Sale*, 8th ed., pp. 329-35).

To protect an unpaid seller who has parted with the property in the goods but has remained in possession thereof, English law grants a lien, entitling him to retain the goods until payment or tender of the purchase price, where they have been sold without any stipulation as to credit or the term of credit granted has expired or the buyer has become insolvent (sec. 41 of the Act; *Halsbury*, para. 198). The concept of such a lien is rendered possible in English law by the rules relating to the passing of ownership which permits of a seller transferring the property in the goods sold without surrendering possession thereof. Since in our law ownership cannot be passed without delivery of possession, there does not appear to be any room for a similar lien in South Africa.

In mercantile contracts involving sea transit (as well as other forms of carriage) and the consignment of goods under bill of lading, English law developed the concept of a "reservation of the right of disposal" by the seller. This concept, in relation to a sale of unascertained goods, was explained by Cotton, L. J., in *Mirabita v. Imperial Ottoman Bank*, (1878) 3 Exch. D. 164 at p. 172, as follows:

"In the case of such a contract the delivery by the vendor to a common carrier, or (unless the effect of the shipment is restricted by terms of the bill of lading) shipment on board a ship of a chattel for the purchaser, is an appropriation sufficient to pass the property. If, however, the vendor, when shipping the articles, which he intends to deliver under the contract, takes the bill of lading to his own order, and does so not as agent, or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property, and that consequently there is no final appropriation, and the property does not on shipment pass to the purchaser."

(See also *Halsbury*, paras. 110 and 313.) Where a seller takes the bill of lading to his own order in this way, he is merely deemed *prima facie* to reserve the right of disposal and this inference may be excluded by other circumstances (*Halsbury*, para. 313). Such a reservation is evident particularly in c.i.f. contracts. Our law achieves broadly a similar result, without having to resort to the concept of a reservation of the right of disposal, by means of the principles that delivery of possession must take place before ownership can pass and that a seller who takes a bill of lading to his own order is generally regarded as retaining possession of the goods until he transmits the bill, duly endorsed, to the purchaser (see Mackeurtan, *Sale of Goods in South Africa*, 4th ed., pp. 294-5).

Under f.o.b. contracts the position in English law with regard to the passing of property is stated by *Halsbury*, 3rd ed., vol. 34, para. 302, as follows:

“When Property Passes. *Prima facie* the property passes to the buyer upon shipment but as in a c.i.f. contract the inference may be rebutted and the moment of the passing of the property postponed, as for instance where the seller deals with the bill of lading in such a manner as to show that he did not intend to appropriate the goods to the contract, or that he has reserved a right of disposal until performance of the contract terms of payment, whether they are for payment in cash or by acceptance of a bill of exchange.”

In a note to the portion of this paragraph dealing with a reservation of the right of disposal there is a cross-reference to para. 313, part of which reads:

“Reservation of Right of Disposal. Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal but this inference being *prima facie* only may be excluded by other circumstances.”

Halsbury thus appears to draw no fundamental distinction between c.i.f. and f.o.b. contracts in this connection. Moreover, there are English cases where the Court has held, in regard to f.o.b. contracts, that by taking the bill of lading to his own order and contracting for cash against the bill the seller reserves the right of disposal (see *Wait v. Baker*, (1848) 2 Exch. 1; *Ogg v. Shuter*, (1875) 1 C.P.D. 47). It is true that the correctness of these decisions has been called in question by, for example, Carver, *Carriage by Sea*, 12th ed., paras. 1064-6, mainly on the ground that it is the seller's duty under an f.o.b. contract to pass the property in the goods upon the shipment thereof (see also *British Shipping Laws*, vol. 5, paras. 389-92). Nevertheless, in *Smyth and Co. v. Bailey & Co.*, (1940) 3 All E.R. 60, a decision of the House of Lords, Lord Wright, in discussing the principles relating to the reservation of the right of disposal (and the consequent postponement of the passing of property) in c.i.f. contracts quoted *Wait v. Baker*, *supra*, and *Ogg v. Shuter*, *supra*, apparently with approval. It is clear from the judgment that Lord Wright had clearly in mind that these cases dealt with f.o.b. contracts and in fact in regard to *Wait v. Baker*, *supra*, he stated—

“... the sale was f.o.b. but, in the respect now material, the principle is the same”.

Further, the views expressed in *Carver*, *op cit.*, do not appear to be shared by certain other writers (see e.g. Schmitthoff, *The Export Trade*, 5th ed., p. 69, Atiyah, *Sale of Goods*, 4th ed., p. 217). The f.o.b. contract has become a flexible instrument (see *Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd.*, (1954) 2 Q.B. 402 at p. 424), and

may in some instances come close to a c.i.f. contract. In *The Parchim*, 1918 A.C. 157, a Privy Council decision concerning a contract which was a cross between an f.o.b. and c.i.f. contract (see *Carver, op. cit.*, para. 1064), it was pointed out by Lord Parker of Waddington (at pp. 170-1) that, in cases where a seller has taken the bill of lading to his own order and deals with the bill only to secure the contract price, the property may pass forthwith (meaning in that case on shipment), subject to the seller's lien or conditionally on performance by the buyer of his part of the contract. His Lordship stated (at pp. 170-1):

“The *prima facie* presumption in such a case appears to be that the property is to pass only on the performance by the buyer of his part of the contract and not forthwith subject to the seller's lien. Inasmuch, however, as the object to be attained, namely, securing the contract price, may be attained by the seller merely reserving a lien, the inference that the property is to pass on the performance of a condition only is necessarily somewhat weak, and may be rebutted by the other circumstances of the case.”

(See further the explanation of this decision in *The Kronprincessin Margareta*, 1921 A.C. 486 at pp. 515-7.)

I do not propose to delve more deeply into English law. Whatever the true position may be in regard to f.o.b. contracts where the seller has taken the bill of lading to his own order and whether in a particular case the seller be regarded as thereby reserving the right of disposal or merely preserving his lien, the important consideration is that there is, so far as I am aware, no suggestion in English law that a seller in such circumstances delivers possession of the goods prior to transferring the bill of lading. In so far then as the English decisions may be relevant, they would confirm the view that, according to the principles of our law no ownership would pass upon shipment, despite the fact that it is a contract f.o.b. They would also indicate that, even according to the principles of English law, the passing of ownership under an f.o.b. contract may be postponed by the seller taking the bill of lading to his own order.

Appellant's counsel emphasised the provisions of clause 7 of the maize contract, which states, *inter alia*, that bills of lading supported by mass certificates “shall be proof of delivery”, as being an indication that the parties intended delivery of possession of the goods to the buyer to take place upon shipment. The meaning and significance of this provision must be considered against the background of the contract as a whole and, in particular, the terms of clause 11. Clause 7 does not specifically state that the delivery referred to is delivery to the buyer. Ostensibly it is delivery to the carrier (the bill of lading constituting proof of what had been shipped) and in terms of the bill contemplated by the contract the carrier would be obliged in turn to deliver the goods at the port of destination to the order of the seller. Consequently, I do not think that clause 7 can be read as displacing the strong *prima facie* inference to be drawn from the fact that the bill of lading was to be taken to the order of the seller and only transferred against payment of the purchase price.

In my view, therefore, the main submission by appellant's counsel fails at its inception in that it was not established in this case that delivery of the maize to CMA took place immediately that it was loaded aboard the “Mariannina”. I doubt, also, whether it was properly established that a substantial period of time would necessarily elapse between such shipment and payment of the purchase price, but it is not necessary to pursue this point.

It was also contended by appellant's counsel that the intention underlying the contractual provisions concerning the bill of lading was merely to preserve the seller's security but did not operate to prevent the passing of ownership to the buyer; and that the holding of the bill operated as a *quasi-lien*. It is not clear what is meant by the term "*quasi-lien*" in the context of our law; and I know of no authority for the existence of such a concept. In English law, in addition to the lien already described, a seller is accorded a right which has been described as a "*quasi-lien*" (see *Benjamin, op. cit.*, p. 847) but this pre-supposes that the property in the goods has *not* passed to the buyer. It appears to be similar in effect to the rule in our law that, in the absence of special agreement, delivery and payment are concurrent conditions, with the result that an unpaid seller may withhold delivery until the purchase price is paid or tendered (see *Mackeurian, op. cit.*, pp. 197-8). In the present case, if delivery of possession took place on shipment (and ownership passed simultaneously), then it is difficult to see what form of security could, in the absence of possession, be retained by the seller. If, as would seem to be the case, the form of the intended bill of lading and the manner in which it was to be dealt with would postpone delivery until transference of the bill against payment, then no ownership could pass and no security in the form of a lien would be either necessary or, for the reasons already indicated, legally possible. In my view, there is no substance in this contention.

A further argument raised by appellant's counsel was that the provision of the irrevocable confirmed letter of credit by the buyer's bank constituted the giving of security for the price and made this a sale on credit. To my mind, the furnishing of the letter of credit was in this case irrelevant to the passing of ownership. If, as I have held to be the *prima facie* viewpoint, there was to be no delivery until the handing over of the bill of lading and this was to be done against payment of the purchase price in cash, then clearly ownership would pass then and it would be a cash sale, the letter of credit notwithstanding. The nature of the relationship created between banker and seller by the issue of a letter of credit is a matter of considerable difficulty (see Gutteridge and Megrah, *The Law of Bankers' Commercial Credits*, pp. 15 *et seq.*) but, whatever it may be, the letter does no more, in a case like the present one, than to provide the seller with the assurance that the buyer will be able and willing to implement his obligations when they become due: it could not convert a sale expressly for cash into a credit transaction.

For the reasons aforesaid, I am of the view that the provisions of the maize contract indicate, *prima facie*, that it was intended by the parties that delivery of possession of the maize to the buyer should take place when the relative bill of lading was transferred by the seller against payment of the purchase price and that ownership was to pass then; and that no alteration to these provisions is shown to have been agreed to by the parties. Certainly *Lendalease* did not establish any contrary intention or state of affairs. In the circumstances, at the stage when the Court *a quo* was asked to make an order of attachment, the ownership of the maize was still vested in the seller, the Board. It would follow that the maize was not an asset belonging to CMA which could be attached to found jurisdiction and that the application for attachment was correctly dismissed. Appellant's counsel argued that, alternatively, the bill of lading which "was in effect issued in favour of CMA" was a species of property belonging to CMA which *Lendalease* was entitled to attach. As no bill of lading had in fact been issued when the attachment order was sought this argument cannot succeed. The prayer for attachment of the bill of lading was rightly refused.

This conclusion renders unnecessary a consideration of the correctness of the finding of the Court *a quo* in regard to sovereign immunity. Nevertheless, appellant's counsel invited this Court to express its views on this topic and, in particular, to hold that the Court *a quo* erred in following the *Baccus* case, *supra*. A welter of authority, emanating from many jurisdictions, was quoted to show that in recent years the doctrine of sovereign immunity has undergone radical changes and that by now, apart from the United Kingdom and Soviet Russia, most legal systems have abandoned the principle of absolute immunity in relation to commercial transactions. A distinction is drawn between *acta jure imperii* and *acta jure gestionis* and immunity is restricted to the former. Even in England, so it was submitted, recent decisions, such as that of the Court of Appeal in *The Harmattan*, (1975) 3 All E.R. 961, and that of the Privy Council in *Philippine Admiral (Owners) v. Wallem Shipping (Hong Kong) Ltd.*, (1976) 1 All E.R. 78, showed a movement away from the doctrine of absolute sovereign immunity, especially in the realm of commercial transactions. I think it can be accepted that the majority judgments in the *Baccus* case, *supra*, are not the last word on the subject of sovereign immunity in English law and it may well be that that system is moving in the direction suggested by counsel. Generally, the problem is an interesting and difficult one but, in my view, the decision as to whether in this country we should adopt the approach followed in the *Baccus* case, *supra*, or that of other authority leading in the direction of a more restricted immunity, must be left for some future occasion when the issue arises more pertinently.

The appeal is dismissed with costs, including the costs of two counsel.

2. *Inter-Science Research and Development Services (Pty) Ltd. v. Republica Popular de Moçambique*. DECISION BY THE TRANSVAAL PROVINCIAL DIVISION ON 14 NOVEMBER 1979⁶⁵

The facts and the judgement:

Margo J: This is an application for leave to implead the Government of Mocambique as the defendant in an action for (a) payment of moneys alleged to have become due under certain contracts, (b) damages for breach of those contracts, and (c) damages for the loss of certain vehicles alleged to have been expropriated without compensation. More specifically, the application is for the attachment of the alleged interest of the Government of Mocambique in certain immovable properties in Johannesburg and in moneys in a bank account there, in order to found or alternatively to confirm jurisdiction in the proposed action, and for leave to sue in such action by edictal citation.

An application for the same relief was made on 12 June 1979, but, for reasons which appear from the judgment delivered on that date, no order was made, save that the applicant was given leave to renew the application on the papers as supplemented. The present application is a renewal of the earlier one in terms of such leave. Though set down and heard as *ex parte* proceeding, notice of the application was given to a firm of attorneys who claim to be acting for the Mocambique Government. Notice was also given to the diplomatic representative of the Government of

⁶⁵ Reproduced from *South Africa Law Reports*, No. 2 (1980), p. 111.

Portugal in Cape Town, with the request that such notice be transmitted to the Government of Mocambique.

Until 1974 Mocambique was a Portuguese colony, governed by a branch of the Government of Portugal (hereinafter referred to as the Colonial Government). On 7 September 1974 a treaty known as the Lusaka Agreement was concluded between the Frente de Libertacao de Mocambique (Frelimo) and the State of Portugal, in terms whereof Mocambique was to become independent and there was to be a transfer of power to a transitional government. Arising out of the Lusaka Agreement, the Republic Popular de Mocambique (hereinafter referred to as RPM) came into existence.

In 1973 the Colonial Government entered into a contract with a company named Empresa Tecnica de Levantamentos Aereos, Limitada, described in the papers as Etlal, an acronym formed from the first letters of its name. Etlal was a Mocambique company engaged in aerial and land survey and associated business. The contract was for the carrying out of certain survey and planning work relating to the development of agricultural areas and of water resources in a certain area of Mocambique. A second and similar contract was concluded with Etlal in 1974. For the first contract Etlal engaged, as sub-contractors, a partnership known as R F Loxton, Hunting and Associates, and for the second contract it engaged as sub-contractors the same partnership and the applicant.

In terms of the sub-contracts the sub-contractors were to render planning services in South Africa and were to carry out field work in Mocambique, and Etlal was to make all payments due under the sub-contracts to the sub-contractors in Johannesburg.

In implementation of the respective sub-contracts, the sub-contractors incurred large expenditure and carried out much of the work, but the transfer of power in Mocambique in September 1974 intervened to prevent them from completing their contracts and from being paid by Etlal for all the work done by them.

Article 14 of the Lusaka Agreement, as translated, provided that:

“The Frente de Libertacao de Mocambique declares that it is prepared to accept responsibility for the financial obligations assumed by the State of Portugal in the name of Mocambique provided that they were assumed in the effective interest of the territory.”

It may safely be assumed, for the purposes of this case, that the present Government of Mocambique, that is, the RPM Government, succeeded to the obligations accepted by the Frente, though views may differ on what was and what was not “in the effective interest of the territory”.

On Thursday, 23 October 1975, the Government of the RPM promulgated what is described in the translation thereof as a “Decree-Law”, it being Decree-Law 29 of 1975. In a preamble, or explanatory introduction, it provided that, since the profession of private surveyor, the activities of which concerned principally the delimitation of private land ownership, had ceased to represent any objective, given the fact that all land had passed into State ownership, the Government had considered it most convenient that the entire technical structure relating to the branches of topography, photogrammetry and cartography should be “considered” solely in departments of State and that there existed no valid reasons to justify activities in topography, photogrammetry and cartography by private individuals. With that preamble,

the Decree-Law went on to provide in article 1 that the activity of private surveyor under the title of liberal profession was no longer permitted in Mocambique; nor could any private concern have as its principal activity the execution of work in the branches of topography, photogrammetry and cartography.

Article 2.1 provided that material and equipment belonging to private surveyors and survey firms, as well as movable property and vehicles registered in their names, should be delivered and come under the administration of the Ministry of Agriculture or of the Department which the Minister might indicate.

Article 3.1 provided that private surveyors and personnel of the firms mentioned might be integrated in accordance with their competence in departments dependent upon the Ministry of Agriculture.

Article 4 provided that, as from the date of the Decree-Law, contracts entered into with surveyors and firms mentioned earlier in the Decree-Law should cease to be effective, whether they were for demarcation of lands for private concerns or for execution of work of topography, cartography and photogrammetry for the State.

Article 7 provided that amounts due to private surveyors and to those firms mentioned should only be "due" if the relative work should have been delivered to the competent department or to whomsoever might have ordered it to be performed, before the date of the Decree-Law coming into force.

In terms of article 8 any doubts concerning the execution of the Decree-Law were to be settled by a ruling of the Minister of Agriculture.

Article 9 provided that the Decree-Law was to come into force immediately.

Two days later, the Minister of Agriculture issued a Decree to take immediate effect. It provided as follows, in translation:

"In view of the provisions of Decree-Law 29 of 1975 of 23 October, and in order to immediately ensure the administration and financial management of the firm Etlal (Empresa Tecnica de Levantamentos Aereos, Limitada), I appoint an administrative commission made up as follows: (Then the names of the commissioners are set forth.)

This Decree goes into operation immediately."

The applicant originally sought to justify its claims against the RPM Government on the basis of the Lusaka Agreement, read with the Decree-Law and the Decree of 25 October 1975 but, for the reasons stated in the judgment on the earlier application, nothing in the Agreement or in those subsequent enactments rendered the RPM Government liable for Etlal's debts.

In the present application the applicant continues to rely on these documents, but now as the historical and legal basis for certain subsequent steps taken by the RPM whereby it absorbed Etlal and assumed liability for its debts. There is now evidence, in the papers as supplemented, that, following the decree of 25 October 1975, Etlal was "nationalised and integrated" into the RPM Government, so that the company ceased to exist as such; that since then its affairs have been conducted for the benefit of the Government; that moneys owing to Etlal in respect of work performed and services rendered have been collected and deposited in Etlal's banking account in Maputo (formerly Lourenco Marques); that Etlal's bank account is at present being operated by the administrative commission; and that it is expected that creditors will be paid from funds available in the account.

There is also evidence that the administrative commission has regarded the sub-contracts between Etlal and the sub-contractors as terminated, presumably in consequence of article 4 of the Decree-Law. On 5 July 1977 the administrative commission addressed a letter to Johannesburg representatives of the sub-contractors, in which certain details were requested of the amount said to be standing to their credit in Etlal's books at the time of the integration of Etlal, so that "the said amount may be duly proved by our books of account". This letter provides some evidence of the administrative commission's recognition of Etlal's debts to the sub-contractors and of the liability of the commission therefor.

The applicant avers that the RPM Government, which is the legal successor to the Colonial Government, has taken over the rights and obligations of Etlal. The applicant, which has taken cession of the rights and claims of the other sub-contractor under its sub-contracts with Etlal, alleges that the rights and claims so acquired, and also its own rights and claims under the second sub-contract with Etlal, are now enforceable against the RPM Government as having stepped into the shoes of Etlal. The applicant has claimed payment on this basis from the administrative commission, but, notwithstanding the apparent recognition of liability for moneys due under the sub-contracts up to the time of integration, no payments have been forthcoming.

In the proposed action the applicant wishes to claim (a) the sums of R91 721,09 and R307 680,97 for services rendered to Etlal by the respective sub-contractors up to the date of Etlal's integration; (b) the sums of R11 289,65 and R57 900,75 as damages alleged to have been suffered by the respective sub-contractors by reason of the premature termination of their respective sub-contracts; and (c) the sum of R11-876,25 as the value of certain vehicles, the property of the sub-contractors, which, it is alleged, were expropriated by the RPM Government and for which no compensation has been paid.

The allegations of expropriation of the vehicles rest on a written report by one Ferreira, a former employee of a company associated with the applicant, to the applicant's secretary, Marais. This report to Marais is hearsay, and there are indications that Ferreira himself was reporting on hearsay information. Moreover, in a letter to the sub-contractors, the administrative commission reported that they and the police had carried out extensive investigations, but had not located the vehicles, and had been forced to conclude that they had been removed by unknown persons and without proper authorisation.

On these papers various legal questions arise. The first of these is whether or not the Republic of South Africa recognises the RPM as an independent State, and, if so, whether or not it recognises the RPM Government as the Government of that State. This question was not raised in the papers, and was not dealt with by the applicant's counsel. However, without such recognition, the alleged nationalisation and integration of Etlal could not be acknowledged as the acts of the Government of Mozambique, and, for present purposes, would have no greater validity than the seizure of Etlal's assets by some non-governmental body, having no lawful authority or rights in the matter. In such a situation, the applicant would not have established any right to sue on the sub-contracts, although it might have a claim against that body for the unlawful appropriation of the vehicles (that is, if there were *prima facie* proof of such appropriation by it).

In England, it has repeatedly been laid down that the question of recognition is

a matter solely for the executive authority. In *Duff Development Co. Ltd. v. Government of Kelantan and Another* 1924 AC 797 (HL) Viscount Finlay said at 813:

“It is settled law that it is for the Court to take judicial cognizance of the status of any foreign Government. If there can be any doubt on the matter the practice is for the Court to receive information from the appropriate department of His Majesty’s Government, and the information so received is conclusive...It has long been settled that on any question of the status of any foreign power the proper course is that the Court should apply to His Majesty’s Government, and that in any such matter it is bound to act on the information given to it through the proper department. Such information is not in the nature of evidence; it is a statement by the Sovereign of this country through one of his Ministers upon a matter which is peculiarly within his cognizance.”

Viscount Finlay went on to say at 814:

“We were asked to say that it is for the Court and for this House in its judicial capacity to decide whether these restrictions were such that the Sultan had ceased to be a sovereign. We have no power to enter into any such inquiry.”

At 815 he added:

“There is no ground for saying that because the question involves considerations of law these must be determined by the Courts. The answer of the King, through the appropriate department, settles the matter whether it depends on fact or on law.”

See also *Engelke v. Mussman* 1928 AC 433 (HL) at 442-3 where Lord Buckmaster explained that the same rule applies to the method of proving the status of foreign ambassadors and the acceptance and recognition of persons who form their staff. In *Government of the Republic of Spain v. SS “Arantzazu Mendi”* 1939 AC 256 Lord Atkin at 263-4 referred with approval to the course taken by Bucknill J at first instance in directing a letter to be written by the Registrar of the Court to the Secretary of State for Foreign Affairs, asking whether the Nationalist Government of Spain was recognized by the Her Majesty’s Government as a foreign State. Lord Atkin went on to say at 264:

“I pause here to say that not only is this the correct procedure, but that it is the only procedure by which the Court can inform itself of the material fact whether the party sought to be impleaded, or whose property is sought to be affected, is a foreign State. . . . Our State cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another. Our Sovereign has to decide whom he will recognize as a fellow sovereign in the family of States; and the relations of the foreign State with ours in the matter of State immunities must flow from that decision alone.”

In *Carl Zeiss Stiftung v. Rayner & Keeler Ltd* 1967 AC 853 Lord Reid at 901 said:

“It is a firmly established principle that the question of whether a foreign State ruler or government is or is not sovereign is one on which our Courts accept as conclusive information provided by Her Majesty’s Government: no evidence is admissible to contradict that information.”

In South Africa, where recognition of a foreign State, or of a government as the government of a foreign State, or of the status of diplomatic representatives of a foreign State, are also matters exclusively within the prerogative of the executive gov-

ernment, the same principles and procedure ought to apply. See *S v. Devoy* 1971 (3) SA 899 (A) at 908D-E, where Ogilvie Thompson CJ quoted with approval the statement in O'Connell *International Law* that:

“Recognition is a function of the executive branch of the Government; it is a political act entailing legal consequences...”

and the statement in Starke *An Introduction to International Law* that recognition is much more a question of policy than of law.

The statutory powers conferred on the executive government by our constitution expressly include that of the recognition of diplomatic representatives—see s 7 (3) (d) of the Republic of South Africa Constitution Act 32 of 1961. See also s 2 (1), and especially s 2 (1) (f), of the Diplomatic Privileges Act 71 of 1951. While there appears to be no statutory conferment of the exclusive power of recognition of States and governments, it has always been accepted that foreign relations are essentially embraced within the executive's prerogative powers. See *Sachs v. Dönges NO* 1950 (2) SA 265 (A) *per* Centlivres JA at 301 and Van den Heever JA at 308-9. See also the remarks of Schreiner JA at 306-7 on the general history and nature of the prerogatives of the executive sovereign.

As to the decisive character of a certificate from the executive, when such is provided, there appears to me to be no logical basis for differing from the rule settled in the House of Lords decisions cited above. The observation to the contrary by Beadle CJ in *Madzimbamuto v. Lardner-Burke NO and Another NO* 1968 (2) SA 284 (RA) at 311C is, with respect, difficult to justify. The issue of a certificate from the Minister concerned was held in the *Devoy* case *supra* at 907A to be an appropriate method of informing the Court of the Government's attitude in a matter peculiarly within its own knowledge.

It is unnecessary to decide whether a certificate is the only method by which the attitude of the executive on recognition is to be determined. Where recognition is a matter of judicial cognizance, no certificate or other advice would be required. That would explain the decision in *Parkin v. Government of the Republique Democratique du Congo and Another* 1971 (1) SA 259 (W) where no certificate was laid before the Court, and in *S v. Oosthuizen* 1977 (1) SA 823 (N) at 824H, in the paragraph numbered 3, where the Court took judicial cognizance of the “fact” that South Africa had not “formally” recognised Rhodesia. However, as was said in the *Duff Development Co* case *supra loc cit*, if there is any doubt on the matter the practice is for the Court to receive information from the appropriate Government Department.

In the present case, following what was said in the *SS Arantzazu Mendi* case *supra loc cit*, the Registrar of this Court was directed to refer to the Department of Foreign Affairs, and to require that Department to provide a certificate as to whether or not the RPM Government is recognised by the Republic of South Africa. Such a certificate was provided on 27 November 1979. It reads as follows:

“The Government of the Republic of South Africa recognises the government with its seat at Maputo as the *de facto* and *de jure* government of the Popular Republic of Mocambique.”

That certificate is conclusive on the matter of recognition.

The second question of law which arises is whether or not the RPM Government, as a foreign sovereign, is immune from the jurisdiction of our Courts. There

are two broad views on sovereign immunity. The first is the absolute doctrine, namely that a foreign sovereign enjoys absolute immunity; and the second is the restrictive doctrine, namely that a foreign sovereign enjoys immunity in respect of *acta jure imperii*, i.e. the exercise of sovereign powers, but not in respect of *acta jure gestionis*, in the sense of trading or commercial transactions. The restrictive doctrine is in turn subject to two interpretations, the first being that the immunity is lost in respect of all commercial transactions, and the second being that it is lost in respect only of claims *in rem* arising out of a commercial transaction.

We have considered whether it is necessary in this case to decide which of these doctrines should be applied, for neither the nationalisation of Etlal, nor the alleged expropriation of the vehicles, could be regarded as a commercial transaction. However, on the question of nationalisation, the applicant's case is that the RPM Government has taken over and adopted the trading operations of Etlal, and has itself conducted the commercial activities of administering Etlal's affairs, of collecting money due to it and of paying its creditors. The applicant's case on that score may not appear at this stage to be a strong one, but, for the limited purposes of an attachment to found or confirm jurisdiction, that is not the criterion. As Steyn J. (Later CJ) said in *Bradbury Gretorex Co (Colonial) Ltd v. Standard Trading Co. (Pty) Ltd* 1953 (3) SA 529 (W) at 533C-E, after an examination of the earlier authorities, the requirement of a *prima facie* cause of action, in relation to an attachment to found jurisdiction, is satisfied where there is evidence which, if accepted, will show a cause of action. The mere fact that such evidence is contradicted would not disentitle the applicant to the remedy. Even where the probabilities are against the applicant, the requirement would still be satisfied. It is only where it is quite clear that the applicant has no action, or cannot succeed, that an attachment should be refused or discharged. This approach was approved by the Full Court in *Tick v. Broude and Another* 1973 (1) SA 462 (T) at 467E-F. See also *Italtrafo SpA v. Electricity Supply Commission* 1978 (2) SA 705 (W) at 709C-F, and *Butler v. Banimar Shipping Co* SA 1978 (4) SA 753 (SE) at 757C-F. On that test, the applicant *in casu* has made out a *prima facie* case on the merits for the limited purposes of an attachment. A decision on the differing views of sovereign immunity therefore cannot be avoided.

The first step in the inquiry is whether we should apply the absolute or the restrictive doctrine. There is an abundance of South African judicial authority, extending to recent times, in support of the absolute doctrine. In *De Howorth v. The SS India* 1921 CPD 451 at 461 *et seq.*, Gardiner J adopted the rule of immunity in general terms, as stated in *The Parlement Belge* 4 PD 129 and *The Porto Alexandre* 1920 PD 30; 122 LTR 6601, namely that, as laid down by the Court of Appeal in the later of these two cases, a vessel owned or requisitioned by a sovereign independent State and earning freight for the State, is not deprived of the privilege, decreed by international comity, of immunity from the process of arrest, by reason of the fact that she is being employed in ordinary trading voyages carrying cargoes for private individuals. However, in the *De Howorth* case *supra*, Gardiner J at 464 recognised the possibility of loss of immunity for commercial transactions conducted in a purely private capacity. In *Ex parte Sulman* 1942 CPD 407 Davis J referred, *inter alia*, to the same authorities and also to *The Cristina* (1938) 1 All ER 733 (HL), 1938 AC 485, and applied the same rule, though no question arose in that case of a commercial transaction. The same situation led to the same result in *Kavouklis v. Bulgaris* 1943 NP 190. In *Parkin v. Government of the Republique Democratique du Congo and Another* 1971 (1) SA 259 (W) Myburgh J, applying the earlier cases, held, at 262, that the immunity applies to all property of a foreign sovereign State in the area of juris-

dition of the Court. Again no question arose of any commercial transaction, the applicant's claim being one for remuneration as a mercenary soldier in the armed forces of the respondent government. In *Leibowitz and Others v. Schwartz and Others* 1974 (2) SA 661 (T) Nicholas J, on the basis of the cases of *De Howorth and Parkin (supra)*, held that the Courts will not by their process make a foreign State a party to legal proceedings against its will. Once more, no question arose of any commercial transaction on the part of the foreign State. In *Lendalease Finance Co (Pty) Ltd v. Corporation de Mercadeo Agricola and Others* 1975 (4) SA 397 (C) De Kock J (with whom Baker J concurred) said at 404F:

“But...it seems to me that this Court, sitting as a Court of first instance, should adhere to the traditional view of granting immunity in respect of property which belongs to a sovereign foreign State or of which it is in possession or control. The decision in the *Baccus* case is directly in point and in my view we should follow that case and principle laid down by Gardiner J in the *SS India* case.”

The references here were to the cases of *Baccus SRL v. Servicio Nacional de Trigo* (1956) 3 All ER 715 (CA), where the old principle of absolute immunity was reaffirmed, and to *De Howorth v. The SS India (supra)*. The *Lendalease* case went to the Appellate division (see 1976 (4) SA 464) which found it unnecessary to pronounce on the point. At 499A-D Corbett JA observed that the decision as to whether in this country we should adopt the approach followed in the *Baccus* case, or that of other authority leading in the direction of more restricted immunity, must be left for some future occasion when the issue arises more pertinently. Finally, in the catalogue of the South African cases, there is *Prentice, Shaw & Schiess Incorporated v. Government of the Republic of Bolivia* 1978 (3) SA 938 (W) where Goldstone AJ, on his view of the facts, found that the doctrine of restricted immunity did not arise for consideration.

On the other hand, there is good reason to believe that the rule of sovereign immunity in international law has undergone an important change, and that the old doctrine of absolute immunity has yielded to the restrictive doctrine, in which immunity is denied in respect of *acta jure gestionis* involving commercial transactions. The justification for the modern rejection of absolute immunity is two-fold. Firstly, the old-style sovereigns wielding power by acts of State, and but rarely descending into commercial intercourse in foreign lands, enjoyed absolute immunity because what they did was regarded as *acta jure imperii*; but they have given way to modern governments, regularly contracting at home and abroad, and often engaged in international trading through state-owned or state-controlled corporations. Secondly, justice to the other parties involved demands that the sovereign who chooses to enter the market-places and to engage in trading operations in other countries should be held to his bargains and to his obligations.

The change that has come about in the rule as to sovereign immunity in international law may readily be demonstrated. In England, in *The Cristina (supra)*, Lord Maugham said (1938 AC at 519) that, if the *Parlement Belge* had been used solely for trading purposes, the decision would have been the other way; and Lord Thankerton at 496, and Lord MacMillan, at 498, thought it at least doubtful whether sovereign immunity should be extended to State-owned vessels engaged in ordinary commerce. Another important departure from the doctrine of absolute immunity, as illustrated by cases such as *The Parlement Belge*, *Porto Alexandre* and *Baccus (supra)* was that of Lord Denning in *Rahimtoola v. Nizam of Hyderabad and Another* 1958 AC 379 (HL) at 422, viz:

“...it seems to me that at the present time sovereign immunity should not depend on whether a foreign government is impleaded, directly or indirectly, but rather on the nature of the dispute...If the dispute brings into question, for instance, the legislative 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 other Law Lords cautiously withheld assent to this proposition, *inter alia* as the House had not had the benefit of argument or of the judgments in the Courts below on those matters. See also *Thai-Europe Tapioca Service Ltd v. Government of Pakistan* (1975) 1 WLR 1485 *per* Lord Denning at 1491.

In *Philippine Admiral v. Wallem Shipping (Hong Kong) Ltd* 1957 AC 373 (PC) Lord Cross of Chelsea, delivering the judgment of the Board, after reviewing the earlier cases, said, at 397:

“There is no doubt...that since the Second World War there has been both in the decisions of Courts outside this country and in the views expressed by writers on international law a movement away from the absolute theory of sovereign immunity championed by Lord Atkin and Lord Wright in *The Cristina* towards a more restrictive theory. This restrictive theory seeks to draw a distinction between acts of a State which are done *jure imperii* and acts done by it *jure gestionis* and accords the foreign State no immunity either in actions *in personam* or in actions *in rem* in respect of transactions falling under the second head.”

Lord Cross referred to *Republic of Mexico v. Hoffman* (1945) 324 US 30, a decision of the US Supreme Court, in which Frankfurter J (in whose opinion Black J concurred) agreed with Lord Maugham’s view in *The Cristina* that there should be no immunity for ships owned and operated by a foreign State for ordinary trading purposes; Lord Cross also referred to the so-called “Tate Letter”, addressed by J B Tate, acting legal adviser of the State Department, to the Acting Attorney-General of the United States, notifying him of the change of policy of the State Department whereby it had adopted the restrictive theory of sovereign immunity. Lord Cross then went on to say, at 400:

“According to the Tate letter the countries of the world were then fairly evenly divided between those whose Courts adhered to the absolute theory and those which adopted the restrictive; but there is no doubt that in the last 20 years the restrictive theory has steadily gained ground. According to a list compiled by reference to the various text-books on international law and put before their Lordships by agreement between the parties there are now comparatively few countries outside the Commonwealth which can be counted adherents of the absolute theory.”

After referring to certain Canadian cases, and to the European Convention on State Immunity signed at Basle on 16 May 1972, which in effect adopted the restrictive rule, but which had not then been ratified by the United Kingdom, Lord Cross (at 402-3) said that their Lordships thought that it was wrong that the doctrine of sovereign immunity should be applied to ordinary trading transactions. Lord Cross then went on to deal with the rule which had regularly been accepted by the Court of Ap-

peal that no action *in personam* could be brought against a foreign sovereign on a commercial contract, but held that, notwithstanding the resultant illogicality, the restrictive doctrine should be applied to actions *in rem*.

In *Trendtex Trading Corporation v. Central Bank of Nigeria* 1977 QB 529 (CA), Lord Denning MR made several observations of great importance. He said (at 552):

“The doctrine of sovereign immunity is based on international law. It is one of the rules of international law...It is, I think, for the courts of this country to define the rule as best they can, seeking guidance from the decisions of the courts of other countries, from the jurists who have studied the problem, from treaties and conventions, and, above all, defining the rule in terms which are consonant with justice rather than adverse to it.”

At 555:

“A century ago no sovereign State engaged in commercial activities. It kept to the traditional functions of sovereign—to maintain law and order—to conduct foreign affairs—and to see to the defence of the country. It was in those days that England—with most other countries—adopted the rule of absolute immunity. It was adopted because it was considered to be the rule of international law at that time...

In the last 50 years there has been a complete transformation in the functions of a sovereign State. Nearly every country now engages in commercial activities. It has its departments of State—or creates its own legal entities—which go into the market places of the world.

...This transformation has changed the rules of international law relating to sovereign immunity. So many have departed from it that it can no longer be considered a rule of international law. It has been replaced by a doctrine of restrictive immunity. This doctrine gives immunity to acts of a governmental nature, described in Latin as *jure imperii*, but no immunity to acts of a commercial nature, *jure gestionis*. Many countries have now adopted it. We have been given a valuable collection of recent decisions in which the Courts of Belgium, Holland, the German Federal Republic, the United States of America and others have abandoned absolute immunity and granted only restrictive immunity. Most authoritative of all is the opinion of the Supreme Court of the United States in *Alfred Dunhill of London Inc v. Republic of Cuba*...delivered on 24 May 1976...”

Lord Denning, at 556, quoted from the American decision in which the restrictive doctrine was upheld as being consistent with international law on sovereign immunity.

On the question of the precedents provided by the earlier cases on sovereign immunity, Lord Denning (at 553 of the *Trendtex* case) said:

“What is the place of international law in our English law? One school of thought holds to the doctrine of incorporation. It says that the rules of international law are incorporated into English law automatically and considered to be part of English law unless they are in conflict with an Act of Parliament. The other school of thought holds to the doctrine of transformation. It says that the rules of international law are not to be considered as part of English law except in so far as they have been already adopted and made part of our law by the decisions of the Judges, or by Act of Parliament, or long established custom.”

At 554 Lord Denning continued:

“As between these two schools of thought I now believe that the doctrine of incorporation is correct. Otherwise I do not see that our Courts could ever recognise a change in the rules of international law. It is certain that international law does change...: and the Courts have applied the changes without the aid of any Act of Parliament. Thus, when the rules of international law were changed (by the force of public opinion) so as to condemn slavery, the English Courts were justified in applying the modern rules of international law—Again, the extent of territorial waters varies from time to time according to the rule of international law current at the time, and the Courts will apply it accordingly...The bounds of sovereign immunity have changed greatly in the last 30 years. The changes have been recognised in many countries, and the Courts—of our country and of theirs—have given effect to them, without any legislation for the purpose, notably in the decision of the Privy Council in *The Philippine Admiral* 1977 AC 373...

Seeing that the rules of international law have changed—and do change—and that the Courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law. It follows, too, that a decision of this Court—as to what was the ruling of international law 50 or 60 years ago—is not binding on this Court today. International law knows no rule of *stare decisis*. If this Court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change—and apply the change in our English law—without waiting for the House of Lords to do it.”

Shaw LJ concurred in this approach to the question of *stare decisis*, but Stephenson LJ took the view that they were bound by the majority views of the Court of Appeal in the earlier case of *Thai-Europe* (*supra*). In that case Lawton LJ at 1493C-G and Scarman LJ at 1495E-F, having applied the old rule of absolute immunity, took the view that the changes in the rule could not be implemented because, once a rule of international law had been incorporated into English law by the decision of a competent Court, it was most important that it should not be altered save by the appropriate judicial or legislative body.

Since then there have been three further decisions in England. In *I Congreso del Partido* 1978 QB 500 Robert Goff J applied the decisions in *The Philippine Admiral* and the *Trendtex* cases *supra*. In *The Uganda Co (Holding) Ltd v. The Government of Uganda*, a decision of the Queens Bench Division (Commercial Court) reported in (1979) 1 Lloyds Law Reports 481, Donaldson J considered himself bound by the earlier decision of the Court of Appeal in the *Thai-Europe* case, and not by the *Trendtex* case. In the latest case, *Hispano Americano Mercantil SA v. Central Bank of Nigeria*, decided in the Court of Appeal on 25 April 1979 and reported in (1979) 2 Lloyds Law Reports 277, the decision in the *Trendtex* case was reaffirmed.

Meanwhile, the United Kingdom Parliament has enacted the State Immunity Act 1978, which gives effect to the European Convention on State Immunity signed at Basle on 16 May 1972. For the text of the European Convention see (1972) International Legal Materials vol 11 at 470.

The position in the United States of America appears from the “Tate letter” and from several leading judicial decisions. It is sufficient to refer to the cases of

Victory Transport Inc v. Comisaria General de Abastecimientos Y Transportes 1963 US Court of Appeals (2d Circuit), 336 Fed Rep 2d Series, 354; 35 International Law Reports 110; *ADM Milling Co v. Republic of Bolivia* 1975 US District Court for the District of Columbia 1975 International Legal Materials vol 14 at 279; and the *Alfred Dunhill* case 425 US 682 (1976). The United States has furthermore enacted the Foreign Sovereign Immunities Act of 1976, which gives effect to the restrictive doctrine of sovereign immunity. For the text of that Act, see 1976 International Legal Materials vol 15 at 1388.

In Canada, in *Republic of Congo v. Venne* (1972) 22 DLR (3d) 669, the majority of the Supreme Court found it unnecessary to decide which doctrine of sovereign immunity to apply, because, whatever view was taken, the particular transaction

“was a contract made by a foreign Sovereign in the performance of a public act of State”,

and the foreign sovereign could therefore not be impleaded. See at 678. The transaction was one in which the Republic of Congo employed an architect to design a pavilion at the 1967 exhibition in Montreal. The architect sued for his fees, and the defendant's claim to sovereign immunity was upheld. A similar situation arose in the South African case of *Prentice Shaw (supra)* with a similar result. It is not necessary to consider the correctness of these decisions, because neither decides the question of which doctrine of sovereign immunity to apply. However, in the *Venne* case, Laskin J (now CJ), in his dissenting judgment, made an extensive analysis of judicial decisions and academic writings to show that the restrictive doctrine now prevails in international law, and he concluded (at 687) that sovereign immunity does not rest on status, but on function. In *Zodiak International Products Inc v. Polish People's Republic* 81 DLR (3d) 656 the Quebec Court of Appeal held unanimously that the doctrine of restrictive immunity is part of the law of Canada.

Numerous decisions of the Courts of other countries, upholding the restrictive doctrine, are collected in the argument of counsel in the *Trendtex* case *supra* at 538, and in the argument of counsel in the *Lendalease* case in the Appellate Division *supra* at 470H. See also the German case of *YMN Establishment v. Central Bank of Nigeria*, discussed by Lord Denning in the *Trendtex* case at 558-9.

The proposition that in international law the doctrine of absolute sovereign immunity is outworn and spent, and that it has been replaced by the restrictive doctrine, in which no immunity is conferred in respect of commercial transactions, is fully supported by modern writers. See the opinions cited by Laskin J in the *Venne* case *supra* at 688 and those cited by O'Connell in *International Law* 2nd ed at 841. O'Connell (*op cit* at 844) observes that, “at the present time” (i.e. writing for publication in 1970), only English, and perhaps Russian, law reflects to any extent the traditional doctrine of absolute immunity, and it is clear that the absolute view is not sanctioned by international law. See further Dugard in 1971 *Annual Survey of SA Law* at 51, commenting on the *Parkin* case *supra*, and also in 1974 *Annual Survey* at 57, commenting on *Leibowitz v. Schwartz (supra)*; Booyesen in 1977 *SA Year Book of International Law* at 211 and 212; and also in *Volkereg: 'n Inleiding* (about to be published) at 211 *et seq*, and especially 217-220; and Cartoon in 1978 *CILSA* vol XI at 168 *et seq*, and especially at 182. See also Von Mehren in (1978) *Columbia Journal of Transnational Law* vol 17 at 66 *in fine*, and the formidable list of modern writers cited by counsel in the *Lendalease* case in the Appellate Division *supra* at 469G.

In my view, it must be accepted that the rule of international law on sovereign immunity which prevails today is that reflected in the restrictive doctrine, and that, in the application of that doctrine, there is no longer any justification for distinguishing, in the case of commercial transactions, between claims *in rem* and claims *in personam*. That conclusion is based on the overwhelming weight of modern authority. It is also in accord with logic and with the requirements of justice.

The legal question which now arises is whether we are free to apply the restrictive doctrine in the present case. We are not bound by any of the earlier South African decisions on the point, although we ought to follow them unless there are convincing reasons for not doing so.

International law is part of the law of South Africa, save in so far as it conflicts with South African legislation or common law. Our Courts will take judicial cognizance of international law, and it is their duty in any particular case to ascertain and administer the appropriate rule of international law. *Nduli and Another v. Minister of Justice and Others* 1978 (1) SA 893 (A) *per* Rumpff CJ at 905-6; *South Atlantic Islands Development Corporation Ltd v. Buchan* 1971 (1) SA 234 (C), a Full Court decision *per* Diemont J (as he then was) at 238C. In *Nduli's* case at 905D Rumpff CJ said:

“It was conceded by counsel...that according to our law only such rules of customary law are to be regarded as part of our law as are either universally recognised or have received the assent of this country...I think that this concession was rightly made.”

The concept of universal recognition in this context is obviously not an absolute one, despite the ordinary meaning of the word “universal”, for,

“if a custom becomes established as a general rule of international law, it binds all States which have not opposed it, whether or not they themselves played an active part in its formation”.

See Friedman, Lissitzyn and Pugh on *International Law Cases and Materials* at 35. See also article 38 of the Statute of the International Court of Justice, which provides, *inter alia*, that:

“1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) ...

(b) international custom, as evidence of a general practice accepted as law;

...”

In the case of sovereign immunity, the restrictive doctrine has far transcended mere custom, for it has been accepted in treaties, such as the Basle European Convention, in national legislation, such as the UK and the USA statutes, and in the decisions of the Courts of many countries. However, insofar as it may have to be regarded by our Courts as a rule “of customary law”, it is to be inferred from the statement of *O'Connell (op cit* at 844) that today only Russian law reflects to any extent the traditional doctrine of absolute immunity, and that the restrictive doctrine has become established as the general rule. On that basis the restrictive doctrine qualifies for recognition as part of our law. There is no South African statute or principle of South African law which is in conflict with the restrictive doctrine. The Diplomatic Privileges Act 71 of 1951 is entirely consistent therewith; s 2 confers on heads of State,

diplomatic agents and certain others immunity from the civil and criminal jurisdiction of our courts, but s 3 (1) provides that:

“The provisions of s 2 shall not apply to any person mentioned therein . . . in connection with any transaction entered into by him in his private or personal capacity, for purposes of trade or in the exercise of any profession or calling.”

Were the matter *res nova*, there would be no difficulty in applying the restrictive doctrine. The only remaining question is whether or not, on the principle of *stare decisis*, we should follow the earlier South African decisions. Lord Denning's view in the *Trendtex* case *supra* at 554 is that international law knows no rule of *stare decisis*, but it does not appear to me to be necessary in the present case to adopt that proposition. In South Africa the earlier cases are all founded on the English decisions which laid down and reaffirmed the absolute doctrine of sovereign immunity. Even in the *Lendlease* case, at first instance *supra*, the *ratio* was that of the *Baccus* case *supra* and of the *De Howorth* case *supra* in which the earlier English decisions were applied. However, the rule stated in the earlier English decisions no longer represents the rule of international law, and the *ratio* of the earlier South African cases is therefore no longer applicable. To apply the restrictive doctrine would therefore not involve any criticism of or dissent from the earlier South African decisions.

Having this concluded that we ought to apply the restrictive doctrine, I return to the facts of the instant case. On the claims for payment of moneys due and for damages for breach of contract, the applicant, according to the generous criterion laid down in the *Bradbury Gretorex* case *supra*, has made out a *prima facie* case based on the RPM Government's adoption of and participation in a commercial transaction. If that case should be established, the RPM Government would not be entitled to immunity. Of course the issue of immunity can be raised in the action as a defence on the facts, for the applicant's version may be contested. However, on the claim for damages for the alleged expropriation of vehicles, the applicant has failed to make out even a *prima facie* case on the facts, and besides, on its own version, the expropriation was *jure imperii*, and not *jure gestionis*. The applicant is therefore not entitled to any relief in respect of that particular cause of action.

On the basis of these conclusions, the following order is made:

1. The Sheriff is authorised to attach the interest of the Government of the Republic Popular de Mocambique in the following assets:

(a) Stand No 59 Braamfontein (Lindeque's Portion), Johannesburg Township, held under deed of transfer No L 320/1913;

(b) Lots Nos 58 and 59, Township of Forest Town, held under deed of transfer No F 2600/1961;

(c) All moneys standing to the credit of Banco de Mocambique of Maputo in the books of account of the Bank of Lisbon, 37 Sauer Street, Johannesburg, but not exceeding the sum of R480 468,71;

to found or alternatively to confirm jurisdiction in the action referred to in para 2 of this order.

2. The applicant is given leave to sue the said Government by edictal citation for the following relief:

- (a) payment of the sums of R91 721,09 and R307 680,97 in respect of services rendered to the company known as Etlal;
- (b) payment of the sums of R11 289,65 and R57 900,75 in respect of damages for breach of contract by the said company;
- (c) interest on the said sums *a temporibus morae*;
- (d) other or alternative relief;
- (e) costs of suit.

3. Service of the citation in the said action is to be effected as follows:

- (a) by registered letter addressed to the Minister of Agriculture of the said Government at his official address at Maputo, Mocambique;
- (b) by registered letter addressed to the Comissao Administrativa of the said company known as Etlal, at its address at Maputo, Mocambique;
- (c) by personal service by the Deputy Sheriff on the Commercial Representative of the Mocambique Harbours and Railways at Glencairn, 73 Market Street, Johannesburg.

4. Notice of intention to defend is to be filed and served within two months of the latest of such services.

5. The costs of this application are to be costs in the action.

6. The aforesaid Government is given leave to move on due notice and on good cause shown to set aside the aforesaid attachments and the aforesaid order for leave to sue by edictal citation.

3. *KAFFRARIA PROPERTY CO. (PTY) LTD. v. Government of the Republic of Zambia*. DECISION BY THE EASTERN CAPE DIVISION OF THE SUPREME COURT ON 4 FEBRUARY 1980⁶⁶

The facts and the judgement:

Eksteen J: From the papers before us it appears that at some time presumably during the beginning of last year the Government of the United States of America, acting through the Agency for International Development of the State Department, donated a quantity of mixed fertilizer to the Government of the Republic of Zambia—the respondent in the present proceedings.

The respondent thereupon called for tenders for the shipment of the fertilizer from the United States of America, and the Westfield Shipping Company, SA Panama, was awarded the contract. On 8 May 1979 the respondent, acting through its embassy in Washington, entered into an ordinary commercial charter party agreement with the Westfield Shipping Company as owners of the motorship *Dimos Halcoussis* for the carriage of 14,400 net metric tons of the bagged mixed fertilizer. On 7 June 1979 the Administrator of the Agency for International Development acting on behalf of the United States of America signed a letter of commitment to the Westfield Shipping Company undertaking to pay an amount not exceeding \$1,163,520 to cover the ocean transportation charges of the cargo of fertilizer.

⁶⁶ Reproduced from *South Africa Law Reports*, No. 2 (1980), p. 709.

The charter party referred to contained the usual clauses found in such a document, and provided *inter alia* that:

“At loading charterers to pay demurrage at the rate of US \$5,000 per day of 24 running hours or *pro rata* for any part thereof, for all time used in excess of lay-time.”

It also provided for the arbitration of any dispute which may arise between the owners of the vessel and the charterers, and for the enforcement of any award made by a court order.

The cargo was loaded at Gulfport, Mississippi, and Galveston, Texas, during July and August 1979 and eight days 17 hours and 50 minutes demurrage was incurred during loading, which, calculated at \$5,000 per day, amounted to US \$43,715.28.

The ship then sailed for East London where the cargo was to be discharged and on arrival there it was detained for a further four days exactly, by reason of the respondent's failure to furnish the necessary letters of credit for the freight charges payable, as provided for in the charter party. The damages occasioned by this delay are calculated at the same rate as is provided for in respect of demurrage and amount therefore to a further US \$20,000. The total claim by the owners against the respondent in respect of demurrage and damages therefore amounts to US \$63,715.28.

On 18 September 1979 while the motor vessel *Dimos Halcoussis* was still lying in East London harbour discharging its cargo of fertilizer the owners of the ship ceded their rights to claim payment of the amount of US \$63,715.28 referred to above to the present appellant, and on 19 September appellant brought an *ex parte* application before my Brother De Wet in East London for the attachment of 1,000 tons of the fertilizer then being discharged *ad fundandam jurisdictionem* in a proposed action against respondent, and for leave to sue the respondent by edictal citation. No notice of the application was given to the respondent or its agents so as to avoid, it is stated,

“the possibility of the respondent availing itself of the time between giving such notice and the granting of any order—to remove the cargo from the jurisdiction of the honourable Court”.

There was therefore no appearance for the respondent, but Mr. *Kroon*, who appeared on behalf of the applicant, very properly dealt with the possible objection that the respondent may enjoy sovereign immunity against any process in our Courts. He submitted, however, that the application related to a purely commercial transaction and that, by virtue of the restricted view international law took of the doctrine of sovereign immunity today, respondent would not be entitled to claim any such immunity in the circumstances of this case. De Wet J however considered himself bound by cases such as *De Howarth v The SS ‘India’* 1921 CPD 451 in which absolute sovereign immunity was held to be the norm of international law as applied by our Courts, and therefore refused the application. The present appeal is brought against that refusal.

The possible objection to the appealability of that judgment, which contained no order as to costs, on the ground that the fertilizer which it had been sought to attach may well have been railed to Zambia by now, was overcome by an affidavit deposed by appellant's attorney to the effect that to the best of his knowledge and belief political factors such as the closing of the border between Rhodesia and Zambia had re-

sulted in a delay in the railing of goods from East London to Zambia and that there was still a very substantial quantity of goods belonging to the respondent stored in East London by Steer and Co in their warehouses and in the warehouse of the South African Wool Commission in East London. A large portion of these goods, he alleges, is fertilizer of the same type as was discharged from the *MV Dimos Halcoussis* and it is therefore possible that it may well have formed part of that cargo. There is therefore a considerable volume of goods belonging to the respondent in East London which could be attached *ad fundandam jurisdictionem*.

Before addressing myself to the problem of whether the principle of absolute sovereign immunity is accepted in our law or whether a more restricted view of that immunity applies, I propose adverting to two preliminary aspects of this matter. In the first place it is convenient to note at the outset that the *onus* resting upon the appellant in this application is one merely requiring him to make out a *prima facie* case and that that *onus* is satisfied if the appellant's papers contain allegations which, if accepted, will establish a cause of action. (*Bradbury Gretorex Co (Colonial) Ltd v Standard Trading Co (Pty) Ltd* 1953 (3) SA 529 (W); *Bird v Lawclaims (Pty) Ltd* 1976 (4) SA 726 (D); *Butler v Banimar Shipping Co SA* 1978 (4) SA 753 (SE) and the cases there cited.) Secondly, the mere fact that the appellant is a cessionary who received his right of action from a *peregrinus* does not disentitle him from bringing an application to attach *ad fundandam jurisdictionem* (*Hill and Paddon v Borchert* (1883) 2 HCG 253 and *Butler v Banimar Shipping Co SA* (*supra*)).

I turn now to consider the question of the applicability of international law to our law. In *South Atlantic Islands Development Corporation Ltd v Buchan* 1971 (1) SA 234 (C) at 238 Diemont J comes to the conclusion that international law forms part of our law and that it is the duty of the Court to ascertain the rule of international law appropriate to the case under consideration and to administer it.

The learned authors of Hahlo and Kahn *South African Legal System and its Background* express the view at 113 that the Courts will normally apply international law in appropriate cases unless it conflicts with South African legislation or common law. This view was accepted by the Appellate Division in *Nduli and Another v Minister of Justice and Others* 1978 (1) SA 893 (A) at 906 with the qualification that

“the *fons et origo* of this proposition must be found in Roman-Dutch law”.

The learned Chief Justice then goes on to remark that:

“It was conceded by counsel for appellants that according to our law only such rules of customary international law are to be regarded as part of our law as are either universally recognized or have received the assent of this country, cf *Oppenheim International Law* vol 1 8th ed at 39, 41. I think this concession was rightly made.”

Lord Denning MR, in dealing with the proposition that the doctrine of sovereign immunity in international law arises out of the consensus of the civilized nations of the world, says in *Trendtex Trading Corporation Ltd v Central Bank of Nigeria* (1977) 1 All ER 881 at 888 that:

“To my mind this notion of a consensus is a fiction. The nations are not in the least agreed on the doctrine of sovereign immunity. Yet this does not mean that there is no rule of international law on the subject. It only means that we differ as to what that rule is. Each country delimits for itself the bounds of sovereign immunity. Each creates for itself the exceptions from it. It is, I think, for the Courts

of this country to define the rule as best they can, seeking guidance from the decisions of the courts of other countries, from the jurists who have studied the problem, from treaties and conventions and, above all, defining the rule in terms which are consonant with justice rather than adverse to it.”

In *De Howarth v The SS "India"* (*supra*) Gardiner J, after reviewing the writings of our Roman-Dutch authorities, certain English and American decisions, and advertent to the writings of modern continental jurists, came to the conclusion that a ship owned by the Portuguese Government was immune from attachment *ad fundandam jurisdictionem* in an action to be brought for the recovery of moneys spent on supplies to the vessel, despite the fact that the ship, in addition to carrying mails and troops to the Portuguese colonies, also carried passengers and cargo and flew the Portuguese mercantile flag. The English cases to which he referred, viz *The Parlement Belge* 5 PD 197 and *The Porto Alexandre* 1920 PD 30, adopted the view that has come to be known as the principle of absolute sovereign immunity in holding that international comity induces every sovereign state to decline to exercise by means of any of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to its public use. Gardiner J however did contemplate the possibility of a foreign sovereign becoming subject to the jurisdiction of our Courts where he embarked on commercial ventures solely for his own personal gain.

Since that decision was given the growing tendency of sovereign states to engage in commercial activities either through their departments of state or through created agencies has led to a concomitant change in the attitude of civilized states to the principle of absolute immunity, and to the progressive acceptance of a more restricted immunity. This principle of restricted immunity only accords immunity to so-called *acta jure imperii*, i.e. acts of a purely governmental or public nature, and not to *acta jure gestionis*, i.e. acts of a commercial nature.

On 19 May 1952 J B Tate, acting legal adviser to the State Department of the United States of America, addressed a letter (since then referred to as the Tate letter) to the Acting Attorney-General notifying him of the adoption by the State Department of the principle of restrictive immunity and this principle was applied by the United States Supreme Court in *Alfred Dunhill of London Incorporated v Republic of Cuba* 425 US 682 (1976) where WHITE J says:

“Although it had other views in years gone by, in 1958, as evidenced by (the Tate letter), the United States abandoned the absolute theory of sovereign immunity and embraced the restrictive view under which immunity in our Courts should be granted only with respect to causes of action arising out of a foreign State’s public or governmental actions and not with respect to those arising out of its commercial or proprietary actions.”

The trend to the acceptance of the principle of restrictive immunity has also found favour in the Courts of England. Despite the reluctance of the Court to subscribe to the views of Lord Denning on this subject in *Rahimtoola v Nizam of Hyderabad* 1958 AC 379, the Privy Council decided in *Philippine Admiral (Owners) v Wallen Shipping (Hong Kong) Ltd* (1976) 1 All ER 78 that the principle of absolute immunity no longer applied in England in respect of actions *in rem* but only to actions *in personam*, and then in *Trendtex Trading Corporation Ltd v Central Bank of Nigeria (supra)* the Court of Appeal held that in English law the principle of sovereign immunity was not applicable to ordinary commercial transactions of a sover-

eign State as distinct from its governmental acts. In this latter judgment Lord Denning at 891 refers to

“recent decisions in which the Courts of Belgium, Holland, the German Federal Republic, the United States of America and others have abandoned absolute immunity and granted only restrictive immunity”.

Subsequent to the decision in *De Howarth v The SS ‘India’* (*supra*) South African Courts have been called upon to consider and have applied the principle of sovereign immunity in cases such as *Ex parte Sulman* 1942 CPD 407; *Kavouklis v Bulgaris* 1943 NPD 190; *Parkin v Government of the Republique Democratique du Congo and Another* 1971 (1) SA 259 (W); *Leibowitz and Others v Schwartz and Others* 1974 (2) SA 661 (T); *Lendalease Finance Co (Pty) Ltd v Corporacion de Mercadeo Agricola and Others* 1975 (4) SA 397 (C); *Prentice, Shaw & Schiess Incorporated v Government of the Republic of Bolivia* 1978 (3) SA 938 (T). In all these cases, however, it was either expressly stated by the Courts or appeared from the facts stated in the judgment that the actions of the sovereign State concerned were of a public or governmental nature (*acta jure imperii*) and not of an ordinary commercial nature (*acta jure gestionis*). Although this was also the finding of De Kock J in *Lendalease Finance Co (Pty) Ltd v Corporacion de Mercadeo Agricola and Others* (*supra*) he went on to say at 404:

“But, in any event, it seems to me that this Court, sitting as a Court of first instance, should adhere to the traditional view of granting immunity in respect of property which belongs to a sovereign foreign state or of which it is in possession or control. The decision in the *Baccus* case *supra* is directly in point, and in my view we should follow that case and the principle laid down by Gardiner J in the *SS ‘India’* case.”

When this case was taken on appeal (1976 (4) SA 464 (A)) the order made by De Kock J was upheld on other grounds, and the Appellate Division found it unnecessary to enquire into the aspect of sovereign immunity, but in adverting to this principle Corbett JA says at 499 that:

“I think it can be accepted that the majority judgments in the *Baccus* case *supra* are not the last word on the subject of sovereign immunity in English law, and it may well be that that system is moving in the direction suggested by counsel. Generally, the problem is an interesting and difficult one but, in my view, the decision as to whether in this country we should adopt the approach followed in the *Baccus* case *supra* or that of other authority leading in the direction of a more restricted immunity, must be left for some future occasion when the issue arises more pertinently.”

These remarks, I may point out, were made before the decision in the *Trendtex* case *supra*. Since then the matter has again come up for consideration in a South African Court, viz in the matter of *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* (TPD 18 December 1979—not yet reported) in which Margo J (with whom Franklin and Preiss JJ concurred) followed the decision in the *Trendtex* case *supra* and came to the conclusion that:

“it must be accepted that the rule of international law on sovereign immunity which prevails today is that reflected in the restrictive doctrine, and that, in the application of that doctrine, there is no longer any justification for distinguishing, in the case of commercial transactions, between claims *in rem* and claims *in per-*

sonam. That conclusion is based on the overwhelming weight of modern authority. It is also in accord with logic and with the requirements of justice.”

I find myself in respectful agreement with this conclusion, and since, as I have indicated, international law forms part of our law, it is our duty to apply that principle in our law insofar as it does not conflict with our legislation or our common law. I am not aware of any legislative enactments which would make it impossible to apply that principle in the circumstances of the present case, nor do I consider its application in these circumstances to be contrary to the *rationes decidendi* in any of the cases in our Courts referred to by me above, except perhaps that in the *SS ‘India’* case. When that case was decided, however, Gardiner J was merely stating and applying the rules of international law as they existed at the time—as, in fact, we are bound to do today. Customary international law, depending as it does on “universal” recognition by civilized States, is bound to and does change from time to time as a result of changing circumstances, international agreements or treaties, or even by virtue of the force of public opinion; and when it does so change, as it has done on the principle of sovereign immunity, it is the duty of our Courts to ascertain the nature and extent of such change and to apply it in appropriate circumstances. Lord Denning has expressed this principle in the *Trendtex* case by his *dictum* that “international law knows no rule of *stare decisis*” and Shaw LJ (at 910), in my view, persuasively elaborates on the same principle. I therefore see no incongruity in declining today to apply the principles enunciated in the *SS ‘India’* case, without in any way reflecting on the correctness of that decision.

The agreement of carriage on which the appellant’s claim is based in the present case appears from the papers before us to be the normal commercial agreement of this nature generally entered into between contracting parties in the ordinary course of business. This is confirmed by the affidavit of Mr C V Croney, the manager of the company which acts as the shipping agent for the owners of the *MV Dimos Halcoussis*, and by the affidavit of Mr J E Vermaak, a director of the appellant company. A telex from the owner’s managing agent in London, A Halcoussis Shipping Ltd, which is also annexed to the papers, confirms that the contract entered into with the Embassy of Zambia in Washington was of a purely commercial nature, and that it was concluded in the normal commercially competitive manner, ie by tender against the other shipping companies.

The overall transaction of the Republic of Zambia accepting the donation of the fertilizer from the Government of the United States of America and arranging for its conveyance to Zambia may conceivably have been for a public or governmental purpose, although this is by no means apparent from the papers before us. But that is not the transaction on which appellant relies. The appellant’s claim, as I have indicated, arises out of the contract of carriage between the owners of the ship and the respondent, which is an entirely separate contract. This, moreover, as I have said, appears to have been a straight-forward commercial transaction. It seems to me therefore that the applicant has succeeded in showing *prima facie* that the transaction on which it relies was of a purely commercial nature. The respondent may be able to lay other facts before the Court to contradict such a conclusion, but, as the papers now stand *ex parte*, a *prima facie* case does seem to me to have been made out. On this assumption there is no room in international law for the principle of sovereign immunity to be invoked in favour of the respondent. All the other requisites for an attachment *ad fundandam jurisdictionem* are present, and in my view the application for such attachment ought to have been granted.

The appeal therefore succeeds and an order will issue:

1. Authorising and directing the Deputy Sheriff of East London to attach *ad fundandam jurisdictionem* 1,000 tons of mixed fertilizer, the property of the respondent presently being stored in the South African Wool Commission store, Westbank, East London, and in the warehouses of Steer and Co in East London, and, in the event of the said Deputy Sheriff not finding the full quantity of 1,000 tons of mixed fertilizer in the said warehouses, then, in addition to what fertilizer he is able to attach, such other goods as are the property of the respondent so stored as to bring the total value of such attached goods to, but not to exceed R70,000, such value to be calculated by and to be in the discretion of the said Deputy Sheriff, who is authorized hereby to hold the said fertilizer and other goods under attachment until security is furnished in terms of para 2 hereof, and, in default of the furnishing of such security, pending the decision of an action to be brought by the applicant against the respondent for payment of the Rand equivalent of US \$63,718.28 and for ancillary relief and costs; or alternatively, in the event of the dispute between the parties being referred to arbitration, pending the decision of an action to have the arbitration award made an order of this Court.

2. Authorising the said Deputy Sheriff to release the said fertilizer and other goods from attachment upon the respondent lodging with the Registrar security for payment of the sum of R70,000 and the costs of the said action or arbitration, together with the costs of the application for attachment and of this appeal, such security to be to the satisfaction of the Registrar acting in consultation with the applicant's attorneys. The security so furnished shall then be subject to this attachment in lieu of the said fertilizer and other goods.

3. Granting the applicant leave to sue the respondent by edictal citation for payment of the said Rand equivalent of US \$63,718.28 and for costs and ancillary relief; such citation

(a) to call on the respondent, if it desires to defend the action, to serve notice of its intention to defend within two months of the date of service, on the Registrar of this Court, and upon the applicant's attorney, such notice to appoint an address (not being a post office box or *poste restante*) within eight km of the office of the Registrar, East London, for the service on the respondent of all documents and pleadings in the proposed action;

(b) to be served on the respondent by service at the respondent's clearing and forwarding agent in the Port of East London i.e. Freight Services Ships Agency Co Ltd, Colonial Mutual Building, 60 Terminus Street, East London, and by registered post on the Prime Minister of the Government of the Republic of Zambia, at Lusaka, Zambia.

4. The costs of the application for attachment and for edictal citation, together with the costs of this appeal and the costs of storing the fertilizer and other goods attached in terms of this order pending the determination of the action or the furnishing of security by the respondent, shall be costs in the cause in the proposed action.

5. Service of this order on the respondent shall be effected by service of a copy thereof together with the papers on which it was granted upon

(a) the respondent's East London agents, Freight Services Ships Agency Co Ltd, Colonial Mutual Building, 70 Terminus Street, East London, and

(b) the Prime Minister of the Government of the Republic of Zambia, Lusaka, Zambia, by registered post.

6. The respondent is given leave to move on due notice within two months of the date of service of this order to set aside the aforesaid attachment and the aforesaid order for leave to sue by edictal citation.

Q. SWEDEN

DECISION BY THE SUPREME COURT ON 1 MARCH 1957. *Beckman v. Chinese People's Republic*⁶⁷

Summary of the facts:

The plaintiffs in this case, Carin Beckman and Åke Beckman, children and heirs of Bengt Johansson, applied to the City Court of Stockholm for a summons against the Chinese People's Republic. They alleged that on October 4, 1954, certain real property situated in Stockholm and belonging to the estate of their deceased father had been sold to the Republic by the administrators of the estate of their late father without their consent and against their protests. They further alleged that the sale had not been required for the administration of the estate and that it had been disadvantageous to them. On this ground they demanded that the purchase—for which the King in Council had granted permission on September 17, 1954—should be declared invalid.

Upon inquiry by the Royal Swedish Ministry for Foreign Affairs, the Chinese Embassy declared that it pleaded diplomatic immunity and that it was not willing to enter a defence.

The City Court of Stockholm thereupon held that the application for a summons against the Republic must be rejected. The Court said: "As the dispute described in the application, which dispute concerns the question of ownership of a property purchased by the Republic and intended for use by its Embassy in this country, is of such a nature that the Republic is entitled to immunity, and as all other circumstances are such that it must be regarded as evident that proceedings on that ground are barred, the City Court considers it right to dismiss the present application for a summons against the Republic." On appeal, the Court of Appeal held that the ruling of the City Court must be confirmed.

On further appeal, to the Supreme Court, permission to bring the case before that Court was granted.

When, on May 9, 1956, the case was presented to the Supreme Court, the latter decided to request the Minister for Foreign Affairs to procure information, to the extent that it conveniently could be done, concerning legal provisions, cases, and doctrinal views on the immunity of a foreign State from suit regarding real property and execution against such property, and especially with regard to property intended for use by the diplomatic mission of a foreign State. As a result of this request, letters and detailed statements from the Swedish diplomatic missions in Washington, Brus-

⁶⁷ Reproduced from *International Law Reports* (1957), p. 221. Reported originally in *Nytt Juridiskt Arkiv* (1957), p. 195.

sels, Paris, Rome, Peking, The Hague, Berne, London and Bonn, and by the Swedish Representative at the United Nations, were transmitted to the Court.

Excerpts from the judgement:

The reporting Judge who presented the case to the Supreme Court stated in the report: "With a certain exception which may here be disregarded, written Swedish law does not contain any provisions establishing a right for a foreign State to enjoy immunity from action in a Swedish court. Such a right to immunity must, however, be considered as recognized in Swedish law, and has constituted the ground for several decisions by the Supreme Court.

"According to doctrines of international law, Swedish as well as foreign, the right to immunity is considered to be limited in such a way, among others, that actions concerning real property—regardless of the fact that the owner enjoys immunity—may be examined by a court in the State in which the property is situated. This principle—which accords closely with the generally accepted rule of procedure to the effect that the *forum rei sitae* is the exclusive forum for actions regarding real estate—has not, so far as is known, been confirmed in any leading case in Swedish legal practice, but must nevertheless be regarded as expressing Swedish legal opinion.

"In the present case, Carin and Åke Beckman, as part-owners of the estate of the deceased Johansson, have brought an action against the Chinese People's Republic before the City Court of Stockholm and have asked that the Republic's purchase of the real property No. 7 in the block 'Sidensvansen' in Stockholm be declared invalid. The circumstance that the property is used by the Republic for its Embassy in this country cannot be considered as barring examination by the City Court of the case brought by Carin Beckman and Åke Beckman, the object of which examination is to determine the ownership of the real property in question.

"It is my submission, therefore, that the Court should consider it right to set aside the rulings of the Courts below, and to refer the case back to the City Court, the further examination of the case to be resumed by that Court without the necessity for a renewed application by the plaintiffs."

In its majority decision the Supreme Court said: "As the property in this case is used by the Republic for its Embassy in this country, and the Republic for this reason must be regarded as entitled to plead immunity from the action brought by Carin and Åke Beckman, the Court upholds the ruling of the Court of Appeal."

R. SWITZERLAND

1. DÉCISION DU TRIBUNAL FÉDÉRAL EN DATE DU 22 JUIN 1966 (*République italienne, Ministère italien des transports et chemins de fer d'Etat italiens c. Beta Holding S.A. et Autorité de séquestre de Bab-Ville*)⁶⁸

Résumé des faits et du jugement:

Le 30 novembre 1954, Finacom Trust, une société financière ayant son siège à Vaduz (Liechtenstein), conclut un contrat avec les «Chemins de fer d'Etat italiens»

⁶⁸ Reproduced from *Annuaire suisse de droit international*, vol. 31 (1975), p. 219.

(«*Ferrovie italiane dello Stato*»; en abrégé: FS). Dans ce contrat, Finacom s'obligea à accorder aux FS un prêt de 250 à 300 millions de francs suisses, alors que les FS s'engagèrent, sous réserve de l'approbation du Conseil des ministres et du Parlement italiens, à acquérir de Finacom, au prix de 100 millions de francs suisses, les 85 à 90 p. 100 des actions de la société minière «*Constantin der Grosse*» à Bochum (République fédérale d'Allemagne). La première transaction — le prêt — devait dépendre de la seconde, à savoir de l'achat du paquet d'actions, et celle-ci devait s'accomplir jusqu'au 31 mars 1955 au plus tard. Les 2 et 4 février 1955, les parties tombèrent d'accord que le prix d'achat des actions serait versé auprès de la Banque commerciale à Zurich.

Le 4 mars 1955, le prêt recherché par les FS fit l'objet de négociations auxquelles participèrent des représentants de Finacom, des FS, de la Banque commerciale à Zurich et des autorités fédérales, en particulier des Chemins de fer fédéraux suisses (CFF). Ces négociations furent suivies de pourparlers sur le plan diplomatique. Le 23 juillet 1955, la Suisse et l'Italie conclurent l'Accord international concernant le financement de travaux en vue du développement et de l'électrification de certaines lignes des «*Ferrovie italiane dello Stato*» accédant à la Suisse (RO 1957, p. 199). L'article 2 de cet Accord prévoyait que les CFF accorderaient aux FS un prêt de 200 millions de francs suisses.

Le contrat de vente entre Finacom et les FS, qui portait sur la majorité des actions de la société «*Constantin der Grosse*», était toutefois demeuré inexécuté à la date limite (31 mars 1955). Pour ce motif, Finacom réclama aux FS 60 millions de francs suisses de dommages-intérêts au titre de gain manqué à la suite de l'échec de cette transaction; de plus, elle demanda un droit de courtage de 3 p. 100 des 200 millions de francs obtenus au titre de prêt, soit de 6 millions de francs. A l'appui de sa réclamation, Finacom releva que c'était grâce à elle que les FS avaient obtenu le prêt de la part des CFF. Les FS rejetèrent ces demandes en faisant valoir, quant au premier chef de la demande, que l'exécution du contrat de vente par les FS dépendait de deux conditions, dont aucune ne s'était réalisée: l'approbation du Conseil des ministres et du Parlement italiens et l'octroi, par Finacom, d'un prêt de 300 millions de francs suisses aux FS.

Le 12 juin 1962, Finacom céda ses deux prétendues créances à la Beta Holding S.A. à Castagnola (Tessin). Le 22 février 1965 et le 9 juin 1966, celle-ci invoqua l'article 271, alinéa 1^{er}, chiffre 4, de la Loi fédérale sur la poursuite pour dettes et la faillite, du 11 avril 1889 (RS 281.1), pour faire séquestrer, à Bâle, des actions d'Eurofima S.A. (Société européenne pour le financement de matériel ferroviaire) appartenant aux FS, ainsi que des revenus provenant de telles actions. Les deux ordonnances de séquestre y relatives furent signifiées aux FS à Rome.

Les FS renoncèrent à tenter des actions en contestation du cas de séquestre et à adresser des plaintes aux autorités de surveillance en matière de poursuite pour dettes. En revanche, ils firent opposition dans le cadre des poursuites en validation des séquestres. De plus, les FS demandèrent au Tribunal fédéral de lever les séquestres par la voie du recours de droit public. A l'appui de ces recours, ils firent valoir que les séquestres en cause visaient en réalité l'Etat italien, puisque les FS n'étaient qu'une subdivision administrative de l'Etat et n'avaient ainsi aucune personnalité juridique distincte. Les séquestres étaient en conséquence incompatibles avec la règle du droit international qui soustrait les Etats étrangers aux actes de juridiction et d'exécution forcée des autorités locales. Selon les FS, les séquestres étaient égale-

ment incompatibles avec le droit des gens parce que la participation des FS dans Eurofima S.A. constituait des biens administratifs de l'Etat ou devait au moins être assimilée à de tels biens.

Le Tribunal fédéral admit les recours. Ce faisant, il formula certaines observations sur le principe de l'immunité de juridiction et d'exécution forcée des Etats étrangers ainsi que sur le statut d'Eurofima S.A.

[Traduction:]

3. ... Les recourants font ... valoir que les ordonnances de séquestre et les séquestres qui en sont le résultat violent le principe de droit international de l'immunité de juridiction et d'exécution forcée. Selon la jurisprudence, une violation du droit des gens doit être assimilée à la violation d'un traité international (article 84, lettre c, OJ) et la règle mentionnée de l'immunité ... à une règle de droit fédéral sur la compétence des autorités en raison du lieu (article 84, lettre d, OJ). Il s'ensuit que le grief invoqué par les recourants peut faire l'objet d'un recours dirigé directement contre l'ordonnance de séquestre; le Tribunal fédéral appréciera librement. Sur ce point, il suffit de renvoyer à ATF 82 I 80, c, 3 et 6, comme le faisait déjà ATF 86 I 27, c, 1. Il n'y a rien à ajouter à ce qui y a été dit.

4. Il est admis que les Chemins de fer italiens d'Etat (FS) ne possèdent pas la personnalité juridique; comme les CFF, les FS sont non pas une entreprise commerciale, mais un service public et une subdivision administrative de l'Etat. Les réclamations adressées aux FS et qui font l'objet des séquestres litigieux sont donc dirigées contre l'Etat italien; c'est celui-ci qui est le propriétaire des 1400 actions d'Eurofima S.A., actions qui sont inscrites au nom des FS et qui, avec leurs revenus, ont été séquestrées. La République italienne a donc qualité pour former des recours de droit public contre les ordonnances de séquestre en invoquant son immunité. Quant aux corecourants, le Ministère italien des transports et les FS, cette qualité pour agir leur manque, car ils ne sont que des représentants de la République italienne.

... Questions de fond

5. Jusqu'à la seconde moitié du XIX siècle, un principe généralement reconnu du droit international public soustrayait les Etats étrangers à la juridiction des tribunaux internes, à moins que ces Etats n'aient expressément ou tacitement renoncé à cette exemption. A partir de cette époque, la jurisprudence et la doctrine ont admis de plus en plus que l'exemption ou immunité en question n'est justifiée qu'à l'égard de prétentions déduites d'un rapport juridique créé par l'Etat en sa qualité de détenteur de la puissance publique (*jure imperii*); par conséquent, l'Etat étranger resterait assujéti à la juridiction et à l'exécution forcée pour des réclamations basées sur un rapport juridique de droit privé (*jure gestionis*). Cette conception fut appliquée d'abord par les tribunaux italiens et belges; plus tard, ceux-ci furent suivis par les tribunaux d'autres Etats, dans le but, semble-t-il, de tenir compte de l'activité économique croissante de l'Etat. La doctrine nouvelle compte un nombre toujours croissant de partisans (pour saisir le développement et l'acceptation toujours plus larges de cette doctrine, voir la vue d'ensemble donnée par la Cour constitutionnelle allemande dans sa décision du 30 avril 1963, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 24, 1963, p. 296 à 316). Le Tribunal fédéral s'y est rallié déjà dans son arrêt 44 I 49 et s'y est tenu par la suite (ATF 56 I 237; 82 I 23; 86 I 75, ainsi que plusieurs arrêts non publiés).

La distinction entre actes officiels et actes non officiels ou privés est souvent difficile à faire. Les différents Etats n'ont pas recours aux mêmes critères pour définir les actes officiels protégés par l'immunité. Le Tribunal fédéral a toujours été d'avis que, sur ce point, il convient de se fonder sur la nature de l'acte étatique plutôt que sur son but; il y a donc lieu d'examiner si l'acte est de ceux qui ressortissent à la puissance publique ou s'il s'agit au contraire d'un acte pouvant être accompli par n'importe quelle personne privée (ATF 86 I 29, c, 2, dernier paragraphe). De plus, le Tribunal fédéral a toujours admis que, même en ce qui concerne les créances nées de rapports de droit privé, l'Etat étranger n'est pas assujéti à la juridiction suisse en toute circonstance, mais seulement lorsque les rapports de droit en question ont un lien relativement étroit avec le territoire suisse. Un tel lien existe si les rapports dont il s'agit sont nés ou doivent être exécutés sur territoire suisse, ou si le débiteur a au moins accompli des actes susceptibles de créer un lieu d'exécution en Suisse (ATF 56 I 251, c, 3; 82 I 85, c, 7; 86 I 27, c, 2). Cette jurisprudence est constante, et il n'y a aucune raison pour s'en écarter, cela d'autant moins qu'il n'existe pas de règles précises du droit des gens dans le domaine en considération et que les principes appliqués jusqu'ici par le Tribunal fédéral ont été reçus dans des traités internationaux relativement récents conclus par la Suisse (voir ATF 82 I 86, c, 8). Il convient ainsi d'examiner si les deux réclamations qui ont donné lieu aux séquestres litigieux sont tirées de relations juridiques créées (*jure gestionis*) et, dans l'affirmative, si ces relations ont un rapport avec le territoire suisse, comme l'exige la jurisprudence. Pour ce faire, on ne saurait se fonder simplement sur la version des faits présentée à l'appui des réclamations par la Beta Holding S.A. Bien au contraire, la situation doit être appréciée à la lumière des pièces soumises par les deux parties, encore que la question de savoir si les réclamations en cause sont justifiées (ou du moins paraissent l'être) doive être examinée non pas dans le cadre de la présente procédure mais dans celui de l'action en reconnaissance de dette.

Le Tribunal fédéral examina alors la nature des activités entreprises par Finacom en relation avec le prêt désiré par les FS. Ceux-ci arguèrent qu'il n'existait pas de rapport de courtage, puisque le contrat du 30 novembre 1954 prévoyait que c'était Finacom qui devait accorder le prêt. A titre subsidiaire, les FS firent valoir que, même si un contrat de courtage avait existé à l'origine, celui-ci n'avait pas pu se concrétiser, car la vente d'action dont il dépendait n'avait pas eu lieu. Le Tribunal fédéral fit toutefois remarquer que, même s'il en était ainsi, cela n'excluait pas l'existence d'un contrat de courtage en vertu duquel Finacom aurait été chargée par les FS d'obtenir un prêt de la part des CFF. Puis le Tribunal poursuivit:

6. . . .

c) La nature du contrat de prêt conclu le 23 juillet 1955 n'exclut pas d'emblée l'existence d'un rapport de courtage. Il est vrai que, contrairement à ce que prétend l'intimée, ce rapport ne saurait appartenir aux contrats de droit privé qui peuvent être conclus par une personne privée quelconque. Le prêt en question fait en effet l'objet d'un traité entre deux Etats. De plus, il a pour but l'accomplissement d'une tâche publique par l'Etat italien, tâche qui a d'ailleurs été précisée par des dispositions du traité: il s'agit de financer le développement et l'électrification des lignes des FS donnant accès à la Suisse. Cependant, le fait que la conclusion du contrat de prêt est clairement un acte faisant partie de l'activité officielle de l'Etat n'implique nullement qu'il en irait nécessairement de même pour le mandat que les FS auraient pu conférer à Finacom de leur procurer le prêt. Les recourants prétendent (...) que le droit de

courtage réclamé ne peut être qu'une «prétention subsidiaire et accessoire» qui découle d'un acte juridique accompli (*jure imperii*); de plus, affirment-ils, il ne peut y avoir de contrat de courtage (privé) lorsqu'il s'agit de la négociation d'un prêt qui sera affecté au financement de tâches publiques (...). Ces thèses des recourants ne sauraient guère être admises. On pourrait parfaitement imaginer que même en accomplissant des tâches publiques un Etat use de moyens de droit privé, notamment en faisant appel à un intermédiaire privé pour conclure une transaction avec un autre Etat. Le contrat qui lie le premier Etat à cet intermédiaire apparaît alors comme un rapport de droit privé. La nature de ce rapport est indépendante de celle de la transaction désirée si l'intermédiaire est une maison de commerce étrangère, comme c'est le cas en l'espèce. N'étant pas soumise à la souveraineté de l'Etat, cette maison négociera avec celui-ci sur un pied d'égalité. La question de la nature juridique du prétendu contrat de courtage peut cependant rester ouverte, car le séquestre qui s'y rapporte doit être levé même si les FS ont agi comme sujet du droit privé (*jure gestionis*).

d) Conformément à ce qui a été dit au considérant 4, l'Etat italien ne serait soumis à la juridiction et à l'exécution forcée en Suisse, pour des réclamations basées sur un rapport de courtage, que si ce contrat avait un lien relativement étroit avec le territoire suisse. Dans ce contexte il importe peu que le droit de courtage litigieux ait été cédé en 1962 à une maison suisse, car la cession n'a pas pu affecter le rapport juridique entre Finacom et les FS (cf. ATF 82 I 92); or c'est la nature de ce rapport qui est seule déterminante. De plus, les FS n'ont accompli aucun acte susceptible de créer un lieu d'exécution ou un for judiciaire en Suisse. Ils ne se sont pas engagés à verser un droit de courtage éventuel en Suisse; les parties n'ont pas non plus prévu un for judiciaire en Suisse, contrairement à ce qui avait été le cas dans l'affaire ATF 86 I 23. Le prétendu contrat de courtage du 30 novembre 1954, enfin, ne fut pas conclu en Suisse non plus ...

Le Tribunal fédéral se demanda alors où avait été «exécuté» le contrat de courtage — à supposer qu'il existât. Il constata que de toute façon ce contrat n'aurait pas fait l'objet d'actes d'exécution suffisants pour créer le lien requis avec le territoire suisse. Le Tribunal examina ensuite, sous l'angle de l'immunité de juridiction et d'exécution forcée, la demande en dommages-intérêts formulée par l'intimée en raison de l'inexécution du contrat de vente portant sur les actions de la société «Constantin der Grosse»;

I. ...

a) Les recourants prétendent que la conclusion du contrat de vente tombe dans la catégorie des actes accomplis (*jure imperii*). En effet, même l'exposé de l'intimée fait ressortir que l'acquisition des actions en cause avait pour but de renforcer la position de l'Italie au sein de la Communauté européenne du charbon et de l'acier et d'assurer le ravitaillement des FS en charbon. Pour distinguer les actes officiels des actes non officiels, donc privés, le but desdits actes n'a pas ou peu d'importance, puisque toute activité étatique poursuit en dernière analyse des intérêts publics (voir la décision de la Cour constitutionnelle allemande du 30 avril 1963, mentionnée au considérant 5, *op. cit.*, p. 314). Comme il a été indiqué dans ATF 86 I 29, c'est la nature de l'acte étatique qui est décisive. Or, si on applique ce critère, la transaction du 30 novembre 1954 a toutes les caractéristiques d'un contrat d'achat de papiers-valeurs régi par le droit privé. Ce contrat a été conclu par les FS avec une maison de commerce étrangère qui est soustraite à leur juridiction (ainsi qu'à celle de l'Etat ita-

lien); les FS ont négocié avec cette maison comme une personne privée et sur un pied d'égalité.

b) Le fait que le rapport juridique en cause est de nature privée ne signifie pas pour autant que l'Etat italien est assujéti, quant aux réclamations tirées de ce rapport, à la compétence des autorités suisses en matière de juridiction et d'exécution forcée. La jurisprudence exige, en plus, que le rapport dont il s'agit ait un lien relativement étroit avec la Suisse.

Il est d'emblée clair que le contrat tel qu'il avait été conclu le 30 novembre 1954 n'avait aucun lien avec la Suisse. Il s'agit en effet d'un contrat de vente conclu à l'étranger par des étrangers et ayant pour objet des actions d'une société étrangère déposées à l'étranger; ni l'une ni l'autre partie au contrat ne devait exécuter celui-ci en Suisse; le contrat n'était pas soumis au droit suisse et ne prévoyait aucun for judiciaire en Suisse. L'intimée objecte toutefois que le lien requis avec la Suisse a été créé par la lettre des 2 et 4 février 1955, lettre qui, selon l'intimée, prévoit Zurich comme lieu d'exécution.

...

Après avoir rejeté cette objection, le Tribunal fédéral poursuit:

8. Même si l'on admettait que les séquestres ne devraient pas être levés du fait que l'Etat italien est soustrait, pour les réclamations dont il s'agit, à la juridiction et à l'exécution forcée en Suisse, les recours seraient fondés en raison de la nature des objets séquestrés, à savoir des actions Eurofima établies au nom des FS et des dividendes de ces actions.

D'après les articles 7 à 9 de la Loi fédérale du 4 décembre 1947 réglant la poursuite pour dettes contre les communes et autres collectivités de droit public cantonal, seuls les biens patrimoniaux de ces collectivités peuvent être saisis. Les biens administratifs sont en revanche insaisissables, car ils forment le patrimoine de la collectivité et «sont affectés directement à l'accomplissement de ses tâches de droit public». En général la doctrine applique cette distinction en matière d'exécution forcée également à l'égard des Etats étrangers (LÉMONON, *Immunité de juridiction et d'exécution forcée*, Fiche juridique suisse n° 934, p. 11; GULDENER, *Das internationale und interkantonale Zivilprozessrecht*, p. 5, lettre *bb*; RIEZLER, *Internationales Zivilprozessrecht*, p. 401). Le Tribunal fédéral s'est rallié au point de vue que l'affectation de biens appartenant à l'Etat étranger peut, dans certaines circonstances, soustraire ces biens à l'exécution forcée; dans ATF 86 I 32, il a exposé que l'immunité protège les biens de l'Etat étranger en Suisse lorsque celui-ci les a affectés à son service diplomatique ou à d'autres tâches qui lui incombent comme détenteur de la puissance publique. Il s'ensuit que l'immunité d'exécution forcée ne couvre pas les seuls biens administratifs de l'Etat étranger, mais aussi les autres biens affectés à des tâches publiques.

Les recourants font valoir que la participation des FS dans Eurofima S.A. fait partie des biens administratifs ou doit être assimilée à de tels biens. L'intimée le conteste et allègue que, s'agissant d'actions aliénables d'une société anonyme, ces actions sont des biens patrimoniaux saisissables. La question de savoir si les biens séquestrés font partie des biens administratifs au sens propre du terme peut être laissée ouverte, car il ne fait pas de doute que ces biens sont affectés à une tâche publique dévolue à l'Etat italien.

L'Eurofima (Société européenne pour le financement de matériel ferroviaire), une société anonyme avec siège à Bâle, fut fondée en 1955 par les administrations de chemin de fer de 14 pays européens en raison du vieillissement du parc roulant à la suite de la guerre. Elle a pour but de mettre à la disposition de ces administrations, en cas de besoin et aux meilleures conditions possibles, des voitures de marchandise et autre matériel ferroviaire standardisé; dans ce but, Eurofima fait notamment fabriquer du matériel ferroviaire à son propre compte pour le mettre ensuite à la disposition des administrations de chemin de fer au moyen de contrats de location-vente (*cf.* FF 1955 II 1059-1062). Eurofima S.A. n'est pas une société anonyme privée. Cela résulte déjà du fait que sa création fit l'objet d'une convention internationale conclue le 20 octobre 1955 par les gouvernements de 14 Etats et que le préambule de cette convention constate expressément « que, tant par sa composition que par son but, la Société présente un intérêt public et un caractère international » (RO 1959, p. 628). La nature particulière d'Eurofima se manifeste aussi dans le fait que la Société est régie en premier lieu par la convention internationale et par ses statuts et n'est assujettie aux lois de l'Etat de son siège (la Suisse) qu'à titre subsidiaire (article 1^{er}, lettre *a*, de la convention et article 1^{er} des statuts, FF 1955 II 1086). Il y a lieu de relever également que les statuts « seront valables et auront effet nonobstant toute disposition contraire du droit de l'Etat du siège » (article 2, lettre *a*, de la convention) et que la Suisse accorde à Eurofima une immunité fiscale étendue (Protocole additionnel à la Convention relative à la constitution d'« Eurofima », RO 1959, p. 634).

Contrairement à ce que prétend l'intimée, les FS ne sont pas, on l'a déjà dit, une entreprise commerciale mais une entité de droit public accomplissant une tâche d'intérêt public, comme c'est aussi le cas des CFF (et, du point de vue suisse, même des sociétés privées de chemins de fer organisées comme des sociétés anonymes; JAAC 1959 [fasc. 29], n°14 [?]). En participant au capital d'Eurofima, établie elle aussi dans l'intérêt public, par des apports en espèces et en voitures de marchandise, les FS ont affecté des biens à un but d'intérêt public poursuivi par eux. Ce but consiste à satisfaire leurs besoins en matériel ferroviaire. Les actions d'Eurofima établies au nom des FS sont donc des valeurs affectées à l'accomplissement d'une tâche d'intérêt public; comme telles, elles sont couvertes par l'immunité de l'Etat italien et soustraites à l'exécution forcée en Suisse. La réalisation des actions séquestrées semble d'ailleurs exclue, puisque les statuts d'Eurofima (article 7) n'en permettent la cession qu'à d'autres actionnaires (et, à certaines conditions, à des administrations de chemin de fer); de plus, l'approbation de l'assemblée générale d'Eurofima est requise. Etant donné que les actions établies au nom des FS sont couvertes par l'immunité, les dividendes de ces actions, qui sont des droits accessoires, partageront le même sort. Il découle en outre d'une communication faite par Eurofima à l'Office des poursuites de Bâle-Ville que la somme séquestrée de Fr. 482 284 — il s'agit du dividende pour 1964 échu le 15 juin 1965 — a été compensée avec une créance que possède Eurofima envers les FS (cette créance de Fr. 1 226 903 résultait sans doute de la livraison de matériel ferroviaire par Eurofima aux FS). Le dividende mentionné n'était donc pas à la libre disposition des FS, mais devait servir à exécuter des obligations. Ces obligations résultaient de la participation des FS dans Eurofima, comprise comme étant l'accomplissement d'une tâche publique. C'est là une autre raison pour soustraire le dividende en cause aux procédures d'exécution forcée en Suisse (*cf.* ATF 86 I 31, c. 5).

2. DÉCISION DU TRIBUNAL SUPÉRIEUR DE ZURICH EN DATE DU 27 MARS 1973
*X c. République du Ghana*⁶⁹

Résumé des faits et du jugement :

Il est établi en réalité que les conditions exigées à l'article 59, paragraphe 1 du Code de procédure civile sont remplies, sous réserve qu'il soit prouvé, comme l'a demandé le juge unique, qu'il y a exemption en vertu d'un traité international. La défenderesse fait valoir néanmoins que les cautions prévues à l'article 59 du Code de procédure civile sont des moyens de garantir l'exécution forcée et que, selon les principes du droit international, des mesures d'exécution ne peuvent pas être prises contre des Etats étrangers, que l'Etat étranger se présente dans l'exercice de la puissance étatique (*juge imperii*) ou comme participant à un autre titre à l'acte juridique (*juge gestionis*), cette distinction n'entrant en ligne de compte que du point de vue de la compétence juridictionnelle, et non du point de vue de l'exécution; en outre, la défenderesse dit qu'elle agit en l'occurrence dans l'exercice de la puissance étatique.

3. Ces allégations de la défenderesse partent du postulat que l'obligation de versement d'une caution en vertu de l'article 59 du Code de procédure civile représente une mesure d'exécution. Guldener [Schweiz. Zivilprozessrecht, deuxième édition, p. 379, N. 19. lettre a] déclare que la constitution de sûretés en ce qui concerne les dépens de l'adversaire peut être conçue soit comme un amortissement anticipé et conditionnel de la créance de l'adversaire, pour le cas où le déposant serait tenu à indemnisation, soit comme séquestre, auquel cas la caisse du tribunal devient propriétaire de la somme déposée et est habilitée par la loi à rembourser à l'adversaire le montant de ses frais. D'après cette deuxième interprétation, le dépôt d'une caution représenterait bel et bien une mesure d'exécution. Toutefois cette interprétation n'est pas convaincante. L'obligation de verser une caution n'est pas une mesure d'exécution à l'égard d'une créance existante. La raison du dépôt réside davantage dans le fait que la partie étrangère met des tribunaux suisses à contribution et qu'elle doit verser une caution à ce titre. Le versement de cette caution ne donne lieu à aucune contrainte; la partie qui ne verse pas la caution ne perd que le droit de poursuivre la procédure dans l'affaire en cause. Si le droit international public interdit de prendre des mesures d'exécution à l'égard d'un Etat étranger, il n'interdit pas de l'obliger à verser une avance sur les dépens s'il a de son chef recours à des tribunaux suisses.

Lorsque la défenderesse se prévaut d'un message du 29 janvier 1923 (BBL 1923 I S, 422) concernant une loi fédérale non entrée en vigueur d'ailleurs sur les mesures de saisie et l'exécution à l'égard de biens étrangers, elle ne fait pas valoir un argument déterminant. Ce message parle simplement de moyens de garantir l'exécution qui sont assimilables à la saisie et à d'autres mesures d'exécution et qui ne sont pas applicables aux biens d'Etats étrangers, mais il ne mentionne pas expressément la caution judiciaire.

Le Département politique fédéral estime manifestement aussi que les cautions ne sont pas des mesures d'exécution, ainsi qu'il ressort du rapport publié par lui le 16 avril 1973 après des consultations avec le Département fédéral de la justice et de la police. En outre, la jurisprudence, qui n'a toutefois pas soulevé ce problème de façon expresse, est toujours partie du postulat que des cautions peuvent être imposées

⁶⁹ Reproduced from *Annuaire suisse de droit international*, vol. 30 (1974), p. 280. (Translated by the Secretariat.)

à des Etats étrangers. Selon l'ancienne jurisprudence zurichoise, même les Etats parties à la Convention de La Haye qui étaient parties à un procès en Suisse n'étaient pas exemptés du dépôt d'une caution au titre des frais et dépens, même si leurs ressortissants l'étaient (ZR 49 Nr. 13; 50 Nr. 210). Le Tribunal supérieur, notamment dans la deuxième décision mentionnée, a cité de nombreux auteurs selon lesquels l'Etat étranger n'est pas exempté de l'obligation de déposer une caution (voir également Riezler, *Int. Zivilprozessrecht*, 1949, p. 440, par. 14; Schnitzer, *International Privatrecht*, quatrième édition, deuxième volume, p. 846). Le Tribunal justifie le fait d'exiger une caution même des Etats parties à la Convention de La Haye en précisant que la constitution d'une sûreté pour garantir les dépens paraît d'autant plus nécessaire que les mesures d'exécution sont exclues, du moins temporairement, à l'égard de ces Etats-là.

Le Tribunal fédéral a ensuite naturellement déclaré que la Convention de La Haye exempterait aussi les Etats parties à l'obligation de déposer une caution (BGE 71 I 48) et le Tribunal supérieur s'est rangé à cette opinion — s'écartant ainsi de la jurisprudence suivie jusqu'alors (ZR 52 Nr. 150). Toutefois, ces décisions partent également du postulat et confirment justement qu'en l'absence d'un traité international pertinent l'obligation de déposer une caution existe.

4. S'il y a lieu de nier qu'il y ait en l'occurrence mesure d'exécution, le fait que la défenderesse ait agi ou non dans l'exercice de la puissance étatique n'entre pas non plus en considération; d'ailleurs, dans les circonstances en question, elle ne pourrait se prévaloir de l'exercice de cette puissance. La défenderesse fait valoir que le plaignant s'était rendu coupable au Ghana d'un manquement à ses obligations professionnelles, qui était l'objet du litige. En droit ghanéen comme en droit suisse, les cadeaux et autres dons destinés à inciter une personne à commettre un délit sont confisqués par l'Etat; lorsqu'ils n'existent plus, celui qui les a reçus en doit la contre-valeur à l'Etat. Cette créance de l'Etat relève du droit public.

Toutefois les tribunaux civils d'un Etat ne sont pas compétents pour se prononcer sur le bien-fondé de revendications qui découlent d'actes de souveraineté d'un Etat étranger — que ce soit pour ou contre ceux-ci. Un Etat étranger ne peut donc tenter une action devant un tribunal civil interne pour obtenir des paiements qui lui reviendraient au titre du droit public (Guldener, *Int. Zivilprozessrecht* S. 4. N. 18). L'exécution des décisions d'Etats étrangers concernant des revendications relevant du droit public est systématiquement refusée en Suisse (Guldener, *op. cit.*, S. 97. N. 35); il ne peut non plus y avoir de saisie dans un cas de ce genre. Si, contrairement à ces principes, la défenderesse avait réussi à obtenir la saisie en Suisse, elle devrait accepter de ne pas être mieux traitée en ce qui concerne l'obligation de verser une caution que s'il s'était agi d'une saisie effectuée au titre d'une revendication de droit privé. L'obligation de déposer une caution existe donc.

3. DÉCISION DU TRIBUNAL FÉDÉRAL EN DATE DU 14 NOVEMBRE 1978 (*Banque centrale de la République de Turquie c. Weston compagnie de finance et d'investissement S.A. et juge unique [procédure sommaire] du Tribunal de district de Zurich*)⁷⁰

Résumé des faits et du jugement :

¹ En 1977, la Lloyds Bank de Zurich avait accordé à la Türkiye Garanti Bankasi à Istanbul un « time deposit » d'un million de francs suisses, remboursable au 3 mai

⁷⁰ Reproduced from *Annuaire suisse de droit international*, vol. 35 (1979), p. 143.

1978 par l'intermédiaire de la Banque centrale de la République de Turquie conformément à la législation turque en matière de devises. Le remboursement n'étant pas intervenu dans le délai fixé, la Lloyds Bank céda sa créance à la Weston compagnie de finance et d'investissement S.A. Celle-ci obtint deux séquestres portant sur des avoirs de la Banque centrale de la République de Turquie à Zurich; l'un des séquestres fut suivi d'un commandement de payer. Agissant par la voie du recours de droit public, la Banque centrale demanda au Tribunal fédéral l'annulation des ordonnances de séquestre et du commandement de payer en se prévalant de l'immunité d'exécution forcée. Le Tribunal fédéral rejeta le recours.

[Traduction:]

2. a) Il n'existe, entre la Suisse et la République de Turquie, aucun traité concernant l'immunité de l'un des deux Etats ou de ses entités de droit public sur le territoire de l'autre, et aucune autre convention internationale n'est applicable en l'espèce. Il est vrai qu'une Convention européenne sur l'immunité des Etats a été conclue le 16 mai 1972. La Suisse, qui l'a signée, ne l'a pas encore ratifiée, tandis que la Turquie n'y a pas accédé. La présente affaire doit ainsi être jugée conformément aux règles non écrites du droit international telles qu'elles se reflètent dans la doctrine et la pratique, notamment, en ce qui concerne la Suisse, la jurisprudence du Tribunal fédéral. Les principes contenus dans la convention européenne peuvent toutefois être considérés comme exprimant la tendance moderne du droit des gens et être pris en considération à ce titre.

b) Lorsqu'il s'agit de prendre des mesures de juridiction ou d'exécution forcée à l'encontre d'un Etat étranger, deux principes du droit des gens semblent entrer en conflit: le principe de la territorialité, qui soumet à la juridiction de l'Etat tout ce qui est localisé sur son territoire, et le principe qui veut que la souveraineté d'un Etat ne saurait être limitée par un autre Etat (Diez, *Arrest und Zwangsvollstreckungsmassnahmen gegen Vermögen ausländischer Staaten*, Revue suisse de jurisprudence, vol. 52, 1956, p. 353).

Dès le début du XIX^e siècle, la doctrine et la jurisprudence de nombreux Etats appartenant au milieu culturel américano-européen ont cherché à trouver, entre ces deux concepts extrêmes, un moyen terme conciliable avec les exigences de la pratique. Point n'est besoin d'exposer cette évolution historique dans ses détails; on peut se borner à renvoyer aux travaux de E.A. GMÜR (*Zur Frage der gerichtlichen Immunität fremder Staaten und Staatsuntersuchungen*, Annuaire suisse de droit international, vol. VII, 1959, p. 9 et suiv.), J.-F. LALIVE (*L'immunité de juridiction des Etats et des organisations internationales*, Recueil des Cours de l'Académie de droit international [de La Haye], [t. 84] 1953-III, p. 209 et suiv.) et E. DIEZ (article cité). Il est en revanche nécessaire d'examiner de plus près la jurisprudence du Tribunal fédéral et les tendances les plus récentes sur le plan international.

c) Déjà dans son arrêt ATF 44 I 49 et suiv. (affaire *Dreyfus*), le Tribunal fédéral, s'appuyant sur les jurisprudences italienne et belge, a admis qu'il convient de distinguer, en matière de juridiction à l'égard des Etats étrangers, entre les cas où l'Etat a agi en vertu de sa souveraineté (*jure imperii*) et ceux où il a agi comme sujet de droit privé (*jure gestionis*). Ce faisant, il a autorisé un séquestre ayant pour objet une demande en remboursement de bons du Trésor autrichien mis en circulation en Suisse. Dans son arrêt ATF 56 I 237 et suiv. (affaire *Walder*), le Tribunal fédéral a en principe maintenu cette jurisprudence, tout en mettant l'accent sur la règle, déjà admise de façon implicite dans l'arrêt *Dreyfus*, que l'existence d'un acte juridique

accompli *jure gestionis* ne suffit point pour l'admissibilité d'un séquestre et que, en plus, l'obligation litigieuse doit « se rattacher au territoire suisse » parce qu'elle est née en Suisse, parce que le débiteur s'est engagé à l'exécuter en Suisse ou parce que celui-ci a du moins agi de façon à constituer un lieu d'exécution en Suisse. En l'absence d'un tel lien avec le territoire suisse, a déclaré le Tribunal fédéral, il convenait d'annuler un séquestre pratiqué à l'égard de la République hellénique à la requête de détenteurs suisses d'obligations qui avaient été émises par une compagnie de chemins de fer nationalisée par la suite. Dans son arrêt ATF 82 I 75 et suiv. [*Royaume de Grèce c. Banque Julius Bär et Cie*], le Tribunal fédéral a expressément confirmé cette jurisprudence, en renvoyant aux cas mentionnés ci-dessus ainsi qu'à plusieurs de ses arrêts non publiés, et a constaté à nouveau l'absence du lien nécessaire entre l'obligation et le territoire suisse, ce qui l'a amené à annuler le séquestre (pratiqué à l'endroit de la Grèce). Dans son arrêt ATF 86 I 23 et suiv. [*République arabe unie c. Dame X*], enfin, le Tribunal fédéral a autorisé le séquestre pratiqué par un particulier domicilié en Suisse à l'égard de la République arabe unie pour une créance de loyer, payable en Suisse, concernant une villa située à Vienne et louée à l'ambassade d'Égypte. Cet arrêt renferme quelques précisions essentielles quant à la distinction entre les actes *jure imperii* et *jure gestionis*, précisions qui peuvent être considérées comme des développements jurisprudentiels tendant à restreindre le principe de l'immunité au bénéfice de celui de la territorialité, conformément aux suggestions formulées par LALIVE (*op. cit.*, p. 279 et 285 et suiv.) et [II.] LAUTERPACHT (*The Problem of Jurisdictional Immunities of Foreign States*, British Year Book of International Law, [vol. 28], 1951, p. 255 et suiv., abondamment cité par LALIVE, *op. cit.*, p. 266 et suiv.; voir également FAVRE, *Principes du droit des gens*, Fribourg, Editions Universitaires, 1974, p. 467 et suiv.). Lorsqu'il s'agit d'opérer la distinction difficile entre actes *jure imperii* et *jure gestionis*, précisent les considérants de cet arrêt, le juge doit se fonder non sur leur but mais sur la nature du rapport juridique dont il faut assurer l'exécution en Suisse. Il s'agit ainsi d'établir si l'acte donnant naissance au rapport juridique en cause relève de la puissance publique ou s'il est semblable aux actes que tout particulier pouvait accomplir. Des indices sur ce point peuvent résulter du lieu où l'acte a été accompli, par exemple. Le fait que ou s'il est semblable aux actes que tout particulier pouvait accomplir. Des indices sans que ses relations diplomatiques avec cet Etat soient mises en cause, constitue un indice sérieux en faveur d'un acte *jure gestionis*. L'arrêt en question constate également qu'il n'existe aucun motif pour restreindre la juridiction en matière d'exécution forcée vis-à-vis des Etats étrangers, notamment dans le domaine des séquestres, davantage que la juridiction civile proprement dite (ATF 86 I 30, c. 4). Des arrêts plus récents du Tribunal fédéral en matière d'immunité des Etats étrangers ne sont pas connus.

d) Quant à la pratique des Etats étrangers, il convient de mentionner une décision rendue en 1963 par la Cour constitutionnelle de la République fédérale d'Allemagne et portant sur les frais de réparation du système de chauffage de l'ambassade de l'Iran à Cologne (BVerf GE, vol 16, p. 27 et suiv.). A en juger par cette décision, la pratique de la République fédérale d'Allemagne concorde pour l'essentiel avec celle de la Suisse. La décision constate en outre que les tribunaux italiens, belges, autrichiens, français, grecs, égyptiens et jordaniens limitent l'immunité des Etats étrangers aux actes accomplis par ceux-ci dans l'exercice de leur puissance publique, alors que la Grande-Bretagne et les Etats-Unis ainsi que le Japon, les Philippines et les pays de l'Europe de l'Est l'étendent aux actes accomplis à un autre titre; mais — ajoute la décision de la Cour constitutionnelle — on peut

constater une tendance, aux Etats-Unis et en Grande-Bretagne, à limiter l'immunité absolue ainsi accordée aux Etats étrangers (voir le résumé dans MÜLLER/WILDHABER, *Praxis des Völkerrechts*, [Berne, 1977], p. 300 et suiv.). Le « Bulletin d'information sur les activités juridiques » du Conseil de l'Europe, de juin 1978, p. 15, résume brièvement un jugement rendu le 19 avril 1977 par la Cour d'appel britannique relatif à une créance résultant d'une lettre de crédit établie par la Banque du Nigéria en échange d'une livraison de marchandises. Dans ce jugement, la Cour a constaté que la doctrine de l'immunité des Etats ne couvre pas les transactions commerciales. Pour illustrer la doctrine limitant le champ d'application de l'immunité des Etats, aujourd'hui admise de façon quasi générale, la Cour s'est référée à la convention européenne mentionnée au début du présent arrêt.

e) La Convention européenne sur l'immunité des Etats, du 16 mai 1972 (...), qui a été citée plus haut mais qui n'est pas applicable à l'espèce, règle la question de l'immunité des Etats, principalement en définissant toute une série de situations où cette immunité vis-à-vis d'un autre Etat ne peut pas être invoquée. En l'espèce, ce sont les articles 4 et 27 qui nous intéressent. Ces dispositions (citées dans leur texte français original) ont la teneur suivante:

« Article 4

1. Sous réserve des dispositions de l'article 5, un Etat Contractant ne peut invoquer l'immunité de juridiction devant un tribunal d'un autre Etat Contractant si la procédure a trait à une obligation de l'Etat qui, en vertu d'un contrat, doit être exécutée sur le territoire de l'Etat du for.

2. Le paragraphe 1 ne s'applique pas:

a) lorsqu'il s'agit d'un contrat conclu entre Etats;

b) lorsque les parties au contrat en sont convenues autrement;

c) lorsque l'Etat est partie à un contrat conclu sur son territoire et que l'obligation de l'Etat est régie par son droit administratif.

...

Article 27

1. Aux fins de la présente Convention, l'expression « Etat Contractant » n'inclut pas une entité d'un Etat Contractant distincte de celui-ci et ayant la capacité d'ester en justice, même lorsqu'elle est chargée d'exercer des fonctions publiques.

2. Toute entité visée au paragraphe 1 peut être atraite devant les tribunaux d'un autre Etat Contractant comme une personne privée; toutefois, ces tribunaux ne peuvent pas connaître des actes accomplis par elle dans l'exercice de la puissance publique (*acta jure imperii*).

3. Une telle entité peut en tout cas être atraite devant ces tribunaux lorsque ceux-ci, dans des circonstances analogues, auraient pu connaître de la procédure si elle avait été engagée contre un Etat Contractant.»

Dans son résultat, la convention, qui peut être considérée comme reflétant la conception ayant cours en Europe occidentale, ne s'écarte donc guère de la pratique suisse, bien qu'elle tende à restreindre davantage encore l'immunité des Etats étrangers (exception expressément prévue pour des rapports contractuels devant être exécutés dans l'Etat du for; présomption que les entités de droit public ne bénéficient pas de l'immunité).

3. Selon ses propres dires, la recourante est une société anonyme ayant une personnalité juridique propre et soumise au droit privé turc. 51 p. cent au moins de ses actions doivent être entre les mains de l'Etat turc. La recourante fait fonction de banque d'émission et de banque centrale. Son Gouverneur est nommé par le Conseil des ministres sur proposition du Conseil d'administration. Ainsi il n'y a pas juridiquement identité entre la République de Turquie et la recourante, de sorte qu'il faut se demander si celle-ci peut même se prévaloir de la doctrine de l'immunité des Etats. Il résulte en effet d'une jurisprudence relativement ancienne du Tribunal fédéral que les entités dotées d'une personnalité juridique propre conformément à la loi de leur siège ne peuvent invoquer cette doctrine (ATF 73 III 164; arrêts non publiés dans les affaires *Banque nationale de Bulgarie c. Alcalay*, du 6 novembre 1931, et *Bovard c. Caisse autonome d'amortissement de la dette publique chilienne*, du 30 juin 1942; la même conclusion ressort de l'arrêt *Seckel c. Trésor autrichien* du 12 avril 1940; voir aussi GMÜR, *op. cit.*, p. 65). On peut toutefois se demander si cette jurisprudence peut être maintenue. D'une manière générale, les jurisprudences suisse et étrangères attribuent actuellement un plus grand poids aux facteurs économiques que par le passé; souvent les apparences juridiques sont même totalement écartées au profit des réalités économiques («levée du voile» pour les sociétés à membre unique; prise en considération des réalités économiques en droit fiscal). L'article 27 précité de la convention européenne contredit lui aussi l'affirmation suivant laquelle les entités de droit public ou privé, distinctes de l'Etat mais étroitement liées à celui-ci, ne peuvent en aucun cas s'abriter derrière l'immunité accordée à l'Etat. La question peut cependant demeurer ouverte dans les cas où l'immunité doit être refusée pour d'autres motifs.

4. En l'espèce, il reste à résoudre deux questions: l'obligation faisant l'objet du séquestre attaqué est-elle née de l'exercice de sa puissance publique (*jus imperii*) par l'Etat turc ou repose-t-elle sur une base différente, étant ainsi assimilable à un rapport de droit privé (*jus gestionis*)? Dans ce dernier cas, l'obligation a-t-elle le lien requis avec le territoire suisse?

a) En procédant à la distinction entre des obligations *jure imperii* et *jure gestionis*, il convient de se fonder sur la nature du rapport juridique en cause plutôt que sur son but. L'on examinera si ce rapport est caractéristique pour l'exercice de la puissance publique ou si, au contraire, des rapports identiques ou semblables peuvent être noués par des particuliers (ATF 86 I 29, c, 2 *in fine*). En l'espèce, il s'agit du remboursement de ce que l'on appelle un «time deposit». La recourante s'est abstenue de qualifier la nature juridique de ce rapport, mais le caractère même de la transaction permet d'affirmer qu'il ne peut s'agir, en droit suisse, que d'un dépôt irrégulier (article 481 du Code des obligations) ou d'un prêt, les intérêts des parties en présence faisant pencher plutôt vers cette dernière solution. Il s'agit d'une relation juridique entre deux banques commerciales, la Lloyds Bank à Zurich et la Türkiye Garanti Bankasi à Istanbul, semblable à celles qui se forment entre des banques partout dans le monde. L'Etat turc n'y était point partie, de sorte que, en ce qui concerne cette relation, la question d'un acte *jure imperii* ne se pose même pas.

b) La recourante attribue un poids excessif à la législation turque en matière de devises. Le contenu essentiel de celle-ci peut être résumé ainsi: les prêts en devises étrangères doivent passer par la recourante agissant en sa qualité de banque d'Etat. La recourante crédite l'emprunteur de la contre-valeur en monnaie turque. A l'échéance du contrat, elle rembourse le prêt en devises étrangères après en avoir reçu couverture en monnaie turque par l'emprunteur. La recourante fait valoir que,

en agissant ainsi, elle applique des directives reçues du Ministère des finances; elle en déduit que, en ce qui la concerne, on est en présence d'un rapport juridique issu de l'exercice de la puissance publique.

On ne saurait se rallier à ce point de vue. Ce qui est décisif, on l'a vu, c'est la nature juridique du rapport juridique de base et non la manière dont ce rapport peut être mis à exécution par celui qui, à l'origine, y fut partie du côté turc. Si la Lloyds Bank ou son successeur juridique peut agir directement envers la Türkiye Garanti Bankasi, on est en présence d'une transaction ordinaire de droit civil. Les restrictions de paiement apportées par l'Etat n'y changent rien. Il est vrai que la Türkiye Garanti Bankasi est assujettie à la législation turque en matière de devises et, partant, au *jus imperii* revendiqué par l'Etat turc dans ce domaine. En revanche, la puissance publique de cet Etat n'a eu aucune emprise sur la Lloyds Bank si ce n'est que celle-ci s'est à l'avance soumise aux dispositions en vigueur relatives au remboursement de ce prêt qui, du point de vue de la Turquie, doit intervenir en devises étrangères. La doctrine et la jurisprudence, qui viennent de faire l'objet d'un examen approfondi, ne permettent pas de penser que de telles dispositions, qui portent uniquement sur les paiements, transforment une transaction purement privée en un rapport *jure imperii*. Ni les arrêts cités — ATF 86 I 29-30 et 82 I 90-91 — ni les tendances qui se reflètent dans la convention européenne et dans les récentes jurisprudences allemande et anglaise n'autorisent une telle conclusion.

c) La recourante semble considérer que ses relations actuelles avec la Weston Cie sont complètement détachées du contrat initial entre la Türkiye Garanti Bankasi et la Lloyds Bank; ce n'est d'ailleurs que sur cette base que l'existence d'un acte accompli *jure imperii* pourrait être envisagée. Cette manière de voir néglige toutefois un point capital: la Weston Cie a clairement laissé entendre, dans les ordonnances de séquestre litigieuses, que sa créance porte sur un «time deposit» que la recourante peut aisément identifier à l'aide de son numéro d'ordre. On ne saurait donc admettre qu'une relation juridique nouvelle et distincte a pris naissance.

Tout autre est la question de savoir si, sur le plan civil, la recourante est tenue de rembourser le prêt en francs suisses. Dans la procédure aboutissant à l'ordonnance de séquestre, la Weston Cie n'avait pas à prouver l'existence d'une telle obligation, mais simplement à la rendre vraisemblable. Le juge du séquestre a admis que cette condition était remplie, sans doute en se fondant sur les extraits de la législation turque en matière de devises qui lui avaient été soumis ainsi que sur une lettre adressée à la Weston Cie le 16 mars 1978 par la recourante, lettre dans laquelle celle-ci avait promis le remboursement du prêt. Cela n'exclut nullement la possibilité pour la recourante de contester sa légitimation passive, comme du reste la légitimation active de la Weston Cie, dans le cadre de la procédure en validation du séquestre. Dans la présente procédure, qui porte uniquement sur le problème de l'immunité, il n'est pas nécessaire de poursuivre le débat.

d) D'après la jurisprudence citée, l'immunité d'exécution forcée vis-à-vis du droit suisse devrait être reconnue à la recourante, malgré l'existence d'un rapport juridique fondé sur l'exercice du *jus gestionis* et sous réserve des exigences tenant à la personne même de la recourante, si un lien entre ce rapport et le territoire suisse faisait défaut. En l'espèce, l'existence d'un tel lien n'est toutefois pas contestée. Bien au contraire, il est établi que le prêt devait être remboursé en francs suisses auprès d'une banque suisse (cf. ATF 86 I 30). De ce point de vue également, la recourante ne saurait se fonder sur le principe de l'immunité des Etats.

S. UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

[The cases here include those which have been decided after the adoption of the 1978 State Immunity Act.]

1. *The Uganda Company (Holdings) Limited v. the Government of Uganda*. DECISION BY THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION, ON 11 DECEMBER 1978⁷¹

The judgement:

Mr. Justice Donaldson: This summons raises issues of some general importance and it is for that reason, and because the parties have requested it, that I am giving judgment in Open Court. The primary issue is whether the Defendants, as the government of a foreign sovereign state, can be impleaded in the English Courts without their consent. But this has led to a consideration of whether the absolute or restricted concepts of sovereign immunity apply under the law of England to actions *in personam*. And this in turn has raised fundamental questions concerning the doctrine of precedent and the duty of a trial judge if faced with conflicting decisions of the Court of Appeal.

The Background.

The action has an unusual history which should be summarized, even though it is no longer directly material. On 30th May, 1977, the Plaintiffs applied *ex parte* for a "Mareva" injunction restraining the Defendants from disposing of a quantity of tea warehoused in London. This application was coupled with another seeking leave to issue a writ for service out of the jurisdiction and to serve notice of it on the Defendants in Uganda. Both applications were granted.

The writ was issued on 31st May, 1977. Solicitors in Uganda were instructed to serve notice of the writ on the Ugandan Attorney General personally as the proper officer of the Defendant. The solicitors were unable to do so. The Plaintiffs' London solicitors then served notice of the proceedings on the Ugandan Attorney General by post from London and in due course received advice of delivery cards from the Post Office.

By the terms of the writ, the Plaintiffs claim an indemnity in respect of the sum of £240,185.48 paid by them as guarantors of the obligations of a Ugandan company, to which I will refer as "the borrower". The Plaintiffs are an English company and the borrower was a Ugandan subsidiary. The Plaintiffs also claim half this sum as a contribution due between co-guarantors, they having paid the whole sum guaranteed and the co-guarantor having paid nothing. The co-guarantor was a Ugandan subsidiary of the borrower. The Defendants are sued in place of the borrower and of the co-guarantor because, it is said, they have succeeded to the liabilities of those companies upon and by virtue of a compulsory acquisition under the Ugandan Properties and Businesses (Acquisition) Decree, 1972 (Decree No. 32 of 1972), the Ugandan Properties and Businesses (Acquisition) Order, 1972 (S.I. 1972 No. 189)

⁷¹ Copy of the judgement is transmitted by the Government of the United Kingdom to the Secretariat.

and the Properties and Businesses (Acquisition) Decree, 1975 (Decree No. 11 of 1975).

The proceedings first came to my attention when I was asked to give leave to the Plaintiffs to sign judgment in default of appearance. The application was made in the usual way by leaving it with my clerk. I asked the Plaintiffs' solicitors for an explanation of how it was possible to sign judgment against the government of a foreign sovereign state in these circumstances. Mr. Stagg, a very experienced legal executive with the Plaintiffs' London solicitors, attended and explained the circumstances. He also said that he had taken advice from Counsel. I asked to see Counsel or an Opinion from Counsel and in due course was provided with a most helpful joint Opinion by Mr. Anthony Evans, Q.C., and Mr. M. G. Collins.

This Opinion, *inter alia*, referred me to the course adopted by Sir Robert Phillimore in *The Parlement Belge* (1879) 4 P.D. 129 at pp. 144 to 145 when the question of sovereign immunity arose in that case. Following this precedent, I inquired whether H.M. Attorney-General wished to intervene and was told that he did not. However, he pointed out that if I required assistance on the law, Counsel could be instructed by the Treasury Solicitor to act as an *amicus*. I directed that the Plaintiffs' application be renewed on motion and Mr. Peter Webster, Q.C., and Mr. Nicholas Bratza were instructed as *amici curiae*.

When the motion came on for hearing it emerged that there was considerable doubt whether the Defendants had been properly served, bearing in mind in particular the fact that no order had been made for substituted service by post. However, it appeared that the Defendants might be aware of the proceedings and might, if served or further served by post with notice of the proceedings, wish to enter a conditional appearance. The matter was adjourned to enable this to be done. In anticipation of the hearing, Mr. Webster and Mr. Bratza had prepared a memorandum of argument, copies of which had been delivered to me and to the Plaintiffs.

Subsequently the Defendants entered a conditional appearance to the writ and no question of signing judgment in default of appearance now arises.

The present application.

The summons with which I am now concerned seeks an order setting aside the writ and all subsequent proceedings upon the grounds that the Defendants are the government of a foreign sovereign state and that they do not consent to the jurisdiction of this Court.

The Defendants are represented by Mr. John Wilmers, Q.C., Mr. Marcus Edwards. The Plaintiffs are represented by Mr. Peter Millett, Q.C., and Mr. Michael Collins. In the light of this powerful representation, it was unnecessary to ask Mr. Peter Webster and Mr. Nicholas Bratza to attend and present their arguments in person, but their memorandum has been referred to by all concerned and has been of inestimable value.

This application is not affected by The State Immunity Act 1978, which has only just come into force and is not retrospective in its operation. Although there is no lack of authority on the subject of sovereign immunity under English law, I have been principally concerned with two decisions of the Court of Appeal. The first in time is *Thai-Europe Tapioca Service Ltd. v. Government of Pakistan, Ministry of Food and Agriculture, Directorate of Agricultural Supplies* (1975) 1 W.L.R. 1485. The second is *Trendtex Trading Corporation v. Central Bank of Nigeria* (1977) 1

Q.B. 529. There have been no subsequent decisions of the Court of Appeal on this subject and no subsequent decisions of the House of Lords which have expressly or impliedly affirmed or overruled these two decisions.

The doctrine of precedent and stare decisis.

Before examining these decisions in detail, as I must, let me say a word about the system of judicial hierarchy and precedent upon which English law is based. Contrary to popular belief and, in particular, to the belief of those who write and speak in or on "the media", the appellate process does not create a situation of "confrontation" between the appellate Court and the Court appealed from. It is natural and inevitable that there will be differences of opinion amongst the Judges as to what is the law. The doctrine of hierarchy and precedent provides a set of rules for deciding which opinion is to prevail in the particular case and in subsequent similar cases. These rules take no account of the identity of the Judge concerned or of his status or reputation in the judicial hierarchy. They depend solely upon the status of the Court in which he is sitting. Above all, the doctrine does not involve the proposition that a Judge whose decision is overruled on appeal, or whose decision does not prevail in a multi-Judge Court because he is in a minority, was wrong. Of course he may have been wrong and, on reflection, he may agree either publicly or privately that this was so. But the system does not involve this implication. All that it involves is that if there is a difference of opinion, there shall be an objective test for deciding which opinion shall prevail. As Lord Diplock put it in *Broome v. Cassell & Co. Ltd* (1972) A.C., 1027, 1131, "the judicial system only works if someone is allowed to have the last word and if that last word, once spoken, is loyally accepted".

The basic rule for determining who has the last word is simple. The House of Lords will follow its own decisions, unless it expressly decides to review such a decision pursuant to the 1966 Declaration ((1966) 1 W.L.R., 1234). The Court of Appeal will follow decisions of the House of Lords, save to the extent that they have been reviewed and displaced under that Declaration and will also follow its own decisions unless they have been overruled by or are inconsistent with subsequent decisions of the House of Lords. Judges sitting at first instance will follow the decisions of the House of Lords and of the Court of Appeal, subject to the same proviso.

Novel points can arise on which there is no binding authority, but in theory the rule not only indicates who has "the last word", but also ensures that there can never be two inconsistent "last words". In practice the problem of inconsistency has been surprisingly rare, but some guidance exists on what a Court should do if faced with two inconsistent decisions both of which are of binding authority. By "binding authority", I mean, of course, that the *ratio* of each decision covers the instant case and that there are no grounds for distinguishing one decision from the other. Unfortunately, the guidance, in so far as it is itself of binding authority, relates only to the Court of Appeal. In this case, much of the argument has revolved around what a judge sitting at first instance ought to do in such circumstances.

The classic statement of the rule which the Court of Appeals has decided to adopt is contained in *Young v. Bristol Aeroplane Co. Ltd.* (1944) 1 K.B. 719, and was expressed by Lord Greene M.R. in the following terms at p. 729:

"On a careful examination of the whole matter we have come to the clear conclusion that this court is bound to follow previous decisions of its own as well as those of courts of co-ordinate jurisdiction. The only exceptions to this rule (two of them apparent only) are those already mentioned which for convenience we here

summarize: (1) The Court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (2) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords. (3) The Court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam*.”

An example of the application of the first exception to which Lord Greene referred is to be found in *Fisher v. Ruislip-Northwood U.D.C. and Middlesex C.C.* (1945) 1 K.B. 584.

I think that it is clear from the context that the second exception referred to by Lord Greene relates to cases in which a decision of the Court of Appeal cannot stand with a *subsequent* decision of the House of Lords. In relation to a choice between a decision of the Court of Appeal and a *previous* inconsistent decision of the House of Lords the rule is that the Court of Appeal will follow its own decision unless satisfied that its own decision was reached *per incuriam* (see *Williams v. Glasbrook Brothers Ltd.* (1947) 2 A.E.R. 884).

I am not concerned in the instant case with the third exception, since it is not suggested that either the decision in *Thai-Europe* or that in *Trendtex* was reached “*per incuriam*”. Suffice it to say that this exception gives rise to problems for a judge sitting at first instance (see *Rex v. Northumberland Compensation Appeal Tribunal Ex parte Shaw* (1951) 1 K.B. 711; *Cassell & Co. Ltd v. Broome* (1972) A.C. 1027; *Eaton Baker v. The Queen* (1975) A.C. 774, and *Miliangos v. George Frank (Textiles) Ltd.* (1976) A.C. 443).

In *Davis v. Johnson* (1978) 2 W.L.R. 182, the Court of Appeal deliberately refused to follow two of its own previous decisions, thus departing from the rules set out in *Young v. Bristol Aeroplane Co. Ltd.* Lord Denning, M.R., dealt with the suggestion that this course would create a problem for inferior courts in the following terms (at p. 194):

“It was suggested that, if we did this, the judges in the county court would be in a dilemma. They would not know whether to follow the two previous decisions or the later decision of this court. There would be no such dilemma. They should follow this later decision. Such a position always arises whenever the House of Lords correct an error made by a previous decision. The lower courts, of course, follow the latest decision. The general rule is that, where there are conflicting decisions of courts of co-ordinate jurisdiction, the later decision is to be preferred, if it is reached after full consideration of the earlier decision (see *Minister of Pensions v. Higham* (1948) 2 K.B., 153, 155).”

Two points have, I think, to be noted. The first is that on an appeal in that case the House of Lords (1978) 2 W.L.R. 553, emphatically re-affirmed the rule in *Young v. Bristol Aeroplane Co. Ltd.* The second is that *Higham's* case was one in which the ordinary rules of precedent were said not to apply (see (1948) 2 K.B. at p. 155).

In *Miliangos v. George Frank (Textiles) Ltd* (1975) 1 Q.B. 487, the Court of Appeal reversed Bristow J. who had followed a House of Lords decision in preference to a later and inconsistent decision of the Court of Appeal. In the House of Lords (1976) A. 443, the speeches were principally concerned with whether the House should reverse its own decision. However, Lord Simon of Glaisdale said at

page 478 that “It is the duty of a subordinate court to give credence and effect to the decision of the immediate higher court, notwithstanding that it may appear to conflict with the decision of a still higher court. The decision of the still higher court must be assumed to have been correctly distinguished (or otherwise interpreted) in the decision of the immediately higher court”. However, Lord Cross at page 496 said that the Court of Appeal should have followed the House of Lords decision in preference to its own previous decision and that he would consider the appeal as if this had been done and the decision of Bristow J. had been affirmed.

In *Midland Bank Trust Co. Ltd v. Hett, Stubbs & Kemp* (1978) 3 W.L.R. 167, Oliver J. at page 183 said that

“Where there are conflicting decisions of the Court of Appeal, that court is free to choose which it will follow: *Young v. Bristol Aeroplane Co. Ltd.* (1946) A.C. 163. The position of a judge at first instance when faced with such a conflict is not clear. He must, I think, be equally free to choose unless it is to be suggested that he must follow that decision which is latest in point of time.”

Mr. Millett, for the Plaintiffs, submits that a judge at first instance must always follow a decision of the Court of Appeal in preference to a prior inconsistent decision of the House of Lords and that it is not for him to hold that the Court of Appeal decision was given “*per incuriam*”. Leaving aside the “*per incuriam*” rider, which, as I say, does not arise in the present case, I would accept this proposition. It seems to me to follow logically from the fact that this is what the Court of Appeal itself should do (see *Williams v. Glasbrook Brothers Ltd.* (1947) 2 A.E.R. 884 and *Miliangos* (1975) 1 Q.B. 487).

Mr. Millett goes on to submit that a judge of first instance should always follow the latest decision of the Court of Appeal in preference to an earlier decision of that Court on the basis that the latest decision must be assumed to be distinguishable from the earlier case and thus correctly decided. This I do not accept. Any judge at first instance should indeed be very slow to conclude that two decisions of the Court of Appeal are wholly inconsistent with one another. I say this because it is not for a judge at first instance to hold that the Court of Appeal has erred and a conclusion that two of its decisions are wholly inconsistent with one another necessarily involves just such a conclusion. But if it is clear beyond peradventure that the two decisions are indeed inconsistent, I do not think that it can be in any one’s interest that the judge at first instance should be required to deny this fact. He should recognise it and should seek to anticipate how the Court of Appeal itself would, or more accurately should, resolve the conflict on any appeal from his decision. He would thus be adopting the same approach as he would adopt in relation to a conflict between the decision of the Court of Appeal and an earlier decision of the House of Lords—the Court of Appeal would follow its earlier decision. It also has the merit that it better safeguards the interests (particularly in relation to costs) of the party who can be expected to succeed if the matter is taken to the Court of Appeal.

On any appeal from my decision, neither the Court of Appeal nor the House of Lords will be obliged to decide upon the correctness of this view of the duty of a judge at first instance. Strictly speaking, they will only be concerned with the position at their respective levels. However, I personally should appreciate guidance and I do not doubt that others would share this feeling.

The two decisions of the Court of Appeal.

Thai-Europe Tapioca Service Ltd v. Government of Pakistan (1975) 1 W.L.R. 1485.

The Plaintiffs originally claimed demurrage or damages from the West Pakistan Agricultural Development of Corporation. The claim was made under a bill of lading of which the Corporation were the holders and the alleged liability arose out of delay in discharging caused by bombing by Indian aircraft. The Plaintiffs were notified that the Corporation had been dissolved in accordance with the terms of the Ordinance which had created it and that all its liabilities had been assumed by the Government of Pakistan. The Plaintiffs then amended their writ to sue that government. The Court of Appeal (Lord Denning, M.R., Lawton and Scarman L.JJ. unanimously affirmed a decision of Cusack J. that the writ should be set aside.

The argument for the Appellants was that the Defendant Government was not entitled to sovereign immunity because the claim arose out of a commercial transaction and that such claims were an exception to the general rule.

Lord Denning, M.R. held that the case fell within the general rule that a foreign sovereign cannot be personally impleaded in the English Courts and was outside any "commercial exception", since any such exception related only to disputes which "arise properly within the territorial jurisdiction of our Courts" (p. 1492).

Lawton, L.J. at p. 1493 held that he was precluded by the authority of the Court of Appeal's decision in *Compania Mercantil Argentina v. United States Shipping Board* (1924) 131 L.J. 388 from holding that any such exception existed.

Scarman L.J. at pages 1494-5, held that the suggested commercial exception related to property belonging to, or claimed by, a foreign sovereign when the property was within the jurisdiction and that in the case under consideration, the cause of action arose overseas and there was no "res" within the jurisdiction. He also held that it was not open to the Court of Appeal to extend the commercial exception further than it had already been taken by previous decisions of the House of Lords and of the Court of Appeal, since the doctrine of *stare decisis* applied to rules of international law which had become incorporated into municipal law by decisions of a competent court.

Trendtex Trading Corporation v. Central Bank of Nigeria (1977) 1 Q.B., 527.

The Plaintiffs began proceedings claiming payments under a letter of credit issued by the Defendants. In due course the writ was set aside and all further proceedings stayed upon the ground that the Defendants were a department of the State of Nigeria and were therefore immune from suit. On the Plaintiffs' appeal, two principal issues emerged, namely, whether the Defendants were a department of the State of Nigeria and whether, if they were, there was an exception to the rule of sovereign immunity in respect of commercial transactions. The Court of Appeal held unanimously that the Defendants were not a department of State and, Stephenson L.J. dissenting, that there was such an exception and that the Plaintiffs' claim fell within it. I am only concerned with the latter point.

Lord Denning held that the rules of international law are incorporated into and form part of English law, unless they conflict with statute. When those rules change, it is the changed rules which thereafter form part of English law. A decision of the Court of Appeal as to what was the ruling of international law 50 or 60 years ago

was not binding on the Court of Appeal in 1977. "International law knows no rule of *stare decisis*" (p. 554). He went on to hold that the rule of absolute sovereign immunity was no longer a rule of international law. It had been replaced by a new rule of restrictive immunity, which gave immunity to acts of a governmental nature, but no immunity to acts of a commercial nature (p. 555). He also held that the letter of credit, which had been issued in London through a London bank in the ordinary course of commercial dealings, was completely within the territorial jurisdiction of the English courts. Lord Denning referred to *Thai-Europe* only to affirm the view on the rules of international law which he there expressed.

Stephenson L.J. held that he was bound by the decisions of the majority in *Thai-Europe* to hold that the doctrine of *stare decisis* applied to a rule of international law and that the rule of absolute immunity (in actions *in personam*) had been incorporated into the municipal law of England by decisions binding on the Court of Appeal.

Shaw L.J. agreed with Lord Denning and expressly adopted the proposition that "international law knows no rule of *stare decisis*" (p. 579). Referring to *Thai-Europe* he said that the difference of opinion between Lord Denning, on the one hand, and Lawton and Scarman L.JJ. on the other, was not material to the ultimate decision and suggested that there might be a flaw in the latter's reasoning (p. 578).

Are the two decisions reconcilable?

With all respect to Shaw L.J., I have been driven to the conclusion that they are not and indeed the contrary was virtually assumed in the argument before me. Whilst it is true that all three members of the Court were agreed in *Thai-Europe* that the Defendants were entitled to sovereign immunity, the reasoning of the majority was wholly different from that of the minority. The *ratio decidendi* was thus that which appealed to Lawton and Scarman L.JJ. This ratio is wholly inconsistent with that of the majority in *Trendtex*.

Which decision should be followed?

In these circumstances it seems to me that I have to elect which authority to follow. The decision in *Thai-Europe* is based on at least one and possibly three previous decisions of the Court of Appeal. The decision in *Trendtex* seems to me to break new ground in two respects. The first is the decision that the doctrine of restrictive sovereign immunity applies to actions *in personam*. The second, which is perhaps even more far reaching is that there is an exception to the rule of *stare decisis*. It would follow that there is no settled law in relation to sovereign immunity and that whilst I should, of course, pay respectful attention to the views of Lord Denning and of Shaw L.J., it would nevertheless be my duty to form my own view on the extent to which international law currently restricts sovereign immunity.

I consider that I should follow *Thai-Europe* because a decision which asserts the doctrine of precedent must logically have more weight *as a precedent* than one which denies or modifies that doctrine. Furthermore, I attach great weight to the forecast by the Judicial Committee of the Privy Council that the House of Lords will be unwilling to abandon the absolute rule of immunity in actions *in personam* whatever may happen with regard to actions *in rem* (see *The Philippine Admiral* (1977) A.C. 373, 402).

This is sufficient to determine the application in favour of the Defendant Gov-

ernment, but I have also been asked to consider the application on the basis of the law as declared in *Trendtex*.

The application of the Trendtex decision.

If I were to follow the *Trendtex* decision, I should perhaps be free to reach a new and individualistic decision on what is the current rule of international law, since, on this basis, international law itself knows no rule of *stare decisis* and nor does English law in relation to rules of international law. However, there has been no serious attempt to provide me with the necessary materials and I will not do so. This is not a matter of criticism—far from it. I merely mention the fact as a matter of record.

The Plaintiffs submit that their claim arises out of a commercial transaction and is sufficiently closely connected with the jurisdiction of the English Courts to be within the “commercial exception”. The appellants submit that the claim goes to the heart of matters which are rightly categorized as *jus imperii*.

The claim does not relate to property physically within the jurisdiction. The tea and the proceeds of the sale of tea which are the subject matter of the “Mareva” injunction are not the subject of the dispute. They simply provide a fund upon which the Plaintiffs might be able to levy execution if successful in the action. The submission that there is a close territorial connection rests upon the fact that the original loan which the Plaintiffs guaranteed was payable in London both as to principal and as to interest and that both the loan and the guarantee were governed by English law.

The Defendant Government replies that whatever the position as between original borrower and lender, the situs of their liability (if any) as successors to the borrower or to the co-guarantor is Uganda. This is an interesting dispute, but one upon which I need not express any opinion since the Defendants have a further and better argument. This is that the fundamental difference between the parties is as to the meaning and effect of legislation designed to achieve the compulsory acquisition of properties and businesses and that this is a classic example of an act which is *jus imperii* as contrasted with one which is *jus gestionis*.

The Plaintiffs’ answer to this is that the validity of the legislation is not in issue. Their whole claim is based upon the Ugandan decrees. This answer is superficially attractive. It becomes less so when regard is had to Article 6 of the 1972 Decree. This is in the following terms:

“6 (1) Subject to the provisions of subsection (2) of this section, all liabilities and obligations which belonged to or were binding upon the owner of any property or business immediately before the commencement of this Decree shall belong to or become binding upon the Government on the commencement of this Decree”.

“(2) Any contract or agreement relating to any property or business affected by this Decree whether or not in writing and whether or not of an assignable nature shall not have effect and may not be enforced unless the Minister has, by statutory order, ratified such contract or agreement”.

The Defendants’ solicitor has sworn an affidavit deposing to the fact that no statutory order has been made under Article 6(2) or under the corresponding Article 7(2) of the 1975 decree. The Plaintiffs say that, assuming this to be true, they can nevertheless succeed by virtue of the general words of Article 1 which vested in the

Government all the specified properties and businesses without further assurance. This, they submit, must of itself vest the liabilities as well as the assets if the legislation is not to be regarded as confiscatory. The Defendants do not accept this argument. I express no view upon the merits of these arguments. Suffice it to say that I am satisfied that the litigation would involve the Court in expressing an opinion on the meaning and effect—and perhaps the propriety—of Ugandan legislation in a suit to which the Government of that State would be a party. I do not think that even the most enthusiastic supporter of the restrictive doctrine of sovereign immunity would hold that it extends this far. It follows that even if I had felt free—or bound—to follow and apply the law as stated in *Trendtex*, I should still have determined this application in favour of the Defendant Government.

2. *Hispano Americana Mercantil S.A. v. Central Bank of Nigeria.*
DECISION BY THE COURT OF APPEAL ON 25 APRIL 1979⁷²

The judgement:

The Master of the Rolls: This is another case arising out of the troubles in Nigeria. In 1975 the port of Lagos was crowded with shipping. It was completely congested. There were 300 or 400 ships waiting outside the port—full of cement—with demurrage running up continually in huge sums.

Orders had been given by the ministries in Nigeria for this cement. It came largely from Europe. Far too much had been ordered. That was why the port was congested with ships.

The transactions were financed by way of letters of credit issued by the Central Bank of Nigeria. We had an instance in *Trendtex Trading v. Bank of Nigeria* (1977) 1 Queen's Bench 529. That was a letter of credit which was issued on the 24th July, 1975. In this case we have one issued on the 22nd April, 1975. It was issued by the Midland Bank here on the advice of the Central Bank of Nigeria in Lagos. It was an irrevocable letter of credit. It was not confirmed by the Midland Bank here: they were only the correspondents. The Central Bank of Nigeria advised the beneficiaries that they had opened an irrevocable letter of credit in favour of the sellers on account of the Permanent Secretary to the Ministry of Defence in Lagos. It was in the sum of U.S. \$14,400,000. There had to be shipment accordingly. Finally they advised: "Settlement under this credit will be by means of our sight draft on New York". The Midland Bank, no doubt, had been put in very considerable funds by the authorities in Nigeria in order to meet these letters of credit when they fell due. The beneficiaries of the letters of credit in these cases have now sued the Central Bank of Nigeria on these letters of credit.

In the *Trendtex* case the point was taken by the Central Bank of Nigeria that they had sovereign immunity: and that was elaborately argued here. They put it on two grounds. First, that the Central Bank of Nigeria was merely an alter ego or an organ of the State of Nigeria. That argument was overruled by the whole of the court, which said that the Central Bank of Nigeria was not a mere alter ego or organ of the State of Nigeria: and for that reason alone would not qualify for sovereign im-

⁷² Copy of the judgement is transmitted by the Government of the United Kingdom to the Secretariat.

munity. Apart from that, by a majority of two to one in this court, it was held that in regard to a commercial transaction of this kind (which was within the territorial jurisdiction of the United Kingdom by means of the letters of credit) there was no sovereign immunity.

The decisions on those points are not challenged in the hearing before us to-day. In the *Trendtex* case the court did grant an injunction (what is often called in these courts a *Mareva* injunction) to restrain the bank from moving the funds out of the jurisdiction and preventing them from being disposed of. In the course of my judgment in that case, I said on that point at page 561:

“It was said that the money standing to the credit in the books of the Midland Bank was money belonging to the Federation of Nigeria: and that it was not subject to seizure or to an injunction. This point seems to me to depend on precisely the same grounds as those considered earlier. If the Central Bank is entitled to immunity from being sued, so also can the funds be immune from being seized. Otherwise not.” It was the word “not” which applied there. If the bank was not immune from being sued, the funds were not immune from being seized.

Lord Justice Stephenson adhered to that view in his very last sentence. He said: “I do not therefore dissent from Lord Denning M.R.’s opinion on this point that it depends on precisely the same grounds as those considered earlier and that we should continue the injunctions”.

Lord Justice Shaw equally said at the end of his judgment: “If the bank is to be regarded as part of that government yet not immune from suit (and a fortiori if it is not so regarded) it is a reasonable corollary that those funds should be preserved within the jurisdiction so long as there is a possibility that the action may survive and succeed”. And he added (because we had some information in that case): “I am much encouraged to this view by the brash intimation given to *Trendtex* in Lagos in October 1975 that they would not receive any payment. I would continue the injunction”.

So the whole court in the *Trendtex* case granted an injunction to prevent the funds being moved out of England so that the creditors could not get them.

But in the case to-day (which is identical in all material respect to the *Trendtex* case) Mr. Kemp has come before us and urged that it was not a case for an injunction. He said that the court made a mistake in the *Trendtex* case in granting the injunction. He said that it is not in conformity with modern law for an injunction to be granted in such a case as this—especially against the funds or property of a central bank.

Mr. Kemp urged that whatever the position was at the date of the *Trendtex* case, the position to-day is different even in international law because of statutes which have since come into force. On the 21st October, 1976 the Foreign Sovereign Immunities Act of 1976 came into force in the United States: and on the [22 November], 1978 the State Immunity Act 1978 of our own Parliament came into force. Mr. Kemp urged that international law has been changed by those statutes: and we ought to recognise that alteration to-day. He also drew our attention to a decision by Mr. Justice Donaldson in *The Uganda Company (Holdings) Limited v. The Government of Uganda* on the 11th December, 1978, in which he held that the *Trendtex* case was a departure from earlier cases.

In both those statutes there are provisions which say that, so far as the property of a foreign central bank is concerned, it ought not to be taken in execution. Further that an injunction ought not to be issued so as to impair the dealings of a foreign central bank with its funds.

There is, however, a difference between the United States' statute and the English statute. The United States' statute says that "the property of a foreign state shall be immune from attachment and from execution if—(1) the property is that of a foreign central bank or monetary authority held for its own account". What do the words "held for its own account" mean? There is an explanatory memorandum attached to the Bill of Congress. It says: "(The immunity) applies to funds of a foreign central bank or monetary authority which are deposited in the United States and 'held' for the bank's or authority's 'own account'—i.e., funds used or held in connection with central banking activities, as distinguished from funds used solely to finance the commercial transactions of other entities or of foreign states".

Stopping there, it can well be argued that the funds which are in question here are not held in connection with the central banking activities of the Central Bank of Nigeria but are being used to finance the commercial transactions of other entities: for example, the Ministry of Defence, the Ministry of Housing and the like which were ordering cement for use in Nigeria at the time.

The reason given for this in the explanatory memorandum is this: "If execution could be levied on such funds without an explicit waiver, deposit of foreign funds in the United States might be discouraged. Moreover, execution against the reserves of foreign states could cause significant foreign relations problems".

Those are no doubt reasons which would appeal to commercial interests in the City of London equally as they would in the City of New York. No doubt for similar reasons section 13(2) and (4) coupled with section 14(4) of our statute make it clear that the property of the central bank of a foreign State ought not to be seized: and an injunction ought not to be granted to prevent the bank dealing with it.

But I stress this, that this Act does not apply retrospectively. It only applies to transactions which took place after it came into force—which was in November 1978. contracts under the law as it previously was and not under the law as it is now embodied in the 1978 statute.

So I would say that the English Act is not applicable to the transactions in this case. So far as the American statute is concerned, it seems to me that it does not apply to this case at all because it can be argued that these funds are not being held by the Central Bank of Nigeria "for its own account". They are held not for its own central banking activities, but for the activities of Government departments in Nigeria.

Apart from those two grounds, it seems to me that the international law remains as I stated it in the *Trendtex* case. We had before us a decision of the Provincial Court of Frankfurt in which (in a precisely similar case to ours) an injunction had been granted: and in the *Trendtex* case (operating as we thought in accordance with international law as it then stood) we granted an injunction. It seems to me that the latest statutes of the United States and of our Parliament are not sufficient to alter the international law as we stated it.

It was suggested that the decision in *Trendtex* was *per incuriam*. But we have again been referred to the authorities on what would amount to *per incuriam*: and especially to what was said by myself in *Miliangos v. Geo. Frank (Textiles) Ltd.* (1975) 1 Queen's Bench 487 and by Lord Simon of Glaisdale when the case reached the House of Lords in (1976) Appeal Cases 443 at page 477. All I would say about that is that *Trendtex* was not decided *per incuriam*.

Or the point of the injunction, as well as the point of sovereign immunity in regard to the Central Bank of Nigeria, *Trendtex* governs this case. It is precisely in point on an almost identical situation. The proper course for this court to take is simply to follow *Trendtex* and hold that there is no sovereign immunity and that a *Mareva* injunction should go pending the ultimate decision.

This is clearly a case in which we should give leave to appeal to the House of Lords on all points. The *Trendtex* case did not go to the Lords because it was settled. We are told that the German case did not go higher because that was settled.

It seems to me the right course would be to continue the injunction and give leave to appeal on all points to the House of Lords. I would allow the appeal accordingly.

Lord Justice Waller: I agree. This case was originally heard in March 1976, and there has been an injunction since that time. It was heard at approximately the same time as the *Trendtex* case, and Mr. Kemp accepts that in all substantial respects the two cases are similar. He has submitted that in a sense it is an essential step to appeal the whole case to the House of Lords; but submits that this court should remove the injunction which was imposed by the learned judge in March 1976.

As an important part of his submissions he has drawn attention to two Acts—the enactment of the United States and the State Immunity Act 1978—as showing that international law would grant immunity in such a case as this. But in my view, as my Lord has already said, we should look at this case as the law stood when the contracts were made in 1975, and when the case was heard on March 1976: and in those circumstances the learned judge imposed this injunction, and I do not think that we should interfere with it. If I were in doubt, I would still come to the same conclusion in the result because where there has been an injunction in force for three years, if this court were to say it should be removed, there would immediately be an application (as we have been told by Mr. Hunt) for it to be reimposed pending his appeal against the removal going to the House of Lords. In those circumstances this court, I would have thought, would inevitably have to reimpose the injunction until the House of Lords decided upon the matter.

I entirely agree that the appeal should be allowed in toto.

Lord Justice Cumming-Bruce: I agree.

(Order: Appeal allowed with costs here and below. Application for leave to appeal to the House of Lords granted).

3. *The I Congreso del Partido.*
 DECISION BY THE COURT OF APPEAL ON 12 JULY 1979⁷³

The judgement:

LORD DENNING, M.R.:

1. *The Organisation of Cuba:* The Republic of Cuba is organised on lines with which we are becoming familiar in these Courts. The commerce of the country is not in private hands. It is entrusted by the government to state trading enterprises. The sugar trade is in the hands of an enterprise called Empresa Exportadora de Azúcar (CUBAZUCAR). The shipping is in the hands of another called Empresa Navegación Mambisa (MAMBISA). These state enterprises are very like the Polish state organisation ROLIMPEX which was considered by us in *Czarnikow Ltd. v. Centrala Handlu Zagranicznego Rolimpex*, [1977] 2 Lloyd's Rep. 201; [1978] Q.B. 176 and by the House of Lords in [1978] 2 Lloyd's Rep. 305; [1978] 3 W.L.R. 274. The state owns the sugar, but CUBAZUCAR buys and sells it. The state owns the ships, but MAMBISA has possession and control of them. Each of these state trading organisations must comply with the overall directions of the government: but on day-to-day matters each makes its own decisions about its commercial activities. Neither of them is a department of the government of Cuba. But each is subject to the control of the government and must do as it says.

Similarly with Chile. It has a state trading enterprise which holds the majority of shares in a company called Industria Azucarera Nacional S.A. (IANSA).

2. *The contracts:* In 1973, when the two countries were on very friendly terms, CUBAZUCAR of Cuba made a contract with IANSA of Chile. Under it CUBAZUCAR was to sell nearly 130,000 tonnes of sugar to IANSA by eight shipments of 10,000 to 20,000 tonnes each. It was an ordinary commercial contract. The price was U.S. \$176.53 per tonne, cost and freight free out to a Chilean port. The purchasers IANSA were to open an irrevocable and confirmed letter of credit payable in Cuba. On shipping the sugar, CUBAZUCAR would take the bills of lading to the National Bank of Cuba and get payment against the shipping documents.

We are concerned here with two of the shipments of sugar. The one of 10,476 tonnes by a vessel called *Playa Larga*. She flew the Cuban flag. She was owned by the Republic of Cuba, but chartered to MAMBISA, who subchartered her by a voyage charter to CUBAZUCAR. The second of 10,890.379 tonnes by a vessel called *Marble Islands*. She flew the Somali flag and was owned by a Liechtenstein corporation. She was under demise charter to MAMBISA, who had subchartered her on a voyage charter to CUBAZUCAR.

3. *The coup d'état:* On Sept. 11, 1973, there was a *coup d'état* in Chile. President Allende was killed. His government was overthrown and was replaced by a new government formed by President Pinochet. It was of a very different complexion. From extreme left to extreme right. The Cuban government say that there was violence specially directed at them. Their embassy was attacked. Their vessel, *Playa Larga*, was shelled. Their ambassador had to leave for his own safety. They regarded it as a major international incident. It was debated by the Security Council in

⁷³ Reproduced from *Lloyd's Law Reports*, vol. 1 (1980), p. 25.

the United Nations on Sept. 17 and 18, 1973. The Cuban government broke off diplomatic relations with Chile. It froze all Chilean assets. It ordered its vessel to leave. On Sept. 27, 1973, the Cuban government passed a law forbidding all dealings with Chile. It was "a deliberate act of International Policy" and was expressed to take effect from Sept. 11, 1973.

4. *The ships get away:* On the morning of Sept. 11, 1973, *Playa Larga* had arrived in Chile and was lying at anchor in the port of Valparaiso. The Chileans had put on board four large cranes for unloading sugar. They belonged to a Chilean corporation, *Compania de Refineria de Azucar de Vina del Mar (CRAV)*. She had already discharged part of the cargo, 2,569.305 tonnes: and had on board the remaining part, 7,907.206 tonnes, yet to discharge for delivery to IANSA. She was at anchor awaiting instructions to return to berth to complete discharging. After the *coup d'état* the Cuban government gave urgent instructions to the master. She weighed anchor and started to leave the port with sugar, cranes, and all. The Chileans did their best to stop her. She had no port clearance. They transported radio messages telling her to stop. They sent out a helicopter and a destroyer. They fired warning shots. But she got away.

The next day, on her way northwards *Playa Larga* met the other vessel, *Marble Islands*. She was at sea a day's journey from Valparaiso. She had on board a cargo of 10,890.329 tonnes of sugar. It was also destined for the Chilean importers, IANSA. But she also had had urgent orders from the Cuban government. Instead of going on to Valparaiso, she turned round and went northwards in company with *Playa Larga*. Together they sailed north for three days, covering 1500 miles and then put into Callao, the port for Lima in Peru. The Chilean ambassador to Peru sent his naval attaché to the vessels. He asked the captains to discharge the sugar at Callao. Both categorically refused. The Cuban ambassador made his weight felt. He gave instructions that under no circumstances was the sugar to be unloaded in Callao.

Five days later *Playa Larga* left Callao on her own. She made her way up the coast of South America, through the Panama Canal, across the Caribbean Sea till she reached Cuba. She discharged her cargo of sugar there on Oct. 5, 1973, that is, 3½ weeks after leaving Valparaiso. The Cuban authorities took possession of the sugar and supplied it to their own people in Cuba for their own use.

Marble Islands had a more exciting time. She stayed at Callao a further week. Then she left on Sept. 27, 1973, and went north, hoping to go through the Panama Canal on the way to Cuba. But when she got to Balboa at the Pacific end of the Canal, the Chilean importers IANSA got her arrested by the U.S. authorities in the Canal Zone—because of their claim to the sugar. The master was not the sort of man to submit to this interference. Nor was the Cuban government. He broke arrest, and sailed off to the west. He went on for days and days across the wide stretches of the Pacific. No doubt he put into some port for bunkers. Perhaps to Yokohama or Hong Kong. Then across the South China Sea until he reached a country friendly to Cuba. It was North Vietnam. He berthed at Haiphong, the port for Hanoi. It was on Nov. 6, 1973, nearly six weeks after he had left Callao. At Haiphong he unloaded her cargo of sugar. The Cuban authorities presented it to the people of Vietnam as a gift. Meantime, while she was crossing the Pacific, on Oct. 13, 1973, she had been purchased from her Liechtenstein owners by the Republic of Cuba.

5. *The ownership of the sugar:* The Chilean importers IANSA were very an-

gry about all this. The sugar in both ships belonged to them. They had paid for it and got the shipping documents. They had opened letters of credit which had been honoured. The payment for the cargo on the *Playa Larga* had been made—and the documents received—on Aug. 29, 1973, long before the coup d'état. They had also paid for the cargo in the *Marble Islands*. Their correspondent bank in Paris had paid on Sept. 14, 1973, in the belief that the documents for the *Marble Islands* had been presented by CUBAZUCAR on Sept. 11, 1973, before the *coup d'état*.

Beyond all doubt IANSA had paid for both cargoes and CUBAZUCAR had received the payment.

The owners of the four large cranes, the Chilean corporation CRAV, were equally angry. They had lost their cranes beyond recall.

6. *The arrest of Imias*: The Chileans then discovered that *Imias*, a vessel owned by the Cuban government (and run by MAMBISA), was passing through the Panama Canal Zone. The Chilean importers and crane owners determined to get her. They issued writs in the U.S. Canal Zone District Court against MAMBISA claiming more than \$4 million. They served *Imias* with a writ of foreign attachment and arrested her. The Cuban government claimed her release on the ground of sovereign immunity. The U.S. Department of State conceded it, whereupon the District Court allowed her to go free, see *Spacil v. Crowe*, (1974) 489 Fed. Rep. 2nd 614. A well-informed commentator suggests that—

. . . diplomatic and political considerations were deemed to be of overriding importance [see Professor Monroe Leigh, "The Case of the 'Imias' " (1974) *Ajil* Vol. 68 pp. 280-289].

7. *The arbitration*: In November 1974 IANSA commenced arbitration proceedings against CUBAZUCAR before the Sugar Association in London. They were so protracted that an award was not made until Apr. 18, 1978. The arbitrators then made an award in the form of a special case. It has not yet come before the Court for decision.

In the course of the arbitration the arbitrators inquired closely into the circumstances in which the cargoes were diverted. They found that the decisions were taken during the morning of Sept. 11, 1973, at a high level in the Cuban government: and that CUBAZUCAR were involved in and party to those decisions. They found that at that time, on Sept. 11, 1973, the documents for *Marble Islands* had not been presented for payment: that at that very time CUBAZUCAR and their bankers, the National Bank of Cuba (NBC), knew that *Marble Islands* had been diverted: and nevertheless thereafter with knowledge of her diversion, presented documents for payment: and got payment from them. The arbitrators found that CUBAZUCAR and NBC were parties to an attempt (which as things turned out proved successful) to obtain payment for the sugar on board the vessel, well knowing that there was no likelihood that the cargo would be diverted to IANSA.

We allowed the arbitrators' award to be put before us on the footing that their findings were in no way binding on the Republic of Cuba and that we would only look at them for what they were worth. The telexes set out in the award go far to support those findings. So much so that I think we should have regard to them in so far as they are relevant to the issue we have to decide.

8. *The sister ship I Congreso del Partido comes on the scene*: Meanwhile, while the arbitration was going its slow length along, IANSA saw an opportunity of

getting redress in another way. They discovered that a new vessel was being built at a yard in Sunderland, here in England. She was being built for a Liberian company; but, while she was still on the stocks, the Liberian company had assigned the benefit of the contract to the Cuban state shipping enterprise, MAMBISA. On Sept. 3, 1975, she completed her sea trials. On Sept. 5, 1975—that is, two days later—MAMBISA took delivery of her on behalf of the Republic of Cuba. She was named *I Congreso del Partido*, and was entered in the Cuban registry in the name of the Republic of Cuba as owners of her. She was a trading vessel and intended for use for trading.

IANSA were quick to seize the opportunity. Within four days they started an action in rem here in England, and arrested *I Congreso*. A few weeks later they started two more actions in rem and re-arrested her. In due course security was given. She was released from arrest and went trading for Cuba. So the dispute has been transferred from the ship to the security.

9. *These actions:* In these actions the plaintiffs were described as—

The owners of cargo lately laden on board ship or vessel “Playa Larga” or “Marble Islands” (as the case may be) [—and the defendants as—] The owners of the ship or vessel “I Congreso del Partido”.

For some time in these actions the plaintiffs IANSA sought to make MAMBISA liable, and this was canvassed extensively before the Judge. But all that has disappeared now. Only two actions remain in being. The plaintiffs now only seek to make the Republic of Cuba liable. They say that the Republic of Cuba were the owners of *Playa Larga* and *Marble Islands*, and that they have claims against the Republic of Cuba for the loss of the cargoes on those vessels and that the Republic of Cuba were liable in personam for them. So much so that the Admiralty Court has jurisdiction to determine the claims in personam under s. 1(1)(g) and (h) and 3(1) of the Administration of Justice Act, 1956. They go on to say that, at the time when the actions were brought in late 1975, the new vessel *I Congreso* was beneficially owned by the Republic of Cuba, and that in consequence the Admiralty jurisdiction can be invoked by an action in rem against *I Congreso* by virtue of s. 3(4)(b) of the Administration of Justice Act, 1956.

10. *The effect of s. 3(4)(b) of the 1956 Act:* In applying s. 3(4)(b) you have first to consider the position at the time *when the cause of action arose* in connection with the offending ship. You have then to discover *a person* who would be “liable on the claim in an action in personam”. Having discovered him, you have to consider the position *at the time when the action is brought*. You have then to inquire whether that person at that time beneficially owned any other ship (a sister ship) besides the offending ship. If there is such a person, you can invoke the Admiralty jurisdiction of the High Court against that sister ship.

Now in this case the plaintiffs say that the Cuban government was that person. They say that the government was liable in personam at the time when the cause of action arose and that that government were the beneficial owners of that sister ship (*I Congreso*) at the time when the action was brought.

It is quite clear that the Cuban government owned *I Congreso* at the time when the actions were brought. So the inquiry is only whether the Cuban government were liable in personam at the time when the cause of action arose.

11. *The liability in personam:* On that analysis, it seems to me that we can put

on one side any complication about the sister ship. The legal position is just the same as it would be if *Playa Larga* on her way back had put into Kingston, Jamaica, and had been arrested there: or if *Marble Islands* had put into Hong Kong after Oct. 13, 1973, and had been arrested there. At those times would the Cuban government be liable in personam for the claims of the Chileans? I think the Cuban government would be and for these reasons:

First, so far as *Playa Larga* is concerned, the Chilean importers have a claim for damages for breach of contract. It arises out of the bill of lading dated Aug. 9, 1973. That says in express terms that this contract of carriage is entered into with "the owner of the above-named ship". The consignee was named as Industria Azucarera Nacional S.A. (IANSA). The owners were the Cuban government. The failure to deliver at Valparaiso was clearly a breach of contract unless excused by some defence such as frustration or force majeure.

Furthermore, so far as *Playa Larga* is concerned, the Chilean importers IANSA have claims in tort against the Cuban government for detinue or conversion of the sugar, starting with the carrying of it off to Callao, then the refusal to deliver at Callao, and eventually the disposal of it in Cuba.

Second, so far as *Marble Islands* is concerned, their claim is solely in tort for detinue or conversion. The Cuban government only became owners of the vessel on Oct. 13, 1973, when she was crossing the Pacific, but they clearly converted the sugar when she reached Haiphong on Nov. 6, 1973. They unloaded it and presented it to the people of Haiphong as a gift.

So the Cuban government is to my mind clearly a person who would be liable on the claim in an action in personam when the cause of action arose. Save for this one point—and it is the great point in the case—is the Cuban government entitled to claim sovereign immunity so as to deprive the Court of any jurisdiction in the matter?

12. *The restrictive doctrine of sovereign immunity*: Until a few years ago this case would have been covered by *The Porto Alexandre*, (1919) 1 L.L. Rep. 191; [1920] p. 30. It was there held by the Court of Appeal that, in an action in rem, a trading vessel owned by a sovereign state was immune from arrest, even when it incurred ordinary trading debts or liabilities. In that case it was for salvage. That was in the days when this country adopted and applied the absolute doctrine of sovereign immunity. But it was not followed by the Privy Council in *The Philippine Admiral*, [1976] 1 Lloyd's Rep. 234; [1977] A.C. 373. It was there held that, in an action in rem, a trading vessel owned by a sovereign state could be arrested for a trading debt. In that case it was for goods supplied and disbursements made for the ship. Strangely enough, however, the Privy Council confined themselves to actions in rem. They seem to have thought that, in actions in personam, a foreign sovereign was still absolutely entitled to invoke the doctrine of sovereign immunity, see [1976] 1 Lloyd's Rep. 234; [1977] A.C. 373 at pp. 240-241 and 402-403. Such was the view of Lord Justice Lawton and Lord Justice Scarman in *Thai-Europe Tapioca Service Ltd. v. Government of Pakistan Directorate of Agricultural Supplies* [1976] 1 Lloyd's Rep. 1; [1975] 1 W.L.R. 1485 and of Mr. Justice Donaldson in *Uganda Co. (Holdings) Ltd. v. Government of Uganda*, [1979] 1 Lloyd's Rep. 481. In *Trendtex Trading Corporation v. Central Bank of Nigeria*, [1977] 1 Lloyd's Rep. 581; [1977] 1 Q.B. 529, however, Lord Justice Shaw and I took a different view. I said of the restrictive theory (at pp. 593 and 556):

. . . It covers actions in personam. In those actions, too, the restrictive theory is more consonant with justice. So it should be applied to them. It should not be retained as an indefensible anomaly.

My view has been reinforced by several important events.

First, the United States of America has passed the Foreign Sovereign Immunities Act, 1976, adopting the restrictive theory.

Second, the United Kingdom has passed the State Immunity Act, 1978, also adopting it.

Third, the United Kingdom has ratified the European Conventions of 1926 and 1972 also adopting it.

In view of these developments I think it plain that the absolute doctrine is no longer part of international law. The restrictive theory holds the field in international law: and by reason of the doctrine of incorporation it should be applied by the English Courts, not only in actions in rem but also in actions in personam. The difficulty lies, however, in applying it to the various situations which arise.

13. *State trading vessels*: Ships of war, and ships of a sovereign state "destined for its public use", have always been considered to be absolutely immune from arrest. Even if they were involved in a collision with a merchantman, they could not be arrested in rem: nor could the sovereign be sued in personam. Such was established in the United States in the great case of *The Schooner Exchange v. McFaddon*, (1812) U.S. Supreme Court 7 Cranch. 116, and in England in *The Parlement Belge*, (1880) 5 P.D. 197. Though the position now is modified in regard to collisions &c. by the Brussels Convention.

That doctrine about warships was wrongly extended in *The Porto Alexandre*, (1919) 1 Ll.L. Rep. 191 to state trading vessels. But now that that case is no longer law, I am of opinion that we can go back to the law as stated by that great international lawyer Sir Robert Phillimore over 100 years ago in *The Charkieh*, (1873) L.R. 4 A. & E. 59. That vessel was owned by the Khedive of Egypt. She was used as an ordinary merchant trading vessel. She was in collision in the Thames. Sir Robert said (at page 99):

. . . No principle of international law, and no decided case, and no dictum of jurists of which I am aware, has gone so far as to authorize a sovereign prince to assume the character of a trader, when it is for his benefit; and when he incurs an obligation to a private subject to throw off, so to speak, his disguise, and appear as a sovereign, claiming for his own benefit, and to the injury of a private person, for the first time, all the attributes of his character; . . . Assuming the privilege to exist, it has been waived with reference to this ship by the conduct of the person who has claimed it.

This view of international law is strongly supported by the Brussels Convention, 1926. Article 1 says that:

Sea-going ships owned or operated by States, cargoes owned by them, and cargoes and passengers carried on State-owned ships (as well as the States which own or operate such ships and own such cargoes) shall be subject, as regards claims in respect of the operation of such ships or in respect of the carriage of such cargoes, to the same rules of liability and the same obligations as those applicable in the case of privately-owned ships, cargoes and equipment.

Article 3 makes an exception in the case of ships of war, &c.

Similar provisions are contained in the United States Foreign Sovereign Immunities Act, 1976, s. 1605 (a) (b) and our State Immunity Act, 1978. I refer especially to s. 10(2) which says:

A State is not immune as respects—(a) an action in rem against a ship belonging to that State; or (b) an action in personam for enforcing a claim in connection with such a ship, if, at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes.

So, in regard to state trading vessels, I take it that when a sovereign chooses to go into the markets of the world so as to let out his vessel for hire or to carry goods for freight—just like an ordinary private shipowner for commercial purposes—then he clothes himself in the dress of an ordinary ship's captain. He is liable to be sued on his contract or for his wrongs in the courts of any country which has jurisdiction in the cause. He cannot renounce the jurisdiction by a plea of sovereign immunity. He can, of course, plead frustration, or force majeure, if and in so far as they afford a defence. But he must face the music. He seeks like an actor to run behind the arras and come out saying: "Look, I am no longer a ship's captain. I wear the crown of a King. You cannot sue me". That he should not be allowed to do.

If this view be correct, there is no need to go further, at any rate so far as the *Playa Larga* is concerned. The Cuban state owned her and used her, or permitted her to be used, for the carriage of sugar on an ordinary trading voyage. The Cuban state cannot avail itself of sovereign immunity in respect of any loss of or damage to cargo arising out of or in consequence of that trading, no matter what the cause be of that loss or damage.

14. *Sovereign authority*: It was submitted, however, by Mr. Bingham, Q.C., that, in these cases and in all others, the sovereign can claim immunity when the acts which caused the loss or damage were done by him in the exercise of his sovereign authority—or as it is put in Latin *jure imperii*—as distinct from *jure gestionis*. This is a very elusive test. As to what acts fall within it is anyone's guess. As Terence says:

Quot homines tot sententiae: suo quoque mos [So many men, so many opinions: his own a law to himself].

But, however elusive the test, Mr. Bingham submits that action in the foreign relations or diplomatic field falls squarely within the category of "sovereign government acts". In the present case, he said, the acts done by the government of Cuba were taken in the foreign relations field following a violent military coup against the government of a close ally: and were therefore sovereign governmental acts—*jure imperii*.

On this point we were referred to masses of cases and text books in many languages of many countries and to masses of affidavits by professors of international law all over the world. I stand amazed at the time and money which the parties have expended on this case.

15. *The nature of the act, not its purpose*: One thing seems to be reasonably clear. Immunity depends on the nature of the act and not in its purpose. After much research I declared in *Rahimtoola v. Nizam of Hyderabad*, [1958] A.C. 379 at p. 422 in a passage which Mr. Bingham, Q.C., was good enough to commend:

At the present time sovereign immunity should not depend on whether a foreign government is impleaded, directly or indirectly, but rather on the nature of the conflict. Is it properly cognizable by our courts or not? If the dispute brings into question, for instance, the legislative 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 only qualification I need make to that passage to-day is that the phrase about "territorial jurisdiction of our courts" has no application to an action in rem against a foreign state-owned trading ship, for the reasons stated by Mr. Justice Robert Goff in the present case (see [1977] 1 Lloyd's Rep. 536 and [1977] 3 W.L.R. 778 at pp. 557-558 and 809-810).

Subject to that qualification, that passage has virtually been adopted by Parliament in the State Immunity Act, 1978 in s. 3(1) in relation to "commercial transactions", and in s. 14(2) in regard to "separate legal entities".

Whenever that passage comes to be applied, you must remember that there is always some action taken or omitted by the foreign government or by one of its separate legal entities, which gives rise to the dispute. Sovereign immunity depends on the nature of that action: not on the purpose or intent or motive—use whichever word you like—with which it is done. To prove this I would take the old chestnut. All the pundits say that when a government department places an order for boots for the army, it is acting *jure gestionis*, not *jure imperii*: but when it places an order for guns it is *jure imperii*. I cannot accept that distinction. Suppose the Navy Department of a foreign government orders a helicopter for military purposes, and its Agriculture Department orders a like helicopter for surveying the fields. In neither case is the foreign government entitled to sovereign immunity. The seller is not concerned with the purpose for which the helicopter is required. Likewise with a gun. The seller is not concerned whether the foreign government wants it to kill an enemy or to fire a salute or to train recruits. Whenever a foreign government orders goods or services of a trader, it ought to pay for them, no matter for what purpose it intends to use them. Especially in these days when foreign governments order many goods and engage many services in the name of their state trading enterprises. If it refuses to take delivery, it ought to pay damages—unless it has some defence such as frustration or force majeure.

This view is supported by the case of the *Empire of Iran*, (1963) 45 I.L.R. 57 in which the Federal Constitutional Court of West Germany considered many authorities in many countries and said (at p. 80):

As a means for determining the distinction between acts *jure imperii* and *jure gestionis* one should rather refer to the nature of the state transaction or the resulting legal relationships, and not to the motive or purpose of the state activity.

Finally, in the United States Foreign Immunities Act, 1976 in s. 1603 it says:

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.

16. *Actions such as nationalisation, requisition and confiscation:* We were referred to many actions which undoubtedly attract sovereign immunity by their very nature. Such as the familiar case where a foreign government, by legislative measures, nationalises property or a business situated in its own country, no matter whether it is the property or business of its own nationals or others, providing it is ready to pay compensation to those affected, see *Luther v. James Sagor & Co. Ltd.* [1921] 3 K.B. 532, *Princess Paley Olga v. Weiss*, [1929] 1 K.B. 716, *Re Helbert Wagg & Co.'s Claim* [1956] 1 Ch. 323 at pp. 548-549, *Carey v. National Oil Corporation*, (1978) 453 F. Supp. 1097. Next, the equally familiar case where a foreign government, by legislative or executive measures, requisitions the property of its own subjects for the public use of that country, even though the property may not be inside its territory at the time, provided again that it is ready to pay compensation for the hire of it, see *The Cristina*, (1938) 60 Ll.L. Rep. 147; [1938] A.C. 485. Or the case which sometimes occurs where a foreign government takes possession of the property of others—for safe custody—without confiscating it, see the 51 bars in *United States of America and Republic of France v. Dollfus Mieg & Cie S.A.*, [1952] A.C. 582; or the cases where there is a custodian of enemy property. In all those cases the sovereign is entitled to immunity.

But confiscation or expropriation by a foreign government of the property of aliens resident there—without compensation—is contrary to international law: and the foreign government has no immunity in respect of it, see the 13 bars in the *Dollfus Mieg* case, *The Rose Mary*, [1953] 1 W.L.R. 246 and the dissenting judgment of Mr. Justice White in *Banco Nacional de Cuba v. Sabbatino*, (1964) 376 U.S. 398: and the European cases he cites in *Alfred Dunhill v. Republic of Cuba*, (1976) 48 L. Ed. 2d 308, at p. 320.

In all those cases the action by the government comes “out of the blue” so as to injure the individual or deprive him of his property. Those cases have no application here because the transactions originated with the government itself. It was the initial trading step which enabled it to do what it did.

17. *The nature of the act here:* In the case of *Playa Larga* the origin of all that happened was a simple commercial transaction by which the government of Cuba agreed to carry sugar to Chile and deliver it to the Chilean importers. When the *Playa Larga* got to Valparaiso and failed or refused to deliver its cargo of sugar there—and afterwards refused at Callao—that was a plain repudiation and breach of that contract. 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. If it had been done for economic reasons—as, for instance, because the market price of sugar had risen sharply—it could not possibly have given rise to sovereign immunity. If it had been done for humanitarian reasons—as, for instance, because the Cuban government were short of sugar for their own people—or wanted to give it to the people of North Vietnam—equally it could not possibly have given rise to sovereign immunity. 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. This is supported by the decision itself in *Trendtex Trading Corporation v. Central Bank of Nigeria*, [1977] 1 Lloyd's Rep. 581; [1977] Q.B. 529 and the parallel decisions in Germany and the United States. No one suggested that the policy of the new Nigerian government afforded any answer. It is also supported by the

reasoning of four wise Judges of the United States Supreme Court in *Alfred Dunhill v. Republic of Cuba*, (1976) 48 L. Ed. 2d 308 at D, p. 312, who held that—

... the concept of an Act of State should not be extended to include the repudiation of a purely commercial obligation owned by a foreign sovereign or by one of its commercial instrumentalities.

That case concerned the U.S. doctrine of Act of State which is similar to our doctrine of sovereign immunity.

In the case of *Marble Islands* the origin of all that happened was a simple commercial transaction by which one of the state organisations of Cuba agreed to carry sugar to Chile and deliver it to the Chilean importers. The Cuban government induced its state organisation to repudiate that contract and ordered it to carry the sugar to North Vietnam. The Cuban government then bought the vessel and, by its conduct, adopted the repudiation as its own. It continued the repudiative act and went on to carry the sugar to North Vietnam and handed it to the people there. The nature of the transaction was again the repudiation of a purely commercial obligation. Its purpose was two-fold—to show its hostility to Chile and to help the people of Vietnam. But the purpose does not matter. The act by its very nature was an act of repudiating a binding commercial obligation. Such an act does not give rise to sovereign immunity.

Conclusion

I would not leave this important case without a word of tribute to Mr. Justice Robert Goff who tried the case (see [1977] 1 Lloyd's Rep. 536). Many of the points argued before him have not been re-argued before us: because the parties accepted his decision upon them. The one point on which I do differ from him is that he regards the diversion of the two cargoes as "essentially an act of foreign policy", whereas I regard it as essentially a repudiative breach of contract. Foreign policy afforded only the motive for the act. It did not affect the nature of it. When the government of a country enters into an ordinary trading transaction, it cannot afterwards be permitted to repudiate it and get out of its liabilities by saying that it did it out of high governmental policy or foreign policy or any other policy. It cannot come down like a god on to the stage—the *deus ex machina*—as if it had nothing to do with it beforehand. It started as a trader and must end as a trader. It can be sued in the Courts of law for its breaches of contract and for its wrongs just as any other trader can. It has no sovereign immunity. I would allow the appeal accordingly.

LORD JUSTICE WALLER

In these actions Mr. Justice Robert Goff on Jan. 27, 1977, held that the Republic of Cuba, as owner of *Congreso*, was entitled to invoke sovereign immunity (see [1977] 1 Lloyd's Rep. 536). The plaintiffs appeal against that decision on the grounds, among others, that the ship was a commercial ship on a commercial venture and accordingly is not entitled to immunity. The judgment of the learned Judge is reported in [1977] 1 Lloyd's Rep. 536 and [1978] Q.B. 500, and it is convenient to refer to parts of that to save repetition.

Save for one matter, I see no reason to differ from any of the provisional findings of fact made by the learned Judge and set out at pp. 539-544 and 506B-513D. I agree with the Judge's finding that the decision by the government that *Playa Larga* should leave Valparaiso was taken partly out of concern for the safety of the ship. We were invited at the hearing of this appeal to consider an award in arbitration pro-

ceedings between IANSA and CUBAZUCAR; I do not consider it would be proper to incorporate findings by arbitrators in proceedings where the parties were different. I am of opinion, however, that sufficient information is before us to say that the decision was also influenced by the deterioration of relations between Cuba and Chile which culminated in the termination of diplomatic relations within 24 hours.

I do not find it necessary to repeat here the details of the proceedings before Mr. Justice Robert Goff which are fully set out at pp. 544-546 and 513-517. This appeal relates to the second and third actions there mentioned.

Before dealing with the essential issues in this dispute, Mr. Justice Robert Goff had to consider whether or not he was bound by the decision in *The Porto Alexandre*, (1919) 1 L.L. Rep. 191; [1920] p. 30. The Privy Council in *The Philippine Admiral*, [1976] 1 Lloyd's Rep. 234; [1977] A.C. 373 considered the principles to be applied in actions in rem when sovereign immunity was claimed. Lord Cross quoted (at pp. 243 and 395) the well known passage from the speech of Lord Atkin in *The Cristina* (1938) 60 L.L. Rep. 147; [1938] A.C. 485 setting out the doctrine of sovereign immunity:

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

Lord Cross thereafter considered a number of other cases which I do not here repeat and set out his conclusion in the pages to which my Lord has already referred. Mr. Justice Robert Goff came to the conclusion that he was not bound by the decision in *The Porto Alexandre*. The contrary was not argued before this Court. I entirely agree with the reasoning of the learned Judge.

Were it not for this conclusion, the plaintiffs would have been in an impossible position because in *The Porto Alexandre* the Court of Appeal held that *The Parlement Belge* 5 P.D. 197 had decided that any ship owned by or in the possession of a foreign sovereign enjoys immunity in an English Court irrespective of the use to which it is put. The present case therefore presents an entirely new problem and one which did not arise in *The Philippine Admiral*. Mr. Justice Robert Goff stated it as follows at pp. 551 and 524:

. . . It was common ground between the parties that where a plaintiff proceeds by way of an action in rem against an ordinary trading ship, then even though such vessel is the property of a foreign sovereign, he cannot have the writ set aside on the ground of sovereign immunity where the claim arises out of the ordinary operations of the vessel as a trading vessel . . . It must also follow . . . that the position would be the same if the vessel arrested was an ordinary trading vessel in the ownership of a foreign sovereign and that vessel was the sister ship of another ordinary trading vessel in the same ownership out of whose ordinary trading operations the claim arose . . . But the question which arises in the present case and did not arise in *The Philippine Admiral*, is this. What if the claim in respect of which an ordinary trading vessel belonging to a foreign sovereign is arrested, arises as a

result of a governmental act of that sovereign? In those circumstances should the English Court set aside the proceedings on the ground that the foreign sovereign is impleaded?

Mr. Alexander submitted that when the sovereign engages in commerce or, as he put it, descends into the market place, and is the owner of a vessel which is an ordinary trading vessel no claim for immunity can arise and that it is inappropriate to examine the motive for the breach. Mr. Bingham, while accepting that the restrictive doctrine of sovereign immunity applies, submitted that the fundamental principle was to refuse jurisdiction where the defendant is a friendly foreign government and the dispute concerns the sovereign public acts of that government.

We have been referred to a very large number of decisions both in the United States of America which, like Britain, adopted until comparatively recently the absolute doctrine of sovereign immunity and from other countries in Europe which have for very many years adopted the restrictive doctrine of sovereign immunity. None of the decisions is directly in point. In no case has the commercial character of the vessel and the non-commercial sovereign act of the state been in such conflict as in the present case.

In *Rahimtoola v. Nizam of Hyderabad*, [1958] A.C. 379 at p. 422, my Lord, Lord Denning, when dealing with the resolution of conflict of authority, said:

. . . Faced with an inconsistency between two lines of cases the only course is to see which is more consistent with the principle. For this I go back as Mr. Justice Upjohn did to the words of that great international lawyer Sir Robert Phillimore in the *Charkieh* who, after a full review of the authorities, said this:

The object of international law in this as in other matters is not to work injustice, not to prevent the enforcement of a just demand but to substitute negotiations between governments, though they may be dilatory and the issue distant and uncertain for the ordinary use of courts of justice in cases where such use would lessen the dignity or embarrass the functions of the representatives of a foreign state.

Applying this principle it seems to me that at the present time sovereign immunity should not depend on whether a foreign government is impleaded directly or indirectly but rather on the nature of the dispute. Not on whether "conflicting rights have to be decided" but on the nature of the conflict. Is it properly cognizable by our courts or not? If the dispute brings into question for instance legislative 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.

Of the many cases cited which together show the approach of other countries to the question of sovereign immunity I only wish to quote two. The first is *Claim against the Empire of Iran*, case (1963) 45 I.L.R. 57 decided by the Federal Constitutional Court of the Federal Republic of Germany in April, 1963. Although the facts there were very different from the present case, the Court considered with great care the application of the doctrine of sovereign immunity in a number of different

countries. There are observations cited from decisions of Courts in different countries which are helpful in showing the approach made in those countries when distinguishing between *acta jure imperii* and *acta jure gestionis*. In Belgium the Court of Appeal of Ghent in 1879 said:

. . . When however the state having regard to the needs of the community does not limit itself to its political role but acquires and owns property, concludes contracts, becomes a creditor or debtor or even engages in trade, it is not acting in the sphere of public authority but as a civil or private person.

And the Austrian Supreme Court asserted jurisdiction over Turkey in respect of a claim for payment for certain building works carried out at the Turkish Embassy in Vienna and said:

In private law actions which in no way touched on the sovereignty of the state claims against the foreign state also had to be subject to courts of the state where the business was situated.

And in another Austrian case also cited the Court, following the decision just quoted, examined—

. . . Whether the plaintiff is claiming against the sued state on the strength to a private law relationship or one in its sovereign domain. In order to decide whether a private or sovereign act was involved the act (which was carried out by organs of the state) is to be judged not by its aim or its purpose; whether an act of one or the other sort is involved is to be determined from the nature of the legal proceedings i.e. from the inherent internal character of the transaction or from the legal relations created.

And a quotation in relation to the Greek Courts was:

. . . State immunity is limited to activities which a state engages in as a sovereign political power and does not extend to matters which arise from activities—such as the administration of property—which in no way concern sovereignty.

And later in the judgment the Court said this:

. . . As a means for determining the distinction between acts *jure imperii* and *jure gestionis* one should rather refer to the nature of the state transaction or the resulting legal relationships and not to the motive or purpose of the state activity. It thus depends on whether the foreign state has acted in exercise of its sovereign authority, that is in public law or like a private person, that is in private law.

And lastly:

National law can only be implied to distinguish between a sovereign and non-sovereign activity of a foreign state in so far as it cannot exclude from the sovereign sphere and thus from immunity such state dealings as belong to the field of state authority in the narrow and proper sense according to the predominantly held view of states.

These quotations do lend support to the argument that the act which causes the claim has to be examined and that the claim for sovereign immunity is defeated when the whole activity is commercial and the act is in no way concerned with sovereignty.

The second case to which I would refer is *The Victory Transport*, (1964) 336 Fed. Rep. 354 heard in the United States Court of Appeals 2nd Circuit. In giving judgment Mr. Justice Smith said this:

The purpose of the restrictive theory of sovereign immunity is to try to accommodate the interest of individuals doing business with foreign governments in having their legal rights determined by the courts with the interest of foreign governments in being free to perform political acts without undergoing the embarrassment or hindrance of defending the propriety of such acts before foreign courts.

At that time, which was 1964, the United States was moving from a position of absolute immunity to a position of restrictive immunity.

Our attention was also called to the International Convention for the Unification of certain Rules concerning the Immunity of State Owned Ships (the Brussels Convention). Although the United Kingdom was party to this Convention and signed in 1926, the Convention had not been ratified at the time of the events in the present case. However it was cited to us as showing the state of international law at the relevant time. By art. 1:

Seagoing ships owned or operated by states, cargoes owned by them and cargoes and passengers carried on state owned ships as well as the states which own or operate such ships and own such cargoes shall be subject as regards claims in respect of the operation of such ships or in respect of the carriage of such cargoes to the same rules of liability and the same obligations as those applicable in the case of privately owned ships, cargoes and equipment.

And by art. 3(1):

The provisions of the two preceding Articles shall not apply to ships of war, state owned yachts, patrol vessels, hospital ships, fleet auxiliaries, supply ships and other vessels owned or operated by a state and employed exclusively at the time when the cause of action arises on government and non-commercial service and such ships shall not be subject to seizure, arrest or detention by any legal process nor to any proceedings in rem.

It was said on the one hand that these two articles were evidence of international law and supported the argument that there was no sovereign immunity for a merchant vessel. On the other hand, the provisions of art. 3 show that the signatories intended to preserve sovereign immunity in proper cases. Mr. Bingham also relied on the writings of foreign lawyers to support the view that the Convention did not exclude sovereign immunity in a proper case. See also Professor O'Connell's article on the American statute of 1976 in which he argued that an exception for *jure imperii* must be implied to that statute.

We have also had for our consideration a number of affidavits of foreign lawyers which I have found of considerable assistance in considering the many international authorities cited to us. These opinions emphasise that the Court will not grant immunity where a commercial vessel involved in a private law activity is subject to a private law claim, e.g. collision damage. But they do suggest that if the claim for sovereign immunity is founded on an act said to be "*jure imperii*" then the nature of the act must be examined.

The background to the Republic of Cuba's case is that prior to September, 1973, they had friendly commercial and diplomatic relations with "the democratically elected government of Chile" but that according to the then Cuban ambassador to Chile, on Sept. 11, 1973, the military junta overthrew by force the government of Chile and publicly announced that it had severed diplomatic relations with the gov-

ernment of Cuba. It was on Sept. 11 that *Playa Larga* was ordered to leave Valparaiso and on Sept. 12 that *Marble Islands* was ordered to go to Peru. Both vessels arrived at the Peruvian port of Callao on Sept. 15. Both ships refused to unload there, *Playa Larga* left on Sept. 20 for Cuba and *Marble Islands* left on Sept. 27, and ultimately arrived at Haiphong, Vietnam, on Nov. 6. In Cuba, Law 1256 was enacted on Sept. 27 but expressed to take effect from Sept. 11. On Oct. 16 the Republic of Cuba became the owner of *Marble Islands*. Both cargoes had been sold or otherwise disposed of.

The claim in respect of the cargo on *Marble Islands* is in tort, being damages for detention or conversion or breach of duty. There was no contractual relationship between the Republic of Cuba and the plaintiffs. The claim in respect of the cargo on the *Playa Larga* is in contract and tort, the claim in tort being the same as in the case of the *Marble Islands* and the breach of contract being breach of the contract in the bill of lading which was signed by the master. Although there are differences of detail between the case of *Marble Islands* and that of *Playa Larga* it is clear, in my opinion, that in each case the cause of the failure to deliver was the reaction of the Republic of Cuba to the coup d'état in Chile. Our attention has been called to differences between the affidavits filed on each side but none of these differences is sufficient to offset the basic facts which I have set out above.

Mr. Alexander, in support of his submission that the Republic of Cuba is to be judged as an operator of commercial vessels for commercial purposes emphasised that it has a nationalised corporation MAMBISA which owns ships and a state owned enterprise CUBAZUCAR for the export of sugar. It also owns merchant ships other than through MAMBISA. The Republic is therefore heavily involved in commerce and accordingly when action of the Republic prevents commercial contracts being fulfilled either because of tortious interference or because of breach of contract no further facts can be proved to establish sovereign immunity. If there is any defence it should be raised at trial.

Mr. Bingham submits that the Court must look at the basic facts which have prevented the cargoes from being delivered to IANSA. They do not merely show a colourable case of state interference. It is not a mere assertion. It is at the very least an arguable case (see Lord Somervell at p. 410 in *Rahimtoola* and see also *Juan Ysmael & Co. Inc. v. Republic of Indonesia*, [1954] 2 Lloyd's Rep. 175; [1955] A.C. 72). It is essentially a political act of foreign policy.

It appears that from the many authorities cited that not every country draws the line between *acta jure imperii* and *acta jure gestionis* in the same place, but I draw the inference from the passages which are quoted in the *Empire of Iran* that one way of posing the question is to ask whether the state has acted in exercise of its sovereign authority or as a private person. And if there is borne in mind the passage quoted above from *The Victory Transport* the Republic of Cuba clearly has an interest in being free to perform political acts without undergoing the embarrassment of hindrance of defending the propriety of such acts before foreign Courts. I do not read the affidavits of foreign lawyers as doing anything to dispel this approach; on the contrary some, at any rate, give such a view clear support.

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] 1 Lloyd's Rep. 581; [1977] Q.B. 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] A.C. 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.

It is submitted by the appellants that sovereign immunity will not be granted if the act on which the claim is based is contrary to international law, i.e. either confiscatory without compensation or discriminatory. I entirely agree with Mr. Justice Robert Goff at pp. 556 and 531F-532F and I do not wish to add anything on the point.

The final point taken by Mr. Alexander is that the Republic of Cuba is not in possession of *Congreso*. Again I entirely accept the judgment of Mr. Justice Robert Goff on this point at pp. 550-551 and 522E-523G. I would only add that the view which he has expressed is in accordance with that of Lord Wright in *The Cristina* (at pp. 164-165 and 507) and the Privy Council in *The Philippine Admiral* (at pp. 249 and 404). I would dismiss this appeal.

[Order: Appeal formally dismissed with costs. Ancillary matters to be drawn up by Counsel. Liberty to apply. Application for leave to appeal to the House of Lords granted.]

T. UNITED STATES OF AMERICA

1. *Yessenin-Volpin v. Novosti Press Agency*. DECISION BY THE DISTRICT COURT, S.D. NEW YORK ON 23 JANUARY 1978⁷⁴

The judgement:

Plaintiff Alexander S. Yessenin-Volpin, "a persistent defender of the civil and human liberties of the Russian people," Complaint ¶ 5, commenced this action in New York State Supreme Court seeking damages for libel against defendants TASS Agency ("TASS"), Novosti Press Agency ("Novosti") and The Daily World, a newspaper of the Communist Party of the United States. By petition filed February 9, 1977, TASS removed the action to this Court. Defendants TASS and Novosti now move for the dismissal of this action on the grounds: (1) that they are immune from the jurisdiction of this Court with respect to the acts alleged in the complaint under the Foreign Sovereign Immunities Act of 1976 ("Immunities Act"), 28 U.S.C. §§ 1602-11; (2) that the Court lacks personal jurisdiction over the defendants; and (3) that the complaint fails to state a cause of action against these defendants. For the reasons set forth below, the Court concludes that TASS and Novosti are entitled to

⁷⁴ *Federal Supplement*, vol. 443 (1978), p. 849.

claim sovereign immunity with respect to the claims against them in this action and that the case against them must therefore be dismissed for want of jurisdiction.

Immunities Act

The Immunities Act⁷⁵ establishes a comprehensive procedure whereby a plaintiff may bring a foreign state or one of its political subdivisions, agencies or instrumentalities before an American court, either federal or state, obtain a ruling on the sovereign immunity of that entity, and, if immunity is found not to exist, secure an adjudication and satisfaction of its claims. The Act's central feature is its specification of categories of actions for which foreign states are not entitled to claim the sovereign immunity from American court jurisdiction otherwise granted to such states. These exceptions are contained not in the sections of the Act which describe the grounds on which jurisdiction may be obtained, however, but are phrased as substantive acts for which foreign states may be found liable by American courts. This effects an identity between substance and procedure in the Act which means that a court faced with a claim of immunity from jurisdiction must engage ultimately in a close examination of the underlying cause of action in order to decide whether the plaintiff may obtain jurisdiction over the defendant.

The Court's attention must first focus, however, on whether the entity sued may be classified as a "foreign state" within the meaning of 28 U.S.C. § 1603 and thus invoke in any set of circumstances the protection of the Immunities Act. In this case both TASS and Novosti have claimed such protection.

Status as a 'Foreign State'

TASS: There seems to be little doubt concerning TASS's status. Anatoliy F. Dobrynin, the Ambassador of the U.S.S.R. to the United States, has certified to the Court that TASS, whose full name is the "Telegraph Agency of the Soviet Union of

⁷⁵ The plaintiff argues that the Immunities Act, which "became effective only subsequent to the time this action was commenced and long after the accrual of plaintiff's causes of actions of claims," Memorandum 2, should not be applied to this case. This contention is without merit. The Supreme Court discussed the considerations which should weigh in an evaluation of the application of a new statute: "a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be 'the unequivocal and inflexible import of the terms and the manifest intention of the legislature.'" *Greene v. United States*, 376 U.S. 149, 160, 84 S.Ct. 615, 621, 11 L.Ed.2d 576 (1964), quoting *Union Pac. R.R. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199, 34 S.Ct. 101, 58 L.Ed. 179 (1913). This Court concludes that applying the Immunities Act to the instant case will give effect to the congressional intent and will not interfere with the antecedent rights of the parties. The preamble to the statute itself states: "Claims of foreign states to immunity *should henceforth be decided* by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. § 1602 (emphasis added). Moreover, the Act does not purport to create new rights of immunity but to "codify the so-called 'restrictive' principle of sovereign immunity . . . [which] was adopted by the Department of State in 1952 and has been followed by the courts and the executive branch ever since." H.R.Rep.No.94-1487, 94th Cong. 2d Sess. 7, reprinted in [1976] *U.S.Code Cong. & Admin.News* 6604, 6605. Indeed, insofar as the Immunities Act alters the rights of parties, it does so by expanding the ability of plaintiffs to obtain satisfaction of judgments against foreign states. *Id.* at 8.

Finally, the Department of State itself, while not taking a position on the claims of sovereign immunity, has stated that it "concurs in the position taken by the attorneys for Novosti and TASS that the Foreign Sovereign Immunities Act applies in this case, even though the actions were commenced before January 21, 1977." Statement of Department of State, dated May 16, 1977, appended as Exhibit I to Reply Affidavit of Martin Popper, sworn to May 24, 1977.

the USSR Council of Ministers," is "the organ of the Soviet State, that is of the Union of Soviet Socialist Republics." Certificate dated February 4, 1977. The plaintiff admits that TASS comes within the definition of "foreign state" in section 1603. Memorandum 4. Thus, there is no dispute: TASS is entitled to claim the protection of the Immunities Act.

Novosti: The plaintiff is unwilling, however, to concede the same status to *Novosti*. *Novosti* argues that it must be classified as an "agency or instrumentality of a foreign state" (and thus within the more general definition of "foreign state"), since it meets the three criteria set forth in section 1603(b). The plaintiff agrees on two of the three criteria: *Novosti* is "a separate legal person" within the meaning of section 1603(b)(1), since its "Statute" or charter clearly establishes its existence as a separate "juridical person" which opens bank accounts, acquires and alienates property and concludes contracts in its own name. *Novosti* Press Agency Statute ("Novosti Statute") § III(8), appended as Exhibit I to Affidavit of Martin Popper, sworn to March 14, 1977 ("Popper Affidavit"). The plaintiff also agrees that *Novosti* is not a citizen of any state of this country, as set forth in section 1603(b)(3). Thus, the dispute over the classification of *Novosti* must focus on the last of the three provisions, which requires that an "agency or instrumentality of a foreign state" be an entity

which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof

28 U.S.C. § 1603(b)(2).

Unfortunately, this definition, which seems designed to establish the degree of the foreign state's identification with the entity under consideration, is ill-suited to concepts which exist in socialist states such as the Soviet Union.

Novosti, as the *Novosti* Statute sets forth, is "an information agency of Soviet public organizations . . . operating under Articles 125 and 126 of the Constitution of the U.S.S.R." *Novosti* Statute § I(1). These constitutional articles guarantee freedom of the press to the citizens of the U.S.S.R. through their control of communications facilities (Art. 125) and also guarantee to the citizens "the right to unite in mass organizations" such as *Novosti*. (Art. 126). *Novosti*'s organizational structure consists of three bodies of ascending size and descending responsibility which govern the organization. These bodies are made up of delegates elected from *Novosti*'s "Sponsors": the Union of Journalists of the U.S.S.R., the Union of Writers of the U.S.S.R., the Union of Soviet Societies of Friendship and Cultural Relations with Foreign Countries and the U.S.S.R. *Znanie* Society. *Novosti* Statute § II(4). The stated purposes of *Novosti* include, *inter alia*, entering into contracts with foreign-owned media to supply them with *Novosti* material for an appropriate fee, *id* § I(2)(b), and exchanging material with Soviet and foreign news agencies, organs of the press, publishing houses, and other agencies on the basis of reciprocity. *Id.* § I(2)(c).

In accomplishing these purposes *Novosti* is provided by the state with the free use of buildings and structures, transmission facilities, communications, furniture, and equipment worth a total of 2,941,500 roubles. Notarized Statement of L. Bogdanov, dated March 3, 1977 ("Bogdanov Statement"); Notarized Statement of I. Kolganov, dated May 24, 1977 ("Kolganov Statement"). This use is "in accordance with Article 6 of the Constitution of the USSR," *id.*, which states:

The land, its mineral wealth, waters, forests, the factories and mines, rail, water and air transport facilities, the banks, means of communication, large state-organised agricultural enterprises (state farms, machine and tractor stations, etc.), as well as municipal enterprises and the bulk of the dwelling-houses in the cities and industrial localities, are state property, that is, belong to the whole people.

At the same time, Novosti has "its own fixed assets," valued on January 1, 1977 at 1,719,600 roubles. Bogdanov Statement. The remaining property "provided for the Novosti Press Agency by the State" is leased from the state for a yearly rent of 460,000 roubles. Kolganov Statement. Novosti's relation to the state is further defined by its charter provision which states that "[n]o Soviet state organ bears responsibility for the business activities and financial obligations or any other actions of the Agency." Novosti Statute § III(10).

The plaintiff argues that this latter provision "conclusively shows" that Novosti is not an agency or instrumentality of the U.S.S.R. and contends that Novosti cannot "bootstrap the 'free use of real estate' into an 'ownership interest.'" Memorandum 6. Such arguments misconstrue the nature of legal, social and economic organization in the U.S.S.R., however. Admittedly, the Immunities Act, by phrasing its test for the involvement of a foreign state in an independent entity in terms of "ownership," does not simplify construction of the Act in its application to socialist entities. Harold J. Berman, in his book *Justice in the U.S.S.R.*, discusses this problem in the context of defining the nature of ownership in a "state economic enterprise":⁷⁶

Ownership is defined in Soviet law, as in European law generally, as including the right of possession, use, and disposition of the thing which is owned. What the state owns it has the right to possess, use, and dispose of. But what a state economic enterprise possesses, uses, and disposes of—it does not own! May one speak, then, of a "right" of possession, use, and disposition in the state economic enterprise? Or does not the enterprise merely exercise certain economic-administrative functions delegated to it by the state?

H. Berman, *Justice in the U.S.S.R.* 115 (1963). The state economic enterprise, like the voluntary association, is self-administering, *id.* at 116, and is financially responsible for its obligations. *Id.* at 111. It is a juridical person, which, "having received from the State for its exclusive use both equipment and capital, proceeds to operate

⁷⁶ Novosti is not such a "state economic enterprise" but a voluntary association organized under Article 126 of the U.S.S.R. Constitution, as described above. Nevertheless, the two types of organizations seem to have many attributes in common, as described in the text. Furthermore, George C. Guins, in his book on the Soviet legal system, concludes that there is no real difference between the other economic enterprises and "voluntary associations" organized pursuant to Article 126:

Even the so-called voluntary associations, tradeunions, youth organizations, sport and defense clubs, cultural, technical, and scientific societies which, according to our usual conception must be the most independent in their activities, are in fact directed by the Communist Party and are, the same as all other entities, at the service of the state.

No matter to which group any legal entity belongs, it is always subject to government control and directives and performs special functions inspired by the highest organs of the state. G. Guins, *Soviet Law and Soviet Society* 97 (1954) ("Guins").

on its own, with its own financial accounting, bank account, credit facilities, and, finally, with the right to make a profit." *Id.* at 110. However, self-administration, while significant to the life of the enterprise, is not the same as ownership, as Ber- man points out:

Administration in the Soviet sense is not merely direction or supervision, but in- volves all aspects of control, including the realization of that control. *It is thus something less than ownership*, but something more than giving orders.

Id. at 116 (emphasis added).

Thus, if the concept of "ownership" is to be applied in this situation, it would have to be said that the state is the "owner" both of the state economic enterprise and of organizations such as Novosti. Guins, in describing all legal entities in the U.S.S.R. including voluntary associations organized under Article 126 of the Consti- tution of the U.S.S.R., states:

With a few insignificant exceptions, the socialist state is the sole owner of all means of production and is a trade monopolist. It is evident that all legal entities in the Soviet Union are government enterprises though organized on a commercial basis. . . .

Guins, *supra* foot-note 76, at 96.

Thus, whether one relies on the fact that more than 63% of the property over which Novosti exercises the rights of possession and use is actually "owned" by the state, or whether one looks to the essentially public nature of all organizations such as Novosti in the Soviet Union, one must conclude that Novosti is either an organ of the U.S.S.R. or "owned" by the U.S.S.R. or its political subdivisions. As Stalin stated,

The foundation of our system is public ownership, just as the foundation of capi- talism is private ownership. Whereas the capitalists have proclaimed private prop- erty rights to be sacred and inviolable, achieving in their time the strengthening of the capitalist system, we Communists have all the more reason to proclaim public ownership sacred and inviolable, so as to strengthen thereby the new socialist forms of economy in all fields of production and trade.

Quoted in Guins, supra foot-note 76, at 106.⁷⁷

Furthermore, the Court has before it Ambassador Dobrynin's statement that, at the time that it received notice of this action, "Novosti was an instrumentality of the Union of Soviet Socialist Republics" and that it continues to have "the same status at the present time." Claim of Sovereign Immunity by Ambassador Dobrynin, dated March 11, 1977, appended as Exhibit G to Popper Affidavit. The persuasive quality of such evidence was discussed in *Krajina v. The Tass Agency*, [1949] 2 All E.R. 274 (C.A.), in which the English Court of Appeal found TASS entitled to sovereign immunity largely on the statement of the Soviet Ambassador concerning the status of the agency under Soviet law. Two of the three judges found this evidence conclusive

⁷⁷ This principle is embodied in Article 4 of the Constitution of the U.S.S.R.:

The economic foundation of the U.S.S.R. is the socialist system of economy and the so- cialist ownership of the instruments and means of production, firmly established as a result of abolishing the capitalist system of economy, the private ownership of the instruments and means of production and the exploitation of man by man.

on the relation of TASS to the state, *id.* at 276 (Cohen, L.J.), 285 (Singleton, L.J.); the third stated that "the certificate of [the Soviet] ambassador in this country is not conclusive of the matter, though, no doubt, it is evidence of very high evidential value, and, in a matter of this kind, I think it is probably the best kind of evidence that can be procured." *Id.* at 281 (Tucker, L.J.). Thus, in sum, the Court concludes that Novosti fulfills all aspects of the definition of an "agency or instrumentality of a foreign state" set forth in 28 U.S.C. § 1603(b) and is thus entitled to invoke sovereign immunity in this Court.

Immunity

The validity of a claim of immunity is predicated, as was discussed above, upon the Court's classification of the cause of action alleged: if it comes within one of the exceptions to immunity set out in 28 U.S.C. § 1605, then immunity is not appropriate and the action must proceed. In the instant action, the plaintiff has alleged four acts of libel, two against Novosti and two against TASS. Specifically, Novosti is charged in the first and second causes of action with having written articles which allegedly defamed the plaintiff and with having caused those articles to be published in February 1976 in two periodicals, *Sowjetunion Heute* and *Krasnaya Zvezda*, both of which are alleged to be distributed in the United States. Similarly, TASS is said to have written two allegedly defamatory articles and caused them to be published in June 1976 in two other publications, *Izvestia* and *Sovietskaya Russiya*, likewise alleged to be circulated to the public in the United States.

Two provisions of section 1605 could be construed to apply to these causes of action. The first, subsection (a)(5), was intended to cover noncommercial torts which were not covered by the other subsection, (a)(2). H.R.Rep.No.94-1487, 94th Cong., 2d Sess. 20-21, reprinted in [1976] *U.S. Code Cong. & Admin.News* pp. 6604, 6619 ("House Report"). Application of this provision would be immediately fatal to the plaintiff's assertion of jurisdiction, however, for it specifically excludes (*i.e.*, reinstates a grant of immunity for) "any claim arising out of . . . libel." 28 U.S.C. § 1605(a)(5)(B). Thus, immunity must be granted to TASS and Novosti unless the Court finds that the acts alleged are within the scope of subsection (a)(2).

That subsection states that a foreign state shall not be immune in any case

in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States

The plaintiff seems to rely on the third of these three possible bases of jurisdiction—an act committed outside the United States which has a direct effect inside the United States. Memorandum 8. Indeed, that provision seems to be the only relevant basis. With respect to the first possible ground, this action is not based on any commercial activity carried on *inside* the United States by Novosti or TASS since the allegedly offending articles were published outside the country and sent into the United States by means wholly outside the control of either TASS or Novosti. Similarly, the second ground is inapposite since the "acts" alleged—the writing and publication of the articles—were not performed in the United States. The language of the third provision seems to track that of the complaint: acts performed outside the United States (here, writing and publication of the articles) which caused a direct ef-

fect in the United States (*e.g.*, injury to the good name and reputation of the plaintiff).

One essential requirement remains to be established however: the act must be “in connection with a commercial activity of the foreign state.” 28 U.S.C. § 1605(a)(2). In attempting to demonstrate that this requirement has been fulfilled, the plaintiff cites section 1(2) of the Novosti Statute discussed above, as exhaustively listing Novosti’s commercial activities. Thus, the plaintiff’s argument in this regard seems to be based on the unstated premise that an entity which engages in commercial activity is a commercial *entity* and thus is not entitled to claim sovereign immunity. The Immunities Act does not embody such a principle, however. Rather, it clearly contemplates that a given entity may at some times engage in commercial activities, on which it would not be immune, and at other times take actions “whose essential nature is public or governmental,” on which it would be immune. *See* House Report 16. For example, a foreign government, otherwise clearly entitled to immunity, would lose that immunity with respect to its sale of a product to an American citizen. *See id.* Thus, the inquiry under subsection (a)(2) must focus on the specific activity at issue and determine whether it may be characterized as “commercial.”

The Immunities Act states that the term “commercial activity” means

either a regular course of commercial conduct or a particular commercial transaction or act. 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.

28 U.S.C. § 1603(d). The House Report amplifies this definition: “commercial activity” encompasses

a broad spectrum of endeavor, from an individual commercial transaction or act to a regular course of commercial conduct. A “regular course of commercial conduct” includes the carrying on of a commercial enterprise such as a mineral extraction company, an airline or a state trading corporation. Certainly, if an activity is customarily carried on for profit, its commercial nature could readily be assumed. At the other end of the spectrum, a single contract, if of the same character as a contract which might be made by a private person, could constitute a “particular transaction or act.”

House Report 16; U.S.Code Cong. & Admin.News 1976, p. 6614. As the Report goes on to state, “it is the essentially commercial nature of an activity or transaction that is critical.” *Id.*; U.S.Code Cong. & Admin.News 1976, p. 6615.

There is no doubt that Novosti does engage in commercial activity. For example, it sells articles to foreign media.⁷⁸ The relevant issue in this case, however, is not whether Novosti or TASS engage in commercial activities but whether their alleged libels were “in connection with a commercial activity.” The Court concludes that they were not.

⁷⁸ There was no similar evidence presented with respect to TASS’s activities, although a TASS statute, which appears to resemble that of Novosti, seems to exist. *See Krajina v. The Tass Agency, supra*, [1949] 2 All E.R. at 276–77 (Cohen, L.J.). For the purposes of this discussion, however, it is irrelevant whether either TASS or Novosti engages in some or even substantial commercial activity since the Court concludes that the acts alleged to have injured the plaintiff in this case were not performed in connection with a commercial activity.

The four publications in which the alleged libels appeared are all publications of the U.S.S.R. itself. The masthead of *Sowjetunion Heute* identifies its publisher as "Press Department of the Embassy of the U.S.S.R. [in West Germany] in collaboration with the press agency Novosti." Popper Affidavit Exh. A (as translated). *Krasnaya Zvezda* is identified as the "Central Organ of the Ministry of Defense of the USSR." *Id.* Exh. B (as translated). *Izvestia*, somewhat better known in the West, is identified as the "Organ of the Soviets of Working People's Deputies," published by "The Presidium of the Supreme Soviet of the USSR." *Id.* Exh. C (as translated). Finally, *Sovetskaya Rossiya* (or *Russiya*) describes itself as the "Organ of the Central Committee of the Communist Party of the Soviet Union, The Supreme Soviet of the Russian Federative Socialist Republic [RSFSR] and the Council of Ministers of the RSFSR." *Id.* Exh. D (as translated). Thus, by collaborating in the publication of stories in these journals, Novosti, as well as TASS, was engaged not in "commercial activity" but in acts of intra-governmental cooperation of a type which apparently constitutes much of Novosti's (and presumably more of TASS's) activity. See Novosti Statute § I(2)(c). Such action was not in connection with a contract or other arrangement with a nongovernmental or foreign party, which activity would be found commercial under most circumstances. Rather, it was one instance of a cooperative arrangement with a governmental agency and thus cannot be characterized either as "a regular course of commercial conduct" or as "a particular commercial transaction or act." 28 U.S.C. § 1603(d).

Furthermore, the net result of this cooperative relationship was the publication of articles which, under the circumstances, must be regarded as official commentary of the Soviet government. Whether or not the Court admires the tone of such commentary, it cannot be gainsaid that it constitutes "an activity whose essential nature is public or governmental." To reach around the various organs of the Soviet government which actually published the alleged libels and subject to this Court's jurisdiction a news agency whose ownership by and identification with the Soviet state has been demonstrated, as in the case of Novosti, or admitted, as with TASS, would contravene the spirit of sovereign immunity as well as the letter of the Immunities Act.

The Court therefore concludes that Novosti and TASS are immune under the Immunities Act from this Court's jurisdiction on the claims alleged against them by the plaintiff in this action. Accordingly, the complaint is dismissed as against Novosti and TASS.

So ordered.

2. *Iptrade International v. Federal Republic of Nigeria*. DECISION BY THE DISTRICT COURT, DISTRICT OF COLUMBIA ON 25 SEPTEMBER 1978⁷⁹

The judgement:

On June 6, 1978, Petitioner Iptrade International, S.A. (Iptrade) filed a Petition to Confirm Arbitration Award under the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 *et seq.* Jurisdiction against Respondent, the Federal Republic of Nigeria, is based upon the

⁷⁹ *Federal Supplement*, vol. 465 (1978), p. 824.

Foreign Sovereign Immunities Act, 28 U.S.C. § 1330(a), and venue lies in the District of Columbia under 9 U.S.C. § 204 and 28 U.S.C. 1391(f)(4).

On March 17, 1975 Nigeria and Iptrade entered into a written commercial contract for the purchase and sale of cement. By entering into the contract, Nigeria expressly agreed that the construction, validity, and performance of the contract would be governed by the laws of Switzerland and that any disputes arising under the contract would be submitted to arbitration by the International Chamber of Commerce, Paris, France. During 1975 and 1976 various disputes arose with respect to the contract and on May 12, 1976, Petitioner filed a demand for arbitration with the Secretariat of the Court of Arbitration of the International Chamber of Commerce. Thereafter, an arbitration proceeding was conducted in which the Federal Republic of Nigeria refused to participate, relying on the legal defense of sovereign immunity. The arbitrator, Dr. Max Brunner of Basel, Switzerland, found that under Swiss law Respondent was bound by the obligations it voluntarily entered into and proceeded with the arbitration. On April 25, 1978, the arbitrator issued his written decision (the Award), granting some of Petitioner's claims but rejecting others. Under Swiss law the Award of April 25, 1978 is final and binding on Respondent. Petitioner has made demand upon Respondent for payment pursuant to the terms of the Award but Respondent has not made such payment.

The Award is subject to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards to which the United States, France, Nigeria and Switzerland are each signatories. Article V of the Convention specifies the only grounds on which recognition and enforcement of a foreign arbitration award may be refused. 9 U.S.C. § 201. None of the enumerated grounds exists in the instant case. The Foreign Sovereign Immunities Act, which codifies existing law with respect to suits against foreign states in United States courts, gives federal district courts original jurisdiction against a foreign state as to "any claim for relief *in personam* with respect to which the foreign state is not entitled to immunity under sections 1605-1607 of this title or any applicable international agreement." 28 U.S.C. § 1330. The Act specifies that there is no immunity 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." 28 U.S.C. § 1605(a)(1). The legislative history of this section expressly states that an agreement to arbitrate or to submit to the laws of another country constitutes an implicit waiver. H. Rep. No. 94-1487, 94th Cong., 2d Sess., reprinted in [1976] U.S.Code Cong. & Admin.News, at 6604, 6617. Consequently, Respondent's agreement to adjudicate all disputes arising under the contract in accordance with Swiss law and by arbitration under International Chamber of Commerce Rules constitutes a waiver of sovereign immunity under the Act. This waiver cannot be revoked by a unilateral withdrawal.

Service of the Petition to Confirm Arbitration Award was made pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1608(a), and by Order of this Court dated June 7, 1978. That Court Order fixed August 23, 1978 as the date by which Respondent was directed to appear, plead, answer or otherwise move with respect to the petition, or in default thereof, have the foreign arbitral award confirmed. There has been return receipt from the service on the Embassy of the Federal Republic of Nigeria, 2201 M Street, N.W., Washington, D. C., made pursuant to this Court's Order of June 7, 1978, but no return receipt from the service made upon the Honor-

able Commissioner of External Affairs, Federal Republic of Nigeria, Lagos, Nigeria. According to the affidavit of Carl F. Salans, filed with the Court, Respondent has actual notice of the pendency of this proceeding.

No judgment by default shall be entered by a federal district court against a foreign state unless the claimant establishes his right to relief by evidence satisfactory to the Court. 28 U.S.C. § 1608(e). In the instant case, Petitioner is entitled to such relief because the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and of the Foreign Sovereign Immunities Act are satisfied.

3. *Carey v. National Oil Corporation*. DECISION BY THE COURT OF APPEALS, SECOND CIRCUIT ON 24 JANUARY 1979⁸⁰

The judgement:

This is a contract case which involves several international transactions and attempts to bring into play issues of international concern. The case was dismissed on jurisdictional grounds in the United States District Court for the Southern District of New York, Kevin T. Duffy, *Judge*. For the reasons set out below, we affirm.

The facts may be stated briefly as follows:

Appellant New England Petroleum Corporation ("NEPCO") is a New York company which sells residual fuel oil in the eastern United States. One of the sources for this residual oil is a refinery company located in the Bahamas, the Grand Bahama Petroleum Company, Ltd. ("PETCO"). PETCO is a wholly-owned subsidiary of NEPCO. Appellant Carey is an assignee of PETCO.

In 1968, PETCO entered into a long-term contract to purchase crude oil from Chevron Oil Trading ("COT"), a branch of a petroleum company which held 50 per cent of an oil concession in Libya. The oil obtained under this contract was to be refined and sold to NEPCO. Libyan crude oil was particularly attractive to NEPCO because its low sulphur content aided compliance with United States air pollution standards.

In September, 1973 the Socialist People's Libyan Arab Jamahiriya ("Libya") nationalized several foreign-owned oil concessions in that country, including that of the company of which COT was a part. This caused COT to suspend all crude oil deliveries to PETCO and to terminate its contract with PETCO.

In order to obtain the oil supplies it needed, PETCO entered into new contracts in September, 1973 with the National Oil Corporation ("NOC"), a company wholly owned by the Libyan government. These new contracts were at a substantially higher price than the canceled one with COT.

The following month, Libya imposed an embargo on oil exports to the United States, the Netherlands and the Bahamas. Accordingly, NOC canceled its contracts with PETCO. World oil prices rose and available supplies declined. NOC then accepted bids on new contracts to supersede the ones effective until that time. In order to fulfill its contracts for the sale of refined oil in the United States, PETCO entered into a new contract with NOC for crude oil to be refined in Italy (during the em-

⁸⁰ *Federal Reporter*, vol. 592 (2d) (1979), p. 673.

bargo) and the Bahamas. In January, 1974 the contract was executed, calling for a price per barrel of oil more than three times the previous price.

In December, 1973 another subsidiary of NEPCO, Antco Shipping Company, agreed to charter two tankers owned by a Libyan government-owned entity. NEPCO claims that these were chartered at excessive rates as a condition of delivering oil to PETCO.

This suit attempts to recover damages for NOC's failure to deliver oil under the September, 1973 contract, for breaches of the 1974 contract, and for overcharges on the charter parties. The damages sought total approximately \$1.6 billion. Because we find that this court has no jurisdiction in this case, we do not reach the merits of these claims.

Foreign states⁸¹ are immune from suit in the courts of the United States for many of their acts, and thus federal courts have no jurisdiction in disputes involving such public acts.⁸² Specific exceptions to this general grant of immunity were carefully mapped out by Congress in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1330 and §§ 1602-11.

Appellants claim, most relevantly, that the events involved in this case come within the exception to immunity which allows U.S. jurisdiction where a claim is based on "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2).⁸³ We find no direct effect in the United States here.

We assume that Congress chose the language in the act purposefully.⁸⁴ Section 1605(a)(2) speaks of acts which have a "direct" effect in the United States. The legislative history of this section⁸⁵ makes clear that it embodies the standard set out in *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945), that in order to satisfy due process requirements, a defendant over whom jurisdiction is to be exercised must have "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantive justice.'" That standard has not been met here.

⁸¹ National Oil Corporation ("NOC"), as well as Libya, is considered a "foreign state" under 28 U.S.C. § 1603(a) and (b)(2), since NOC is a corporation "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof."

⁸² See 28 U.S.C. § 1604; Legislative History of the Foreign Sovereign Immunities Act, 1976 U.S.Code Cong. & Admin.News 6605-07.

⁸³ 28 U.S.C. § 1605 provides:

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

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

⁸⁴ See *Phillips v. United States*, 346 F.2d 999 (2d Cir. 1965).

⁸⁵ 1976 U.S.Code Cong. & Admin.News 6612.

PETCO is a Bahamian corporation. Though a subsidiary of NEPCO, it was a separate corporate entity, and we will not here “pierce the corporate veil” in favor of those who created that veil.⁸⁶ The cancellation of the contracts between NOC and PETCO, and the overcharge on the charters, had a direct effect on PETCO as a party to those contracts, but not in the United States. Similarly, while there was an admitted effect on NEPCO, an American company, that effect can only be deemed indirect, through NEPCO’s relations with PETCO and Antco, whose dealings with NOC were entirely outside the United States.

At no time did NOC or Libya “purposely avail itself of the privilege” of conducting business in the United States.⁸⁷ The product which was destined for the United States, the refined oil, was a different substance than the crude oil sold by NOC to PETCO, so there was no real entering of the marketplace in the United States.⁸⁸

The appellants claim that the Libyan government and NOC were aware that the refineries in the Bahamas were being used primarily to channel oil into the United States. Appellants also contend that the Libyan oil embargo was expressly aimed at affecting the United States. Even if these allegations are true, they do not fulfill the “minimum contacts” requirement of *International Shoe*, and thus cannot reach the level of “direct” effects described in the statute. The claims concerning the charter parties fail for the same reason.

The judgment of the district court dismissing for lack of jurisdiction is affirmed.

4. *Behring International v. Imperial Iranian Air Force*. DECISION BY THE DISTRICT COURT, D. NEW JERSEY, ON 24 JULY 1979⁸⁹

The judgement:

...

This case raises serious questions concerning the interpretation of and the relationship between the Foreign Sovereign Immunities Act of 1976, Pub.L. No. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.) [hereinafter “Immunities Act” or “Act”] and the Treaty of Amity, Economic Relations and Consular Rights

⁸⁶ See, e.g., *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437, 66 S.Ct. 247, 90 L.Ed. 181 (1946); *Commissioner of Internal Revenue v. Schaefer*, 240 F.2d 381, 383 (2d Cir. 1957); *Boise Cascade Corp. v. Wheeler*, 419 F.Supp. 98, 102 (S.D.N.Y.1976), *aff’d*, 556 F.2d 554 (2d Cir. 1977).

⁸⁷ E.g., there has been no evidence of “continuous and systematic” activities of NOC or Libya in the United States, corporate agents regularly doing business in this country, or any other way in which defendants have exercised the privileges or benefited from protections of conducting business in the United States. See *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958); *International Shoe Co. v. Washington*, 326 U.S. 310, 317-19, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

⁸⁸ See *Honeywell, Inc. v. Metz Apparaterwerke*, 509 F.2d 1137, 1144 (7th Cir. 1975) noting that jurisdiction could be found where defendant through an exclusive agreement for distribution in the United States had “inject[ed] its products into the...marketplace.”

⁸⁹ *Federal Supplement*, vol. 475 (1979), p. 383.

Between the United States of America and Iran, August 15, 1955 [1957] 8 U.S.T. 899, T.I.A.S. 3853 [hereinafter "Treaty of Amity" or "Treaty"]. This opinion resolves the defendant's motions to release the restraints on its property and to enter a turnover order, filed April 26 and May 4, 1979 respectively and supersedes my earlier summary opinion, filed May 11, 1979.⁹⁰ At issue here is this Court's power to attach defendant's property prior to judgment, over objections to attachment based upon claims of sovereign immunity.⁹¹

1. *Factual background*

A. *The Parties*: Plaintiff in this action is Behring International, Inc. ["Behring"], a Texas corporation maintaining its principal place of business in Houston, Texas. Behring maintains additional offices in Edison, New Jersey and New York City, and is authorized to transact business in this state. Primarily, Behring is in the business of international commercial freight forwarding. As such, it neither manufactures nor sells goods but, rather, performs specialized services for its clients, who do purchase goods from United States manufacturers and vendors. Those specialized services consist principally of arranging for, or accepting, delivery of the goods on behalf of its clients, preparation of those goods for shipment overseas, and the supervision of the eventual shipment of the goods.

The defendants in this action are the Imperial Iranian Air Force ["I.I.A.F."], the Iran Aircraft Industries ["I.A.C.I."], and the Imperial and Islamic Governments of Iran ["Iran"], and their successors. Both I.I.A.F. and I.A.C.I. were clients of Behring, making frequent use of its international freight forwarding services. Both entities are alleged to be agencies or instrumentalities of Iran.⁹² To date, only the Islamic Republic Iranian Air Force ["I.R.I.A.F."], the successor of I.I.A.F., has appeared. Service of process upon all defendants was started through diplomatic channels pursuant to 28 U.S.C. § 1608(a) and (b). As of the May 9th hearing on this motion, however, no return of service had been filed with the Clerk of the Court. On that date, therefore, the time within which the other defendants were required to answer or otherwise respond to the complaint had not yet begun to run.⁹³

B. *Events Culminating in this Lawsuit*: Starting in August of 1975, I.I.A.F., predecessor to I.R.I.A.F., contracted with Behring for the performance of freight forwarding services.⁹⁴ As the agreement is portrayed in the Verified Complaint, filed

⁹⁰ Defendant filed these motions on April 26 and May 4, 1979. A hearing was held on May 9, 1979. At that time the parties requested that the matter be decided expeditiously, and indicated their willingness to accept an order disposing of the matter to be followed by an opinion at a later date. Rather than simply enter an order, however, I issued a Summary Opinion, filed May 11, 1979, outlining in broad brushstrokes the basis for my decision. This opinion constitutes my formal opinion in this matter and supersedes the Summary Opinion in all respects.

⁹¹ Defendant claims only that sovereign immunity bars the prejudgment attachment of its property. It does not claim that it is immune from suit in this Court. See foot-note 102 and text at p. 483, *infra*.

⁹² Verified Complaint, filed February 28, 1979, Jurisdiction ¶¶ (ii) and (iii).

⁹³ Service has been completed since the hearing date. See foot-note 97, *infra*.

⁹⁴ The contract between Behring and I.I.A.F. is appended to the Verified Complaint, *supra*, foot-note 92, as Exhibit B. Since only I.I.A.F.'s successor has appeared and moved in this matter, I omit any discussion with respect to Behring's dealings with I.A.C.I.

February 28, 1979, Behring would arrange to take delivery of goods purchased by I.I.A.F. at the Behring warehouse in Edison, New Jersey. Behring would often expend monies to pay shipping and related expenses incurred in moving the goods from the vendors' premises to plaintiff's warehouse. At the warehouse, plaintiff's employees would prepare the goods on separate pallets for shipment to Iran.

Generally, the goods were shipped via I.I.A.F. cargo planes from either Kennedy International Airport or McGuire Air Force Base in New Jersey. I.I.A.F. would notify Behring of the time and place its planes would be available to take on cargo. Behring would then transport the palletized cargo to the appropriate shipment point, where the cargo would be loaded and transported to Iran. Behring would then submit its invoices to I.I.A.F.'s representative in New York City for approval. Upon approval, payment was made under a letter of credit issued in plaintiff's favor by Manufacturer's Hanover Trust Co., New York City, within thirty (30) days of the invoice's approval.

The agreement between Behring and I.I.A.F. proceeded smoothly until the recent political turmoil in Iran.⁹⁵ Starting in January of 1979, Behring was unable to communicate with I.I.A.F. officials in Teheran, Iran. In early February, I.I.A.F. ceased flying aircraft to this country. As a result, shipments readied by Behring sat uncollected at either the Edison warehouse or at McGuire Air Force Base. At or about that same time, the I.I.A.F. representative refused to approve payment on any invoices—invoices relating to shipments already forwarded to Iran. As of January 31, 1979 those invoices are alleged to have amounted to \$390,494.00. Plaintiff also alleges that at all relevant times there were sufficient funds available under the letter of credit to pay those invoices once approved.

During this two-month interval, plaintiff was faced mostly with unknowns. The political turmoil in Iran left plaintiff in doubt as to the ability of the defendants to honor their obligations. I.I.A.F. personnel in New York City vacated their offices and returned to Iran. The Behring representative in Teheran, Iran, was unable to meet or communicate in any way with I.I.A.F. officials in Iran, and was eventually forced to evacuate the country. Plaintiff instituted this lawsuit on February 28, 1979.

II. Procedural history of this action

Accompanying the Verified Complaint was an Affidavit of Attachment and an application for the entry of an Order to Show Cause why an order should not be entered authorizing the issuance of a writ of attachment of the property of the defendants located at the Behring warehouse. *See Fed.R.Civ.P.* 64; N.J.S.A. 2A:26-1 *et seq.* In the interim, plaintiff sought a Temporary Restraining Order in the nature of an attachment pending the Court's ruling on the Order to Show Cause. The temporary restraints sought prohibited the defendants from removing any of their property from the jurisdiction of this Court or from cancelling the letter of credit issued in Behring's behalf. On the day the suit was brought, the late Honorable George H. Barlow entered the Order to Show Cause, including the Temporary Restraining Or-

⁹⁵ This Court may take judicial notice of the recent upheaval in Iran and the continuing political uncertainties which it has occasioned. *E. g.*, *Stromberg-Carlson Corp. v. Bank Melll Iran*, 467 F.Supp. 530, 532 n.2 (S.D.N.Y.1979).

der.⁹⁶ The return date of the Order to Show Cause was set for March 12, 1979. Due to the fact that service was required to be made pursuant to 28 U.S.C. § 1608, considerable delay occurred before service could be completed.⁹⁷ Preferring not to decide the questions raised by the Order to Show Cause without input from the defendants, the return date of the Order to Show Cause was carried numerous times, and argument was finally heard on that matter on June 1, 1979. At all times the temporary restraints were maintained in full force and effect.

It was not until April 26, 1979 that the defendant I.R.I.A.F. retained counsel and appeared in this action. Prior to the return date of the Order to Show Cause, I.R.I.A.F. filed two motions, one calling for the release of all restraints upon its property, and the other requesting the entry of a turnover order directing Behring to release the I.R.I.A.F. property in its possession to I.R.I.A.F. Reserving all of the other legal and factual determinations necessary to be made before a writ of attachment could be issued to the adjourned return date of the Order to Show Cause, I.R.I.A.F.'s motions raised for immediate resolution by the Court the actually quite narrow legal question whether the Foreign Sovereign Immunities Act of 1976 prohibits the attachment of the property of a foreign sovereign prior to judgment under the circumstances of this case.⁹⁸ This opinion answers only that question and does not attempt to address any other issue connected with the issuance of a writ of attachment pursuant to Rule 65, *Fed.R.Civ.P.*, and the New Jersey Attachment Statute, N.J.S.A. 2A:26-1 *et seq.*

⁹⁶ The Order to Show Cause, Temporary Restraining Order and Summons, filed February 28, 1979, at pp. 2-3 reads in pertinent part:

2. That pending determination of said Show Cause Order, defendants, . . . , are hereby restrained and enjoined from transferring, removing, sequestering, dismantling, hypothecating or in any other way acting with respect to said material in any manner inconsistent with plaintiff's interest therein; [and]

3. That pending determination of said Show Cause Order, defendants, . . . , are hereby restrained and enjoined from revoking the letter of credit (Exhibit A to Affidavit of Attachment) written in favor of plaintiff and/or from removing any of defendant's property or property in which defendant has an interest from the jurisdiction of this Court and/or the United States to the extent and the amount necessary to satisfy plaintiff's liquidated and unliquidated claims totalling approximately two million dollars;

⁹⁷ Service upon Iran was originally attempted in accord with 28 U.S.C. § 1608(a)(3) by service by a form of mail requiring a signed receipt upon the Ministry of Foreign Affairs of Iran. Service upon the agencies was attempted in accord with 28 U.S.C. § 1608(b)(3)(B), also by a form of mail requiring a signed receipt, upon the agencies themselves in Teheran, Iran. Upon learning that the United States Postal Service had suspended all mail service to Iran, *see* Affidavit of George A. Murphey, filed March 12, 1979, ¶ 3, service was again attempted upon Iran, this time pursuant to 28 U.S.C. § 1608(a)(4) through the Director of Special Consular Services. An Order for Alternative Method of Service was entered pursuant to 28 U.S.C. §§ 1608(b)(3)(C) authorizing service upon the agencies to also be made through the Director of Special Consular Services. A diplomatic note was filed with the Clerk of the Court on July 9, 1979 indicating that the transmittal date of the papers was May 9, 1979. Service was therefore completed on May 9, 28 U.S.C. § 1608(c)(1), and the defendants have sixty (60) days from the date to respond to the Complaint.

⁹⁸ In its moving papers, I.R.I.A.F. urged four grounds in support of its motion for the release of the restraints. They are:

1. Any attachment of the property of a foreign state or its agencies for jurisdiction purposes attempted after the effective date of the [Immunities] is void.

III. Preliminary legal issues

Before addressing the central legal questions presented by this motion, there are certain preliminary questions involving this Court's jurisdiction over this action and these defendants which must be noted and determined.

The central goals of the Immunities Act are to codify the "restrictive theory" of sovereign immunity recognized under international law⁹⁹ as the statutory law of this country and to provide that the validity of claims of sovereign immunity interposed in suits against foreign states shall be determined by the United States courts rather than by the State Department. 28 U.S.C. § 1602; H.R.Rep. No. 94-1487, 94th Cong., 2d Sess. 14 reprinted in [1976] U.S.Code Cong. & Admin.News, pp. 6604, 6613 ["H.R.Rep. No. 94-1487"]; *National American Corp. v. Federal Republic of Nigeria*, 448 F.Supp. 622, 638 (S.D.N.Y.1978).

Under the provisions of the Immunities Act this lawsuit and the defendant I.R.I.A.F. are properly before this Court. Subject matter jurisdiction exists under 28 U.S.C. § 1330(a), which provides:

(a) The district courts shall have original jurisdiction, without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief *in personam* with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

Section 1330(a) is applicable because this action is a nonjury civil action; because all

2. Under § 1610(d) of the [Immunities Act] I.R.I.A.F. property is immune from attachment prior to judgment.

3. The I.R.I.A.F. property is immune from attachment under § 1611(b)(2)(B) of the [Immunities Act] because it is intended to be used in connection with a military activity and is under the control of a military authority or defense agency.

4. In the alternative, I.R.I.A.F. reserves, until further investigation is completed, the right to establish that the materials in the Edison warehouse are "of a military character" and, therefore, immune from attachment under § 1611(b)(2)(A) of the Act.

I.R.I.A.F. Motion for Release of Restraints On All I.R.I.A.F. Property, filed April 26, 1979, ¶¶ 9-12.

The last of these arguments is expressed in the alternative, and counsel for I.R.I.A.F. did not argue that it supports the immediate release of the property restrained. Indeed, no proof was offered as to the military character of the property to be attached. I therefore express no opinion as to the merits of I.R.I.A.F.'s final argument.

As will be seen, because of the nature of the record before the Court at the time this decision was rendered, I am not required to respond at this time to all of the remaining arguments raised by I.R.I.A.F.

⁹⁹ See generally Note: Sovereign Immunity of States Engaged in Commercial Activities, 65 *Colum.L.Rev.* 1086 (1965), about the difference between the traditional absolute immunity principle and the modern "restrictive" theory, as well as a discussion of the United States courts' prior practice of deferring to recommendations of the State Department regarding the propriety of claims of sovereign immunity, rather than determining such claims for themselves. See also H.R.Rep. No. 94-1487, *supra*, at 6-9 [1976] U.S.Code Cong. & Admin.News at pp. 6604-08.

defendants are "foreign states" as that term is defined in 28 U.S.C. § 1603(a),¹⁰⁰ because the claim asserted by Behring is one for relief *in personam*,¹⁰¹ and because, as shall be seen below, the defendant is not entitled to immunity *from suit*¹⁰² by virtue of both 28 U.S.C. § 1605(a) and the Treaty of Amity.

Having subject matter jurisdiction under 28 U.S.C. § 1330(a), this Court may exercise personal jurisdiction over the defendants under 28 U.S.C. § 1330(b)¹⁰³ so long as the service provisions of 28 U.S.C. § 1608 are met. Service was in fact made upon the defendant I.R.I.A.F. pursuant to 28 U.S.C. § 1608 (b)(3).¹⁰⁴

With respect to immunity from suit, I.R.I.A.F. recognizes that it is not, in fact, immune from suit in this matter.¹⁰⁵ Section 1604 sets out the sole source of a foreign state's immunity from the jurisdiction of courts of the United States.¹⁰⁶ It states the general rule that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States. . . ." 28 U.S.C. § 1604. The immunity granted in section 1604, however, may be waived in two ways, first, it is subject to existing international agreements to which the United States is a party at the time of the enactment of the Immunities Act, and, second, by engaging in activities described in the statutory exceptions established by 28 U.S.C. §§ 1605-1607. Both of these waivers are applicable here.

¹⁰⁰ Section 1603(a) defines a "foreign state" to include agencies or instrumentalities of a foreign state. Section 1603(b) defines an "agency or instrumentality of a foreign state" to mean any entity—

- (1) which is a separate legal person, corporate or otherwise, and
- (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or a political subdivision thereof, and
- (3) which is neither a citizen of a state or of the United States as defined in section 1332(c) and (d) of [Title 28], nor created under the laws of any third party.

28 U.S.C. § 1603(b). All parties agree that Iran and I.R.I.A.F. are foreign states as that term is defined above. *Cf. Edlow International Co. v. Nuklearna Elektrarna Krsko*, 441 F.Supp. 827 (D.D.C.1977) (holding that the defendant was *not* an agency or instrumentality of a foreign state).

¹⁰¹ This Court has no doubt that this action is a proceeding *in personam* against the defendants and not one *in rem* or *quasi in rem*. *See infra*, foot-note 115.

¹⁰² It is important to note that the Immunities Act deals both with a foreign state's immunity from the jurisdiction of United States courts, *see* 28 U.S.C. §§ 1604-1607, and with the immunity a foreign state's property enjoys from attachment and execution. *See* 28 U.S.C. §§ 1609-1611. In this case it is the second form of immunity which is the source of the controversy. It is the first form of immunity, however, which is determinative of this Court's subject matter jurisdiction under 28 U.S.C. § 1330(a).

¹⁰³ Section 1330(b) reads:

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

¹⁰⁴ In addition to service upon I.R.I.A.F. pursuant to 28 U.S.C. § 1608(b)(3)(C) and (a)(4), *see* foot-note 97, *supra*, service was also attempted upon the I.R.I.A.F. representative in New York City, Colonel Khatami, at his home. *See* 28 U.S.C. § 1608(b)(2).

¹⁰⁵ Under the Immunities Act sovereign immunity is an affirmative defense which must be specifically pleaded. The burden is upon the foreign state to "produce evidence of its claim of immunity". H.R. Rep. No. 94-1487, *supra*, at 17; [1976] U.S. Code Cong. & Admin. News, p. 6616.

¹⁰⁶ *Id.*

One of the statutory waivers of immunity set out in the Immunities Act states:

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

(a) in which the action is based upon a commercial activity carried on in the United States by the foreign state

28 U.S.C. § 1605(a)(2).

“Commercial Activity” is defined by the Act to mean “either a regular course of commercial conduct or a particular commercial transaction or act”. 28 U.S.C. § 1603(d). The commercial character of the activity is to be determined not by reference to the purpose of the activity but by reference to its nature. *Id.* See *National American Corp.*, *supra*, 448 F.Supp. at 641; *United Euram Corp. v. Union of Soviet Socialist Republics*, 461 F.Supp. 609 (S.D.N.Y.1978). To be considered “carried on in the United States”, the commercial activity of a foreign state need only have “substantial contact” with the United States. 28 U.S.C. § 1603(e). See *East Europe Domestic International Sales Corp. v. Terra*, 467 F.Supp. 383 (S.D.N.Y.1979).

It is obvious that I.R.I.A.F. was engaged in commercial activity carried on in the United States. I.R.I.A.F. was engaged in using its cargo planes to ship goods purchased in this country to Iran. Its contract with Behring obligated Behring to prepare those goods for shipment by I.R.I.A.F. The contract was negotiated and executed in New York City; I.R.I.A.F. maintained an office there, and it regularly sent its planes to this country to pick up cargo. Thus, I.R.I.A.F. has waived its jurisdictional immunity by engaging in commercial activity carried on in this country. 28 U.S.C. §§ 1604, 1605(a)(2). See *United Euram Corp.*, *supra*, 461 F.Supp. 609; *Outboard Marine Corp. v. Pezetel*, 461 F.Supp. 384 (D.Del.1978); *Upton v. Empire of Iran*, 459 F.Supp. 264 (D.D.C.1978); *National American Corp.*, *supra*, 448 F.Supp. at 640–641.

A second waiver of jurisdictional immunity is to be found in the Treaty of Amity. Section 1604 expressly establishes that existing international agreements to which the United States is a party survive the Immunities Act. H.R.Rep. No. 94–1487, *supra*, at 10, 17–18; [1976] U.S.Code Cong. & Admin.News, at pp. 6608, 6616. See also *Carey v. National Oil Corp.*, 453 F.Supp. 1097 (S.D.N.Y.1978).¹⁰⁷ The Treaty of Amity is just such an agreement. Article XI, paragraph 4, of the Treaty of Amity provides:

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

Treaty of Amity, *supra*, art. XI, para. 4 [1957] 8 U.S.T. at 909 (emphasis added).¹⁰⁸

¹⁰⁷ The survival of the Treaty of Amity is crucial to the central dispute about whether pre-judgment attachment of I.R.I.A.F. property is authorized in this case. See discussion in text, *infra*, pp. 489–491.

¹⁰⁸ No party has argued, and I have found no other indication, that the Treaty of Amity has been abrogated by the recent political upheaval in Iran. This opinion is, therefore, based upon the assumption that the Treaty is still valid.

Since I have already stated that I.R.I.A.F. was engaged in commercial activity within the United States, the waiver of immunity contained in the Treaty of Amity also prevents I.R.I.A.F. from claiming immunity from this Court's jurisdiction to hear and determine this action.

For all of the foregoing reasons, I.R.I.A.F. is not immune from the jurisdiction of this Court, and I must conclude that this suit and the defendant-I.R.I.A.F. are properly before me at this time.

IV. Controlling legal issues

As narrowed by the briefs and memoranda submitted by the parties and the affidavits before the Court, the legal questions determinative of plaintiff's present entitlement to a prejudgment attachment of I.R.I.A.F. property in its Edison warehouse facility are:

(1) Whether I.R.I.A.F. property may be attached prior to judgment because of the statutory waivers of immunity contained in section 1610(b) or (d) of the Immunities Act; and

(2) Whether I.R.I.A.F. property may be attached prior to judgment because of the waiver of immunity contained in the Treaty of Amity, a waiver which survives the enactment of the Immunities Act.¹⁰⁹

Any resolution of these questions must begin with the Immunities Act.¹¹⁰ The appropriate starting point within the Act is section 1609, which states:

Subject to existing international agreements to which the United States is a party at the time of the enactment of this Act the property in the United States of a foreign state shall be immune from attachment, arrest or execution except as provided in sections 1610 and 1611 of this chapter.¹¹¹

¹⁰⁹ These questions have become the focus of this opinion only by the process of argument and counterargument by the parties. When Behring first sought a writ of attachment pursuant to *Fed.R.Civ.P.* 64 and N.J.S.A. 2A:26-1, *et seq.*, it recognized the possible existence of a defense of sovereign immunity. It anticipated and countered the defense by arguing that the Immunities Act, 28 U.S.C. § 1610(b)(1) and (2), waived any immunity from prejudgment attachment of property. See Plaintiff's Brief in Support of its Order to Show Cause and Verified Complaint, at 26-29. I.R.I.A.F. disputed Behring's interpretation of the Act and argued that the Act waives immunity from prejudgment attachment of a foreign state's property only in the limited circumstances described in 28 U.S.C. § 1610(d), circumstances, it argued, which were not present. See Memorandum of Law In Support of Motion For Release of Restraints From All I.R.I.A.F. Property, at 9-11. Behring's response was twofold. First, it argued, assuming the correctness of I.R.I.A.F.'s interpretation of section 1610(b), that the requirements of section 1610(d) were met. Second, it argued that the Treaty of Amity survived the enactment of the Immunities Act and that the Treaty authorized the use of prejudgment attachments as a provisional remedy. See Memorandum of Law In Opposition to I.R.I.A.F.'s Motion For Release of Restraints From All I.R.I.A.F. Property and For Turnover Order, at 7-12 and 25-33. I.R.I.A.F. in turn disputed both of these contentions.

¹¹⁰ Both the Immunities Act and the Treaty of Amity are acts of the domestic sovereign entitled to equal weight under the Constitution. The later of the two acts will, therefore, supply the governing rule of law in the event that the two acts conflict. *E. g.*, *Akins v. United States*, 551 F.2d 1222, 1229-30 (Cust. & Pat.App.1977). In this case the Immunities Act is the more recent sovereign act. See generally 1A Sands, *Sutherland Statutory Construction*, §§ 32.01 & 32.06 at 378 (4th ed. 1972).

¹¹¹ Historically, unless otherwise waived, the property of a foreign state was immune from attachment in any form, except as a basis for obtaining *in rem* or *quasi in rem* jurisdiction over the foreign state. Even then, however, the property attached for the purpose of obtaining jurisdiction could not be executed upon to satisfy a judgment. H.R.Rep. No. 94-1487, *supra*, at 26,

Section 1609, paralleling section 1604, establishes as a general rule that the property of a foreign state is immune from attachment. Two broad exceptions are carved out of this general rule. First and foremost, the immunity from attachment granted by section 1609 to a foreign state's property is, as is the immunity from suit granted by section 1604 to the foreign state itself, *see* text at pp. 484–485, *supra*, subject to existing international agreements to which the United States was a party at the time the Immunities Act was enacted. The Treaty of Amity, therefore, survives section 1609, as it survives section 1604. Second, the general rule of immunity from attachment is modified by the exceptions set out in sections 1610 and 1611.

If the prejudgment attachment of I.R.I.A.F. property is authorized, therefore, it must be authorized either by the text of the Immunities Act itself, or by the Treaty of Amity.

A. *Is I.R.I.A.F. Property Subject to Attachment Prior to Judgment Because of the Statutory Waivers of Immunity Contained in Section 1610(b) or Section 1610(d) of the Immunities Act?*

1. *Section 1610 (b).*

Contrary to Behring's initial argument, section 1610(b) of the Immunities Act does not authorize the attachment of a foreign state's property prior to judgment. Section 1610(b) establishes that, upon the meeting of certain conditions, a foreign state's property "shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court . . ." 28 U.S.C. § 1610(b) (emphasis added).¹¹² If the language of the Act is not clear enough, then the legislative

27–28; [1976] U.S.Code Cong. & Admin.News at pp. 6625–26. Section 1609 is not merely a codification of this rule. It also modifies it by prohibiting the prejudgment attachment of property in aid of jurisdiction. *Id.* See foot-note 115, *infra*.

¹¹² 28 U.S.C. § 1610(a) and (b) reads:

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a 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 court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment.

history demonstrates without a doubt Congress' intent to exclude prejudgment attachments from the term "attachment in aid of execution". See H.R.Rep. No. 94-1487, *supra*, at 28; [1976] U.S.Code Cong. & Admin.News at p. 6627. This conclusion is even further buttressed by the explicit provision made for "attachment prior to the entry of judgment" in section 1610(d). I must therefore conclude that section 1610(b) does not waive I.R.I.A.F.'s immunity from prejudgment attachment of its property.¹¹³

2. Section 1610(d)

Prejudgment attachment of property is therefore authorized by the Immunities Act only under the narrow exception set out in section 1610(d). That section waives immunity from attachment of property prior to judgment only on the concurrence of two conditions: (1) the foreign state must "explicitly" waive such immunity; and (2) the purpose of the attachment must be to secure payment of a judgment which may be entered in the future.¹¹⁴ Although the second of these conditions is met, the first is undoubtedly lacking.

I must reject Behring's assertion that article XI, paragraph 4, of the Treaty of Amity, quoted *supra* at p. 485, constitutes the *explicit* waiver of immunity from prejudgment attachment required by section 1610(d). A comparison of section 1610(a) and (b), quoted *supra* foot-note 112, with section 1610(d), quoted *supra* foot-note 114, reveals that Congress did not intend to allow implied waivers of immunity from attachment prior to judgment under the Immunities Act.

I must conclude that section 1610 does not provide a statutory basis for subjecting I.R.I.A.F. property to prejudgment attachment in this action. See *Jet Line Services, Inc. v. M/V Marsa El Hariga*, 462 F.Supp. 1165 (D.Md.1978).¹¹⁵

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in 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 court of the United States or of a State after the effective date of this Act if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates 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) of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based.

¹¹³ By interpreting section 1610(a) and (b) in this manner I need not consider whether the other conditions imposed by those subsections are met.

¹¹⁴ 28 U.S.C. § 1610(d) reads:

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachments prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

¹¹⁵ A careful reading of sections 1609 and 1610 reveals that I.R.I.A.F. is correct in its assertion, see foot-note 98 ¶1, *supra*, that the Immunities Act does not authorize prejudgment at-

B. *Is I.R.I.A.F. Property Subject to Attachment Prior to Judgment Because of the Waiver of Immunity Contained in the Treaty of Amity?*

In the alternative, Behring argues that in the Treaty of Amity, Iran, on behalf of itself and its agencies, waived any immunity from attachment its property may have previously enjoyed. This argument assumes, first, that the Treaty of Amity was not abrogated by the Immunities Act, and, second, that its language can reasonably be read to effect a waiver of immunity from prejudgment attachment of its property.

I have repeatedly indicated my belief that the Immunities Act does not abrogate any existing international agreement to which the United States was a party prior to the Act's enactment. Congress was, obviously careful not to abrogate existing agreements by the passage of the Immunities Act. To the extent such international agreements set forth a waiver of immunity, those agreements are to be given effect. It is only if such agreements are silent as to immunity that the Act supplies the governing rule of law.¹¹⁶ Article XI, paragraph 4, of the Treaty of Amity is not silent on the issue of immunity. I.R.I.A.F. recognizes the force of these arguments and concedes that the Treaty is in full force and effect today.

The ultimate question becomes, therefore, whether the Treaty of Amity waives immunity from prejudgment attachment. Unfortunately, there are no cases construing this specific Treaty language to guide me.¹¹⁷ All that I have before me is the relevant language of the Treaty, again found in article XI, paragraph 4, wherein the par-

achment of property as a device for obtaining jurisdiction. H.R.Rep. No. 94-1487, *supra*, at 26; [1976] U.S.Code Cong. & Admin.News at p. 6625 states: "[N]either section 1610 nor 1611 would permit an attachment for the purpose of obtaining jurisdiction over a foreign state or, its property." See *National American Corp.*, *supra*, 448 F.Supp. 622. The Immunities Act's provision for *in personam* jurisdiction eliminates, to a large degree, any need for attachments in aid of jurisdiction.

Agreeing with I.R.I.A.F. does not, however, help it obtain the relief sought. True, the Immunities Act does not authorize attachment in aid of jurisdiction, but that is not what occurred here. Behring's attachment is designed to insure the payment of a judgment which may be rendered in its favor in the future. Jurisdiction was in fact obtained in conformity with the Immunities Act. I therefore need not address the difficult question of whether jurisdictional attachments, if authorized by the Treaty of Amity, would survive the Act and still be an acceptable method of commencing suit against this particular foreign state.

¹¹⁶ In explaining the savings clause of section 1604, the House Report states:

All immunity provisions . . . are made subject to "existing" treaties and other international agreements to which the United States is a party. In the event an international agreement conflicts with this bill, the international agreement would control . . .

Treaties of friendship, commerce and navigation and bilateral air transport agreements often contain provisions relating to the immunity of foreign states. Many provisions in such agreements are consistent with but do not go as far as, the current bill. To the extent such international agreements are silent on a question of immunity the bill would control; the international agreement would control only where the conflict is manifest.

H.R.Rep. No. 94-1487, *supra*, at 17-18; [1976] U.S.Code Cong. & Admin.News at p. 6616. See also 28 U.S.C. § 1330(a) and H.R.Rep. No. 94-1487, *supra*, at 13; [1976] U.S.Code Cong. & Admin.News at p. 6611; 28 U.S.C. § 1609 and H.R.Rep. No. 94-1487, *supra*, at 26; [1976] U.S.Code Cong. & Admin.News at p. 6625. And, although the House Report gives as an example treaties which do not go as far as the Immunities Act in waiving immunity, it would seem that treaties containing greater waivers of immunity would also be given full force and effect.

¹¹⁷ Three other bilateral treaties to which the United States is a party have come to the Court's attention containing substantially identical waivers of sovereign immunity. They are the

ties waive, for themselves and *for their property*, immunity “from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein” (emphasis added).

Before proceeding to answer that question, I must resolve a preliminary question regarding the proper principles of construction to be applied. I.R.I.A.F. argues that, since section 1610(d) requires an explicit waiver of immunity from prejudgment attachments, I should also require one in construing the Treaty of Amity. Because of my earlier ruling that the Treaty does not constitute the explicit waiver required by section 1610(d), I would therefore be forced to conclude that the Treaty does not authorize this attachment. I disagree.

The Immunities Act is not a statute governing the construction of prior treaties but is one of substantive law. Sections 1610(a) and (b) inform litigants about the circumstances in which the property of a foreign state will be available to satisfy a judgment. Section 1610(d) sets out the much narrower circumstances in which prejudgment attachment will be allowable. The provisions govern not existing international agreements, but the everyday commercial agreements between contracting parties, such as that between I.R.I.A.F. and Behring. The explicit waiver required by section 1610(d) could be satisfied by the provisions of the contract between the parties, or even by their conduct during the course of their commercial dealings. The requirement of an explicit waiver in section 1610(d) however, cannot be read to modify the savings language of section 1609. Section 1610(d) does not require the drafter of a 1955 treaty to anticipate the requirements of a law that will be passed twenty-one years later. In recognition of these realities, Congress inserted a savings clause in section 1609 (as well as in sections 1330(a) and 1604) and I therefore need not find an explicit waiver in the Treaty in order to find that prejudgment attachment is proper. Ordinary principles of construction are all that I need apply.

I find the logic of this conclusion compelling. The United States and a foreign state will, in future treaties, be free to determine what waivers of immunity are desired by the parties in a particular case. If waivers differing from the general rules set out in the Immunities Act are desired, they will be able to modify those general rules accordingly. Congress has recognized that past decisions as to the appropriate immunity to be retained in a specific situation, which may or may not differ from what is now the general rule set forth in the Act, should be honored. In this respect, Congress chose to regard treaties and other international agreements to which the United States is a party very differently from ordinary commercial agreements between United States citizens and foreign states. In other words, my decision would be different if I were construing a waiver contained in an ordinary commercial agreement which was entered into prior to, or subsequent to, the enactment of the Act. I am, however, construing a treaty, deserving of special treatment.

Footnote 117 continued

Treaty of Friendship, Commerce and Navigation Between the United States of America and the Republic of Korea, November 28, 1956, Art. XVIII, par. 2 [1957] U.S.T. 2217; T.I.A.S. 3947; the Treaty of Friendship, Commerce and Navigation Between the United States of America and Japan, April 2, 1953, Art. XIX, par. 2; [1953] 2 U.S.T. 2063; T.I.A.S. 2863; and the Treaty of Friendship, Commerce and Navigation Between the United States of America and the Italian Republic, February 2, 1948, Art. XXIV, par. 6; [1949] 63 Stat. 2255, T.I.A.S. 1965. However, none of these treaties' waivers of immunity clauses has been authoritatively construed by the courts.

Applying ordinary principles of construction, *see* 1A Sands, *Sutherland Statutory Construction*, § 32.09 (4th ed. 1972), I must conclude that the Treaty of Amity authorizes this attachment. Behring has argued that the "or other liability" language of article XI paragraph 4 shows that the specific language preceding it was meant by way of illustration and not limitation; that it is a nonexclusive list of situations in which immunity is waived. The listing of "execution of judgment" must waive immunity from attachment in aid of execution, *compare* § 1610(a), (b). The "or other liability" language must refer to situations other than attachment after the entry of judgment—including the use of prejudgment attachments as a provisional remedy. Although I.R.I.A.F. strongly contests this construction of the provision, I believe it to be the better interpretation.

It is apparent from my reading of the Treaty that the United States and Iran desired that they be treated like ordinary private parties in the other's courts. *Cf. Pfizer, Inc. v. Lord*, 522 F.2d. 612 (8th Cir. 1975), *cert. denied*, 424 U.S. 950. 96 S.Ct. 1421, 47 L.Ed.2d 356 (1976) (involving Iran's rights under the Treaty of Amity as a plaintiff).¹¹⁸ Such treatment would of course include liability to prejudgment attachment of property.

I therefore conclude that the Treaty of Amity authorizes prejudgment attachment of I.R.I.A.F.'s property under the circumstances of this case, and that I.R.I.A.F. is not entitled to an order releasing all restraints from its property.¹¹⁹

¹¹⁸ *Pfizer* involved the Government of Iran's attempt to bring an anti-trust action against an American corporation to collect damages on behalf of Iranian citizens on a *parens patriae* theory. It is well settled under the anti-trust laws that a state of the United States could not bring such an action. *See Hawaii v. Standard Oil Co.*, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972). Relying in part upon Art. III, par. 2 of the Treaty of Amity, the Court of Appeals held that the plaintiff did not have "the right to press their citizens' claims in a manner barred to domestic states vis-a-vis their 'citizens'" 522 F.2d at 618 & 619 n.9. Although certainly not directly apposite to the case before me, *Pfizer* indicates that a foreign state's rights under the Treaty are no different than those of a domestic state. By analogy I can reason that the United States and Iran desired that their status would be similar to that of other litigants, whether as plaintiff, or defendant, in the other's courts.

¹¹⁹ As was previously stated, *see* foot-note 98 *supra*, I have not felt it necessary to address all other arguments raised by I.R.I.A.F. in its moving papers. Most importantly, this opinion leaves unresolved the applicability of I.R.I.A.F.'s third argument, regarding 28 U.S.C. § 1611(b)(2)(B), which states:

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

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

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

Although this third argument raises serious questions about whether section 1611 governs in spite of prior international agreements, or is merely a codification of prior law, I need not resolve them now because there has been an utter failure of proof on the issue of who controls the property restrained by I.R.I.A.F. in support of this motion. The Verified Complaint alleges that all of the property now restrained in its warehouse is under Behring's control and that Behring is neither a military authority nor a defense agency. *See* Verified Complaint, *supra*, ¶¶11, 13. I.R.I.A.F., which has the burden of proving a defense of immunity, *see* foot-note 105, *supra*, has offered no testimony or any other form of proof that contradicts these verified allegations. Even if the law is as I.R.I.A.F. claims, it would not be entitled to the release of all restraints on its property on the basis of the record before me. Since I.R.I.A.F. desires the resolution of this motion expeditiously, but a ruling in its favor cannot aid it, I decline to answer the question at present. *See National American Corp.*, *supra*, 448 F.Supp. at 641-42.

Conclusion

Summarizing my conclusions with respect to the Immunities Act: First, only section 1610(d) curtails the immunity from prejudgment attachment enjoyed by the property of a foreign state under section 1609. Second, Behring has not shown that section 1610(d) is applicable here because it cannot point to any explicit waiver of immunity from such attachments.

With respect to the Treaty of Amity, my conclusions may be summarized as follows: First, it survives the Immunities Act. Second, the intent of the parties as of the time of the signing governs. Third, it is my task to determine that intent in accordance with ordinary rules of construction. Fourth, I believe that the parties intended that they be treated like any private person. Prejudgment attachment of the property was proper. Defendant's motion for the release of restraints is denied. In light of this decision, I.R.I.A.F.'s motion for a turnover order must also be denied. An order has been entered in accord with this opinion.

5. *Behring International v. Imperial Iranian Air Force*. DECISION BY THE DISTRICT COURT, D. NEW JERSEY, ON 13 AUGUST 1979¹²⁰

The judgement:

I. Introduction

This opinion authorizes the issuance of a writ of attachment directing the United States Marshal to seize certain property of the defendant Islamic Republic Iranian Air Force [hereinafter "I.R.I.A.F.'], the successor of the Imperial Iranian Air Force ["I.I.A.F.'], pending the resolution of plaintiff's suit against the defendants. The attachment is issued pursuant to the provisions of *Fed.R.Civ.P.* 64 and the New Jersey Attachment Statute, N.J.S.A. 2A:26-1 *et seq.*

The factual background of this action, including the identity of the parties and a review of the events leading up to this lawsuit, is set out in detail in my opinion denying the defendant's motion for the release of all restraints on its property and for a turnover order, filed July 24, 1979 [hereinafter referred to as "Opinion Maintaining Restraints"], and is not repeated here. The procedural history of this action is also set out in that opinion. Certain events have occurred subsequent to my denial of defendant's motions which must be set out.

After defendant's motions were denied on May 11, 1979, defendant applied to this Court for an order setting an amount to be deposited in a Trust Account established pursuant to an earlier court order,¹²¹ in lieu of posting a bond, and an order re-

¹²⁰ *Federal Supplement*, vol. 475 (1979), p. 396.

¹²¹ On April 20, 1979 the parties, with the Court's approval, entered into a consent order entitled "Third Order Partially Releasing Restraints" ["Third Order"]. That order established a procedure whereby one planeload of equipment at a time would be released in exchange for a cash payment of \$150,000.00. The cash payment was to be made directly to Behring to the extent that I.R.I.A.F. acknowledged its debts and any payment in excess of that amount was to be paid into a Trust Account to be established pursuant to that order. The order anticipated a later decision as to the total amount to be placed into the account, in exchange for the release of all restraints upon I.R.I.A.F. property. The I.R.I.A.F. consented to the order only upon the stipulation that it did so without prejudice to its rights with respect to the property. See Third Order, ¶ 2(c).

quiring the release of the property upon the deposit of that amount. See New Jersey Civil Practice Rule 4:60-13. A hearing was held and in an oral opinion delivered from the bench on May 22, 1979, transcript filed June 1, 1979, I granted defendant's motion, setting approximately \$2,500,000 as the total amount to be either paid to Behring or deposited in the trust account.¹²² Defendant reserved all rights with respect to the monies to be deposited to secure the release of its property.¹²³

This occurred while the Order to Show Cause, with the accompanying Temporary Restraining Order, filed February 28, 1979, was still outstanding. The hearing on the Order to Show Cause was finally held on June 1, 1979 and I reserved decision on the numerous issues raised by the parties at that hearing. This opinion resolves these issues.

II. *The Pending Application*

The Order to Show Cause and Temporary Restraining Order directed the defendants to appear and show "why an Order should not be entered authorizing the issuance of a Writ of Attachment directing the U.S. Marshal to seize certain [of defendant's property]". Although it has never been absolutely clear whether plaintiff intended to proceed under Rule 65 or Rule 64 of the *Fed.R.Civ.P.*, I deem the pending application to be one under *Fed.R.Civ.P.* 64. Rule 64 authorizes the use of the New Jersey Attachment Statute, N.J.S.A. 2A:26-1 *et seq.*¹²⁴

New Jersey Civil Practice Rules 4:60-1 *et seq.* set out the procedure and basis upon which a writ of attachment may be issued. Rule 4:60-5(a) states that a writ may be issued by the court only if it finds, first, that "there is a probability that final judgment will be rendered in favor of plaintiff; second, that there are statutory grounds for the issuance of the writ; and third, that there is real or personal property of the defendant at a specific location within this state which is subject to attachment". I shall address each of these requirements in order.

¹²² See Order, filed June 13, 1979.

¹²³ If the application for a writ of attachment is denied the monies in the Trust Account must be returned to I.R.I.A.F. See *Jet Line Services, Inc. v. M/V Marsa El Hariga*, 462 F.Supp. 1165 (D.Md.1978).

¹²⁴ Rule 64, *Fed.R.Civ.P.* provides:

SEIZURE OF PERSON OR PROPERTY

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

I apply Rule 64 because there is no substantial difference between Rule 64 and Rule 65 in the circumstances of this case. The only difference is that the bonding requirement of the New Jersey Attachment Statute incorporated by Rule 64 is discretionary with the court, see New Jersey Civil Practice Rule 4:60-5(d), while the bonding requirement of Rule 65 is mandatory. See *System Operations v. Scientific Games*, 555 F.2d 1131, 1145-46 (3d Cir. 1977).

A. *The Probability that Final Judgment will be Rendered in Favor of Plaintiff.*

At the outset, the parties dispute the actual content of this requirement. Defendant contends that New Jersey Civil Practice Rule 4:60-5(a)(1) requires a showing that there is a reasonable probability that plaintiff will succeed on the merits, similar to the showing required for the issuance of a preliminary injunction under *Fed.R.Civ.P.* 65(a). See e.g., *Doe v. Colautti*, 592 F.2d 704, 710-12 (3d Cir. 1979). Plaintiff, on the other hand, contends that the state cases require no more than a showing that plaintiff has a prima facie cause of action against the defendant. See, e.g., *Tanner Associates, Inc. v. Ciraldo*, 33 N.J. 51, 161 A.2d 725 (1960). I need not resolve this dispute because I believe that plaintiff has satisfied even the stricter showing which defendant would have me require.

The affidavits filed to date in this action show overwhelmingly that plaintiff is likely to succeed in this action. The Verified Complaint, and the Affidavit of Attachment of George Murphy, an employee and officer of Behring, filed together on February 28, 1979, aver the existence of the Behring-I.I.A.F. agreement and Behring's performance under it at all relevant times prior to January 1979. Verified Complaint, *supra*, Exhibit B. Mr. Murphy further swears that defendant breached the contract both by failing to approve invoices for goods shipped to Iran and by failing to send planes to pick up cargo ready for shipment. Although reference to the contract shows that there is in fact a question as to whether the failure to send planes constitutes a breach, the failure to approve invoices properly submitted would constitute a breach of that agreement. I.R.I.A.F. has proffered no evidence which contradicts the averments in Mr. Murphy's affidavit.

The I.R.I.A.F., however, raises two affirmative defenses which are alleged to excuse its non-performance under the contract: force majeure and the Act of State Doctrine. See Answer and Counterclaim, filed May 18, 1979, First, Second, Third, and Fourth Affirmative Defenses. Before turning to the merits of these affirmative defenses, I note that I find it difficult to believe that defendant seriously presses them. I.R.I.A.F.'s Memorandum of Law In Response To Order To Show Cause Why A Writ of Attachment Should Not Issue [hereinafter "I.R.I.A.F.'s Responsive Memorandum"] presents its conclusory allegations with regard to these defenses in two paragraphs without citing a single authority. Furthermore, I.R.I.A.F. does not support these allegations with any evidence. Even if I were to conclude that these doctrines were generally applicable, I would therefore have no factual basis for finding that I.R.I.A.F.'s non-performance was excused. Defendant's failure to supply evidence does not hurt it, however, because I do not believe that the defenses are applicable here.

1. *Act of state.*

The traditional formulation of the Act of State doctrine is set out in *Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S.Ct. 83, 84, 42 L.Ed. 456 (1897), where the Supreme Court stated:

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers between themselves.

See *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 691 n. 7, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976). The doctrine, however, distinguishes between the public and governmental acts of sovereign states and their private and commercial acts. The doctrine does not preclude me from considering the “repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities”. *Alfred Dunhill of London, Inc., supra*, 425 U.S. at 695, 96 S.Ct. at 1861. Even when applicable the doctrine only serves to preclude certain issues from consideration by the court; it does not render an entire case or controversy non-justiciable. See *National American Corp. v. Federal Republic of Nigeria*, 448 F.Supp. 622, 640 (S.D.N.Y. 1978).

As is indicated by my Opinion Maintaining Restraints, all parties to this action have proceeded upon the assumption that I.R.I.A.F.’s activities in this country were commercial in nature. This Court so held in determining that subject matter jurisdiction over this controversy existed by virtue of 28 U.S.C. §1330(a). See Opinion Maintaining Restraints, *supra*, at 402–403 (D.C.). Finally, it can be argued that the breaches of contract committed by I.R.I.A.F. occurred *in this country*, when the I.R.I.A.F. representative in New York City refused to approve invoices for payment.¹²⁵

I therefore conclude that the Act of State doctrine in no way diminishes the probability that Behring will succeed in this litigation.

2. *Force Majeure.*

The traditional formulation of the doctrine of force majeure (*Vis Major*) may be found in *Blacks Law Dictionary* (Rev’d 4th ed. 1968):

A greater or superior force; an irresistible force. A loss that results immediately from a natural cause without the intervention of man, and could not have been prevented by the exercise of prudence, diligence, and care. A natural and inevitable necessity, and one arising wholly above the control of human agencies, and which occurs independently of human action or neglect. In the civil law, this term is sometimes used as synonymous with “*vis divina*”, or act of God. (Citations omitted.)

There is no doubt that what occurred here was within the control of human agencies. Although keeping in mind that defendant has submitted absolutely no proof as to the cause of its breach, I.R.I.A.F.’s Responsive Memorandum, *supra*, at 4, claims that the causes of the alleged breach were “political turmoil and violent revolutionary struggles in Iran, a breakdown in the military chain of command, lack of fuel, airfields closed, by strikes and/or government decrees, and denial of over-flight permission by third countries”. Even if proved, such circumstances would not excuse I.R.I.A.F.’s breach on the grounds of *force majeure*.

¹²⁵ In addition to the fact that the refusal to honor invoices occurred in New York City, there is no indication that the refusal was ordered from or approved by Teheran. Considering the political state of Iran, it would appear possible that the refusal was the result of the I.R.I.A.F. representative’s fear to take any action which could cause trouble for him with Iran’s new government. Putting aside such speculation, I.R.I.A.F. has failed to introduce any proof tending to show that the refusal was “invested with sovereign authority” from Iran. *National American Corp. supra*, 448 F.Supp. at 639–41.

I conclude that there is a probability that Behring will succeed on the merits of this case, N.J. Civil Practice Rule 4:60-5(a)(1), and now turn to the statutory authority for the issuance of a writ of attachment.

B. *Statutory Basis for the Writ.*

The second requirement set out in New Jersey Civil Practice Rule 4:60-5(a) for the issuance of a writ of attachment is that there exist a statutory basis for the issuance of the writ. The New Jersey Attachment Statute, N.J.S.A. 2A:26-1 *et seq.*, is the sole source of authority for a writ of attachment in New Jersey. *E.g. Tanner Associates, Inc. v. Ciraldo*, 33 N.J. 51, 161 A.2d 725 (1960). That statute allows a writ to issue in five situations, two of which Behring contends apply here. In pertinent part, N.J.S.A. 2A:26-2 provides:

Issuance of attachments; grounds

An attachment may issue out of the superior court, any county court or county district court upon the application of any resident or nonresident plaintiff against the property, real and personal, of any defendant in any of the following instances:

(a) *Where the facts would entitle plaintiff to an order of arrest before judgment in a civil action; and in such cases the attachment may issue against the property of a female, or of a corporation in the same manner as though the defendant would be liable to arrest in a civil action, except that, in actions founded upon a tort, an attachment shall not issue against a corporation upon which a summons can be served in this state; or*

(b) *Where the defendant absconds or is a nonresident of this state, and a summons cannot be served on him in this state; but an attachment shall not issue hereunder against the rolling stock of a common carrier of another state or against the goods of a nonresident in transit in the custody of a common carrier of this or another state. . . .*

For the purposes of this section a summons can be served upon a person in this state where service can duly be made upon someone on his behalf in the state, but not where service may be made only by publication in the state. (Emphasis added.)

1. *N.J.S.A. 2A:26-2(a).*

Behring first argues that a writ of attachment is available because it would be entitled to an order of arrest before judgment in a civil action. N.J.S.A. 2A:26-2(a). The availability of such an arrest order is governed by the Capias Act, N.J.S.A. 2A:15-40 *et seq.* In relevant part, the Capias Act provides:

A capias ad respondendum shall issue in an action founded upon contract, express or implied, due to plaintiff from defendant, only when the proof establishes the particulars specified in one or more of the following subparagraphs:

(a) That defendant is about to remove any of his property out of the jurisdiction of the court in which the action is about to be commenced or is then pending with intent to defraud his creditors; . . .

N.J.S.A. 2A:15-42(a).

Behring contends that it could obtain an order of arrest of I.R.I.A.F., if it were an individual, under the circumstances of this case. I disagree.

There is no doubt that the defendant will remove its property out of the jurisdiction of this Court should I deny plaintiff's application. A cursory reading of the statute, however, reveals that this alone will not support a writ. The quoted language explicitly requires that the removal of property be done with the intent to defraud creditors. *Cf. H. B. Claflin & Co. v. Deterbach*, 28 A. 715 (N.J.1893) (applying a predecessor statute of N.J.S.A. 2A:15-42(a)).

The most that can be inferred from the present record is that during the regular course of defendant's dealings with plaintiff, I.R.I.A.F. will have its property shipped out of the jurisdiction of this Court, and that plaintiff fears that the political upheaval in Iran will prevent any more of defendant's property from coming into this Court's jurisdiction, thus preventing plaintiff from satisfying its judgment within this district. Nowhere in the Verified Complaint are defendant's acts alleged to be done with intent to defraud plaintiff. Likewise, none of the affidavits filed by plaintiff aver that I.R.I.A.F. intends to defraud Behring.

I am therefore satisfied that the record before me does not allow of an attachment issued pursuant to N.J.S.A. 2A:26-2(a) and 2A:15-42.

2. *N.J.S.A. 2A:26-2(b)*.

An order of attachment is issuable under N.J.S.A. 2A:26-2(b) when two requirements are satisfied. The first requirement is that the defendant must either abscond from or be a nonresident of this state. There is little doubt that I.R.I.A.F. is not a resident of New Jersey. I.R.I.A.F. is an agency or instrumentality of a foreign state, Iran. 28 U.S.C. §1603. It is not created under the laws of this state. It has not obtained a certificate of authority to do business here. It maintains no offices here. Its sole presence in this state consists of the occasional visits of I.R.I.A.F. cargo planes to McGuire Air Force Base to pick up shipments of goods, and the occasional visits of I.R.I.A.F. employees to Behring's Edison, New Jersey, warehouse to inspect its purchases. These contacts with this state fall short of making New Jersey I.R.I.A.F.'s residence as that term is used in the statute. *See Baldwin v. Flagg*, 43 N.J.L. 495 (Sup.Ct.1881); *Augustus Co. v. Manzella*, 19 N.J.Misc. 29, 17 A.2d 68 (Atlantic Co.Ct. 1940). I therefore find that the first requirement set out in N.J.S.A. 2A:26-2(b) is satisfied.

The second requirement of the statute is that the defendant must not be subject to service of process in this state. The statute, in clarification of this requirement, states that "a summons can be served on a person in this state where service can duly be made upon some one on his behalf in the state. . . ." N.J.S.A. 2A:26-2. I.R.I.A.F. argues that its representative in this country, Colonel Khatami, could have been duly served with a summons on its behalf in this state pursuant to 28 U.S.C. §1608(b)(2).¹²⁶ Behring claims that he could not.

Resolution of the conflict demands that I first determine when it was that service could have been made upon defendant in this state. The statute cases indicate that

¹²⁶ 28 U.S.C. §1608(b)(2) reads in relevant part:

(b) Service in the courts of the United States shall be made upon an agency or instrumentality of a foreign state:

(2) . . . by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States. . . .

the presence or absence of this requirement is to be determined at the time the writ is to be issued. *E.g. Baldwin, supra*, 43 N.J.L. at 498; *Augustus Co., supra*, 19 N.J.Misc. at 31, 17 A.2d 68. Technically, any writ of attachment authorized by this opinion should look to whether the defendant—or someone who could be served on its behalf—was subject to service of summons within this state on the hearing date of June 1, 1979.

Plaintiff, however, argues that the Court should look to February 28, 1979, when it first sought the writ of attachment and when the Temporary Restraining Order in the nature of an attachment was issued. I agree. For the purposes of this element, I believe it proper to act as if the Court issued a writ of attachment on February 28, 1979 and treat the present opinion as if addressing a motion to dissolve the attachment brought pursuant to New Jersey Civil Practice Rule 4:60-11. *Cf. Sampson v. Murray*, 415 U.S. 61, 86-87 & n. 58, 94 S. Ct. 937, 39 L.Ed.2d 166 (1974) (regarding the propriety of treating a temporary restraining order as a preliminary injunction under *Fed.R.Civ.P.* 65). This accords with the express statutory directive that the Attachment Statute "be liberally construed, as a remedial law for the protection of resident and nonresident creditors and claimants". N.J.S.A. 2A:26-1. *E.g. United States Steel Corporation v. Commercial Contracting Corp.*, 168 F.Supp. 375 (D.N.J. 1958); *Mueller v. Seaboard Commercial Corp.*, 5 N.J. 28, 39, 73 A.2d 905 (1950).

On February 28, 1979 Colonel Khatami was not present in this state for the purpose of accepting service of process on behalf of the defendant I.R.I.A.F.¹²⁷ Even if he had been in the state on that date, I would hold that he was not one upon whom service could duly be made on I.I.A.F. or I.R.I.A.F.'s behalf pursuant to 28 U.S.C. §1608(b)(2). At that time, events in Iran were such that Behring could not be certain of Khatami's status with the defendant. In fact, the defendant with which Colonel Khatami was then affiliated, the I.I.A.F., is now apparently defunct and only its successor I.R.I.A.F. has appeared. It is not apparent from the record when or how Colonel Khatami became a representative of the successor organization. I therefore conclude that Khatami was not someone on whom service could have been made on behalf of I.R.I.A.F.¹²⁸ I therefore conclude that the second requirement of N.J.S.A. 2A:26-2(b) is met.

I cannot yet conclude, however, that the statutory grounds for the issuance of a writ of attachment are completely satisfied. I.R.I.A.F. contends that N.J.S.A. 2A:26-2(b) provides for attachment only as an aid to jurisdiction, and that it is not available when jurisdiction *in personam* may be obtained over the defendants. I.R.I.A.F., however, cites no cases in direct support of this proposition.

The New Jersey Attachment Statute has been in substantially the same form for over a century. *See Hotel Registry Corp. v. Stafford*, 70 N.J.L. 528, 57 A. 145 (Sup.Ct. 1904). As a result, most of the cases interpreting the attachment act and its

¹²⁷ See Affidavit of Notice of Robert W. Delvanthal, Esq. filed March 5, 1979.

¹²⁸ In addition to service upon the defendant I.I.A.F. through diplomatic channels, service was in fact attempted upon I.I.A.F. by service upon Colonel Khatami pursuant to 28 U.S.C. § 1608(b)(2). *See* Opinion Maintaining Restraints, *supra*, at p. 482, foot-note 97. Although the question of the sufficiency of service upon Khatami as service upon I.R.I.A.F. has risen in the context of the instant attachment problem, I must keep in mind whether I would have been willing to enter a default judgment against I.R.I.A.F. solely on the basis of service upon Khatami had the I.R.I.A.F. not appeared in this matter.

predecessors involve jurisdictional attachments prior to the widespread enactment of “long arm” statutes occasioned by *International Shoe Corp. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). I am satisfied, however, that a writ of attachment is authorized by the New Jersey statute under the circumstances of this case even though plaintiff has obtained *in personam* jurisdiction of the defendant I.R.I.A.F.

The statute itself requires no more than an inability to serve a defendant within the state; it does not require that personal jurisdiction over the defendant not be obtainable. In fact, even the older cases using attachment as a jurisdictional device recognized that a diligent plaintiff-creditor could often obtain personal jurisdiction over a defendant by waiting until he entered the state, yet nonetheless allowed the writ to issue. *See, e.g., Baldwin, supra*, 43 N.J.L. at 498 (wherein the court states: “[A debtor] may come into the state so frequently and openly, that a creditor by watching an opportunity may obtain personal service of process upon him, and still be liable to process of attachment.”). It is obvious to the Court that one of the major, accepted purposes of attachment is to protect a prospective fund from which plaintiff could satisfy a judgment to be rendered in the future in an action on a contract from being dissipated. *See Lundy v. Collitti*, 155 N.J.Super. 34, 38, 382 A.2d 94 (L. Div.1977); *Prozel & Steigman v. International Fruit Distributors*, 171 F.Supp. 196, 199 (D.N.J. 1959). That purpose recognizes that debtors having little contact with this state, even though those contacts may be more than minimal, will suffer little by withdrawing altogether from this state in an effort to frustrate the judgment won by the creditor. Additionally, it is clear that under other sections of the Attachment Statute, a writ of attachment is authorized even though the debtor is within the state and subject to personal jurisdiction. *E.g. Seiden v. Fishstein*, 44 N.J.Super. 370, 376, 130 A.2d 645 (App.Div.1957) (allowing the attachment of the property of a resident debtor under N.J.S.A. 2A:26-2(a)).

I therefore conclude that there exists a statutory basis for the issuance of a writ of attachment in N.J.S.A. 2A:26-2(b) and that the second element of New Jersey Civil Practice Rule 4:60-5(a) is present.

C. *The Presence of Property in this State Subject to Attachment.*

I turn now to the final requirement of New Jersey Civil Practice Rule 4:60-5(a):

“that there is real or personal property of the defendant at a specific location within [New Jersey] subject to attachment.” The defendant’s personal property located at plaintiff’s Edison, New Jersey warehouse satisfies this requirement in all but possibly one respect. Defendant argues that its property enjoys immunity from attachment under the Foreign Sovereign Immunities Act of 1976, Pub.L. No. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.) [hereinafter “Immunities Act” or “Act”] because it is intended for use in connection with a military activity. 28 U.S.C. §1611(b)(2). *See also Aerotrade Inc. v. Republic of Haiti*, 376 F.Supp. 1281 (S.D.N.Y. 1974).

My Opinion Maintaining Restraints resolved two central questions. I first held that I.R.I.A.F. property was *not* subject to attachment prior to judgment under the Immunities Act, sections 1609, 1610(b) and (d). However, I then held that Iran had waived its immunity from such attachments in the Treaty of Amity, Economic Relations and Consular Rights Between the United States of America and Iran, August 15, 1955, art. XI, para. 4 [1957] 8 U.S.T. 899; T.I.A.S. No. 3583 [hereinafter “Treaty of Amity” or “Treaty”], and that that waiver had to be given effect under

section 1609 of the Immunities Act. Although I.R.I.A.F. raised its contentions with respect to section 1611(b) of the Act, I refrained from deciding that issue because the record was barren of any facts supporting its claim. In spite of the continued barrenness of the record, which again causes me to conclude that I.R.I.A.F. has not carried its burden of showing that its property is immune,¹²⁹ I will address this argument in more detail at this time.¹³⁰

As it was the starting point for discussion in my prior opinion, the starting point for this discussion is the Immunities Act. See *Opinion Maintaining Restraints*, *supra*, text at p. 486 and foot-note 110. Section 1609 of the Act sets out as a general rule that the property, of whatever nature, of a foreign state is immune from attachment.¹³¹ Exceptions to this general rule are found within the Act in section 1610, and without the Act in certain international agreements which section 1609 explicitly saves from repeal. The exceptions established in section 1610 are based upon the activities in which a foreign state engages, and not upon the type of property involved. The exceptions established without the Act by international agreement do not follow any general rule, but are a product of the negotiations between the United States and foreign states, differing from one agreement to the next. Section 1611 provides that certain types of property will be immune from execution regardless of prior waivers.

At issue here is section 1611(b)(2) which provides immunity for certain types of military equipment. Although section 1611(b)(2) does restore the immunity, otherwise waived in section 1610, of military equipment, I must reject I.R.I.A.F.'s contention that section 1611(b)(2) restores the immunity of military equipment when that immunity has been waived by an international agreement saved by section 1609.¹³² The prefatory language of section 1611(b) states only that "[n]otwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment" if certain conditions are met. This language states that the subsection operates notwithstanding the provisions of only section 1610; section 1609 is not men-

¹²⁹ I.R.I.A.F. has the burden of proving a defense of sovereign immunity. H.R.Rep. No. 94-1487, 94th Cong., 2d Sess. 17 reprinted in [1976] U.S.Code Cong. & Admin.News, pp. 6604, 6616 [hereinafter H.R.Rep. No. 94-1487]. See *Opinion Maintaing Restraints*, *supra*, at p. 484, foot-note 105.

¹³⁰ I am aware that, based upon my summary opinion, filed May 11, 1979, the parties entertained the misconception that I have already ruled upon this question, holding that section 1611 is inapplicable to this case. See Plaintiff's Letter Memorandum of Law in Response to Order to Show Cause Why a Writ of Attachment Should Not Issue, at 2-3. My failure to address this issue in that summary opinion was not meant to be taken as an implied ruling on the issue. This misconception has since been clarified. See *Opinion Maintaining Restraints*, *supra*, at p. 491, foot-note 119.

¹³¹ 28 U.S.C. §1609 provides:

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

¹³² I.R.I.A.F. argues that section 1611(b) applied "notwithstanding any of the [Immunities Act's] exceptions to the immunity of the property of a foreign state". See I.R.I.A.F. Responsive Memorandum at 2. As the text reveals, I believe that section 1611 applies notwithstanding only the exception to immunity set out within the act in section 1610. Section 1611 standing alone has no effect on those exceptions from without the Act by virtue of the savings clause of section 1609.

tioned. A central premise of my Opinion Maintaining Restraints was that section 1609 saved from repeal any existing international agreement to which the United States was a party at the time the Act was enacted.¹³³ Section 1611(b), by referring only to section 1610, cannot be read to abrogate existing treaties saved from repeal by section 1609 to the extent that military equipment might be involved.

The Treaty of Amity is therefore the next point of departure. My first concern must be whether the Treaty addresses the problem of military equipment. If the Treaty expresses a rule which conflicts with the Immunities Act, I must give effect to that rule, whatever it may be. If the Treaty is silent on that issue, however, then the provisions of the Immunities Act will, in accord with Congress' intent, govern the outcome of this case.¹³⁴ My first task is therefore to determine whether the Treaty is silent on the issue of military property.

The grants and waivers of immunity provided by the Immunities Act are based upon four variable factors: the nature of the foreign entity, the nature of the activity in which the foreign entity is engaged, the nature of the liability sought to be enforced against that foreign entity, and the nature of the property of the foreign entity sought to be attached. In enacting the Act, Congress clearly considered each of these four categories and expressed its intentions with regard to each of them.

Keeping these four categories in mind while examining the pertinent provisions of the Treaty of Amity, I must conclude that in negotiating and ratifying the Treaty, the United States and Iran only expressed their intentions as to the first three of these variables; the Treaty is silent as to the fourth. The relevant portion of the Treaty is article XI, paragraph 4, which provides:

No *enterprise* of either High Contracting Party [referring to the United States of America and Iran], including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment, or other liability to which privately owned and controlled enterprises are subject therein. (Emphasis added.)

[1957] 8 U.S.T. at 901. Behring argues that this Court's prior interpretation of this language, that the parties desired to be treated as private ordinary citizens, necessitates a conclusion that any and all property of the defendant must be subject to attachment. I disagree.

My decision that the United States and Iran desired to be treated as ordinary individuals in the other's courts operates only with regard to the liabilities to which they would be subject. In the Treaty, the parties waived immunity "from taxation, suit, execution of judgment or other liability to which privately owned and controlled

¹³³ See Opinion Maintaining Restraints, *supra*, text at p. 489 and foot-note 116.

¹³⁴ My Opinion Maintaining Restraints discusses the legislative history of the Immunities Act. That history shows quite clearly that Congress intended the Immunities Act to govern notwithstanding the savings clause of sections 1604 and 1609 whenever an international agreement was silent upon an issue which the Act addresses. See H.R. Rep. No. 94-1487, *supra*, at 13, 17-18, 26; [1976] U.S.Code Cong. & Admin.News at 6611, 6616, 6625. See also Opinion Maintaining Restraints, *supra*, text at p. 489 and foot-note 116.

enterprises are subject". In my Opinion *Maintaining Restraints*, *supra*, at p. 491, I accepted Behring's argument that the "or other liability" language which the parties employed indicated that the specific language preceding it was language of illustration and not of limitation. I therefore concluded that the United States and Iran expressed their intention that the waiver be read broadly to include prejudgment attachments. This phrase, however, deals only with one of the four variables which Congress addressed in the Immunities Act—the liabilities to which the parties would be subject.

The Treaty uses similarly broad language with respect to two other variables: the nature of the foreign entity and the nature of the activity in which that entity is engaged. With respect to the former, the waiver of immunity is effective for all "enterprises" of the United States and Iran, "including corporations, associations, and government agencies and instrumentalities". The list indicates that the parties considered the proper scope of the waiver with regard to the variable and stated a position on it. With respect to the latter variable, the waiver of immunity is effective whenever the foreign entity engages in "commercial, industrial, shipping or other business activities". Again I must conclude that the parties considered the proper scope of the waiver with respect to this variable and stated a position on it. In each case illustrative lists or catch-all "or other..." language is used to indicate the desired breadth of the waiver.

The Treaty, however, does not use such language with respect to the variable presently at issue: the nature of the property. It states only that the foreign entity shall not enjoy immunity "for itself or its property". The "...or its property" language is almost an afterthought. No illustrative list precedes the word property. No catch-all "or other property" or "of whatever kind" language is used. It is not obvious that the United States and Iran considered the question of differentiating between types of property, and I therefore cannot conclude that they stated, or intended to state, a position on this issue.

I must therefore conclude that the Treaty is silent with respect to whether certain types of property are subject to attachment. This being the case, the legislative history, *see* note 14, *supra*, makes perfectly clear that I must look to the Immunities Act, in this case section 1611, to determine whether certain types of property are immune from attachment. Section 1611(b)(2) states:

- (b) . . . the property of a foreign state shall be immune from attachment and from execution, if—
 - (2) the property is, or is intended to be, used in connection with a military activity and
 - (A) is of a military character, or
 - (B) is under the control of a military authority or defense agency.

I.R.I.A.F. has not shown that either of these exceptions apply. There is no proof in the record of this case regarding whether the property sought to be attached is of a military character. It is therefore not immune from attachment under section 1611(b)(2)(A). Likewise, there is no evidence contradicting the allegations of Behring's Verified Complaint and supporting affidavits that the property is in the control of Behring, which is neither a military authority nor a defense agency.¹³⁵ The property

¹³⁵ *See* Verified Complaint, *supra*, ¶ 11; Affidavit of Attachment of George A. Murphy, *supra*, ¶ 12.

therefore is not immune from attachment under section 1611(b)(2)(B). The only proof submitted by the defendant which addresses this issue is the Affidavit of Colonel Khatami filed May 4, 1979 at ¶ 2, to the effect that the materials were purchased for use in connection with I.R.I.A.F. military activities.¹³⁶ At most, I.R.I.A.F. has raised an issue of fact with respect to only this last element.

I must conclude that I.R.I.A.F. has not sustained its burden of showing immunity from attachment. There is, therefore, property in this state subject to attachment and the third requisite of New Jersey Civil Practice Rule 4:60-5(a) is satisfied.

Accordingly, I must conclude that plaintiff has established that it is entitled to a writ of attachment in this matter, and I will enter an order authorizing the issuance of such a writ.

III. *Bond*

The defendant has requested that plaintiff be required to post a bond sufficient to cover any damages caused to it by the writ of attachment should plaintiff fail in this action, or should it eventually be determined that it was not entitled to this writ of attachment. Under *Fed.R.Civ.P.* 64, and New Jersey Civil Practice Rule 4:60-5(d), a bond requirement is entirely within the discretion of the court. Because of the unusual nature of this case and the unusual circumstances in which the defendants find themselves, I will require the plaintiff to post a bond. I have reviewed the defendant's answer and counterclaim in this matter, and, in light of the fact that defendant has been able to have the use of its property by the deposit of monies to a Trust Account, *see supra* note 1, I believe that a bond in the amount of \$20,000.00 will adequately protect the defendant.

Plaintiff shall submit an order in accord with this opinion.

6. *International Association of Machinists and Aerospace Workers v. The Organization of the Petroleum Exporting Countries*. DECISION BY THE DISTRICT COURT, C.D. CALIFORNIA ON 18 SEPTEMBER 1979¹³⁷

The judgement:

In September, 1960, defendants Iran, Iraq, Kuwait, Saudi Arabia and Venezuela met in Baghdad, Iraq. The result of this meeting and subsequent meetings was the Organization of Petroleum Exporting Countries (hereinafter "OPEC"). Thereafter, defendants Algeria, Ecuador, Gabon, Indonesia, Libya, Nigeria, Qatar and The United Arab Emirates joined OPEC, bringing to 13 the number of member nations. The principal aim of this organization was stated as "the unification of petroleum policies for the Member Countries and the determination of the best means for safeguarding the interests of Member Countries individually and collectively." Resolution of the First Conference, Resolution 1.2(4). To accomplish this goal, the organization expressed the desire to "formulate a system to ensure the stabilization of

¹³⁶ Affidavit of Colonel Khatami, filed May 4, 1979, at ¶ 2, states:

2. All of the [goods covered by the Behring Contract] purchased by the [I.R.I.A.F.] or its predecessor [I.I.A.F.] in the United States have been purchased for use by [I.R.I.A.F.] in connection with military activities and not for resale or any non-military use.

¹³⁷ *Federal Supplement*, vol. 477 (1979), p. 553.

prices by, among other means, the regulation of production, with regard to the interests of the producing and of the consuming nations, and to the necessity of securing a steady income to the producing countries, as efficient economic and regular supply of this source of energy to consuming nations. . . .” *Id.* Resolution 1.1(3). The system that was implemented by OPEC included, among other features, the setting of prices for the sale of their crude oil.

Plaintiff International Association of Machinists and Aerospace Workers (hereinafter “IAM”) filed this action in December 1978, by way of Complaint and then a day later by way of First Amended Complaint, challenging the price setting activities of OPEC and its 13 member nations, naming each nation and OPEC as defendants. Plaintiff alleged that these price setting activities violated Section 1 of the Sherman Act, 15 U.S.C. §1,¹³⁸ under which price fixing has, in a long line of cases,¹³⁹ been ruled a *per se* violation.¹⁴⁰ The injury plaintiff has allegedly received is the payment of higher prices for gasoline at the service station pumps, by virtue of the anti-competitive actions taken by defendants and the antitrust violations involved. In this action, plaintiff asks for damages under Section 4 of the Clayton Act, 15 U.S.C. §15,¹⁴¹ and injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. §26,¹⁴² praying this Court to enjoin the price setting activities of these defendants, OPEC

¹³⁸ 15 U.S.C. §1 provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

¹³⁹ See *Albrecht v. Herald Co.*, 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968), *reh. den.* 390 U.S. 1018, 88 S.Ct. 1258, 20 L.Ed.2d 169; *United States v. General Motors*, 384 U.S. 127, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966); *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958); *United States v. McKesson & Robbins*, 351 U.S. 305, 76 S.Ct. 937, 100 L.Ed. 1209 (1956); *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951), *reh. den.* 341 U.S. 956, 71 S.Ct. 1011, 95 L.Ed. 1377; *United States v. Paramount Pictures*, 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260 (1948); *Moore v. Jas. H. Matthews & Co.*, 473 F.2d 328 (9th Cir. 1972); *Local 36 of Intern. Fishermen & Allied Workers of America v. United States*, 177 F.2d 320 (9th Cir. 1949).

¹⁴⁰ The *per se* category of antitrust violations is made up of agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to precise harm they have caused or business excuse for their use. *Sitkin Smelting & Refining Co. v. FMC Corp.*, 575 F.2d 440, 446 (3d Cir. 1978).

¹⁴¹ 15 U.S.C. §15 provides:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.

¹⁴² 15 U.S.C. §26 provides:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief

and member nations. Plaintiff claims that jurisdiction of this Court is based upon the Foreign Sovereign Immunities Act of 1976 (hereinafter "FSIA"), 28 U.S.C. §1602, *et seq.*, particularly 28 U.S.C. §1605(a)(2),¹⁴³ as well as upon the Sherman and Clayton Acts.

On June 25, 1979, plaintiff moved for a preliminary injunction. At that time, none of the defendants had made an appearance in this action or had filed an opposition to that motion. Since default had been entered by the Clerk on only three of the defendants, and since the remainder of the defendants still had time within which they could file an answer, the motion for preliminary injunction was continued. This Court wanted to give each and every defendant a full opportunity to be heard prior to ruling on the motion for preliminary injunction. Furthermore, the Court was aware of the constraints of the FSIA, in particular the provision that "No judgment by default shall be entered by the court . . . unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. §1608(e). Since the preliminary injunction sought by plaintiff would have given plaintiff a good measure of what it sought, it would have been inappropriate for this Court to proceed on an incomplete record without a full hearing. So the Court ordered the evidentiary hearing on the motion for preliminary injunction consolidated with the trial on the final injunction under Rule 65 of the Federal Rules of Civil Procedure, together with the evidentiary hearing on the motion for default judgment, all to be heard on August 20, 1979. In this manner, the requirements of 28 U.S.C. §1608 (e) could be fulfilled while allowing defendants sufficient time to appear and oppose this action and at the same time allowing plaintiff sufficient time to prepare and gather evidence in support of the injunction. Moreover, the Court also issued an Order To Show Cause asking for factual and legal assistance on some eighteen basic questions from the defendants, and from any other knowledgeable sources as *amici curiae*, with the requirements that plaintiff effect service on the defendants and on numerous Federal and State officials and agencies, and make copies available to the news media. See Appendix A.

In response, 11 briefs were submitted, and plaintiff and four amici curiae appeared by counsel. As ordered, the consolidated hearings and trial proceeded on Au-

against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

¹⁴³ 28 U.S.C. §1605(a)(2) provides:

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

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

gust 20, 1979. As of that date, each of the 13 member nations had been validly served. Each, however, had chosen not to make an appearance in this action, and as a result, a default entry had been made by the Clerk of Court against each of the 13 member nations, with determination of whether the Court would make and enter a default judgment to abide the outcome of the hearings and trial.

What follows now shall constitute the Court's written findings of fact and conclusions of law, pursuant to Rule 52 (a), F.R.Civ.P.

At the outset, the Court pointed out that OPEC could not legally be served either under FSIA, 28 U.S.C. §1602 ff., or under the International Organizations Immunities Act, (hereinafter "IOIA"), 22 U.S.C. §288 *et seq.*, or otherwise, holding that FSIA applies only to foreign sovereignties, which OPEC is not; and IOIA applies only to those international organizations "in which the United States participates," and the United States does not participate in OPEC. The Court added its doubts that OPEC could ever be legally served with process. But, in any event, plaintiff and its counsel admitted that OPEC could not be and had not been legally served. Whereupon the Court dismissed OPEC from the lawsuit and out of the case entirely.

Thereupon the consolidated hearings and trial commenced and ran four days and four evenings, usually from 9:30 a. m. to anywhere from 8:30 p.m., to 11:30 p.m., with appropriate recesses for rest, physical relief and meals. At the conclusion of a full day of argument, the Court issued its oral decision from the Bench dismissing the case as against all the remaining defendants, to wit, the 13 nations, members of OPEC, and ordering judgment against the plaintiff.

Plaintiff as "Indirect purchaser"

1. *Damages*

In the early stages of the proceedings, the Court dismissed the damage portion of plaintiff's complaint. Plaintiff did not allege any direct purchase from defendants. The injury claimed allegedly resulted from the purchase of gasoline here in the United States. Since plaintiff did not allege or show that it purchased any crude oil or gasoline from the defendants, or had any dealings with the defendants at all, it necessarily had to be and was and is an "indirect purchaser" of and from the defendants with respect to the gasoline it purchased in the United States. The most that plaintiff could show or claim was that it purchased in the United States, at service station pumps, gasoline which in part may have been refined in the United States by American companies from defendants' crude. Viewing the facts in a light most favorable to plaintiff, it is clear that since the defendants' crude oil passed f. o. b. the particular defendant country's port, was sold and title passed from defendants to purchasers at such ports, was sold again and title passed again and again—through crude buyers, crude shippers, crude resellers, refineries, was re-refined into gasoline, then went through gasoline distributors and marketing wholesalers and gasoline retailers—until the gasoline was purchased by plaintiff at the service station pumps, plaintiff was and is at the very best an indirect purchaser, eight times removed from the defendants, that is, an indirect purchaser of domestic gasoline eight times removed from defendants, and not a direct purchaser of defendants' foreign crude.

As an indirect purchaser, plaintiff is precluded from seeking damages. In *Illinois Brick Co., v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), the Supreme Court held that a plaintiff in a price fixing case may recover only if it

purchased directly from the alleged price fixer. An indirect purchaser may not recover on the basis of the so-called pass-on or pass-through doctrine, urged by plaintiff. Plaintiff cannot establish antitrust injury by showing that the additional cost imposed on crude oil by the price fixing defendants has been passed on to the plaintiff by the first direct purchaser from the defendants and any intermediate purchasers along the line through the refineries and on to the service station pumps as gasoline.

The *Illinois Brick* case followed the earlier decision of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968). In the *Hanover Shoe* case, the defendant, accused of monopolizing shoe machinery, attempted to defend against this charge by asserting that plaintiff was not injured by any acts committed by the defendant because the plaintiff, a shoe manufacturer, passed the additional costs along to the ultimate consumer. The Supreme Court rejected this pass-on or pass-through doctrine as a defense which could be asserted in an action for treble damages under §4 of the Sherman Act, 15 U.S.C. §4. The Supreme Court based its holding on the difficulties and uncertainties of proof concerning such a defense when it stated:

A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher prices had the overcharge been discontinued. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable.

Hanover Shoe v. United Shoe Mach., *supra*, 392 U.S. at 492-493, 88 S.Ct. at 2231.

Additionally, the Court was concerned about the antitrust laws losing their effectiveness if such a defense were allowed. If this defense was carried to the extreme, the only possible plaintiffs would necessarily be the ultimate customers who, in the instances in *Hanover Shoe*, were buyers of single pairs of shoes. Since such individuals would only have a tiny stake in a lawsuit and, therefore, little interest in it, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one would be available to bring and prosecute vigorously any class action against them. *Id.* at 494, 88 S.Ct. 2224.

In *Illinois Brick*, the Court was faced with the choice of either carving out an exception to *Hanover Shoe*, or disallowing the use of the pass-on doctrine both offensively and defensively. In disallowing its use, offensively and defensively, the Court noted that "The principal basis for the decision in *Hanover Shoe* was the Court's perception of the uncertainties and difficulties in analyzing price and out-put decisions 'in the real economic world rather than an economist's hypothetical

model,' 392 U.S., at 493 [88 S.Ct. at 2231], and of the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom.'" *Illinois Brick Co. v. Illinois, supra*, 431 U.S. at 731-732, 97 S.Ct. at 2068. The Court went on to find that "the evidentiary complexities and uncertainties involved in the defensive use of pass-on against a direct purchaser are multiplied in the offensive use of pass-on by a plaintiff several steps removed from the defendant in the chain of distribution.'" *Id.* at 732, 97 S.Ct. at 2068. Thus, the evidentiary complexities of the pass-on doctrine, where one could become mired in a determination of how much damage to apportion to each purchaser in a long chain of distribution, led the Court to reject the offensive use of this doctrine. Additionally, the Court was concerned with exposing defendants to multiple liability if the pass-on doctrine were allowed to be used offensively, but not defensively, because in such a situation, each purchaser in the chain of distribution could recover the full measure of his own injury, and damages, as well as the injury and damages of each purchaser below him, and yet the defendant could not offset the recovery of the first purchaser against the recovery of the second purchaser, or the recovery of any subsequent purchaser against any recovery of further subsequent purchasers, or *vice versa*. *Id.* at 730-731, 97 S.Ct. 2061.

The Court was also concerned about the problems of joinder inherent in such a situation, such as impossibility of joinder, frustrating attempts at class actions, difficulties in properly apportioning recoveries, and other inherent problems. *Id.* at 737-741, 97 S.Ct. 2061.

The Court did recognize that there may be instances where an indirect purchaser could be a proper plaintiff. A pre-existing cost-plus contract was cited as such an exception to the Court's opposition to application of the pass-on doctrine. The interaction of supply and demand would not complicate the damage determination in such a situation since the indirect purchaser would be tied to a fixed quantity with the overcharge being directly passed on. *Id.* at 736. 97 S.Ct. 2061. The Court also recognized that another situation where the pass-on doctrine might be allowed is where the direct purchaser is owned or controlled by its customer. *Id.* at 736 n. 16. 97 S.Ct. 2061.

In the present action, plaintiff does not even allege that it is a direct purchaser, and it is clearly an indirect purchaser. Plaintiff, however, asserts that it falls into the exceptions of *Illinois Brick* and has the right to maintain the action for damages. Plaintiff attempts to support this assertion based on three theories: (1) that certain Federal pass-through regulations are analogous to the cost-plus contract; (2) that domestic oil companies have conspired with the defendants; and (3) that the defendants control the United States oil companies with which plaintiff deals.

The two primary features of the cost-plus contract which led the Court to cite this as a possible exception to *Illinois Brick* are: (1) a direct and easily measurable pass-on of costs; and (2) a commitment for a fixed quantity, precluding evidentiary complexities due to considerations of decreasing sales. The Federal pass-through regulations upon which plaintiff relies have neither of these characteristics. Plaintiff alleges that consumer prices for gasoline directly reflect any price increase by the OPEC nations, based on the pass-through statute, 15 U.S.C. §753(b)(2),¹⁴⁴ which al-

¹⁴⁴ 15 U.S.C. §753(b)(2) provides in pertinent part:

(2) in specifying prices (or prescribing the manner for determining them), the regulation under subsection (a) of this section—

lows a dollar-for-dollar pass-through of net increases in the cost of crude oil. Plaintiff's exhibits in support of its motion for preliminary injunction, however, irrefutably establish that the actual pass-through is accomplished in a banking mechanism. The oil companies "bank" these pass-throughs until such time, as they believe, the market will allow an increase in the price of gasoline. The pass-through, if it occurs at all, is not direct and is not easily measurable. Furthermore, consumers are not required to buy a fixed quantity of gasoline. Consequently, evidentiary problems much the same as in *Illinois Brick* could and most surely would arise. Therefore, this pass-through statute and the regulations of the Department of Energy thereunder, 10 C.F.R. 212.83, pp. 277-290 (1978), are not in any way analogous to a true cost-plus contract and cannot serve as an exception to *Illinois Brick*.

Plaintiff's contentions with respect to conspiracy with "certain private companies and other entities" (Plaintiff's First Amended Complaint, par. 24, page 11, lines 15-21), and control of them by the OPEC countries are equally frivolous. While plaintiff does allege a conspiracy in its complaint, the allegation is extremely general and vague. Plaintiff utterly fails to allege any facts to support a conspiracy charge, and does not even name any domestic oil companies as engaging in any such conspiracy, or being controlled in any way by OPEC or its members. Furthermore, plaintiff's complaint contains absolutely no allegations concerning control. Moreover, no evidence of any kind was adduced at the hearings and trial to show any kind of such conspiracy or control. Consequently, these contentions must fall.

The Court, therefore, must and does strike and dismiss from the First Amended Complaint the prayer for damages.

2. Injunctive relief

Aside from seeking damages, plaintiff has prayed the Court to enjoin the defendants from continuing to conspire to fix prices. This claim is based on Section 16 of the Clayton Act, 15 U.S.C. §26, which states in part:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . .¹⁴⁵

While the Supreme Court has spoken clearly and definitively concerning an indirect purchaser's right to seek damages in *Illinois Brick*, the Court has not made a definitive statement concerning the right of an indirect purchaser to seek injunctive relief. Both *Illinois Brick* and *Hanover Shoe* involved damage actions only, and the Supreme Court limited its ruling to the question of damages. Thus, whether an indirect purchaser may properly seek injunctive relief for an antitrust violation remains an open question.

In *Mid-West Paper Products Company v. Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979), the Court of Appeals for the Third Circuit held that *Illinois Brick*

(A) shall provide for a dollar-for-dollar passthrough of net increases in the cost of crude oil, residual fuel oil, and refined petroleum products at all levels of distribution from the producer through the retail level;

¹⁴⁵ For full text of 15 U.S.C. §26, see foot-note 142, *supra*.

and *Hanover Shoe* do not preclude an indirect purchaser from seeking injunctive relief. The Court based this holding on the finding, at 590, that

in contrast to the treble damage action, a claim for injunctive relief does not present the countervailing considerations—such as the risk of duplicative or ruinous recoveries and the spectre of a trial burdened with complex and conjectural economic analyses—that the Supreme Court emphasized when limiting the availability of treble damages.

In support of this ruling the Court draws a distinction between Section 4 of the Clayton Act (15 U.S.C. §15) which provides for damages for any person who shall be injured by conduct in violation of the antitrust laws, and Section 16 (15 U.S.C. §26) which allows injunctive relief against threatened loss or damage. The Court went on to state that

for purposes of § 16 the complainant “need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur” . . . *Id.* at 591 (footnote omitted).

This distinction between the plaintiff’s obligation to show that he has actually been injured under Section 4, and plaintiff’s obligation to show only threatened injury under Section 16, led the Court to conclude that

the test for standing under Section 16 has been framed in terms of a proximate cause standard that is “less constrained” than that under §4 and which might in fact be no more rigorous than the general rule of standing. *Id.* at 591–592 (footnote omitted).

The Court also showed concern for plaintiffs that have obviously been damaged yet have been foreclosed from seeking relief, and additional concern for the enforcement mechanisms of the antitrust laws if these plaintiffs should be completely barred from seeking redress. *Id.* at 593.

A suit for injunctive relief does not present many of the problems that led the Court in *Illinois Brick* to preclude an indirect purchaser from seeking damages. For instance, as stated in *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 261, 92 S.Ct. 885, 891, 31 L.Ed.2d 184 (1972), “100 injunctions are no more effective than one.” Thus the multiplicity of suit problem does not exist in the context of Section 16, injunctive relief. The remedy of an injunction does not give rise to recovery of a fund from which a Court would have the impossible task of attempting to apportion the recovery among a long line of indirect purchasers on a chain of distribution. Accordingly, some of the evidentiary and joinder problems that perplexed the Court in *Illinois Brick* are not present in an injunctive action. This is not to say, however, that all the evidentiary problems are nonexistent. The dynamics of the marketplace could still lead to extremely complex and complicated evidentiary problems in determining whether an indirect purchaser has been injured by the prohibited action. Counterbalanced against this possible difficulty of proof, however, is the recognition that should the indirect purchaser be precluded from seeking injunctive relief, he would be totally without any remedy for an injury that is many times all too real. In view of the desire of Congress for effective enforcement procedures under the antitrust law, this Court does not believe that Congress intended to totally exclude such a large class of potential plaintiffs from the protection of the antitrust laws. Accordingly, this Court agrees with the *Mid-West Paper* decision and concludes that an indirect purchaser may sue for injunctive relief under the antitrust laws. But this does not end

the matter in some way favorable to plaintiff because we must look for and find jurisdiction if plaintiff is to prevail.

Jurisdiction

Subject matter jurisdiction is granted to the district courts to hear actions against foreign states under 28 U.S.C. §1330(a).¹⁴⁶ As explicitly provided by this statute, however, district courts only have jurisdiction to hear such actions when the foreign state is not entitled to immunity. Consequently, the question of sovereign immunity has been given jurisdictional status by its express inclusion in this statute and must be the first question addressed by this Court in determining whether this Court has been presented evidence satisfactory to support its jurisdiction to grant plaintiff's claim for relief.¹⁴⁷

Sovereign immunity is a doctrine of international law under which domestic courts must refrain from asserting jurisdiction over a foreign state. This doctrine was first recognized in the case of *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 3 L.Ed. 287 (1812). Until recently, when a foreign state wished to assert immunity, it would request the Department of State to make a formal suggestion of immunity to the court. The courts had begun to rely quite heavily on the practices and policies of the State Department and to place less emphasis on whether immunity was supported by the law and practice of nations, that is, international law.

The theory of absolute sovereign immunity initially predominated all judicial discussion and decision. Under this theory, a foreign state could not be sued whatsoever without its consent. But as the law evolved in this area, a restrictive theory of immunity began to gather growing support. Under the restrictive theory, foreign states and sovereignties are not immune insofar as their commercial activities are concerned. This theory was first stated as United States policy in 1952 in a letter ("the Tate Letter") from the Acting Legal Advisor of the Department of State, Jack B. Tate, to the Acting Attorney General, Philip B. Perlman:

. . . [T]he immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*). 26 Dep't State Bull. 984 (1952).

In 1976, Congress enacted the Foreign Sovereign Immunities Act. The legislative history is clear that the Act codified the restrictive theory of sovereign immunity. Additionally, a principal purpose of this act was "to transfer the determination of sovereign immunity from the executive branch to the judicial branch thereby... assuring litigants that these often crucial decisions are made on purely legal grounds

¹⁴⁶ 28 U.S.C. §1330(a) provides:

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

¹⁴⁷ A Federal Court in every case must first determine, on its own motion if the question is not otherwise suggested, whether the court has jurisdiction. *Warner v. Territory of Hawaii*, 206 F.2d 851, 852 (9th Cir. 1953). Accordingly, whenever the question of lack of jurisdiction arises, whether it be by the parties, by the court itself, or by the suggestion of *amici curiae* as in this case, it is the duty of the court to review this issue of jurisdiction.

and under procedures that insure due process.” House Report No. 94-1487, p. 7, 5 U.S. Code Cong. & Admin. News (1976), pp.6604, 6606. After the enactment of FSIA, any claim of sovereign immunity must be decided in conformity with principles set forth in this act. 28 U.S.C. §1602.

Under it, the FSIA, foreign states are granted immunity from the jurisdiction of American courts subject to certain exceptions. 28 U.S.C. §1604.¹⁴⁸ The only exception to immunity upon which plaintiff relies provides that foreign states are not immune in any case:

in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and the act causes a direct effect in the United States. 28 U.S.C. §1605(a)(2).

Accordingly, for this court to have subject matter jurisdiction the plaintiff must show that the activities engaged in by the defendants are “Commercial activities.”

As shown by the evidence, the pricing mechanism used by the member nations involves mutual agreement on what is called the “government take.” The government take is the amount of money the government will receive for each barrel of oil extracted within its borders and sold. Initially, each of the OPEC member sovereignties received this “take” by levying a tax on the foreign company extracting the oil or by charging the foreign company a royalty for the oils extracted. As each country gained a greater proprietary interest in the company extracting the oil, a greater amount of the “take” was derived from “buyback,” a term used to signify the amount a foreign state receives through the ownership, partial or total, of the company extracting and selling the crude oil. Today, the “government take” is accomplished and maintained by taxation and direct price quotation and demand, supported by production controls, sometimes euphemistically referred to as “conservation.”

While price-fixing is the more publicized aspect of the crude oil activities carried on by the OPEC countries, it is not the heart of the pricing mechanism for crude. The foundation of these activities is the ability and willingness to control production of crude oil. As testified by the preeminent expert in the field of World Petroleum Economies, Dr. Morris A. Adelman, one of the two Court appointed experts:¹⁴⁹

¹⁴⁸ 28 U.S.C. §1604 provides:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

¹⁴⁹ The Court, dissatisfied with the apparent expertise and proposed testimony of the plaintiff’s experts, Dr. Arnold E. Safer, Dr. James R. Kurth, and Dr. Stanley J. Foster, and after consulting the outstanding academic economic authorities in the United States, appointed as its own experts, Dr. M. A. Adelman, Professor of Economics at Massachusetts Institute of Technology, and Dr. Philip K. Verleger, Jr., Senior Research Scientist, School of Organization and Management, Yale University who until very recently had been working as Special Assistant to the Assistant Secretary for Economic Policy in the Department of the Treasury. Both of the experts were unanimously acknowledged by their peers as the two most outstanding and erudite experts in the field of both world and domestic petroleum economics.

Control of supply is the essence of monopoly; price fixing the result. . . . [T]he OPEC nations can raise or lower prices at will by controlling output. Most of the [crude oil] price increases since 1970 have in fact resulted from output restriction. Prices have also been raised by taxation and by direct price quotation. These two methods are convenient, but not necessary. Court Exhibit 26, Statement of M.A. Adelman, pp. 1, 12-13.

In order to determine whether these activities are "commercial activities," the Court must once again return to the FSIA for guidance. Section 1603(d) defines "commercial activity" as follows:

A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. 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. (Emphasis added).

The legislative history in the House Report elaborates, referring to a foreign state's commercial acts as "those which private persons normally perform," and "of the same character as . . . might be made by a private person." House Report No. 94-1487, at pp. 14, 16 5 U.S. Code Cong. & Admin. News (1976), pp. 6613, 6615. If the activity is one which normally could be engaged in by a private party, it is a commercial activity and the foreign state is not entitled to immunity. House Report No. 94-1487 at 16, 5 U.S. Code Cong. & Admin. News (1976), p. 6615. If the activity is one in which only a sovereign can engage, the activity is noncommercial.

These standards are somewhat nebulous, however, in the context of a particular factual situation. As discussed by counsel for *Amicus Curiae*, Indonesia-U.S. Business Committee for the Indonesian Chamber of Commerce, the determining factor is how the court defines the act or activity. An act or activity can be defined broadly, such as "hiring of employees," an activity carried on by private parties, and thus, "commercial," or it can be defined narrowly, such as, "employment of diplomatic, civil service or military personnel," a governmental activity. It was suggested that in determining whether to define a particular act narrowly or broadly, the court should be guided by the legislative intent of the FSIA, to keep our courts away from those areas that touch very closely upon the sensitive nerves of foreign countries.

This Court agrees that this "commercial activity" should be defined narrowly. This determination, while based partially on the factor mentioned above, is premised primarily on the recognition that a court must base its ruling on specific facts. By basing a ruling on a *generalized* view of the evidence, a court may be basing its ruling on half-truths. This Court is required to make its ruling upon the *specific* evidence presented in the evidentiary hearings and trial. From the evidence presented to this Court, it is clear that the nature of the activity engaged in by each of these

That this action by the Court was a wise course is amply demonstrated by even a casual comparison between plaintiff's experts and the Court appointed experts, not only as to *expertise*, compare the curriculum vitae of Safer, Foster and Kurth (Exhibits 1, 7 and 10) with the curriculum vitae of Adelman and Verleger (Exhibits 25 and 37); but also as to testimony, compare testimony of Safer (Rep.Tr.552-900), testimony of Foster (Rep.Tr.903-1020) and testimony of Kurth (Rep.Tr.1022-1122, 1162-1185) with testimony of Adelman (Rep.Tr.1230-1522) and testimony of Verleger (Rep.Tr.1523-1615).

This comparison confirms the wisdom of the Court's complete reliance upon its own appointed experts as contrasted with its skeptical consideration of plaintiff's experts.

OPEC member countries is the establishment by a sovereign state of the terms and conditions for the removal of a prime natural resource—to wit, crude oil—from its territory.

In determining whether the activities of the OPEC members are governmental or commercial in nature, the Court can and should examine the standards recognized under international law. The United Nations, with the concurrence of the United States, has repeatedly recognized the principle that a sovereign state has the sole power to control its natural resources. *See, e.g.*, Resolution 1803, G.A. Res. 1803, §1(1), 17 U.N. GAOR, 2d Comm. 327, U.N. Doc. A/C 2/5 R 850 (1962):

Bearing in mind its resolution 1515 (XV) of 15 December 1960, in which it recommended that the sovereign right of every State to dispose of its wealth and its natural resources should be respected,

Considering that any measure in this respect must be based on the recognition of the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests, and in respect for the economic independence of States, . . .

Declares that:

1. The right of people and nations to permanent sovereignty over their national wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.¹⁵⁰

Accord, Charter of Economic Rights and Duties of States, G.A. Res. 3281, Ch. II, Art. 2(1), U.N. Doc. A/RES/3281 (XXIX) (1974); Declaration on the Establishment of a New International Economic Order in 1974, G.A. Res. 3201 (S-VI), §4(e), U.N. GAOR, 6th Spec. Sess., Supp. (No. 1) 3, U.N. Doc. A/9559; Resolution 3171, G.A. Res. 3171, 28 U.N. GAOR 30 (Vol. I) at 52, U.N. Doc. A/9030 (1973); Resolution 3016, G.A. Res. 3016, Preamble and § 1, 27 U.N. GAOR, Supp. (No. 30), U.N. Doc. A/8730; Resolution 2158, G.A. Res. 2158, §1(1), 21 U.N. GAOR, Supp. (No. 16) 29, U.N. Doc. A/6316 (1966). The United States' endorsement of this principle derives from its control, as a sovereign, of the development of its own lands and resources. *See, e.g.*, U.S. Constitution, Art. 4, Sec. 3, Cl. 2.

The control over a nation's natural resources stems from the nature of sovereignty. By necessity and by traditional recognition, each nation is its own master in respect to its physical attributes. The defendants' control over their oil resources is an especially sovereign function because oil, as their primary, if not sole, revenue-producing resource, is crucial to the welfare of their nations' peoples. As stated by Dr. Adelman:

It is difficult or impossible to separate the OPEC governments as governments from their role as oil producers. They began their price fixing role by levying taxes on foreign companies operating within their borders. The oil revenues are the great bulk of governmental revenues. Indeed for the OPEC nations supplying

¹⁵⁰ The United States voted in favor of Resolution 1803, which passed by a vote of 104-0-6. Resolution 1803, G.A. Res. 1803, §1(1), 17 U.N. GAOR, 2d Comm. 327, U.N. Doc. A/C 2/5 R 850 (1962).

most of the oil, the oil revenues are the great bulk of the whole national product. Court Exhibit 26, Statement by M.A. Adelman, p. 9.

We need not look beyond our own borders for examples of a government taking a determinative role in the marketing of its wealth and natural resources. *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), involved an antitrust challenge to a California state program which controlled the marketing of raisins grown in the state, so as to restrict competition among the growers, and maintain prices. According to the defendants in that case, (California officials), the activity was for the benefit and protection of the public welfare. The Court, in reversing the grant of injunctive relief to plaintiff, held that the program was "an act of government," *Id.* at 352, 63 S.Ct. 307, and reasoned:

[I]t is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and efficacy from the legislative command of the state and was not intended to operate or become effective without that command. *Id.* 350, 63 S.Ct. at 313.

Similar activity has been carried on by other States and the Federal Government in this country. The discovery of the East Texas Oil Field in the early 1930's led to distressing conditions in the crude oil industry. This new oil became a drug on the market and was being sold for as little as 10 cents a barrel in Texas, at a time when the price throughout the country had soared to more than \$3.00 a barrel. The State of Texas and other States, had, in order to prevent waste, and to conserve their natural resources, passed certain statutes and imposed restrictions requiring proration, and limiting the quantities that could be taken from the wells in various fields. The Federal Connally Hot Oil Act, 49 Stat. 30, 15 U.S.C. § 715, *et seq.*, was enacted by the Congress to enforce the state statutes, by prohibiting the shipment in interstate commerce of crude oil produced in violation of state laws and regulations. *United States v. Brumfield*, 85 F.Supp. 696, 699 (W.D. La. 1949). Thus, certain States in the United States have restricted production of crude oil in order to maintain and stabilize prices and, thereafter, the Federal Government not only acquiesced in this activity, but made the States' acts effective by the assistance of Federal law enforcement.

In view of our own State and Federal domestic crude oil activities, there can be little question that establishing the terms and conditions for removal of natural resources from its territory, when done by a sovereign state, individually and separately, is a governmental activity.¹⁵¹ Plaintiff, however, asserts that, while this may

¹⁵¹ The legislative intent of FSIA does state that a " 'regular course of commercial conduct' includes the carrying on of a commercial enterprise such as a mineral extraction company, an airline or a state trading corporation." House Report No. 94-1487 at 16, 5 U.S.Code Cong. & Admin.News (1976) pp. 6614-6615.

Plaintiff contends that because the OPEC member nations have a proprietary interest in the oil companies which are extracting the oil from within their respective territories, the price fixing activities in which the defendants engage are necessarily "commercial" in view of this legislative intent. While it may be true that through their activities as partial or total owners of these companies, the defendant nations do engage in commercial activities, this does not mean, and the legislative intent does not support the conclusion, that all activities, even those remotely connected with these companies, are necessarily commercial. The fact that a nation owns and operates an airline company, does not mean that all government activities regulating the use of airspace, or the ingress and egress of airplanes to and from the nation's airports, are commercial activities. Accordingly, we must look to the specific activities in which the defendants engage.

be true, the actions of the OPEC nations in coming together to conspire to fix prices is commercial and, thus, not immune. Plaintiff's position, however, is untenable. It is ridiculous to suggest that the essential nature of an activity changes merely by the act of two or more countries coming together to agree upon how they will carry on that activity. The action of sovereign nations coming together to agree on how each will perform certain sovereign acts can only, itself, be a sovereign act. The act derives its authority and efficacy from the command of the sovereign nation and is not intended to operate or become effective without that command.

In view of all the evidence presented, this Court finds that the activity carried on by the defendant OPEC member nations is *not* "commercial activity;" that, therefore, defendants are entitled to immunity under 28 U.S.C. §1604; and that, consequently, this Court lacks subject matter jurisdiction under 28 U.S.C. §1330(a).

And, since this Court lacks subject matter jurisdiction, it also lacks personal jurisdiction, as mandated by 28 U.S.C. §1330(b).¹⁵²

In concluding this phase of our decision, it is instructive and helpful to note that the United States Government itself has implicitly recognized the activities of the OPEC member nations to be *sovereign* activities in connection with the production and marketing of crude oil, when the United States entered into consent decrees with the so-called "Big Seven" or "Seven Sisters"—the 7 largest American oil companies doing business with the OPEC member nations. These consent decrees entered into on November 14, 1960, for a period of 25 years until November 14, 1985, in the Department of Justice Antitrust Division Case No. 1163, grant specific "exceptions" and "permissive provisions" allowing these American companies to en-

Here, a clear distinction must be drawn between the activities each government engages in by virtue of its proprietary interests and the activities in which it engages by virtue of its status as a sovereign. The activities of which plaintiff complains are clearly governmental. These activities are engaged in by the defendants in their status as sovereigns and not in their status as proprietors. This determination is conclusively established by looking to the nature of these activities and comparing them with governmental activities of other nations as we have already done.

This determination is further supported by the activities of the nations herein involved. Prior to *any* proprietary interest in any oil extracting company, each defendant nation set the terms of the withdrawal of its resources, through the mediums of taxation and royalties. Thus, the defendants were engaging in this governmental conduct setting terms for crude production long before they obtained any ownership in any production companies. It necessarily follows that these activities are engaged in by virtue of each defendant's status as a sovereign—because these activities preceded *any* proprietary interest. Therefore, the essential nature of the activity is governmental.

Furthermore, this governmental nature does not change merely because the medium through which the activity is accomplished has changed. When defendants obtained ownership interests in their respective oil production companies, the media being utilized by the defendants to fix the terms of oil extraction were altered and were changed. Through their proprietary interests the nations could directly control the establishment of these terms. But this change in format does not change the essential nature of the activity, which is still governmental.

As a result, the conclusion is irrefutable that these activities are governmental in nature.

¹⁵² 28 U.S.C. §1330(b) provides:

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

gage in price fixing, production control and market allocation programs for crude oil when required to do so by the law of any foreign nation, specifically the sovereignties which later organized and became members of OPEC, and which are defendants herein. *United States v. Standard Oil Co. (New Jersey)*, 1960 CCH Trade Cases ¶ 69,849, p. 77,335, S.D.N.Y., Civil Action No. 86-27 (Nov. 14, 1960); *United States v. Gulf Oil Corp.*, 1960 CCH Trade Cases ¶ 69,851, p. 77,344, S.D.N.Y., Civil Action No. 86-27 (Nov. 14, 1960).

Foreign sovereignty cannot be defendant in antitrust action

Even if subject matter jurisdiction did exist, dismissal of the complaint would still be necessary and appropriate. Section 1 of the Sherman Act provides in part that “[e]very person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony. . . .” (Emphasis added.¹⁵³) Any person guilty of such a felony is subject to liability for treble damages. 15 U.S.C. §15. It is apparent from the statutory language that plaintiff is entitled to relief in the instant action only if the defendants are “persons” as that term is used in section 1.

Section 8 of the Sherman Act, 15 U.S.C. §7, and section 1 of the Clayton Act, 15 U.S.C. §12, define “person” or “persons,” “to include corporations and associations existing under or authorized by the laws of the Territories, the laws of any State, or the laws of a foreign country.” This statutory language does not support the conclusion that foreign sovereigns are “persons” subject to Sherman Act liability. The case law accords with this interpretation.

In *Parker v. Brown*, *supra*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), the Supreme Court held that a domestic State is not a person who may be sued under the antitrust laws. The Court reasoned, at 351, 63 S.Ct. at 313:

The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. The Act is applicable to “persons” including corporations (§ 7), and it authorizes suits under it by persons and corporations (§ 15). A state may maintain a suit for damages under it, *Georgia v. Evans*, 316 U.S. 159, [62 S.Ct. 972, 86 L.Ed. 1346] but the United States may not sue for damages, *United States v. Cooper Corp.*, 312 U.S. 600, [61 S.Ct. 742, 85 L.Ed. 1071]—conclusions derived not from the literal meaning of the words “person” and “corporation” but from the purpose, the subject matter, the context and the legislative history of the statute.

There is no suggestion of a purpose to restrain state action in the Act’s legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only “business combinations.” 21 Cong. Rec. 2562, 2457; see also at 2459, 2461. That its purpose was to suppress combinations to restrain competition and attempts to monopolize by *individuals and corporations*, abundantly appears from its legislative history. (Emphasis added.)

These same considerations apply with equal force to foreign nations.¹⁵⁴

¹⁵³ For full text of Section 1 of the Sherman Act see foot-note 138, *supra*.

¹⁵⁴ Plaintiff has argued that *Parker v. Brown* has lost its effect through the decisions in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) and *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364

In *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 78 n. 14 (2d Cir. 1977), *cert. denied*, 434 U.S. 984, 98 S.Ct. 608, 54 L.Ed.2d 477 (1977), the court concluded that foreign sovereigns are not “persons” subject to Sherman Act liability. Plaintiff in that case alleged, *inter alia*, that certain private party defendants had entered into anti-competitive agreements with the government of Libya. Though Libya was not named as a defendant, the Second Circuit considered Libya’s liability under the Sherman Act and held that “Libya cannot be guilty of a Sherman Act violation . . . because it is not a person or corporation within the terms of the Act but a sovereign state.”

A similar conclusion is found in *Interamerican Refining Corporation v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1298 (D.Del. 1970), where the court held that “[t]he Sherman Act does not confer jurisdiction on United States courts over acts of foreign sovereigns. By its terms, it forbids only anticompetitive practices of persons and corporations.” (footnote omitted). Later the court added: “The Sherman Act refers only to persons, not to states or nations, and both the Act and the Constitution would be badly misinterpreted to permit liability for acts of a sovereign.” *Id.* at 1298 n. 18.

Plaintiff has asserted that this *stare decisis* precedent has been altered by the FSIA. Plaintiff relies on a reference contained in the Legislative History of the FSIA, House Report No. 94-1487, p. 19, 5 U.S.Code Cong. & Admin. News (1976), p. 6618, which provides:

Neither the term “direct effect” nor the concept of “substantial contacts” embodied in section 1603(e) is intended to alter the application of the Sherman Antitrust Act, 15 U.S.C. 1, *et seq.*, to any defendant. Thus, the bill does not affect the holdings in such cases as *United States v. Pacific & Arctic Ry. & Nav. Co.*, 228 U.S. 87, [33 S.Ct. 443, 57 L.Ed. 742] (1913), or *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, [131 U.S.App.D.C. 226,] 404 F.2d 803 (D.C. Cir.

(1978). *Goldfarb* was an action challenging under § 1 of the Sherman Act a minimum fee schedule published by the Fairfax County Bar Association and enforced by Virginia State Bar. The State Bar and the County Bar attempted to use the *Parker v. Brown* doctrine as a defense because the State Bar was a State Agency and, as argued by the County Bar, the ethical codes and the activities of the State Bar prompted it to issue fee schedules. The Court, however, rejected these arguments, holding that anti-competitive activities must be compelled by direction of the State acting as a sovereign before the *Parker v. Brown* doctrine may be relied upon. 421 U.S. at 791, 95 S.Ct. 2004. The Court, finding that these activities were not compelled by the State, held that the *Parker v. Brown* doctrine did not apply to the activities of these State and County Bar defendants.

Here, the activities in which the OPEC defendants are engaged, are conducted by each sovereign nation itself. Thus we can only conclude that the nation by its direction has compelled these activities.

Our case here is clearly distinguishable from *Goldfarb* by the simple fact that we are not dealing with an agency of the state but the state itself. Accordingly, *Goldfarb* does not apply here except to the extent that it further supports the determination that when the state itself is conducting the activity, there is no violation of the antitrust laws.

LaFayette is equally inappropriate. The Court concluded in *LaFayette* that municipalities should not be excluded from the reach of the antitrust laws. The Court found that *Parker v. Brown*’s exemption from the antitrust laws was limited to official action directed by the state. 435 U.S. at 412, 98 S.Ct. 1123. The Court supported its ruling by stating that “States’ subdivisions generally have not been treated as equivalents of the States themselves.” *Id.* (Footnote omitted). Once again, we are not involved with any subdivisions of the OPEC nations, but the nations themselves. Accordingly, *LaFayette* does not apply to our suit here.

1968), cert. denied, 393 U.S. 1093, [89 S.Ct. 872, 21 L.Ed.2d 784] (1969). (footnotes omitted.)

Neither of the cases cited in the legislative history, however, supports a conclusion that a foreign nation may be sued for violating our antitrust laws. *United States v. Pacific & Arctic Co.*, *supra*, involved an alleged conspiracy between American and Canadian carriers [not foreign sovereignties or nations] to monopolize certain transportation partly within and partly without the United States. Since this action was brought under our Federal Antitrust laws, a crucial question in this case was the extra-territorial reach of our domestic laws. The Court held that our laws did apply. Basic to the Court's reasoning was that the monopoly consisted of

control to be exercised over transportation in the United States, and, so far, is within the jurisdiction of the laws of the United States, criminal and civil. If we may not control foreign citizens or corporations operating in foreign territory, we certainly may control such citizens and corporations operating in our territory, as we undoubtedly may control our own citizens and our own corporations. 228 U.S. at 106, 33 S.Ct. at 448.

The other case, *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, *supra*, arose from an attempt by American firms to deny another American firm access to a line of international shipping trade created by Congress for the general benefit of American shipping. This case, just as the *Pacific & Arctic* case, did not involve a foreign sovereign, even tangentially. Congress was chiefly concerned with the continuing effectiveness of these two cases when it referred to the applicability of the Sherman Act to "any defendant." Since, in neither of these cases, was there any attempt to assert jurisdiction over a foreign state, Congress' concern cannot be interpreted to authorize a judicial assertion of jurisdiction over a foreign state for violation of our antitrust laws.

In addition, the language in the legislative history clearly tells us that the FSIA was not intended to alter the application of the Sherman Act. Prior to the enactment of the FSIA, the only definitive statement on this point was the holding in *Inter-american Refining Corp.*, *supra*, 307 F.Supp. 1291 (D.Del.1970), that foreign nations are not "persons" who may be sued.

Therefore, this Court in this OPEC case is still bound by all the precedents to hold that the foreign sovereignties cannot be made defendants here, despite a recent Supreme Court decision allowing a foreign sovereignty to be an antitrust plaintiff.

In *Pfizer Inc. v. India*, 434 U.S. 308, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978), the Supreme Court held that a foreign nation may be a "person" under our antitrust laws as a plaintiff for the purpose of bringing suit. The determining factor in the result reached by the Court was that it did not "require the Judiciary in any way to interfere in sensitive matters of foreign policy." 434 U.S. at 319, 98 S.Ct. at 591. To include foreign nations within the ambit of "persons" who may be sued as defendants, however, would require judicial interference in sensitive foreign policy matters.¹⁵⁵ Since Congress has never indicated any intent to extend liability of the

¹⁵⁵ Giving a foreign sovereign the *option* to sue, merely allows the nation to use our judicial system if it wishes. Allowing foreign sovereigns to be sued, however, would *require* their presence in our courts. Thus the latter poses the greater threat to sensitive matters of foreign policy.

Sherman Act to actions of a foreign sovereign, and since the accepted doctrine is that “‘questions of ‘general policy’—especially with respect to foreign sovereigns and absent explicit legislative authority—are beyond the province of the Judicial Branch,” *Id.* at 330, 98 S.Ct. at 597 (Powell, J., dissenting), this Court must refrain from extending the *Pfizer* ruling beyond the strict confines of that case.

Therefore, a foreign nation may sue, but not be sued, under the United States antitrust laws¹⁵⁶ and, perforce, the Court is compelled here to dismiss the entire action against the defendants, members of OPEC, because they cannot be made defendants herein in this antitrust suit and no valid claim for relief can be alleged or proved against them.

No proximate cause, no injunctive relief

Even if the activity of the OPEC nations were not sovereign and governmental in nature and even if a foreign state could be sued under the American Antitrust Laws, the evidence adduced at trial does not support the granting of an injunction. Plaintiff failed to show the requisite causal connection between the alleged injury (rise in domestic gasoline prices) and the alleged anticompetitive conduct (price fixing of OPEC crude oil prices). The evidence clearly demonstrated that the dramatic rise in prices in 1973–1974 and in 1978–1979 was primarily caused by factors other than a rise in the price of crude oil.

While plaintiff in an injunctive action under § 16 is required to show only threatened loss or damage, this damage must be proximately caused by the alleged anticompetitive actions of the defendants. *Mid-West Paper Products Co. v. Continental Group*, 596 F.2d 573, 590 (3d Cir. 1979); *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172, 1174 (5th Cir. 1976); *Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1132 (5th Cir. 1975); *Reibert v. Atlantic Richfield Company*, 471 F.2d 727, 731 (10th Cir. 1973). In order to demonstrate that the injury or damage was proximately caused by defendants’ anticompetitive conduct, the plaintiff must demonstrate by a preponderance of the evidence that: (1) the alleged prohibitive conduct of OPEC was a substantial factor in the occurrence of any injury or damage to IAM; and (2) the plaintiff is engaged in activities intended to be protected by the American antitrust laws. *Reibert v. Atlantic Richfield Company*, *supra*, at 731. Plaintiff here (IAM) has utterly failed to meet the first of these two tests.

Plaintiff alleges that it has been damaged because it had to pay higher domestic gasoline prices by reason of the higher foreign OPEC crude oil prices attributable to the price fixing activities of the defendants, members of OPEC. Particularly, plaintiff alleges that the OPEC crude oil price hikes in 1973–1974 and in 1978–1979 resulted in higher domestic gasoline prices and were responsible for injury to plaintiff. Therefore, in order for the plaintiff to satisfactorily demonstrate causation, plaintiff must prove that the crude oil price increases were a substantial factor in the occurrence of the gasoline price hikes.

¹⁵⁶ This determination is consistent with the Court’s rulings concerning domestic States under the antitrust laws. States may sue, *Georgia v. Evans*, 316 U.S. 159, 62 S.Ct. 972, 86 L.Ed. 1346 (1942), but not be sued, *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), under the antitrust laws.

Dramatic gasoline price increases and dramatic crude oil price hikes did in fact occur during these two time periods, 1973–1974 and 1978–1979. Mere approximation of occurrence, however, does not demonstrate causation, in and of itself. Plaintiff is required to present specific evidence satisfactory to the Court to establish this causation. 28 U.S.C. §1608(e) This, plaintiff has failed to do. Rather the evidence clearly and convincingly shows that the increase of domestic gasoline prices during these time periods was not the proximate result of increase in foreign OPEC members' crude oil prices.

Domestic gasoline prices of late have principally been the result of a shortage of refinery capacity, Department of Energy allocation regulations, and shortages in crude oil at domestic refineries in 1973 and 1979. Federal regulations have also greatly discouraged refiners from adding much needed refining capacity. The quota required by the Mandatory Oil Import Program discouraged construction of additional refining capacity between 1958 and 1973. After 1973, Federal Energy Administration regulations promulgated under authority granted in the Emergency Petroleum and Allocation Act discouraged refiners from adding to refinery capacity by preventing them from recovering the incremental or marginal costs of the additional capacity. These margins had been essentially frozen at their nominal 1973 levels.

At the same time these Federal regulations were restricting the expansion of refining capacity, other Federal regulations were reducing the supply of gasoline. Two regulations promulgated by the Environmental Protection Agency, one prohibiting use of the additive MMT in unleaded gasoline and the other reducing the level of lead in gasoline, have both resulted in reduced production and availability of domestic gasoline.

In the context of this already restrained supply situation, an unexpected surge in domestic gasoline consumption in the latter half of 1978 significantly contributed to increased domestic gasoline prices. This unexpectedly high level of fourth quarter consumption caused refiners to reduce inventories below planned levels and thus further induced gasoline price increases. Ordinarily the loss in inventories could have been made up by increased utilization of refineries. Reduction in Iranian production (completely unrelated to any price fixing activities), however, decreased the world supply of crude oil, reduced the amount of crude oil available to the United States, and prevented refiners from operating refineries at a level which would have enabled them to rebuild the reduced inventories. This lower level of inventories of domestic gasoline then substantially contributed to higher prices.

During this time of reduced availability of domestic gasoline due to lack of sufficient refining capacity and reduction of crude oil supply, additional Federal regulations increased the severity of this shortage. The Department of Energy promulgated a series of regulations for the allocation of petroleum products during a period of shortage which established a series of priorities for different types of users and established certain set aside requirements for government supply of gasoline. Because of the compulsory requirement of supplying "priority" customers and the necessity to hold aside the "set aside" gasoline under these regulations, many filling stations received only 80% of the gasoline they had received the year before. Thus, as soon as a crisis developed, both the Federal Department of Energy and various State energy offices stepped in to turn a small shortage into a large and horrendous shortage. The result was excessive price increases and long lines at domestic service stations. These increases in domestic gasoline prices once again demonstrate that Federal reg-

ulation of the petroleum market has posed a greater threat to the American consumer than any other single factor.

As can readily be seen, the rise in OPEC members' foreign crude oil prices was not a substantial factor in the rise of domestic gasoline prices. In fact, some respected economists believe that the increased domestic gasoline prices actually caused the rise in OPEC members' foreign crude oil prices. The increase of these crude oil prices occurred only after the gasoline price hikes. These hikes along with the Federal and State systems of controlled allocations created a climate where spot prices of foreign and even domestic petroleum were inevitably bid up. These higher prices on petroleum product markets signaled foreign crude oil exporters that the market would support higher crude oil prices. As made clearly evident by this cause and effect relationship, the rise in foreign crude oil prices, including those of OPEC members, was not a substantial factor in the increased prices of domestic gasoline, and therefore was not the proximate cause of plaintiff's injury in, like the general public, being forced to pay higher prices for domestic gasoline.

Even if plaintiff had been able to demonstrate that the increases of foreign OPEC members' crude oil prices was a substantial factor in the general rise of domestic gasoline prices, proximate cause could not have been shown without more specific evidence. Plaintiff was not maintaining and could not maintain, this action on behalf of the general public or the average American consumer. Rather the action here is necessarily being brought and maintained by a specific plaintiff (IAM), with the result that proximate cause must be established to connect the alleged prohibited conduct of the OPEC members in raising foreign crude oil prices to the specific injury allegedly suffered by plaintiff, IAM, in paying higher domestic gasoline prices. Here plaintiff did not even attempt to establish that the domestic gasoline it purchased was the product of any of the crude oil purchased from one of the defendant members of OPEC. All this Court could do is engage in nebulous speculation as to whether plaintiff was a purchaser of gasoline manufactured from defendants' product, in any way at all. Once again, proximate cause has not been established by the plaintiff and the Court must deny plaintiff's prayer for injunctive relief.

No default judgment and no waiver

Under 28 U.S.C. §1608(e) the Court cannot enter a default judgment automatically upon failure or refusal of a foreign sovereign to appear after being served as required by the Foreign Sovereign Immunities Act. The Court, as previously pointed out in the Order to Show Cause (Appendix A), and in the "Introductory" hereinabove at page 4, must conduct a full and complete hearing to determine if the plaintiff [claimant] has established "his claim or right to relief by evidence satisfactory to the Court." This was one of the reasons the Court consolidated the full trial of the Final Injunction and hearing upon the Preliminary Injunction with this hearing on Default Judgment, and heard all relevant evidence. The Court, is convinced that plaintiff did not carry its burden of showing by a preponderance of the evidence that it was entitled to any relief. *A fortiori*, this Court cannot and will not enter any Default Judgment against any of the defendants.

Since no Default Judgment is entered here against any of the defendants, there is no waiver by defendants of their sovereign immunity, nor do they admit any of plaintiff's allegations concerning such sovereign immunity, each Defendant's sovereignty, or that the defendants' activities with OPEC concerning crude oil prices are in any way "commercial activities."

Conclusion

The Court should not conclude this discussion without reaffirming its admiration of plaintiff and its counsel for bringing this action, a commendation already stated by the Court at trial. In this suit, plaintiff has brought public attention in the United States and throughout the World to the frustration and anger all American gasoline consumers must feel about increasing domestic gasoline prices as a large part of the increasing costs of energy, a frustration in great part due undoubtedly to their own inertia and unjustified reliance on Federal and State bureaucracy. The Federal Executive Branch, through its Cost of Living Council and regulations, its Federal Energy Administration and Emergency Petroleum Allocations, its Department of Energy and accompanying maze of enigmatic and incomprehensible regulations, along with inept State interventions, has helped to create the energy crisis, has helped to intensify this crisis, and has utterly failed to resolve it, through inaction and ineffective action, as illustrated by the domestic gasoline price increases and long service station lines. When the Executive Branch so completely falters in its handling of an obvious and major problem, it is extremely tempting for the Court to take the initiative. However, we must recognize that we are a court of limited jurisdiction with the ability to handle problems only within the confines of the law and only within the power granted to this Court by Congress. Through its Order to Show Cause of June 25th, the Court endeavored to give the Executive Branch every opportunity to assist the Court in its handling of this matter. The Executive Branch, however, remained silent, perhaps hoping this storm would blow over.

With the persistent initiative of plaintiff, aided by the outstanding *amicus curiae* briefs and through oral argument submitted on behalf of plaintiff by Richard A. Fine, Esq., and S.C. Yuter, Esq., *in propria persona*, and submitted by Latham and Watkins and Antonin Scalia, Esq., on behalf of *amicus*, Indonesia-U.S. Business Committee of the Indonesian Chamber of Commerce and Industry, and by Holmes and Warden, and Khalid Abdullah Tariq Al Mansour, Esq., and Faisal Bin Fahad Al Talal, Esq., on behalf of *amicus*, Concerned Black Americans In Support of Africa and the Middle East, the Court has been able to arrive at a just and legally unassailable position here. While this action must be dismissed, the storm and crisis still exist and will not be resolved through inaction. It is only to be hoped that the Executive Branch as the Federal Governmental leader in the field of Foreign Relations, as well as domestic and international Energy, will now take over and bring appropriate relief to the American consumer in the entire field of Energy, and particularly in foreign as well as domestic crude oil prices and domestic gasoline prices. To do less, or to put the burden back on the Judicial branch again is intolerable.

This Court may only act where Congress has given it power to act. For purposes of asserting jurisdiction over a foreign sovereign, Congress has given this Court power to act only when the sovereign does not have immunity from suit. Here the sovereign does have immunity from suit because the activity of which plaintiff complains is, by its nature, sovereign and governmental. There being no waiver, express or implied, of this immunity by the defendant nations, the Court is powerless to act.

Even if the Court did have jurisdiction to act, the defendant nations could not be held accountable for their activities under American antitrust laws. Foreign nations are not persons who may be sued under the American antitrust laws. While the Supreme Court did recently hold that foreign nations may bring suit for violations of

American antitrust laws, this Court will not extend this ruling in the absence of a clear Congressional mandate changing the antitrust laws so as to permit the joining of a sovereign state as a defendant.

Plaintiff also failed on the merits. The requisite proximate cause was not established by evidence satisfactory to the Court. The causal connection between the alleged violation and the alleged injury was not shown *generally*, because the evidence revealed that the principal determinants of the price of gasoline were other than the rise of crude oil prices. Neither was this causal connection shown *specifically*, because the plaintiff failed to establish through specific evidence that it was a buyer, directly or indirectly, of crude oil which originated from any of the defendant nations.

As a result, this Court has no alternative but to terminate this action in favor of the defendants and against the plaintiff, and the Complaint and First Amended Complaint must be dismissed.

...

7. *Maritime International Nominees Establishment v. The Republic of Guinea*. DECISION BY THE DISTRICT COURT, DISTRICT OF COLUMBIA ON 12 JANUARY 1981¹⁵⁷

The judgement:

Petitioner in this case is seeking an order confirming an arbitration award in excess of \$25,000,000 made following this Court's Order of June 15, 1978, directing the parties to arbitrate. The Republic of Guinea, after ignoring the earlier proceedings and failing to participate in the arbitration, now comes forward at the eleventh hour contending that this Court is without jurisdiction. Although numerous issues have been advanced by the parties, it now is agreed that the central issue is whether the Foreign Sovereign Immunities Act ("FSIA") of 1976 (principally codified at 28 U.S.C. §§ 1330, 1602-1611 (1976) granted this Court jurisdiction to order Guinea to arbitrate. The Court finds that it had jurisdiction under the FSIA and an Order now confirming the award accompanies this Memorandum.

A brief description of the history of this litigation will help clarify the legal issues involved. In 1971, petitioner, a Liechtenstein corporation, and the Republic of Guinea signed an agreement forming a company known as Societe d'Economie Mixte de Transports Maritimes (SOTRAMAR) to engage in the shipment of bauxite mined in Guinea. SOTRAMAR was formed as a mixed-economy company under the laws of Guinea,¹⁵⁸ and, according to the contract, "shall have a civil personality and financial autonomy." Disputes under the contract forming SOTRAMAR were to have been resolved by binding arbitration conducted by three arbitrators selected by

¹⁵⁷ Slip opinion.

¹⁵⁸ Article 91 of the Guinean law regarding corporate entities, adopted September 1, 1962, provides that:

The State in a mixed economy company is a shareholder, like any other, and its rights and obligations are those derived from its statute as the shareholder, rather than as the State. Petitioner's Reply brief, at 1.

the President of the International Centre for Settlement of Investment Disputes ("ICSID"), a group affiliated with the World Bank.

A dispute ultimately arose between petitioner and the Republic of Guinea, and petitioner attempted to get approval from Guinea for the matter to be heard in arbitration as contemplated by the contract. Guinea refused to give its consent, and petitioner came before this Court in 1978 seeking an order to compel arbitration pursuant to the United States Arbitration Act, 9 U.S.C. § 1 *et seq.* (1976).¹⁵⁹ Despite more than adequate notice, Guinea never appeared in the proceedings before this Court. A hearing was held and an arbitration was ordered before the American Arbitration Association.

Over a two-year period, extensive arbitration proceedings were held. Guinea repeatedly was made aware of what was occurring and periodically was offered an opportunity to appear and respond. Guinea never answered in any fashion. In June, 1980, the arbitration was concluded and an award was made in favor of petitioner. The petitioner then filed a motion with this Court to confirm the award and enter judgment. Shortly before a hearing on the motion was scheduled in this Court, Guinea obtained counsel and that counsel sought a delay in order to respond. A short delay was granted, and it was then that Guinea first advanced its argument that this Court was without jurisdiction.¹⁶⁰

Jurisdiction under the FSIA has been discussed by several other courts faced with situations somewhat similar to the one now posed. *See, e.g., Verlinden B.V. v. Central Bank of Nigeria*, 488 F.Supp. 1284 (S.D.N.Y.1980); *Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahiryia*, 482 F.Supp. 1175 (D.D.C.1980); *Iptrade International, S.A. v. Federal Republic of Nigeria*, 465 F.Supp. 824 (D.D.C.1978). The discussion here, therefore, will not be extensive. The key question is whether Guinea lost its immunity either because it has waived that immunity, *see* 28 U.S.C. §1605(a)(1) (1976), or because of its commercial activities in the United States, *see* 28 U.S.C. §1605(a)(2) (1976). The Court finds that under both criteria Guinea lost its immunity and the Court accordingly had jurisdiction.

Waiver

Under 28 U.S.C. § 1605(a)(1) (1976), a foreign state loses its immunity in any case "in which the foreign state has waived its immunity either explicitly or by implication." The House Report accompanying the FSIA, moreover, states that:

With respect to implicit waivers, the courts have found such waivers in cases where the foreign state has agreed to arbitration in another country or where the foreign state has agreed that the law of a particular country should govern a contract.

¹⁵⁹ The parties dispute whether petitioner could have proceeded to arbitration in the manner contemplated by the contract despite Guinea's refusal to participate. The Court finds, on the basis of the affidavits and evidence presented, that petitioner could not have proceeded under the contract. The arbitration Act was the only mechanism available to the Court in view of its inability to order the President of ICSID to appoint arbitrators.

¹⁶⁰ At hearing, counsel for Guinea was asked whether there was any explanation for Guinea's repeated failure—despite notice—to respond either in this Court or before the American Arbitration Association. Counsel stated he was unable to present any explanation.

H.R.Rep.No. 94-1487, 94th Cong., 2nd Sess. 18, *reprinted in* [1976] U.S. Code Cong. & Admin. News, pp. 6604, 6617. Although courts have differed on the extent to which the House Report language should be read as controlling the reach of the waiver provision, *compare Verlinden B.V. v. Central Bank of Nigeria*, *supra*, 488 F.Supp. at 1300-02, with *Ipirtrade International, S.A. v. Federal Republic of Nigeria*, *supra*, 465 F.Supp. at 826, it is clear that on the facts of *this* case, there has been an implicit waiver of immunity by Guinea sufficient to give this Court jurisdiction.

No express provision in the SOTRAMAR contract sets forth a place for arbitration,¹⁶¹ but by agreeing to arbitration before arbitrators selected by the president of ICSID, Guinea implicitly agreed to arbitration in the United States. ICSID is located in Washington, D.C., and under Rule 13 of ICSID's "Rules of Procedure for Arbitration Proceedings," sessions of its tribunals "shall meet at the seat of the Centre" unless another site is agreed upon by the parties and approved by ICSID itself. The only fair construction of the SOTRAMAR contract and the ICSID rules is that the parties contemplated arbitration to be held in the United States.¹⁶² This gives the SOTRAMAR contract an even greater nexus with the United States than the contracts in other cases where waiver has been found. *See, e.g., Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahiriya*, *supra*; *Ipirtrade International, S.A. v. Federal Republic of Nigeria*, *supra*; *cf. Verlinden B.V. v. Central Bank of Nigeria*, *supra*. Counsel for Guinea has argued that a waiver should be found only where there is *both* an agreement to arbitrate in another country and an agreement to be bound by the laws of another country. But that is too constricted a view. The Court finds that by agreeing to arbitration that could be expected to be held in the United States, Guinea waived its immunity before this Court within the meaning of 28 U.S.C. § 1605(a)(1) (1976).

Commercial Activities

Under 28 U.S.C. § 1605(a)(2) (1976), a foreign state also loses its sovereign immunity when it engages in commercial activities within the United States or in commercial activities outside the United States that have a "direct effect" within this country. The Court finds that Guinea engaged in activities that meet this standard.

Numerous meetings were held, including meetings in Connecticut and in the District of Columbia, relating to the contract. Guinea directed an American shipping group to perform substantial activities to aid SOTRAMAR. The Guinean ambassador to the United States engaged in several business-oriented contacts with officials of petitioner related to the project. The sum of these activities is more than sufficient to constitute commercial activity within the meaning of section 1605(a)(2), and to give the district courts jurisdiction over Guinea. Venue is proper in this Court under the express authority granted to the District Court for the District of Columbia by 28 U.S.C. § 1391(f)(4) (1976).

Having established that this Court has jurisdiction over Guinea, it is clear that

¹⁶¹ The contract does provide, however, a "law of a particular country" to govern the contract, and that is the law of Guinea.

¹⁶² The omission of a site for the arbitration cannot be viewed as a mere oversight by the parties. In the agreement between the Republic of Guinea and the Harvey Aluminum Company of Delaware concerning mining of the bauxite that would be carried by SOTRAMAR, the contract expressly states that "[a]rbitration shall take place in Geneva."

the Order compelling arbitration was proper, *see* 9 U.S.C. § 4 (1976), and that this Court has authority to confirm the award, *see* 9 U.S.C. § 9 (1976); *cf. Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 275–76, 52 S.Ct. 166, 169, 76 L.Ed. 282 (1932). The Court is satisfied that the arbitration proceedings were conducted in a regular and proper manner and the award for damages and costs is confirmed in all respects.

8. *Texas Trading and Milling Corp. v. Federal Republic of Nigeria and Central Bank of Nigeria* [DECOR BY NIKKEI INTERNATIONAL, INC.; CHENAX MAJESTY, INC.; AND EAST EUROPE IMPORT-EXPORT, INC. WERE PLAINTIFFS-APPELLANT-CROSS-APPELLEE]. DECISION BY THE COURT OF APPEALS FOR THE SECOND CIRCUIT, ON 16 APRIL 1981¹⁶³

The judgement:

These four appeals grow out of one of the most enormous commercial disputes in history, and present questions which strike to the very heart of the modern international economic order. An African nation, developing at breakneck speed by virtue of huge exports of high-grade oil, contracted to buy huge quantities of Portland cement, a commodity crucial to the construction of its infrastructure. It overbought, and the country's docks and harbors became clogged with ships waiting to unload. Imports of other goods ground to a halt. More vessels carrying cement arrived daily; still others were steaming toward the port. Unable to accept delivery of the cement it had bought, the nation repudiated its contracts. In response to suits brought by disgruntled suppliers, it now seeks to invoke an ancient maxim of sovereign immunity—*par in parem imperium non habet*¹⁶⁴—to insulate itself from liability. But Latin phrases speak with a hoary simplicity inappropriate to the modern financial world. For the ruling principles here, we must look instead to a new and vaguely-worded statute, the Foreign Sovereign Immunities Act of 1976 ("FSIA" or "Act")¹⁶⁵—a law described by its draftsmen as providing only "very modest guidance" on issues of preeminent importance.¹⁶⁶ For answers to those most difficult questions, the authors of the law "decided to put [their] faith in the U.S. courts."¹⁶⁷ Guided by reason, precedent, and equity, we have attempted to give form and substance to the legislative intent. Accordingly, we find that the defense of sovereign immunity is not available in any of these four cases.¹⁶⁸

¹⁶³ Slip opinion.

¹⁶⁴ "An equal has no dominion over an equal."

¹⁶⁵ Act of October 21, 1976, Pub. L. 94-583, 90 Stat. 2891, *codified at* 28 U.S.C. §§1330; 1332(a) (2)–1332(a)(4); 1391(f); 1441(d); and 1602–1611.

¹⁶⁶ *Hearings on H.R. 11315 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary*, 94th Cong., 2d Sess. 53 (1976) ("1976 Hearings") (testimony of Monroe Leigh, Legal Adviser, Dep't of State).

¹⁶⁷ *Id.*

¹⁶⁸ These four appeals are part of a group of seven, heard together on appeal and decided in concert today. The other three are *Verlinden B.V. v. Central Bank of Nigeria*, No. 80-7413, slip op. at ____ (2d Cir. Apr. 16, 1981); *Reale International, Inc. v. Federal Republic of Nigeria*, No. 81-7183, slip op. at ____ (2d Cir. Apr. 16, 1981); and *Gemini Shipping, Inc. v. Foreign Trade Organization for Chemicals and Foodstuffs*, No. 80-7851, slip op. at ____ (2d Cir. Apr. 16, 1981).

I.

The facts of the four appeals are remarkably parallel, and can be stated in somewhat consolidated form.¹⁶⁹ Early in 1975, the Federal Military Government of the Federal Republic of Nigeria ("Nigeria") embarked on an ambitious program to purchase immense amounts of cement. We have already had occasion in another case to call the program "incredible," see *National American Corp. v. Federal Republic of Nigeria*, 597 F.2d 314, 316 (2d Cir. 1979), but the statistics speak for themselves. Nigeria executed 109 contracts, with 68 suppliers. It purchased, in all, over sixteen million metric tons of cement. The price was close to one billion dollars.

A.

Four of the 109 contracts were made with American companies that were plaintiffs below in the cases now before us: Texas Trading & Milling Corp. ("Texas Trading"), Decor by Nikkei International, Inc. ("Nikkei"), East Europe Import-Export, Inc. ("East Europe"), and Chenax Majesty, Inc. ("Chenax"). The four plaintiffs are not industrial corporations; they are, instead, "trading companies," which buy from one person and sell to another in hopes of making a profit on the differential. Each of the plaintiffs is a New York corporation.

The contracts at issue were signed early in 1975. Each is substantially similar; indeed, Nigeria seems to have mimeographed them in blank, and filled in details with individual suppliers. Overall, each contract called for the sale by the supplier to Nigeria of 240,000 metric tons of Portland cement.¹⁷⁰ Specifically, the contracts required Nigeria, within a time certain after execution,¹⁷¹ to establish in the seller's favor "an Irrevocable, Transferable abroad, Divisible and Confirmed letter of credit" for the total amount due under the particular contract, slightly over \$14 million in each case.¹⁷² The contract also named the bank through which the letter of credit was to be made payable. Nikkei and East Europe named First National City Bank in New York, and Texas Trading specified Fidelity International Bank, also in New York. Chenax denominated Schroeder, Muenchmeyer, Hengst & Co. of Hamburg, West Germany. Drafts under the letters of credit were to be "payable at sight, on presentation" of certain documents to the specified bank.

Within a time certain after establishment and receipt of the letter of credit,¹⁷³

¹⁶⁹ Since *Texas Trading* was dismissed below on jurisdictional grounds, its facts arrive before us as mere allegations, assumed for purposes of this opinion to be true. The other three cases have gone to trial, and contain formal findings. The facts of all four cases are set forth in greater detail in the opinions of the district court.

¹⁷⁰ The Texas Trading, Nikkei, and Chenax contracts provided for the sale of 240,000 tons, "plus or minus 10% at seller's option." The East Europe contract was for 240,000 tons, *simpliciter*.

¹⁷¹ Twenty-one days in the Texas Trading, Nikkei, and Chenax contracts; fourteen days in the East Europe contract.

¹⁷² The Texas Trading, Nikkei, and Chenax contracts set the price of the cement at \$60 per ton, so each plaintiff was promised a letter of credit for \$14.4 million. The cement price in the East Europe contract was \$59.50 per ton; accordingly, the East Europe letter of credit was to be for \$14.28 million.

¹⁷³ The Texas Trading contract provided for thirty days, the East Europe contract for six weeks, and the Nikkei and Chenax contracts for forty-five days.

each seller was to start shipping cement to Nigeria. The cement was to be bagged, and was to meet certain chemical specifications. Shipments were to be from ports named in the contracts, mostly Spanish, and were to proceed at approximately 20,000 tons per month. Delivery was to the port of Lagos/Apapa, Nigeria, and the seller was obligated to insure the freight to the Nigerian quay. Each contract also provided for demurrage.¹⁷⁴ The Nikkei and East Europe contracts provided they were to be governed by the laws of the United States. The Chenax contract specified the law of Switzerland, and the Texas Trading contract named the law of Nigeria.

In short, performance under the contracts was to proceed as follows. Nigeria was to establish letters of credit. The suppliers were to ship cement. Each time a supplier had loaded a ship and insured its cargo to Lagos/Apapa, the supplier could take documents so proving to the bank named in the contract and, "at sight," be paid for the amount of cement it shipped. The ship might sink on the way to Nigeria, or it might never leave the Spanish port at all, but—on presentation of proper documents showing a loaded ship and an insured cargo—the supplier had a right to be paid. Demurrage was to operate in the same manner: if a ship was detained in Nigerian waters, the supplier would receive certain documents. It could present the documents to the bank, and receive payment.

B.

The actual financial arrangements differed from those set forth in the cement contracts. Instead of establishing "confirmed" letters of credit with the banks named, Nigeria established what it called "irrevocable" letters of credit with the Central Bank of Nigeria ("Central Bank"), an instrumentality of the Nigerian government,¹⁷⁵ and advised those letters of credit through the Morgan Guaranty Trust Company ("Morgan") of New York. That is, under the letters of credit as established, each seller was to present appropriate documents not to the named bank, but to Morgan. And, since the letters were not "confirmed," Morgan did not promise to pay "on sight"; it assumed no independent liability.¹⁷⁶ Each of the letters of credit provided it was to be governed by the Uniform Customs and Practice for Documentary Credits ("UCP") (1962 Revision), as set forth in Brochure No. 222 of the International Chamber of Commerce.

Nigeria's choice of Morgan as the Bank to which suppliers presented documents and from which suppliers secured payments came in the course of a longstanding relationship between Nigeria and Morgan. Central Bank used Morgan as its correspondent bank in the United States, and Morgan conducted myriad transactions on Nige-

¹⁷⁴ The Nikkei and East Europe contracts provided for demurrage at a rate "not exceeding \$4100 *per diem*," and the Chenax contract set a flat rate of \$4100 per day. The Texas Trading contract required Nigeria to pay demurrage "not exceeding \$4000 *per diem*."

¹⁷⁵ Central Bank was established in 1958 under the Central Bank of Nigeria Act 1958. Section 4(1) of the Act provides:

The principal objects of the Bank shall be to issue legal tender currency in Nigeria, to maintain external reserves to safeguard the international value of that currency, to promote monetary stability and a sound financial structure in Nigeria and to act as banker and financial adviser to the Federal Government.

¹⁷⁶ The letters of credit as established varied from the contracts in other respects, but the discrepancies were cured by amendments to the letters of credit to which both parties agreed.

ria's behalf. Employees of Central Bank regularly came to Morgan for training seminars. On Nigeria's request, Morgan made payments to Nigerian students in the United States, to American corporations to which Nigeria owed money, and to the Nigerian embassy and consulates in the United States. Indeed, Nigeria used Morgan to make payments (for salaries, operating expenses, and the like) to Nigerian embassies in other countries as well. Until 1974, Morgan had the right to draw up to \$1 million per day from Nigeria's account at the Federal Reserve Bank of New York to satisfy Nigeria's obligations. Nigeria raised the limit to \$3 million per day in 1974, and Morgan enjoyed unlimited drawing rights on Nigeria's funds beginning in November 1975. Central Bank kept over \$200 million of securities in a custody account at Morgan. Morgan advised as much as \$200 million in letters of credit established by Nigeria, and confirmed, in addition, letters of credit totalling at least \$70 million more.

After receiving notice that the letters of credit had been established, the suppliers set out to secure subcontracts to procure the cement, and shipping contracts to transport it.¹⁷⁷ They, through their subcontractors, began to bag the cement and load it on ships, as suppliers across the globe were doing the same. Hundreds of ships arrived in Lagos/Apapa in the summer of 1975, and most were carrying cement. Nigeria's port facilities could accept only one to five million tons of cement per year; at any rate, they could not begin to unload the over sixteen million tons Nigeria had slated for delivery in eighteen short months. Based on prior experience, Nigeria had made the contracts expecting only twenty percent of the suppliers to be able to perform. By July, when the harbor held over 400 ships waiting to unload—260 of them carrying cement—Nigeria realized it had misjudged the market considerably.

C.

With demurrage piling up at astronomical rates, and suppliers hiring, loading, and dispatching more ships daily, Nigeria decided to act. On August 9, 1975, Nigeria caused its Ports Authority to issue Government Notice No. 1434, a regulation which stated that, effective August 18, all ships destined for Lagos/Apapa would be required to convey to the Ports Authority, two months before sailing, certain information concerning their time of arrival in the port. The regulation also stated vaguely that the Ports Authority would "co-ordinate all sailing," and that it would "refus[e] service" to vessels which did not comply with the regulation. Then, on August 18, Nigeria cabled its suppliers and asked them to stop sending cement, and to cease loading or even chartering ships. In late September, Nigeria took the crucial step: Central Bank instructed Morgan not to pay under the letters of credit unless the supplier submitted—in addition to the documents required by the letter of credit as written—a statement from Central Bank that payment ought to be made. Morgan notified each supplier of Nigeria's instructions, and Morgan commenced refusing to make payment under the letters of credit as written. Almost three months later, on December 19, 1975, Nigeria promulgated Decree No. 40, a law prohibiting entry

¹⁷⁷ Nikkei contracted with Productos Fontanet, a Spanish corporation with an interest in a cement plant and a shipping company, for the purchase and delivery of 120,000 tons of cement with an option for 120,000 tons more. The price was \$54 per ton for the first 8,500 tons, and \$52 per ton for the rest. East Europe secured a contract for 120,000 tons with Intrafinsa, another Spanish supplier, at \$51.25 per ton, and the district court found East Europe would have been able to fulfill the rest of its contract at the same price. Texas Trading contracted with yet another Spanish company, at \$53.10 per ton. Chenax searched for a subcontractor, but never found one; its efforts never rose above the level of oral negotiations.

into a Nigerian port to any ship which had not secured two months' prior approval, and imposing criminal penalties for unauthorized entry.

Nigeria's unilateral alteration of the letters of credit took place on a scale previously unknown to international commerce. Officers of Morgan explained the potential consequences of Nigeria's action to representatives of Central Bank; Central Bank was adamant that Morgan not pay. After a meeting with Central Bank personnel, one Morgan officer stated that Central Bank's Deputy Governor "responded that the [Nigerian] Government was willing to go to court if we did pay." Within weeks of Nigeria's instructions to Morgan not to pay without the additional documentation, Morgan warned Central Bank in a telex: "We believe that there is an increasing possibility that litigation against you may be instituted in New York."

Nigeria's next step was to invite its suppliers to cancel the contracts. As part of the program, Nigeria convened a meeting at Morgan's offices in New York, to discuss Nigeria's position with members of the American financial community. Over forty suppliers eventually did settle. See *National American Corp. v. Federal Republic of Nigeria*, *supra*, 597 F.2d at 316. Nigeria asked Morgan to effect several of the settlement payments; some were for settling suppliers not located in the United States.

Cement suppliers who did not settle sued in courts all over the world.¹⁷⁸ The four suppliers at issue here—Texas Trading, Nikkei, East Europe, and Chenax—sued in the Southern District of New York. Named as defendants were both Nigeria and Central Bank. The complaints alleged that Central Bank's September instructions to Morgan, changing the terms of payment under the letters of credit, constituted anticipatory breaches of both the cement contracts (requiring Nigeria to establish "Irrevocable" letters of credit with certain terms of payment) and the letters of credit (requiring Central Bank to authorize payment when certain documents were presented to Morgan). Defendants do not seriously dispute that their actions constitute such anticipatory breaches,¹⁷⁹ their defenses go more to the propriety of jurisdiction under the FSIA. Judge Cannella in *Texas Trading* found jurisdiction lacking; Judge Pierce in the consolidated *Nikkei, East Europe, and Chenax* actions held it present. Judge Pierce proceeded to a trial on the merits, and awarded \$1.857 million to Nikkei, \$1.986 million to East Europe, and nothing to Chenax. These appeals followed.¹⁸⁰

¹⁷⁸ E.g., *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 2 W.L.R. 356, 1 All E.R. 881 (United Kingdom); *Hispano Americana Mercantil S.A. v. Central Bank of Nigeria*, [1979] 2 Lloyd's L.R. 277 (same); *Ipirade International, S.A. v. Federal Republic of Nigeria* (Int'l Chamber of Commerce Arbitration Award, April 25, 1978), enforced 465 F.Supp. 824 (D.D.C. 1978); *Youssef M. Nada Establishment v. Central Bank of Nigeria*, 16 Int'l Legal Mat. 501 (1977) (Dist. Ct., Frankfurt/Main, Aug. 25, 1976) (West Germany).

¹⁷⁹ Article 3 of the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce (Brochure No. 222) provides that letters of credit "can neither be modified nor cancelled without the agreement of all concerned."

¹⁸⁰ Defendants appeal from both the jurisdictional rulings and the awards on the merits in *Nikkei and East Europe*; plaintiffs cross-appeal from the partial denial of damages. In *Chenax*, plaintiffs appeal from the total denial of damages, and defendants cross-appeal from the finding of jurisdiction. In *Texas Trading*, plaintiffs appeal from the jurisdictional ruling. All appeals are taken formally from the judgment below except in *Texas Trading*. That appeal is taken from Judge Cannella's order, but the error is harmless. See *Poss v. Lieberman*, 299 F.2d 358 (2d Cir.), cert. denied, 370 U.S. 944 (1962).

II.

The law before us is complex and largely unconstrued, and has introduced sweeping changes in some areas of prior law. See House Judiciary Committee, *Jurisdiction of United States Courts in Suits Against Foreign States* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7-8, reprinted in [1976] U.S. Code Cong. & Admin. News 6605, 6604-6 ("House Report").¹⁸¹ In structure, the FSIA is a marvel of compression. Within the bounds of a few tersely-worded sections, it purports to provide answers to three crucial questions in a suit against a foreign state: the availability of sovereign immunity as a defense, the presence of subject matter jurisdiction over the claim, and the propriety of personal jurisdiction over the defendant. See *House Report* at 6611-12. Through a series of intricately coordinated provisions, the FSIA seems at first glance to make the answer to one of the questions, subject matter jurisdiction, dispositive of all three. See *Hearings on H.R. 11315 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary*; 94th Cong., 2d Sess. 28 (1976) ("1976 Hearings") (testimony of Monroe Leigh, Legal Adviser, Department of State).¹⁸² This economy of decision has come, however, at the price of considerable confusion in the district courts. In fact, Congress intended the sovereign immunity and subject matter jurisdiction decisions to remain slightly distinct, and it drafted the Act accordingly. Moreover, Congress has only an incomplete power to tie personal jurisdiction to subject matter jurisdiction; its prerogatives are constrained by the due process clause. These cases present an opportunity to untie the FSIA's Gordian knot, and to vindicate the Congressional purposes behind the Act.

A.

Turning to the specific provisions of the law, a description of the FSIA's analytic structure is helpful. The jurisdiction-conferring provision of the Act, 28 U.S.C. § 1330(a), creates in the district courts:

original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603 (a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

¹⁸¹ See also Senate Judiciary Committee, *Define Jurisdiction of U.S. Courts in Suits Against Foreign States*, S. Rep. No. 1310, 94th Cong., 2d Sess. 8-9. The House and Senate Committees filed identical reports, and references *infra* to the House Report may be deemed to represent the views of the Senate Committee as well.

¹⁸² Leigh stated:

Section 1330 provides that if service is made under section 1608 and if the foreign state is not entitled to immunity, then personal jurisdiction over the foreign state would exist. This is a subtle point. To determine whether it has personal jurisdiction over the foreign state, the court must look not only at whether proper service has been made; the court must also look at the sovereign immunity provisions in sections 1605 through 1607 to determine whether the foreign state is amendable [sic] to jurisdiction.

. . . In short, the jurisdiction section at the beginning of the bill, the immunity provisions, and the service provisions are all carefully interconnected.

Although § 1330(a) refers to sections 1605–1607, the section most frequently relevant,¹⁸³ and the one applicable here, is § 1605. It provides, in part:

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

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

Crucial to each of the three clauses of § 1605(a)(2) is the phrase “commercial activity.” In it is lodged centuries of Anglo-American and civil law precedent construing the term “sovereign immunity.” If the activity is not “commercial,” but, rather, is “governmental,” then the foreign state is entitled to immunity under section 1605, and “original jurisdiction” is not present under § 1330(a).¹⁸⁴

For the definition of “commercial activity,” we turn to subsection 1603(d), which provides:

(d) A “commercial activity” means either a regular course of commercial conduct or a particular commercial transaction or act. 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.

If “commercial activity” under § 1603(d) is present, and if it bears the relation to the United States required by § 1605(a)(2), then the foreign state is “not entitled to immunity,” and the district court has statutory subject matter jurisdiction over the claim through § 1330(a). And, if the exercise of that jurisdiction falls within the judicial power set forth by Article III of the Constitution, subject matter jurisdiction over the claim exists.¹⁸⁵

Our analysis next proceeds to the question of personal jurisdiction; we come again to § 1330. Subsection (b) of section 1330 provides: “Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.” The Act, therefore, makes the statutory aspect of personal juris-

¹⁸³ The House Report calls § 1605(a)(2) “probably the most important instance in which foreign states are denied immunity.” See House Judiciary Committee, *Jurisdiction of United States Courts in Suits Against Foreign States*, H.R. Rep. No. 1487, 94th Cong., 2d Sess. 18, reprinted in [1976] U.S. Code Cong. & Admin. News 6604, 6617 (“House Report”).

¹⁸⁴ Jurisdiction will be absent unless some other provision of the Act, such as § 1607 or other subsections of § 1605, intervenes. Section 1607 concerns counterclaims, and is not relevant here.

¹⁸⁵ See *Verlinden B.V. v. Central Bank of Nigeria*, *supra*, foot-note 168 (suit by an alien against a foreign state for breach of a contract not governed by federal law is not within federal judicial power).

diction simple: subject matter jurisdiction plus service of process equals personal jurisdiction. *See House Report* at 6622. But, the Act cannot create personal jurisdiction where the Constitution forbids it. Accordingly, each finding of personal jurisdiction under the FSIA requires, in addition, a due process scrutiny of the court's power to exercise its authority over a particular defendant.

In short, a “§ 1605(a)(2) case” calls for the resolution of a series of five questions:

- (1) Does the conduct the action is based upon or related to qualify as “commercial activity”?
- (2) Does that commercial activity bear the relation to the cause of action and to the United States described by one of the three phrases of § 1605(a)(2), warranting the Court's exercise of subject matter jurisdiction under § 1330(q)?
- (3) Does the exercise of this congressional subject matter jurisdiction lie within the permissible limits of the “judicial power” set forth in Article III?
- (4) Do subject matter jurisdiction under § 1330(a) and service under § 1608 exist, thereby making personal jurisdiction proper under § 1330 (b)?
- (5) Does the exercise of personal jurisdiction under § 1330(b) comply with the due process clause, thus making personal jurisdiction proper?

It is to those questions we now turn.

B.

Before undertaking the threshold “commercial activity” analysis, our first task is to identify what particular conduct in this case is relevant. Subsection 1603(d) states that “commercial activity” might consist of either “a regular course of commercial conduct” or “a particular commercial transaction or act.” The words “regular course of . . . conduct” seem to authorize courts to cast the net wide, and to identify a broad series of acts as the relevant set of activities. *See House Report* at 6615. Here, the relevant “course of . . . conduct” is undoubtedly Nigeria's massive cement purchase program. Alternatively, each of its contracts or letters of credit with these four plaintiffs would qualify as “a particular . . . transaction.”

The determination of whether particular behavior is “commercial” is perhaps the most important decision a court faces in an FSIA suit. This problem is significant because the primary purpose of the Act is to “restrict” the immunity of a foreign state to suits involving a foreign state's public acts. *House Report* at 6605. If the activity is not “commercial,” it satisfies none of the three clauses of § 1605(a)(2), and the foreign state is (at least under that subsection) immune from suit. Unfortunately, the definition of “commercial” is the one issue on which the Act provides almost no guidance at all. Subsection 1603(d) advances the inquiry somewhat, for it provides: “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.” No provision of the Act, however, defines “commercial.” Congress deliberately left the meaning open and, as noted above, “put [its] faith in the U.S. courts to work out progressively, on a case-by-case basis . . . the distinction between commercial and governmental.” *1976 Hearings* at 53 (testimony of Monroe Leigh). *Accord, House Report* at 6615; *Hearings on H.R. 3493 Before Subcommittee on Claims and Governmental Relations of the House Committee on the Judiciary*, 93d Cong., 1st Sess. 16 (1973) (“1973 Hearings”) (testimony of Charles

N. Brower, Legal Adviser, Department of State).¹⁸⁶ See also Kahale & Vega, *Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States*, 18 Colum. J. Transnat'l L. 211, 236 (1979). We are referred to no less than three separate sources of authority to resolve this fundamental definitional question.

The first source is statements contained in the legislative history itself. Perhaps the clearest of them was made by Bruno Ristau, then Chief of the Foreign Litigation Section of the Civil Division, Department of Justice. Ristau stated: "[I]f a government enters into a contract to purchase goods and services, that is considered a commercial activity. It avails itself of the ordinary contract machinery. It bargains and negotiates. It accepts an offer. It enters into a written contract and the contract is to be performed." 1976 *Hearings* at 51. The House Report seems to conclude that a contract or series of contracts for the purchase of goods would be *per se* a "commercial activity," see *House Report* at 6615, and the illustrations cited by experts who testified on the bill—contracts, for example, for the sale of army boots¹⁸⁷ or grain¹⁸⁸—support such a rule. Or, put another way, if the activity is one in which a private person could engage, it is not entitled to immunity. See 1976 *Hearings* at 24 (testimony of Monroe Leigh), 53 (same); 1973 *Hearings* at 15 (testimony of Charles N. Brower).

The second source for interpreting the phrase "commercial activity" is the "very large body of case law which exist[ed]" in American law upon passage of the Act in 1976. See 1976 *Hearings* at 53 (testimony of Monroe Leigh). See also *id.* at 94 (testimony of Michael M. Cohen, Chairman, Committee on Maritime Legislation, Maritime Law Association of the United States). Testifying on an earlier version of the bill, Charles N. Brower, then Legal Adviser of the Department of State, stated:

[T]he restrictive theory of sovereign immunity from jurisdiction, which has been followed by the Department of State and the courts since it was articulated in the familiar letter of Acting Legal Adviser Jack B. Tate of May 29, 1952, would be incorporated into statutory law. This theory limits immunity to public acts, leaving so-called private acts subject to suit. The proposed legislation would make it clear that immunity cannot be claimed with respect to acts or transactions that are commercial in nature, regardless of their underlying purpose.

1973 *Hearings* at 15.¹⁸⁹ See generally *Petrol Shipping Corp. v. Kingdom of Greece*, 360 F.2d 103 (2d Cir.), *cert. denied*, 385 U.S. 931 (1966); *Victory Transport, Inc.*

¹⁸⁶ The 1973 bill was introduced at S. 566, 93d Cong., 1st Sess., see 119 Cong. Rec. 2204 (1973), and H.R. 3493, 93d Cong., 1st Sess., see *id.* at 2880. The language of § 2 of those bills is identical in material respects to the text of the present 28 U.S.C. § 1330(a). See, e.g., 119 Cong. Rec. 2213-15 (1973) (reprinting S. 566). The 1973 bills were withdrawn by their sponsors, and introduced as revised in H.R. 11315, 94th Cong., 1st Sess., see 121 Cong. Rec. 42017 (1975), and S. 3553, 94th Cong., 2d Sess., see 122 Cong. Rec. 17454 (1976) H.R. 11315 became the FSIA.

¹⁸⁷ *Hearings on H.R. 3493 before Subcommittee on Claims and Governmental Relations of the House Committee on the Judiciary*, 93d Cong., 1st Sess. 16 (1973) ("1973 *Hearings*") (testimony of Charles N. Brower, Legal Adviser, Dep't of State), 40 (State Dep't Section-by-Section Analysis of 1973 bill). See also *House Report* at 6615.

¹⁸⁸ 1976 *Hearings* at 27 (testimony of Monroe Leigh).

¹⁸⁹ The "Tate Letter" is set forth at 26 State Dep't Bull. 984 (1952).

v. *Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).¹⁹⁰ *But see Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198 (2d Cir.) (State Dep't suggestion of immunity supersedes application of restrictive theory), *cert. denied*, 404 U.S. 985 (1971).

Finally, current standards of international law concerning sovereign immunity add content to the "commercial activity" phrase of the FSIA. Section 1602 of the Act, entitled "Findings and declaration of purpose," contains a cryptic reference to international law, but fails wholly to adopt it.¹⁹¹ The legislative history states that the Act "incorporates standards recognized under international law," *House Report* at 6613, and the drafters seem to have intended rather generally to bring American sovereign immunity practice into line with that of other nations. *See 1976 Hearings* at 25 (testimony of Monroe Leigh), 32 (testimony of Bruno A. Ristau); *1973 Hearings* at 18 (testimony of Charles N. Brower). At this point, there can be little doubt that international law follows the restrictive theory of sovereign immunity. *House Report* at 6613. *See, e.g.*, State Immunity Act, 1978, s. 3 (United Kingdom); Council of Europe, European Convention on State Immunity, art. 4 (1972), *reprinted in 1976 Hearings* at 37, 38; *Empire of Iran*, 45 I.L.R. 57 (1963) (West Germany).

Under each of these three standards, Nigeria's cement contracts and letters of credit qualify as "commercial activity." Lord Denning, writing in *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 2 W.L.R. 356, 369, 1 All E.R. 881, with his usual erudition and clarity, stated: "If a government department goes into the market places of the world and buys boots or cement—as a commercial transaction—that government department should be subject to all the rules of the marketplace." Nigeria's activity here is in the nature of a private contract for the purchase of goods. Its purpose—to build roads, army barracks, whatever—is irrelevant. Accordingly, courts in other nations have uniformly held Nigeria's 1975 cement purchase program and appurtenant letters of credit to be "commercial activity," and have denied the defense of sovereign immunity.¹⁹² We find defendants'

¹⁹⁰ Dictum in *Victory Transport*, *supra*, 336 F.2d at 359, and *Heaney v. Government of Spain*, 445 F.2d 501, 504 (2d Cir. 1971), states that a contract made by a government for a public purpose, *e.g.*, bullets for the army, is not "commercial activity." This aspect of prior American law has been overruled by the FSIA, and the definition of "commercial activity" has been concomitantly expanded to include such contracts. *See* 28 U.S.C. § 1603(d); *see also 1976 Hearings* at 95 (testimony of Michael M. Cohen, Chairman, Committee on Maritime Legislation, Maritime Law Association of the United States).

¹⁹¹ Section 1602 provides in part:

Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

In the 1973 version of the bill, the word "chapter" was followed by "and other principles of international law."

¹⁹² *E.g.*, *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 2 W.L.R. 356, 1 All E.R. 881 (United Kingdom); *Hispano Americana Mercantil S.A. v. Central Bank of Nigeria*, [1979] 2 Lloyd's L.R. 277 (same); *Ipirade International S.A. v. Federal Republic of Nigeria* (Int'l Chamber of Commerce Arbitration Award, April 25, 1978), *enforced* 465 F.Supp. 824

activity here to constitute "commercial activity," and we move on to the next step of analysis.

C. 1.

We need look no further than the third clause of § 1605(a)(2) to find statutory subject matter jurisdiction here. That clause provides: "A foreign state shall not be immune . . . in any case . . . in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

The focus of our analysis is to determine whether "the act cause[d] a direct effect in the United States" within the meaning of the FSIA.¹⁹³ The "direct effect" clause has been the subject of considerable commentary,¹⁹⁴ but remains somewhat abstruse. The House Report, for example, states only that the direct effect clause "would subject [commercial] conduct [abroad] to the exercise of jurisdiction by the United States consistent with principles set forth in section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965)." *House Report* at 6618. The reference is a bit of a *non sequitur*, since § 18 concerns the extent to which substantive American law may be applied to conduct overseas, not the proper extraterritorial jurisdictional reach of American courts *n'importe quelle* substantive

(D.D.C. 1978); *Youssef M. Nada Establishment v. Central Bank of Nigeria*, 16 Int'l Legal Mat. 501 (1977) (Dist. Ct., Frankfurt/Main, Aug. 25, 1976) (West Germany). *See also 1976 Hearings* at 76 & n.13 (statement of Committee on International Law, Assoc. of the Bar of the City of New York).

¹⁹³ We need not belabor the point that the specific act or acts upon which these suits are based—the anticipatory repudiation of the cement contracts and letters of credit—took place at least in part "outside the territory of the United States." It was from Nigeria that Central Bank sent the instructions amending the letters of credit; it was in Nigeria that Nigeria instructed Central Bank to do so. Congress in writing the FSIA did not intend to incorporate into modern law every ancient sophistry concerning "where" an act or omission occurs. Conduct crucial to modern commerce—telephone calls, telexes, electronic transfers of intangible debits and credits—can take place in several jurisdictions. Outmoded rules placing such activity "in" one jurisdiction or another are not helpful here.

Moreover, should defendants establish that the "act" or "commercial activity" the action is "based upon" took place not "outside the territory of the United States" but inside it, then the first or second clauses of § 1605(a)(2) might become relevant. We need not decide the question. Given Congress's broad approach in the language of § 1605(a)(2), it is not at all improbable that a suit could be brought under more than one clause. *See House Report* at 6618 (stating that all cases covered by second clause might also come within first clause), *1973 Hearings* at 42 (State Dep't Section-by-Section Analysis) (stating that § 1605(a)(2) covers all cases with an act or direct effect in United States). *See generally Gemini Shipping Inc. v. Foreign Trade Organization for Chemicals and Foodstuffs*, *supra*, foot-note 168.

Moving to the second phrase of the clause, we have little doubt that the acts these actions are "based upon" were "in connection" with defendants' commercial activity. Breach of an agreement is necessarily performed "in connection with" that agreement, or with a series of similar agreements.

¹⁹⁴ E.g., Note, *Direct Effect Jurisdiction under the Foreign Sovereign Immunities Act of 1976*, 13 N.Y.U. J. Int'l L. & Pol. 571 (1981); Note, *Effects Jurisdiction under the Foreign Sovereign Immunities Act and the Due Process Clause*, 55 N.Y.U. L. Rev. 474 (1980) ("NYU Note"); Note, *The Nikkei Case: Toward a More Uniform Application of the Direct Effect Clause of the Foreign Sovereign Immunities Act*, 4 Ford. Int'l L.J. 109 (1980).

law.¹⁹⁵ Nor is the House Report's vague reference to the District of Columbia's long-arm statute, D.C. Code Ann. § 13-423(a), especially helpful; that provision looks to personal jurisdiction, not subject matter jurisdiction, and in any event is concerned in its "effects" provision only with torts. We are left with the words, "direct effect in the United States," and with Congress's broad mandate in passing the FSIA: "Under section 1605(a)(2), no act of a foreign state, tortious or not, which is connected with the commercial activities of a foreign state would give rise to immunity if the act takes place in the United States or has a direct effect within the United States." 1973 Hearings at 42 (State Department Section-by-Section Analysis of 1973 bill).

Fortunately, a certain amount of case law interprets both components of the problematic phrase: "direct" and "in the United States." For a paradigm of "direct," we look to the vivid examples of *Harris v. VAO Intourist, Moscow*, 481 F. Supp. 1056 (E.D.N.Y. 1979), and *Upton v. Empire of Iran*, 459 F. Supp. 264 (D.D.C. 1978), *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979). In *Harris*, a man lost his life in a hotel fire; in *Upton*, a man was injured when the roof of a building collapsed on him. Both men undoubtedly suffered "direct" effects.

Applying the term to a corporation is not so simple. Unlike a natural person, a corporate entity is intangible; it cannot be burned or crushed. It can only suffer financial loss. Accordingly, the relevant inquiry under the direct effect clause when plaintiff is a corporation is whether the corporation has suffered a "direct" financial loss. To discover whether breach of a contract causes this type of loss, we look to *Carey v. National Oil Corp.*, 592 F.2d 673, 676-77 (2d Cir. 1979) (*per curiam*). In *Carey*, we decided that a direct effect can arise not only from a tort, *e.g.*, *Harris* and *Upton*, *supra*, but from cancellation of a contract for the sale of oil as well. Here, under either theory of recovery, breach of the cement contracts or breach of the letters of credit, the effect of the suppliers was "direct." They were beneficiaries of the contracts that were breached. See Note, *Effects Jurisdiction Under the Foreign Sovereign Immunities Act and the Due Process Clause*, 55 N.Y.U. L. Rev. 474, 500-10 & n.192 (1980) ("NYU Note").

Finally, the most difficult aspect of the direct effect clause concerns its phrase, "in the United States." State law abounds with decisions locating "effects" for personal jurisdiction purposes. But those cases are not precisely on point, for they are concerned more with federalism, and less with international relations, than was Congress in passing the FSIA.¹⁹⁶ Reliance on state cases is not necessary here because the

¹⁹⁵ As a result, certain limitations built into the text of § 18, such as the requirement that the "direct effect" be "substantial" or "foreseeable," are not necessarily apposite to the direct effect clause of § 1605(a)(2). To the extent the substantiality and foreseeability requirements of the legislative reach cases are designed to minimize unnecessary conflict between United States and foreign substantive law, 28 U.S.C. § 1606 renders the requirements irrelevant, since it implies that federal substantive law will not always govern in FSIA cases. See generally *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 988, 991 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975).

¹⁹⁶ It is, therefore, less than determinative here that New York law holds that the repudiation by a Ugandan bank of a letter of credit payable in New York creates a cause of action which "arises in New York" under the New York Business Corporations Law. See *J. Zeevi & Sons, Ltd. v. Grindlay's Bank (Uganda), Ltd.*, 37 N.Y.2d 220, 371 N.Y.S.2d 892, 333 N.E.2d 168, *cert. denied*, 423 U.S. 866 (1976). Compare *Friedr. Zoellner (N.Y.) Corp. v. Tex Metals Co.*, 396 F.2d 300, 302 (2d Cir. 1968) (injury located at place of performance), with *Spectacular Promotions, Inc. v. Radio Station WING*, 272 F.Supp. 734, 737 (E.D.N.Y. 1967) (injury located where defendant acts).

financial loss in these cases occurred “in the United States” for two much simpler reasons. First, the cement suppliers were to present documents and collect money in the United States, and the breaches precluded their doing so. Second, each of the plaintiffs is an American corporation. Whether a failure to pay a foreign corporation in the United States¹⁹⁷ or to pay an American corporation overseas¹⁹⁸ creates an effect “in the United States” under §1605(a)(2) is not before us. Both factors are present here, and the subsection is clearly satisfied. *See* NYU Note at 510–13.

The foregoing analysis demonstrates that neither “direct” nor “in the United States” is a term susceptible of easy definition. A corporation is no more than a series of conduits, filtering profit—or loss—through each stage from the company’s customers to its shareholders, who may themselves be fictional entities as well. Harm to any component is somewhat “indirect,” and locating the site of the injury, especially when the harm consists in an omission, is an enterprise fraught with artifice. Courts construing either term should be mindful more of Congress’s concern with providing “access to the courts” to those aggrieved by the commercial acts of a foreign sovereign, *House Report* at 6605, than with cases defining “direct” or locating effects under state statutes passed for dissimilar purposes. Before the FSIA, plaintiffs enjoyed a broad right to bring suits against foreign states, subject only to State Department intervention and the presence of attachable assets. Congress in the FSIA certainly did not intend significantly to constrict jurisdiction; it intended to regularize it. *See House Report* at 6605–06. The question is, was the effect sufficiently “direct” and sufficiently “in the United States” that Congress would have wanted an American court to hear the case? No rigid parsing of § 1605(a)(2) should lose sight of that purpose. We have no doubt that Congress intended to bring suits like these into American courts, *see House Report* at 6618, and we hold that statutory subject matter jurisdiction here exists.

2.

The final step in establishing the court’s right to hear the claim is to find a constitutional basis for the statutory exercise of subject matter jurisdiction. *See Kline v. Burke Construction Co.*, 260 U.S. 226, 234 (1922). Each of these four suits is “between a State, or the Citizens thereof, and foreign States,” U.S. Const., art. III, § 2, cl. 1, and therefore comes within the judicial power by way of the diversity grant. Indeed, it is to that clause that the drafters of the FSIA looked in securing a constitutional basis for FSIA suits generally. *See House Report* at 6611, 6632. *Cf. Verlinden B.V. v. Central Bank of Nigeria*, No. 80–7413, slip op. at _____ (2d Cir. Apr. 16, 1981) (suit by alien against foreign state not supported by constitutional diversity grant). The district court, we conclude, had the power to hear these claims.

D. 1.

Subsequent to the determination of subject matter jurisdiction is the issue of personal jurisdiction. The statutory aspects of the analysis are quite simple. Subsec-

¹⁹⁷ Constitutional obstacles prevent our deciding the question in *Verlinden B.V. v. Central Bank of Nigeria*, *supra*, decided this day.

¹⁹⁸ *Harris* and *Upton* involved Americans injured overseas, but since the injured parties there were natural persons, not corporations, it is easy to locate the “effect” outside the United States. Whether an American corporation injured overseas incurs a direct effect in the United States remains an open question.

tion 1330(b) provides for personal jurisdiction over the foreign state as to any claim the district court has power to hear under § 1330(a), so long as service has been made under § 1608.¹⁹⁹ Service here has been made, or at least not objected to. See Fed. R. Civ. P. 12(h)(1). Subject matter jurisdiction exists, so statutory personal jurisdiction exists as well.

2.

Turning to the constitutional constraints on personal jurisdiction, our first inquiry must be whether the safeguards of due process, which otherwise regulate every exercise of personal jurisdiction, apply to FSIA cases at all. Specifically, is a foreign state a "person" within the meaning of the due process clause? Cases on the point are rare, since pre-FSIA suits against foreign states were generally brought *quasi in rem*, and the due process clause was not uniformly applied to *quasi in rem* suits until 1977, a year after the FSIA was passed. See *Shaffer v. Heitner*, 433 U.S. 186 (1977). Nonetheless, in *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation*, 605 F.2d 648 (2d Cir. 1979), a *quasi in rem* suit filed before the FSIA and decided after *Shaffer*, we applied constitutional due process analysis to a suit against a foreign state. We affirm that holding today. *Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247 (9th Cir. 1980) (applying due process clause in suit against foreign state *in personam*); *Petrol Shipping Corp. v. Kingdom of Greece*, *supra*, 360 F.2d at 110 (same); *Purdy Co. v. Argentina*, 333 F.2d 95, 98 (7th Cir. 1964) (same); *Rovin Sales Co. v. Socialist Republic of Romania*, 403 F. Supp. 1298, 1302 (N.D. Ill. 1975) (same); *T.J. Stevenson & Co. v. 81,193 Bags of Wheat Flour*, 399 F. Supp. 936, 938 (S.D. Ala. 1975) (same) (counterclaim).

Since the constitutional constraints apply here, our next concern must be to delineate the contacts that are relevant. The inquiry has two aspects: whose contacts, and with what? To bring any defendant before the court, of course, the due process analysis must be satisfied as to him. Nonetheless, it is not only defendant's activities in the forum, but also actions relevant to the transaction by an agent on defendant's behalf, which support personal jurisdiction. *Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116, 120-21 (2d Cir. 1967), *cert. denied*, 390 U.S. 996 (1968); *Frummer v. Hilton Hotels International, Inc.*, 19 N.Y.2d 533, 538, 281 N.Y.S.2d 41, 44-45, 227 N.E.2d 851, 854, *cert. denied*, 389 U.S. 923 (1967). Under the *Gelfand* standard, Central Bank's activities with respect to the "commercial activity" are chargeable to Nigeria, and Morgan's activities are chargeable to both. If Morgan had not performed for Central Bank, and Central Bank for Nigeria, the entire payment mechanism supporting the cement contracts, Nigeria would have been required to make the payments directly. See *Gelfand*, *supra*, 385 F.2d at 121. Since service was made under § 1608, the relevant area in delineating contacts is the entire United

¹⁹⁹ The House Report seems to require more, in its statement that, "The requirements of minimum jurisdictional contacts and adequate notice are embodied" in § 1330(b). *House Report* at 6612. *Accord*, 1976 *Hearings* at 96 (testimony of Michael M. Cohen). These statements are not in the Act itself, and are not by themselves sufficiently authoritative to introduce, *ipsisimis verbis*, the Fifth Amendment standard of due process into § 1330(b). Rather, the drafters in these words are merely confirming what they have no power to deny; that any exercise of personal jurisdiction under § 1330(b) is subject to the constitutional limitation of due process. See 1976 *Hearings* at 31 (testimony of Bruno A. Ristau).

States, not merely New York. *Compare* 28 U.S.C. § 1608 (service of process provision for FSIA) with 15 U.S.C. §§ 21(f) (service of process provision for antitrust laws), 77v (same for securities laws). See *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 998–1000 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975); *Mariash v. Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974); *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1340 (2d Cir. 1972).

Whether a defendant's contacts with the forum are so numerous that they reach the "minimum contacts" required by *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), depends broadly on whether "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316, *citing Miliken v. Meyer*, 311 U.S. 457, 463 (1940). That standard, in turn, involves at least four separate inquiries. Under the cases from *International Shoe* to *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), the court must examine the extent to which defendants availed themselves of the privileges of American law, the extent to which litigation in the United States would be foreseeable to them, the inconvenience to defendants of litigating in the United States and the countervailing interest of the United States in hearing the suit. See *World-Wide Volkswagen Corp. v. Woodson*, *supra*, 444 U.S. at 292, 297; *Kulko v. California Superior Court*, 436 U.S. 84, 97–98 (1978); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957); *International Shoe Co.*, *supra*, 326 U.S. at 316.

The facts of these cases establish that Central Bank, and through Central Bank Nigeria, repeatedly and "purposefully avail[ed themselves]" of the privilege of conducting activities in the United States. *Hanson v. Denckla*, *supra*, 357 U.S. at 253, *citing International Shoe Co.*, *supra*, 326 U.S. at 319. Central Bank alone sent its employees to New York for training, kept large cash balances here and maintained a custody account as well. If Morgan had converted Central Bank's funds from either account, New York law would have protected Central Bank, and allowed it to sue. Central Bank made it a regular practice to advise letters of credit through Morgan, and to use Morgan as its means of paying bills throughout the world. New York law protected Central Bank in each of its instructions, transfers, and withdrawals. Central Bank's activities with respect to the cement contracts and the letters of credit, directly chargeable to Nigeria under *Gelfand*, show the same pattern. In Nigeria's behalf and on Nigeria's instructions, Central Bank advised each of the letters of credit through Morgan, in the United States, regardless of the individual supplier's wishes. Having chosen American law and process as their protectors, Nigeria and Central Bank were not hesitant to invoke them; at the mere hint Morgan was reluctant to honor defendants' amendments to the letters of credit, an officer of Central Bank threatened to "go to court" to enforce them.

Having so thoroughly "invok[ed] the benefits and protections of [American] laws," *Hanson v. Denckla*, *supra*, 357 U.S. at 253, Nigeria and Central Bank would have every "reason to expect to be haled before a . . . court" here. *Shaffer v. Heitner*, *supra*, 433 U.S. at 216. Having threatened litigation on their own, and having been notified of its likelihood by Morgan, defendants cannot now assert they could not have expected it. Moreover, the very function of the due process clause is to give "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*

Corp. v. Woodson, *supra*, 444 U.S. at 297. In light of defendants' intentional activities in the United States, litigation was clearly foreseeable here.

Although the United States is certainly distant from Nigeria, litigation here is not unduly inconvenient for defendants. Every modern transnational commercial contract presents problems of adjudicatory cost; in the cement purchase program, where Nigeria bargained with corporations from a plethora of nations, required in the contracts that the goods came mostly from Europe, and provided in some letters of credit that payment was to be made in the United States, the inconvenience was at least expected. Moreover, Nigeria in the cement contracts agreed to submit to arbitration by the International Chamber of Commerce ("ICC"). The ICC's headquarters are in Paris, but its arbitrations can take place anywhere in the world. *See* ICC, *ICC Arbitration—The International Solution to Business Disputes*, art. 12 (undated). Further, any assertion of inconvenience here is belied by defendants' constant resort to the United States for a myriad of services, and by the frequent visits of Central Bank officials to Morgan in New York. *Cf. World-Wide Volkswagen Corp. v. Woodson*, *supra*, 444 U.S. at 297.

In *McGee v. International Life Insurance Co.*, the Supreme Court depended in part on the forum's "manifest interest in providing effective means of redress for its residents. . . ." 335 U.S. at 223. Here, we should not be unmindful that Congress has passed the FSIA specifically to provide "access to the courts." *House Report* at 6605. Similarly, the plaintiff has an "interest in obtaining convenient and effective relief." *World-Wide Volkswagen Corp. v. Woodson*, *supra*, 444 U.S. at 292, *citing Kulko v. California Superior Court*, *supra*, 436 U.S. at 92. *See generally Plant Food Co-op v. Wolfkill Feed & Fertilizer Corp.*, 633 F.2d 155, 158–60 (9th Cir. 1980); *Pedi Bares, Inc. v. P & C Food Markets, Inc.*, 567 F.2d 933, 936–938 (10th Cir. 1977); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 494–98 (5th Cir. 1974). Accordingly, we hold that defendants' relation to the forum here satisfies the "minimum contacts" requirement of *International Shoe*. *Sterling National Bank & Trust Co. of New York v. Fidelity Mortgage Investors*, 510 F.2d 870 (2d Cir. 1975).²⁰⁰

²⁰⁰ We recognize that *International Shoe* and its progeny were decided under the due process clause of the Fourteenth Amendment, while this case falls within the purview of the similar clause in the Fifth Amendment. In *Leasco Data Processing*, *supra*, a Fifth Amendment case, we applied the Fourteenth Amendment analysis, *see* 468 F.2d at 1340, but we added that the assertion of personal jurisdiction "must be applied with caution, particularly in an international context," *id.* at 1341, *citing* von Mehren & Trautman, *Jurisdiction to Adjudicate: A suggested Analysis*, 79 Harv. L. Rev. 1121, 1127 (1966). *See also Bersch v. Drexel Firestone, Inc.*, *supra*, 519 F.2d at 1000. *See generally Romero v. International Terminal Operating Co.*, 358 U.S. 354, 383 (1959). While circumspection is appropriate in transnational disputes, certain other factors which might limit the exercise of personal jurisdiction are not present in such suits. The concerns of federalism discussed at length by the Supreme Court in *Shaffer*, *supra*, 433 U.S. at 216–17, and *World-Wide Volkswagen Corp.*, *supra*, 444 U.S. at 292, for example, would not be relevant in an FSIA suit since states within a federal system, strictly speaking, are not involved. Further, more or less solicitude might be in order because defendant is a government, not a natural person or corporation.

We find neither distinction dispositive here. Like the states of our nation, the United States is a member of an international community. While it has not formally renounced part of its long-arm power by signing an international constitution, considerations of fairness nonetheless regulate every exercise of the federal judicial machinery. *See* Restatement of the Law, Second, Foreign Relations Law of the United States § 37 (1965); von Mehren & Trautman, *supra*, 79 Harv. L. Rev. at 1125 n.8. The analogy between the national and international systems may not

Our rulings today vindicate more than Congressional intent. They affirm the right of all participants in the marketplace of the world to be treated as equals, and to ascribe to principles of trade which found their birth in the law merchant, centuries ago. Corporations can enter contracts without fear that the defense of sovereign immunity will be inequitably interposed, and foreign states can bargain without paying a premium required by a trader in anticipation of a judgment-proof client. Commerce is fostered, and all interests are advanced.

In *Nikkei, East Europe* and *Chenax*, the district court held jurisdiction to be present, and proceeded to the trial of plaintiffs' claims. We find no error in its rulings on the merits, and affirm those three judgments in full.²⁰¹ In *Texas Trading*, the district court ordered the complaint dismissed for lack of jurisdiction. That order is reversed, and the case is remanded for proceedings consistent with this opinion.

9. *Verlinden B.V. v. Central Bank of Nigeria*. DECISION BY THE COURT OF APPEALS FOR THE SECOND CIRCUIT, ON 16 APRIL 1981.²⁰²

The judgement:

Throughout the long summer of 1787, the Framers of the Constitution, assembled at Philadelphia, hammered the parochial prejudices of thirteen colonies into the rough framework of a union. There, a fundamental tenet of American jurisprudence was forged; federal courts are courts of limited jurisdiction. Alexander Hamilton, Luther Martin, James Madison, and others honed such rough verbiage as "cases re-

be sufficiently exact to lead to the same result in every case, but here we see no reason to stray from our former adherence to the analysis developed under the Fourteenth Amendment. Similarly, "we see no reason to treat a commercial branch of a foreign sovereign differently from a foreign corporation." *Victory Transport, Inc.*, *supra*, 336 F.2d at 363.

²⁰¹ Having lost the sovereign immunity decision and the jurisdictional questions, defendants attempt to place a further obstacle in the way of the speedy adjudication of the claims against them: the act of state doctrine. We decline to apply it here. Our decision does not depend on a determination that this case falls within one of the several purported "exceptions" to the rule. Act of state analysis depends upon a careful case-by-case analysis of the extent to which the separation of powers concerns on which the doctrine is based are implicated by the action before the court. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 728 (1976) (Marshall, J., *dissenting*); see *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964). Here, adjudication of the legality of Nigeria's and Central Bank's challenged conduct does not threaten to embarrass the executive branch in its conduct of United States foreign relations, and hence does not seriously implicate the relevant policy considerations. These cases contain none of the elements that other courts have viewed to contain the seeds of such embarrassment. We are not being asked, as the Court was in *Sabbatino*, to judge a foreign government's conduct under ambiguous principles of international law. These are not cases where the challenged governmental conduct is public rather than commercial in nature, see *Alfred Dunhill of London, Inc. v. Republic of Cuba*, *supra*, or where its purpose was to serve an integral governmental function, cf. *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 78 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977) (applying act of state doctrine where governmental conduct in question was part of "a continuing and broadened confrontation between the East and West in an oil crisis which has implications and complications far transcending those suggested by appellants"). Finally, the executive branch has not stated its views in these cases regarding either the propriety of applying the act of state doctrine, as in *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972), or the validity of the very governmental act *sub judice*, as in *Hunt v. Mobil Oil Corp.*, *supra*, 550 F.2d at 77.

²⁰² Slip opinion.

specting the national peace and harmony” to the precision of “cases arising under . . . the Laws of the United States,”²⁰³ and Article III, thus tempered, emerged.

Nearly two centuries later, in 1976, Congress passed the Foreign Sovereign Immunities Act (“FSIA” or “Act”).²⁰⁴ The Act purports to create, pursuant to that same Article III, original jurisdiction in the district courts over “any nonjury civil action against a foreign state . . . at to any claim for relief in personam with respect to which the foreign state is not entitled to immunity. . . .” 28 U.S.C. §1330 (a). This case, one of seven decided today involving the FSIA,²⁰⁵ presents a sharp issue under the Act; may a foreign plaintiff sue a foreign state in a federal court for breach of an agreement not governed by federal law? The language of the statute seems to allow it. After exhaustive examination of the context, language and history of Article III, we defer to the Framers’ prescient restraint, and find jurisdiction lacking in the constitutional sense.

I.

The facts relevant to the issues on appeal can be stated quite briefly. Verlinden B.V. is a Dutch corporation. It has its principal offices in Amsterdam, the Netherlands. On April 21, 1975, Verlinden signed a contract with the Federal Republic of Nigeria agreeing to ship to Nigeria 240,000 metric tons of cement over the course of several months. Nigeria, in turn, promised to establish “an Irrevocable, Transferable abroad, Divisible and Confirmed Letter of Credit in favour of the seller for the total purchase price through Slavenburg’s Bank, Amsterdam, Netherlands.” On June 23, 1975, Nigeria established the letter of credit at the Central Bank of Nigeria,²⁰⁶ and made it payable through the Morgan Guaranty Trust Company in New York. Under the letter of credit, Verlinden could collect, upon presentation of certain documents, \$60 per ton for shipments made to Nigeria. The letter of credit provided it was to be governed by “[U]niform [C]ustoms and Practice Documentary Credits (1962 Revision) Chamber of Commerce Brochure No. 222.”²⁰⁷

²⁰³ See generally 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 46 (notes of James Madison), 133 (notes of Committee of Detail), 186 (notes of James Madison), 238 (notes of Robert Yates), 576 (notes of Committee of Style), 661 (Constitution) (rev. ed. 1937) (hereinafter “Farrand”).

²⁰⁴ Act of October 21, 1976, Pub. L. 94-583, 90 Stat. 2891, codified at 28 U.S.C. §§ 1330; 1332(a)(2)—1332(a)(4); 1391(f); 1441(d); and 1602-1611.

²⁰⁵ The other six are *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, No. 80-7703, slip op. at ____ (2d Cir. Apr. 16, 1981); *Decor by Nikkei International Inc. v. Federal Republic of Nigeria*, No. 80-7783, slip op. at ____ (2d Cir. Apr. 16, 1981); *Chenax Majesty, Inc. v. Federal Republic of Nigeria*, No. 80-7771, slip op. at ____ (2d Cir. Apr. 16, 1981); *East Europe Import-Export Inc. v. Federal Republic of Nigeria*, No. 80-7773, slip op. at ____ (2d Cir. Apr. 16, 1981); *Reale International, Inc. v. Federal Republic of Nigeria*, No. 81-7183, slip op. at ____ (2d Cir. Apr. 16, 1981); and *Gemini Shipping, Inc. v. Foreign Trade Organization for Chemicals and Foodstuffs*, No. 80-7851, slip op. at ____ (2d Cir. Apr. 16, 1981).

²⁰⁶ The Central Bank of Nigeria is an instrumentality of the Federal Republic of Nigeria. It performs functions similar to the United States Federal Reserve and the Bank of England.

²⁰⁷ The Uniform Customs and Practice for Documentary Credits (1962 Revision) Chamber of Commerce Brochure No. 222 (“UCP”) is a document setting forth standards of conduct relating to letters of credit. It is published by the International Chamber of Commerce, which has its headquarters in Paris.

On August 21, 1975, Verlinden subcontracted with a third party, Interbuco (a Leichtenstein corporation), for the purchase of 240,000 tons of cement at \$51 per ton. Verlinden agreed to pay Interbuco \$5 per ton if Verlinden reneged on the purchase.

In September, Nigeria found its ports clogged with ships.²⁰⁸ Central Bank instructed Morgan, and Morgan notified Verlinden, that Morgan was not to pay Verlinden under the letter of credit for a shipment of cement unless Verlinden had obtained, two months before sailing, Nigeria's permission to enter the port. Verlinden, alleging Central Bank's action constituted an anticipatory breach of the letter of credit,²⁰⁹ sued Central Bank in the Southern District of New York. Verlinden's complaint claimed \$4.66 million, consisting mostly of lost profits and of money Verlinden was forced to pay Interbuco under the terms of the subcontract. Central Bank moved to dismiss the complaint for lack of jurisdiction under the FSIA. The district court granted the motion, assuming, as we have in setting forth the facts above, all the allegations of Verlinden's complaint to be true. Verlinden appeals.

II.

Turning to the law, our first inquiry must be whether Verlinden's complaint meets a threshold requirement under the FSIA. Do both Verlinden and Central Bank fall into the category of parties contemplated by the Act? Section 2(a) of the FSIA, *codified at* 28 U.S.C. §1330(a), provides:

The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement.

The parties agree that Central Bank is an "instrumentality of a foreign state" under 28 U.S.C. §1603(b), and therefore is a "foreign state" under §1603(a). Accordingly, Verlinden's suit is one "against a foreign state" for purposes of §1330(a).

Verlinden's qualification under the Act is less clear, since it is a foreign corporation. The Report of the House Judiciary Committee on the bill that later became the Act (H.R. 11315) proclaims the Act's purpose to be to ensure that "our citizens will have access to the courts" in suits against foreign states. House Judiciary Committee, *Jurisdiction of United States Courts in Suits Against Foreign States*, H.R.

²⁰⁸ Nigeria's cement contract with Verlinden was one of 109 such contracts Nigeria entered in 1975. The details of this massive program for the purchase of cement, the port congestion it caused and the litigation that ensued are described more fully in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, *supra*, foot-note 205, decided this day.

²⁰⁹ Article 3 of the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce provides:

An irrevocable credit is a definite undertaking on the part of an issuing bank and constitutes the engagement of that bank to the beneficiary or, as the case may be, to the beneficiary and bona fide holders of drafts drawn and/or documents presented thereunder, that the provisions for payment, acceptance or negotiation contained in the credit will be duly fulfilled, provided that all the terms and conditions of the credit are complied with. . . . Such undertakings can neither be modified nor cancelled without the agreement of all concerned.

Central Bank does not seriously dispute that its instructions to Morgan violated the UCP.

Rep. No. 1487, 94th Cong., 2d Sess. 6, reprinted in [1976] U.S. Code Cong. & Admin. News 6604, 6605 (“*House Report*”) (emphasis added).²¹⁰ The draftsmen of § 1330(a) assumed “U.S. businessmen” and “American property owner[s]” would bring suits under the Act. *Id.* The experts who testified at subcommittee hearings spoke of protecting “American citizens,”²¹¹ “American businesses,”²¹² “American parties,”²¹³ and “American nationals.”²¹⁴ Looking back to the hearings surrounding the introduction of a 1973 predecessor to H.R. 11315, references to “our citizens” again abound.²¹⁵ In general, Congress emphasized that it did not intend “to open up our courts to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world.” *Hearings on H.R. 11315 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary*, 94th Cong. 2d Sess. 31 (1976) (“*1976 Hearings*”) (testimony of Bruno A. Ristau, Chief, Foreign Litigation Section, Civil Division, Dep’t of Justice).

On the other hand, extensive language in the legislative history supports the belief that Congress did not limit the Act to suits brought by Americans. The House Report states the Act provides “when and how *parties*” can sue a foreign state in American courts, *House Report* at 6604 (emphasis added), and that it applies to “any claim” against a foreign state, *id.* at 6611. Testimony before the subcommittee at the 1976 hearings referred broadly to relief for “private parties with claims,” *1976 Hearings* at 31 (testimony of Bruno A. Ristau), and “private litigants,” *id.* at 58 (testimony of Peter D. Trooboff, Chairman, Committee on Transnational Judicial Procedure, International Law Section, American Bar Association). Professor Moore finds a “plain intention . . . to confer on the district court jurisdiction of an action by an alien against a foreign state if the action otherwise meets the requirements” of

²¹⁰ See also Senate Judiciary Committee, *Define Jurisdiction of U.S. Courts in Suits Against Foreign States*. S. Rep. No. 1310, 94th Cong., 2d Sess. 8. The House and Senate Committees filed identical reports, and reference *infra* to the House Report may be deemed to represent the views of the Senate Committee as well.

²¹¹ *Hearings on H.R. 11315 before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary*, House of Representatives, 94th Cong., 2d Sess. 24 (1976) (“*1976 Hearings*”) (testimony of Monroe Leigh, Legal Adviser, Dep’t of State). President Ford, in signing the bill into law, stated that the Act’s provisions were “available to all American citizens.” 12 Weekly Comp. of Pres. Docs. 1554 (1976).

²¹² *1976 Hearings* at 80 (testimony of Bruno A. Ristau, Chief, Foreign Litigation Section, Civil Division, Dep’t of Justice).

²¹³ *1976 Hearings* at 80 (testimony of Cecil J. Olmstead, Chairman, The Rule of Law Committee).

²¹⁴ *1976 Hearings* at 100 (statement of Charles N. Brower, Yale Law School).

²¹⁵ *Hearings on H.R. 3493 before Subcommittee on Claims and Governmental Relations of the Committee on the Judiciary*, 93d Cong., 1st Sess. 18 (1973), (“*1973 Hearings*”) (testimony of Charles N. Brower, Legal Adviser, Dep’t of State). The 1973 bill was introduced as S. 566, 93d Cong., 1st Sess., see 119 Cong. Rec. 2204 (1973), and H.R. 3493, 93d Cong., 1st Sess., see *id.* at 2880. The language of § 2 of those bills is identical in material respects to the text of the present 28 U.S.C. § 1330(a). See, e.g., 119 Cong. Rec. 2213–15 (1973) (reprinting S. 566). The 1973 bills were withdrawn by their sponsors, and introduced as revised in H.R. 11315, 94th Cong., 1st Sess., see 121 Cong. Rec. 42017 (1975), and S. 3553, 94th Cong., 2d Sess., see 122 Cong. Rec. 17454 (1976). H.R. 11315 became the FSIA.

Act. 1 J. Moore, *Federal Practice and Procedure* ¶ 0.66[4] at 700.178–79 (2d ed. 1979). This conclusion is buttressed by the Act’s removal provision, 28 U.S.C. § 1441(d), which is not limited to suits brought by U.S. citizens, and purports to allow removal to federal court of “any civil action brought in a State court against a foreign state” (emphasis added).

From this murky and confused legislative history, only one conclusion emerges: Congress formed no clear intent as to the citizenship of plaintiffs under the Act. It probably did not even consider the question. In the absence of determinative—or even persuasive—guidance from the legislative history, the words of the statute control. Section 1330(a) is not limited to suits brought by Americans. It applies to “any nonjury civil action against a foreign state” (emphasis added). Accordingly, we hold that a suit brought in a federal court by an alien against a foreign state is properly filed—at least under the terms of the Act.

III.

Having concluded that both plaintiff and defendant are within the class of parties contemplated by § 1330(a), we are forced to confront the constitutional dilemma: does Congress possess the power to grant jurisdiction over a suit such as this?

Article III of the federal Constitution provides that the national government’s “judicial Power shall extend to” certain types of disputes, which it lists in clause 1 of section 2.²¹⁶ That Congressional power to confer jurisdiction to those cases and no further has been established on a number of occasions. *E.g.*, *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809). *See also National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 604 (Rutledge and Murphy, *JJ.*, concurring); 626 (Vinson and Douglas, *JJ.*, dissenting); 646 (Frankfurter and Reed, *JJ.*, dissenting); *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45, 51 (2d Cir. 1980) (*per curiam*) (*en banc*). To satisfy federal jurisdictional requirements, therefore, every case must be supported by both a Congressional grant of jurisdiction²¹⁷ and a constitutional base on which the statute rests. *Kline v. Burke Construction Co.*, 260 U.S. 226, 234 (1922). The legislative diversity grant, for example, 28 U.S.C. § 1332, stands squarely on similar words in Article III. The statutory federal question grant also tracks the constitutional phrase. 28 U.S.C. § 1331. Section 1330 can claim no such parallel language for support, and must seek it among the finite—and incongruent—words of Article III.

²¹⁶ The clause provides in full:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

²¹⁷ *See Ex parte Edelstein*, 30 F.2d 636 (2d Cir.) (L. Hand, *J.*), *cert. denied*, 279 U.S. 851 (1929).

A.

The search for a constitutional basis for a § 1330 suit between two aliens brings us first, but only briefly, to Article III's diversity grant. It provides, *inter alia*, that the judicial power shall extend to "Controversies . . . between a State, the Citizens thereof, and foreign States, Citizens or Subjects." The phrase nowhere mentions a case between two aliens. Accordingly, Congress is powerless to confer jurisdiction over such suits, at least on the basis of the diversity grant,²¹⁸ *Hodgson v. Bowerbank*, *supra*, 9 U.S. at 303; *Montalet v. Murray*, 8 U.S. (4 Cranch) 46 (1807),²¹⁹ and Verlinden must look elsewhere in Article III for language to support its suit.

B.

A more colorable—but still unsuccessful—constitutional grounding for Verlinden's FSIA suit is the very first phrase of the relevant clause of Article III. That phrase extends the judicial power to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . ." The federal courts have had little opportunity to construe the crucial language of the phrase, "arising under . . . the Laws of the United States," mainly because the passage in 1875 of the predecessor to § 1331 made direct resort to the Constitution unnecessary. A huge body of law interprets the statute. It is, therefore, to the almost identical words in § 1331—"arises under the . . . laws . . . of the United States"—to which we first turn in exploring whether Verlinden's suit "arises under" federal law for purposes of Article III.

1.

We had occasion in *T.B. Harms Co. v. Eliscu*, 339 F.2d 823 (2d Cir. 1964), *cert. denied*, 381 U.S. 915 (1965), a copyright case, to discuss the three species of suit found to exist within the realm of § 1331. The first type finds its source in *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916), in which Mr. Justice Holmes stated that "a suit arises under the law that creates the cause of action." Five years later in *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), the Supreme Court found the Holmes test too restrictive, and added a second genus of suit to § 1331: those in which the plaintiff's complaint dis-

²¹⁸ Cf. 28 U.S.C. § 1350, conferring jurisdiction over suits "by an alien for a tort only, committed in violation of the law of Nations." Section 1350 permits suits between aliens through the federal question grant of Article III, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). So do, *inter alia*, the securities laws and antitrust laws, again operating through the federal question grant. *IIT v. Vencap, Ltd.*, 510 F.2d 1001 (2d Cir. 1975) (securities laws); *Joseph Muller Corp. Zurich v. Societe Anonyme de Gerance et D'Armement*, 451 F.2d 727 (2d Cir. 1971), *cert. denied*, 406 U.S. 906 (1972) (antitrust laws).

We stated in *Filartiga* that physical torture violates the law of nations, and thereby transgresses the "laws of the United States." 630 F.2d at 888. We have elsewhere held that commercial violations, such as those here alleged, do not constitute breaches of international law. *See Dreyfus v. von Finck*, 534 F.2d 24, 30-31 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976); *IIT v. Vencap, Ltd.*, *supra*, 519 F.2d at 1015.

²¹⁹ At least, Congress is powerless to confer jurisdiction when, as here, the suit contains aliens only. If the case were between an alien and an American on one side and an alien on the other, diversity jurisdiction would not exist under § 1332, *IIT v. Vencap, Ltd.*, *supra*, foot-note 218, 519 F.2d at 1015, but it might be available to Congress under Article III. *Compare State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523 (1967), with *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

closes a need to interpret a federal law.²²⁰ *Accord, Ivy Broadcasting Co. v. American Telephone & Telegraph Co.*, 391 F.2d 486, 492 (2d Cir. 1968). The third grouping is typified by *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). It imposes a “federal common law” upon cases in which the court finds a national interest so strong that a judge-made federal rule of decision preempts the state law that would otherwise govern the cause.

Verlinden’s suit against Nigeria falls into none of the three categories. Its inclusion in the first group, suits in which federal law “creates the cause of action,” is precluded by 28 U.S.C. § 1606. That section provides that, in FSIA suits, “the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.” There is no intent here to create new federal causes of action; the purpose of the Act instead is to provide “access to the courts in order to resolve ordinary legal disputes.” *House Report* at 6605 (emphasis added). The House Report states flatly: “The bill is not intended to affect the substantive law of liability.” *Id.* at 6610.²²¹ Indeed, the parties agree that the law governing Verlinden’s suit for breach of the letter of credit is the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce, or the law of New York. At any rate, it is not federal. Congress here intended to “create” no cause of action, and Holmes’s test is not satisfied. *Cf. Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); *Schumacher v. Beeler*, 293 U.S. 367 (1934). Nor is the third test, for the progeny of *Clearfield Trust* have required a federal interest strong enough to supplant state rules of decision. *See, e.g., Miree v. DeKalb County*, 433 U.S. 25 (1977); *In re: “Agent Orange” Product Liability Litigation*, 635 F.2d 987 (2d Cir. 1980).

Appellant’s contentions focus on the second, broader test. Its application depends upon the exact language of *Ivy Broadcasting*: whether “the complaint discloses a need for the interpretation of an act of Congress.” Undoubtedly the FSIA, an act of Congress, will be construed if Verlinden’s suit is permitted beyond the courthouse door. Delicate questions of sovereign immunity, which Congress in the Act made wholly federal, *see House Report* at 6610, will be the fulcrum of considerable controversy. If decided adversely to plaintiff, as they were by Judge Weinfeld, they will determine the outcome of the litigation.

Despite all this, the issue of sovereign immunity is not disclosed by Verlinden’s well-pleaded complaint. That complaint alleges the breach of a letter of credit, *simpliciter*. The Act retains sovereign immunity as a defense, to be raised by the de-

²²⁰ In *Smith*, the cause of action was created by state law; a shareholder sued to enjoin his corporation’s purchase of bonds, which purchase the shareholder considered unauthorized by the corporation’s charter. State law created the charter. But the ground on which the shareholder alleged the purchase to be improper—that the federal instrumentality which had issued them had done so unconstitutionally—clearly called for the interpretation of a federal law.

Justice Holmes dissented.

²²¹ That is, “whether state or federal law is to be applied will depend on the nature of the issue before the court,” not the presence of a foreign state. “Under the *Erie* doctrine state substantive law, including choice of law rules, will be applied if the issue before the court is non-federal.” *1973 Hearings* at 47 (Dep’t of State, Section-by-Section Analysis of 1973 bill). *Accord, House Report*, at 6621.

fendant.²²² Defenses that have to be raised affirmatively, no matter how urgent their federal nature, do not confer jurisdiction. *Louisville & Nashville Railroad Co. v. Mottley*, 211 U.S. 149 (1908). See also *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125 (1974) (*per curiam*); *Tennessee v. Union & Planters' Bank*, 152 U.S. 454 (1894). The distinction is perhaps best illustrated by *Gully v. First National Bank in Meridian*, 299 U.S. 109 (1936), in which a federal statute removed the national bank's immunity from state taxation. Speaking for a unanimous court, Mr. Justice Cardozo stated: "A suit does not arise under a law renouncing a defense, though the result of the renunciation is an extension of the area of legislative power which will cause the suitor to prevail." *Id.* at 116. See generally P. Bator, P. Mishkin, D. Shapiro, H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 883-90 (2d ed. 1973).

Moreover, the type of statute to be interpreted here is qualitatively different from the statutes involved in *Smith* and its progeny. Federal jurisdiction was present in those cases because the complaint revealed the need to construe a statute conferring substantive rights: in *Smith*, the Federal Farm Loan Act (creating the Federal Land Banks) and Article I, § 8, cl. 18 of the Constitution (granting to Congress the right to make all laws necessary and proper to execute its powers); in *Ivy Broadcasting*, federal common law regarding the duties of communications carriers. *Accord*, *Empresa Hondurena de Vapores, S.A. v. McLeod*, 300 F.2d 222 (2d Cir. 1962) (statute creating right to petition for labor representation elections), *vacated on other grounds*, 372 U.S. 10 (1963). While in none of those cases did a federal law create the cause of action, each suit required construction of a law which, in another posture, had the power to do so. The laws regulated conduct and created rights outside the courtroom. This suit, *per contra*, requires construction of a federal statute, but only one regulating judicial practice. One cannot sue for violation of the FSIA. Accordingly, this case is closer to decisions like *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950). *Skelly Oil* called squarely for the interpretation of a federal statute (the Declaratory Judgment Act, 28 U.S.C. § 2201), yet the Supreme Court found jurisdiction lacking. Speaking for the Court, Mr. Justice Frankfurter explained that "the right to be vindicated was State-created," 339 U.S. at 673, not a right "arising under" federal law. That the conduit of jurisdiction was a federal statute did not create jurisdiction over the claim where none existed before. The same is true here. See also *Moore v. Chesapeake & Ohio Railway Co.*, 291 U.S. 205 (1934).

²²² *House Report* at 6616 ("sovereign immunity is an affirmative defense which must be specially pleaded"; "the burden will remain on the foreign state"). *Accord*, *1976 Hearings* at 74 (statement of Committee on International Law of the Association of the Bar of the City of New York); *Id.* at 81 (testimony of Cecil J. Olmstead). See also *1973 Hearings* at 32 (testimony of Charles N. Brower) ("it is incumbent upon the defendant to raise the defense of sovereign immunity rather than the plaintiff being required to establish lack of immunity").

Some confusion on this point arises from § 1604, which is drafted to create a general principle of immunity, not a presumption of amenability which defendant must overcome. The reasons for this aspect of the Act's structure are historical. *1973 Hearings* at 32 (testimony of Charles N. Brower and Bruno A. Ristau). The above citations establish that the "negative drafting" was not intended to revise the rules of pleading.

2.

Having established that Verlinden's suit does not "arise under" federal law by principles developed in cases construing § 1331, the issue before us is this: is the meaning to be given to the words "arising under" in Article III sufficiently broader than their construction in § 1331 to bring Verlinden's suit within the federal judicial power? We think not, but we refuse to resolve this difficult case on the simple ground of logomachy. "The substantial identity of the words does not . . . require, on that score alone, an identical interpretation. The differences in the functions of the two enactments, in the circumstances surrounding their adoption and in their further provisions justify inquiry as to whether their meaning is different." Shulman & Jaegerman, *Some Jurisdictional Limitations on Federal Procedure*, 45 Yale L.J. 393, 405 n.47 (1936). The Supreme Court has implied, but has never held, that § 1331 occupies less than all of the ground staked out by the parallel phrase in Article III. *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 506 (1900).²²³ The question before us is whether this case can stand on the narrow strip that remains.

The clearest statement of the Framers' intent concerning Article III of the Constitution comes from Alexander Hamilton, a delegate from New York. In *The Federalist*, No. 83, Hamilton wrote:

The judicial authority of the federal judicatures is declared by the Constitution to comprehend certain cases particularly specified. The expression of those cases marks the precise limits, beyond which the federal courts cannot extend their jurisdiction, because the objects of their cognizance being enumerated, the specification would be nugatory if it did not exclude all ideas of more extensive authority.

A. Hamilton, *The Federalist*, No. 83, at 519 (Putnam ed. 1888). In other words, the Framers emphatically did not intend to grant the legislature power to create jurisdiction over any cases Congress chose. Congressional prerogative in this area is circumscribed.

The first test of that Congressional power grew out of the Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789). In § 11 of that Act, Congress purported to confer on the district courts jurisdiction over any case "where . . . an alien is a party." In *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800), however, the Supreme Court found that the judicial power did not extend to a suit between two aliens, even where the statute conferred it.²²⁴ *Accord, Hodgson v. Bowerbank, supra*. The Court in *Mossman* discussed the diversity clause of Article III, and found jurisdiction lacking for the reason set forth in section III-A, *supra*. The Court did not discuss, but by its holding passed upon, the "arising under" clause as well. Since judicial power was found wanting in the constitutional sense, the Court necessarily held that a suit brought under § 11 did not "arise under" a law of the United States for purposes of

²²³ A simpler, but less germane, example of this is the erstwhile presence of a jurisdictional amount requirement in most federal question cases. 28 U.S.C. § 1331(a). See Federal Question Jurisdictional Amendments Act of 1980. Pub.L. 96-486 (to be codified in 28 U.S.C. § 1331), eliminating the requirement.

²²⁴ The Court in *Mossman* did not void § 11 insofar as it applied to such suits, since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and the power to strike down statutes, still lay in the future. Instead, the Court construed § 11 to require that a citizen of a state be on at least one side of the dispute.

Article III. That is, the Supreme Court in *Mossman v. Higginson* decided that, despite a federal interest in suits involving aliens,²²⁵ Congress by the mere act of passing a statute conferring jurisdiction over a class of suits did not bring those suits within the judicial power. The reason is clear: to allow Congress to do so places no limits on the judicial power at all, and a *sine qua non* of constitutional analysis instructs that this power is limited.

Mossman greatly advances our inquiry. Congress in the FSIA has purported to create jurisdiction over not cases "where an alien is a party," but cases "against a foreign state." In the absence of substantive rules of decision, we are constrained to find that the judicial power does not extend this far. See *Textile Workers Union v. Lincoln Mills*, *supra* (Frankfurter, J., dissenting).²²⁶

Looking beyond this sort of detailed and mechanical application of old holdings to new facts, it becomes evident that our decision here is compelled by broader principles. The Framers created federal courts to protect, first, rights secured by the Constitution, and, second, rights created by federal law. They were concerned with the enforcement of uniformity in the interpretation of federal laws, but only insofar as those federal laws regulated conduct. We turn once more to Hamilton, writing in *The Federalist*, No. 80, *supra*, at 495. He stated: "Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed." Significantly, his concern for uniformity extended only to "causes," not to all federal laws. Accordingly, when *Mossman* was *sub judice*, the Supreme Court did not hold that the need for a uniform standard under which aliens might be sued in federal court created, *ipso facto*, federal jurisdiction. The need to develop such a uniform standard (through, perhaps, construction of the term "alien") did not implicate a federal "cause," and was therefore insufficient. Here, the asserted need for a uniform standard under which foreign states might be sued in American courts must fail for the same reason.

Thinking even more broadly, our result is required by the very structure of Article III, § 2, cl. 1. That clause lists, in sequence, nine types of cases to which the

²²⁵ That aliens were a subject of predominant—indeed, preemptive—federal concern was assumed by the Framers. See *Filartiga v. Pena-Irala*, *supra* foot-note 218, 630 F.2d at 877–78. In fact, early drafts of Article III had included references to "all cases in which foreigners may be interested." *E.g.*, 1 Farrand 244 (notes to James Madison). See also *id.* at 247 (notes of Rufus King).

²²⁶ Beyond *Mossman* and *Hodgson*, the latter case of *The Propeller Genessee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1852), provides support. Congress in the Great Lakes Act of 1845 had purported to create jurisdiction over cases "concerning" vessels on the Great Lakes, without changing the substantive rule of decision in those cases. 53 U.S. at 451–52. The Supreme Court, in an opinion by Chief Justice Taney, upheld the law on maritime grounds, but stated flatly that the jurisdictional provision would be unconstitutional if it were based only on the "arising under" grant and if it were unsupported by substantive regulations. *Id.* at 453. That is, a case brought under the jurisdictional provision would not "arise under" a law of the United States for purposes of Article III.

The conclusion to be gleaned from these canescent cases is this: the *Ivy Broadcasting* rule, requiring as a condition of jurisdiction the interpretation of a federal substantive law, *i.e.*, one which regulates conduct outside the courtroom, is of constitutional moment. We need not here hold whether the other aspect of the rule under § 1331 (that the necessity to interpret the federal law be disclosed by the complaint) is constitutionally required. *Louisville & Nashville Railroad Co. v. Mottley (Mottley II)*, 219 U.S. 467 (1911), implies it is not.

judicial power extends. See foot-note 216, *supra*. If we accepted the interpretation of the first phrase necessary to find jurisdiction here—that a case can “arise under” a jurisdictional statute—then we could eliminate the other eight phrases from the clause. For example, if we decided that Verlinden’s suit was one “arising under a law of the United States” because it was brought under § 1330, then we could similarly hold that a suit “arose under a law of the United States” because it was brought under § 1332. The constitutional diversity grant would then be surplusage. If we are not to read the other phrases out of the clause, we must restrict the first phrase to cases arising under a substantive law.

Granted the above, we cannot be deterred by *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). *Osborn* contains dictum, made holding in *Bank of the United States v. Planters’ Bank of Georgia*, *id.* at 904 (1824), that a suit brought by the Bank of the United States could “arise under” the statute creating the Bank and giving it the right to sue and be sued. The facts of the case merit examination, for it has been suggested,²²⁷ and we believe, that the case should be limited to them. Shortly before *Osborn*, the Bank of the United States had won, with great difficulty, the right to exist and to be free of state taxes. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Ohio continued to tax the Bank, and forcibly removed money from the Bank’s vaults to satisfy the levy. In *Osborn*, the Bank sued to enjoin collection of the tax. The Supreme Court, faced with the death of the bank and of its holding in *McCulloch* on the one hand and with stretching jurisdictional concepts on the other, saved the Bank. A fair reading of the case depends heavily on the presence of an instrumentality of the United States as a party, and on the national government’s desire to protect the Bank and itself from the rapacious states. The Court twenty-eight years later did not extend *Osborn*’s holding to cases where the United States was not a party, *The Propeller Genessee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1852),²²⁸ and we decline to do so here. See generally, Mishkin, *The Federal “Question” in the District Courts*, 53 Colum. L. Rev. 157, 160–63, 184–96 (1953).

IV.

In interpreting the Constitution, we discern the Framers’ intent only as seen through a glass, darkly, if at all. The delegates to the Constitutional Convention did not agree on all the Constitution’s provisions, even as they signed it. Accordingly, a court construing its language must look as much to history, good sense, and sound concepts of judicial administration as to the text itself. Considering, therefore, both the past and the present, we find federal courts to be without power to hear suits such as the one before us.

The judgment is affirmed, on the ground that the court lacks subject matter jurisdiction over the controversy.

²²⁷ E.g., *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 481 (1957) (Frankfurter, J., dissenting).

²²⁸ *Osborn* was extended to cases involving federally-chartered corporations, see *The Pacific Railroad Removal Cases*, 115 U.S. 1 (1885), but that holding has been called a “sport,” Mishkin, *The Federal “Question” in the District Courts*, 53 Colum. L. Rev. 157, 160 n. 24 (1953), and has been limited to its facts. See *Textile Workers Union v. Lincoln Mills*, *supra* foot-note 227, at 481 (Frankfurter, J., dissenting).

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, procedurally 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 tous 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 immovable property located in Czechoslovakia or to rights of States on such immovable 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.

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 courts and notarial offices.

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

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

- (a) the subject of the proceedings is real property of the States and persons listed in paragraph 1, which is located in the Czechoslovak Socialist Republic, or their rights relating to such real property belonging to other persons, as well as their rights arising from their tenancy of such real property, unless the subject of the proceedings is the payment of rent,
- (b) the subject of the proceedings is an inheritance in which the persons listed in paragraph 1 appear outside their official duties,
- (c) the subject of the proceedings concerns the pursuit of a profession or commercial activity which the persons listed in paragraph 1 carry out outside their official duties,
- (d) the foreign State or the persons listed in paragraph 1 voluntarily submit to their jurisdiction.

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

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:

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, immovable escheats to the State on the territory of which the immovable 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 immovable 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.

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).

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 I6, 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.

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 extritoriality 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 1979¹⁰ (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.

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 cadre 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 15).

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 exécutoire.

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 manière 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 Commercial 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 levies, 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”.

The 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 undertake 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 penalties 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 whatsoever, 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 definition 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 territorial 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, paragraph I (C), grants exemption 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 Communication 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* (NJ¹² 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.

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 1939¹⁴ concerning the position of foreign State-owned ships, etc.

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.

-
- (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;
- Si 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 de 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 procédurales s'appuient sur le principe de l'égalité des parties au litige. Il n'y a pas de privilèges procédurales 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 immunities 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.

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.

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 connaître 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 régler 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 contre 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 forment 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 cet 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 1¹⁷ 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.

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 commercial 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 *1 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 discussion 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 *1 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) sections 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 than 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 expressly 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 section 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) 1 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 ordinarily 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 be 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 FS1 Act.

The types of “non-public” acts of foreign States not covered by immunities as specified in Section 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 FS1 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 FS1 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 commercial 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 minimis 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 instances 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 FSIA 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 attachment 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 defense agency.

Question 18

Section 1330 of the FSJ 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 FSJ 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 arrangement, 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 FSJ 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 Venezuelan 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 Constitution 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 jurisdictional 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 have 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 practice. 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 Annex¹⁹) 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.

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

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 vessels used for public purposes—vessels of customs, sanitary (health) and similar control and, of course, war vessels. 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 provided by the Federal Secretariat for Foreign Affairs (not the Federal Secretariat for the Administration of Justice 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-

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—analogueous 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 Procedure²¹).

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 the 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.

SUBJECT INDEX

INDEX PAR MATIERES

SUBJECT INDEX

INDEX PAR MATIERES

- Admiralty
 - domestic judgments
 - Austria, 190
 - Canada, 225, 241-245
 - China, 251-252
 - South Africa, 373-405
 - United Kingdom, 456, 458
 - United States, 524-527
 - national legislation
 - Argentina, 3
 - Canada, 8
 - Norway, 19-20
 - Pakistan, 23-24
 - Romania, 27
 - Singapore, 31
 - South Africa, 37-38
 - United Kingdom, 44, 51-52
 - United States, 58-59, 63
 - Yugoslavia, 70
 - records and correspondence
 - Argentina, 73-74
 - Canada, 75-78
 - Norway, 90
 - Suriname, 91-92
 - United Kingdom, 93-96, 123, 124-127, 132, 133
 - United States, 112-113
 - treaty provisions, 155, 165, 173-176, 177-178
- Agency of a foreign state
(*See also* Foreign state)
 - domestic judgments
 - Belgium, 210-214
 - Burma, 217-221
 - Canada, 249
 - Federal Republic of Germany, 321-325
 - Italy, 335-338
 - Netherlands, 344-355
 - Philippines, 364-366, 368-370
 - United Kingdom, 449-450
 - United States, 470-471
 - national legislation
 - Canada, 7, 10, 13
 - United States, 57
 - records and correspondence
 - United States, 106-107
- Albania, treaty provisions, 134-135
- Arbitration proceedings
 - domestic judgments
 - Netherlands, 344-360
 - South Africa, 420
 - United Kingdom, 455
 - United States, 475-477, 524-527
 - national legislation
 - German Democratic Republic, 15, 16-17
 - Pakistan, 23
 - Singapore, 31
 - South Africa, 37
 - United Kingdom, 44
 - treaty provisions, 151-153, 153-154, 159, 176-177
- Argentina
 - national legislation, 3-4
 - records and correspondence, 73-74
- Attachment. *See* Execution and attachment
- Australia, domestic judgments, 181-183
- Austria
 - domestic judgments, 183-209
 - national legislation, 5-6
 - treaty provisions, 140
- Awards and foreign judgments. *See* Enforcement of awards and foreign judgments
- Barbados, records and correspondence, 74-75
- Belgium, domestic judgments, 209-214
- Bilateral treaties, 131-150
 - non-socialist countries, 131-134
 - socialist countries, 134-150
- Bolivia, treaty provisions, 145
- Brazil
 - questionnaire response of, 562-563
 - treaty provisions, 145-146
- Bulgaria, treaty provisions, 135
- Burma, domestic judgments, 214-221
- Bustamente Code, 150-151
- Byelorussian Soviet Socialist Republic,
 - national legislation, 6

- Canada
 - domestic judgments, 221-249
 - national legislation, 7-12
 - records and correspondence, 75-78
- Central banks
 - domestic judgments
 - Italy, 333-334
 - Switzerland, 435-440
 - United Kingdom, 449-452
 - United States, 527-543, 543-553
 - national legislation
 - Canada, 10
 - Pakistan, 25-26
 - Singapore, 33
 - South Africa, 39
 - United Kingdom, 47
 - United States, 62
 - records and correspondence
 - United States, 121-122
- Chile
 - domestic judgments, 250-251
 - national legislation, 12-13
- China
 - (*See also* People's Republic of China)
 - domestic judgments, 251-252
- Code of Private International Law of 1928, 150-151
- Colombia
 - national legislation, 13-14
 - records and correspondence, 78-82
- Commercial activities
 - domestic judgments
 - Austria, 191, 193, 194, 195
 - Belgium, 210-214
 - Canada, 241-245, 249
 - China, 251-252
 - Federal Republic of Germany, 284, 285, 288, 291
 - France, 260-262
 - Italy, 325-329, 329-331
 - South Africa, 373-405, 411, 422
 - Switzerland, 427-433
 - United Kingdom, 446, 447, 448, 450, 453-468
 - United States, 474, 475-477, 485, 512-514, 526-527, 527-543
 - national legislation
 - Canada, 7, 8, 10
 - Chile, 12
 - Czechoslovakia, 15
 - Pakistan, 21, 23-24, 25
 - Singapore, 29, 30, 31, 32-33
 - South Africa, 34, 36, 39
 - United Kingdom, 42, 48
 - United States, 57-58, 66
 - records and correspondence
 - Barbados, 74
 - Canada, 75-78
 - United Kingdom, 133
 - United States, 99, 102, 107-108, 109-110
 - treaty provisions
 - Union of Soviet Socialist Republics, 134-150
 - United States, 131-134
- Contracting state, defined, 164-165
- Contracts
 - domestic judgments
 - Australia, 181-183
 - Austria, 184-185, 188-189, 190
 - Belgium, 210-214
 - Canada, 221-225, 226-231, 232-241, 248-249
 - Chile, 250-251
 - China, 251-252
 - Federal Republic of Germany, 289-293, 297-321
 - France, 253-257, 262-264
 - Italy, 329-331, 333-334
 - Philippines, 360-363
 - South Africa, 373-405, 405-419
 - Switzerland, 427-433
 - United Kingdom, 453, 457
 - United States, 475-479, 527-543
 - national legislation
 - Pakistan, 21
 - Singapore, 29
 - South Africa, 36
 - United Kingdom, 42
 - United States, 58
 - records and correspondence
 - Argentina, 73
 - Federal Republic of Germany, 86
 - United Kingdom, 113
- Contracts of employment
 - domestic judgments
 - Belgium, 209-210
 - Italy, 331-333
 - Philippines, 369
 - national legislation
 - Pakistan, 21, 22
 - Singapore, 29-30
 - South Africa, 36
 - United Kingdom, 42-43, 44
 - treaty provisions, 157-158
- Convention of the Settlement of Investment Disputes between States and Nationals of other States, 155-156
- Convention on the High Seas, 155
- Convention on the Recognition and

- Enforcement of Foreign Arbitral Awards, 151-154
- Convention on the Territorial Sea and the Contiguous Zone, 156
- Copyright, Federal Republic of Germany, 294-297
- Costa Rica, treaty provisions, 146-147
- Counter-claims
 - national legislation
 - Canada, 8
 - Hungary, 18
 - Pakistan, 21, 24
 - Singapore, 29, 32
 - United Kingdom, 42, 45
 - United States, 59
 - records and correspondence
 - United States, 114
 - treaty provisions, 150, 157
- Criminal proceedings
 - Argentina, 3
 - Hungary, 18, 19
 - Pakistan, 26
 - Singapore, 34
- Customs duties
 - national legislation
 - Pakistan, 24
 - Singapore, 31
 - United Kingdom, 44
 - treaty provisions, 165
- Czechoslovakia
 - domestic judgments, 252-253
 - national legislation, 14-15
 - questionnaire response of, 564-567
 - records and correspondence, 82-83
 - treaty provisions, 136
- Death or injury
(*See also* Torts)
 - domestic judgments
 - Austria, 202
 - national legislation
 - Canada, 8
 - Singapore, 30
 - South Africa, 36
 - United Kingdom, 43
 - United States, 59
 - treaty provisions, 159
- Decisions of domestic tribunals. *See* Domestic judgments
- Deeds
(*See also* Property)
 - records and correspondence, Argentina, 74
- Default judgments
 - domestic judgments
 - Austria, 208
 - Federal Republic of Germany, 297-321
 - France, 255-257
 - United Kingdom, 442
 - United States, 476-477, 505, 522
 - national legislation
 - Canada, 11
 - Pakistan, 24
 - Singapore, 32
 - South Africa, 38
 - United Kingdom, 45, 50
 - United States, 60
 - records and correspondence
 - Federal Republic of Germany, 87-88
 - United States, 116-117
 - treaty provisions, 160, 161
- Democratic Republic of Viet-Nam, 139-140
- Democratic People's Republic of Korea, 138
- Denmark
 - records and correspondence, 83-84
 - treaty provisions, 131, 140-141
- Developed countries, 140-145
- Developing countries, 145-150
- Diplomatic immunities
 - domestic judgments
 - Austria, 203-207
 - Belgium, 209-210
 - Burma, 215-217
 - Canada, 222-223, 224, 244
 - Chile, 250
 - Federal Republic of Germany, 273-282, 317-320
 - France, 253-255
 - Italy, 331
 - Japan, 340
 - Madagascar, 342-343, 344
 - Sweden, 426-427
 - national legislation
 - Argentina, 3-4
 - Byelorussian Soviet Socialist Republic, 6
 - Chile, 13
 - Hungary, 17, 18
 - Pakistan, 21, 25
 - Singapore, 29, 34
 - South Africa, 35, 36, 37
 - Union of Soviet Socialist Republics, 40
 - United Kingdom, 42, 46, 47, 49-50, 54-55

- records and correspondence
 - Canada, 75
 - Colombia, 78-82
 - Federal Republic of Germany, 86-88
 - Greece, 89-90
 - Poland, 90-91
 - United States, 146
- treaty provisions, 150-151, 165
- Domestic judgments
 - Australia, 181-183
 - Austria, 183-209
 - Belgium, 209-214
 - Burma, 214-221
 - Canada, 211-249
 - Chile, 250-251
 - China, 251-252
 - Czechoslovakia, 252-253
 - Federal Republic of Germany, 272-325
 - France, 253-272
 - Italy, 325-338
 - Japan, 338-341
 - Madagascar, 342-344
 - Netherlands, 344-360
 - Philippines, 360-373
 - South Africa, 373-426
 - Sweden, 426-427
 - Switzerland, 427-440
 - United Kingdom, 441-468
 - United States, 468-553
- Ecuador, questionnaire response of, 567-569
- Egypt
 - questionnaire response of, 569-571
 - treaty provisions, 147
- Employment. *See* Contracts of employment
- Enforcement of awards and foreign judgments
 - domestic judgments
 - Madagascar, 343
 - Netherlands, 355-360
 - national legislation
 - Austria, 5, 6
 - Colombia, 13-14
 - German Democratic Republic, 16-17
 - Hungary, 18, 19
 - Norway, 19
 - Singapore, 32
 - United Kingdom, 46, 48-49
 - records and correspondence
 - United Kingdom, 93
 - United States, 146
 - treaty provisions, 151-154, 155-156, 161-163, 164, 168-169
- European Convention on State Immunity and Additional Protocol, 156-172
- European Tribunal, 169-171
- Exceptions from immunity
 - domestic judgments
 - Austria, 186-187
 - France, 266-267, 267-272
 - national legislation
 - Argentina, 4
 - Austria, 6
 - Byelorussian Soviet Socialist Republic, 6
 - Canada, 7-10
 - Pakistan, 20-24
 - Singapore, 28-32
 - United Kingdom, 41-44
 - United States, 57-59
 - records and correspondence
 - United States, 108-113
 - treaty provisions, 131-134, 134-150
- Execution and attachment
 - domestic judgments
 - Federal Republic of Germany, 290-293, 297-321
 - Italy, 333-334
 - Madagascar, 343
 - Philippines, 365, 367-368
 - South Africa, 373-405, 405-419, 419-426
 - Switzerland, 427-433, 434-435, 436-440
 - United Kingdom, 450-451, 455
 - United States, 479-492, 492-503
 - national legislation
 - Byelorussian Soviet Socialist Republic, 6
 - Canada, 10
 - Chile, 12, 13
 - Colombia, 13
 - Pakistan, 25-26
 - Singapore, 33
 - United States, 60-61
 - Yugoslavia, 69-70
 - records and correspondence
 - German Democratic Republic, 85
 - Poland, 90-91
 - Suriname, 91-92
 - Union of Soviet Socialist Republics, 92
 - United States, 117-122, 127, 146
 - treaty provisions, 134-150, 153-154, 161-163
- Executive branch of government

- domestic judgments, 409-410
national legislation, 4, 33-34, 62
records and correspondence, 146
Expropriations, 110-111, 461
- Federal Republic of Germany
domestic judgments, 272-325
questionnaire response, 571-575
records and correspondence, 86-89
treaty provisions, 131, 142
- Finland
records and correspondence, 84
treaty provisions, 141
- Foreign state
domestic judgments
Austria, 203-207
Burma, 214-215, 215-217, 217-221
United States, 469-470, 484, 545-547
national legislation
Canada, 7
South Africa, 35
United Kingdom, 46
United States, 56, 57
records and correspondence
Poland, 90-91
United States, 106
- France
domestic judgments, 253-272
treaty provisions, 141-142
- German Democratic Republic
national legislation, 15-17
records and correspondence, 84-85
treaty provisions, 137
- Germany. *See* Federal Republic of Germany; German Democratic Republic
- Ghana, treaty provisions, 147-148
- Greece
records and correspondence, 89-90
treaty provisions, 131-132
- Heads of state
domestic judgments
Austria, 194
national legislation
Pakistan, 25
Singapore, 33, 34
records and correspondence
Canada, 75
United Kingdom, 133
- Hungary
national legislation, 17-19
questionnaire response of, 575-577
treaty provisions, 137-138
- Immunity. *See* Exceptions from immunity; Restriction of immunity; Waiver of immunity
- India, treaty provisions, 148
- Injunctions
domestic judgments
United Kingdom, 450, 452
United States, 494, 505
national legislation
Canada, 10
Pakistan, 25
United Kingdom, 45, 46
- Injury. *See* Death or injury
- International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, 173-176
- International Convention on Civil Liability for Oil Pollution Damage, 176
- Investment disputes, 155-156
- Iran, treaty provisions, 132
- Ireland, treaty provisions, 132-133
- Israel, treaty provisions, 133
- Italy
domestic judgments, 325-338
treaty provisions, 143
- Japan
domestic judgments, 338-341
treaty provisions, 133, 143-144
- Kenya, questionnaire response of, 577-578
- Kingdom of the Netherlands. *See* Netherlands
- Korea. *See* Democratic People's Republic of Korea; Republic of Korea
- Leases
(*See also* Property)
domestic judgments
Canada, 222, 235
France, 267
Philippines, 360-363

- Lebanon, questionnaire response of, 578-580
- Legislation. *See* National legislation
- Libel, 468-475
- Madagascar
 domestic judgments, 342-344
 questionnaire response of, 581-584
- Maritime law. *See* Admiralty
- Mexico, questionnaire response of, 584-587
- Mongolia, treaty provisions, 138-139
- Multilateral treaties, 150-178
- National legislation, 3-70
 Argentina, 3-4
 Austria, 5-6
 Byelorussian Soviet Socialist Republic, 6
 Canada, 7-12
 Chile, 12-13
 Colombia, 13-14
 Czechoslovakia, 14-15
 German Democratic Republic, 15-17
 Hungary, 17-19
 Norway, 19-20
 Pakistan, 20-26
 Romania, 27
 Singapore, 27-34
 South Africa, 34-40
 Union of Soviet Socialist Republics, 40
 United Kingdom, 41-55
 United States, 55-69
 Yugoslavia, 69-70
- Netherlands
 domestic judgments, 344-360
 questionnaire response of, 587-589
 treaty provisions, 134, 144
- News agencies, 217-221, 468-475
- Nicaragua, treaty provisions, 134
- Non-socialist countries, treaty provisions, 131-134
- Norway
 national legislation, 19-20
 questionnaire response of, 589-592
 records and correspondence, 90
- Nuclear matters, 165
- Official records and correspondence. *See* Records and correspondence
- Oil pollution damage, 176
- Ownership. *See* Property
- Pakistan, national legislation, 20-26
- Patents and trade-marks
 domestic judgments
 Austria, 196, 198-200, 201-202
 Canada, 245-248
 national legislation
 Austria, 6
 Singapore, 30
 South Africa, 37
 United Kingdom, 43
 treaty provisions, 158
- People's Republic of China, treaty provisions, 135-136
- Philippines, domestic judgments, 360-373
- Poland, records and correspondence, 90-91
- Portugal, questionnaire response of, 592-594
- Price fixing, 503-524
- Property
 domestic judgments
 Austria, 184, 196-198, 201, 205, 208-209
 Canada, 222, 223, 224, 225, 226-231, 232-241, 241-245
 Federal Republic of Germany, 272-282, 308
 France, 267-272
 Italy, 335-338
 Japan, 339-340
 Madagascar, 342-343
 Philippines, 360-363, 364-366, 367-368, 370-373
 South Africa, 373-405, 405-419
 Sweden, 426-427
 United States, 471-472, 479-492, 492-503
 national legislation
 Byelorussian Soviet Socialist Republic, 6
 Canada, 8, 10
 Chile, 12
 Colombia, 14
 Czechoslovakia, 15
 German Democratic Republic, 15
 Hungary, 17
 Pakistan, 22, 25
 Singapore, 29, 30, 33
 South Africa, 36-37, 39
 United Kingdom, 43, 45
 United States, 58, 62-63
 Yugoslavia, 69
 records and correspondence
 Argentina, 74

- Czechoslovakia, 83
- Finland, 84
- German Democratic Republic, 84-85
- Norway, 90
- Poland, 90-91
- United Kingdom, 96-97
- United States, 111
- treaty provisions, 159, 168
- Protocol on Arbitration Clauses, 176-177
- Public acts
 - domestic judgments
 - Austria, 192
 - Canada, 248-249
 - Italy, 327
- Questionnaire, 557-562
- Questionnaire responses
 - Brazil, 562-563
 - Czechoslovakia, 564-567
 - Ecuador, 567-569
 - Egypt, 569-571
 - Federal Republic of Germany, 571-575
 - Hungary, 575-577
 - Kenya, 577-578
 - Lebanon, 578-580
 - Madagascar, 581-584
 - Mexico, 584-587
 - Netherlands, 587-589
 - Norway, 589-592
 - Portugal, 592-594
 - Romania, 594-596
 - Senegal, 596-598
 - Spain, 598-601
 - Sudan, 601-602
 - Sweden, 602-604
 - Syrian Arab Republic, 604-607
 - Togo, 607-610
 - Trinidad and Tobago, 610-614
 - Tunisia, 614-616
 - Union of Soviet Socialist Republics, 616-619
 - United Kingdom, 619-629
 - United States, 630-638
 - Venezuela, 638-641
 - Yugoslavia, 641-645
- Reciprocity
 - national legislation
 - Argentina, 4
 - German Democratic Republic, 15-16
 - Hungary, 17
 - records and correspondence
 - Colombia, 80
 - German Democratic Republic, 85
 - Poland, 90-91
 - Records and correspondence
 - Argentina, 73-74
 - Barbados, 74-75
 - Canada, 75-78
 - Colombia, 78-82
 - Czechoslovakia, 82-83
 - Denmark, 83-84
 - Federal Republic of Germany, 86-89
 - Finland, 84
 - German Democratic Republic, 84-85
 - Greece, 89-90
 - Norway, 90
 - Poland, 90-91
 - Suriname, 91-92
 - Union of Soviet Socialist Republics, 92
 - United Kingdom, 93-98
 - United States, 98-128
 - Republic of Korea, treaty provisions, 132
 - Restrictions of immunity
 - domestic judgments
 - Austria, 184-185, 190, 192-193, 194-195
 - Federal Republic of Germany, 285-290, 292, 294-297
 - France, 264-265
 - Italy, 331-333
 - Netherlands, 345, 357
 - South Africa, 375-377, 411, 422
 - Sweden, 427
 - Switzerland, 429-430
 - United Kingdom, 447, 457-458, 466
 - United States, 469, 473-474, 483, 511-512, 527-543
 - national legislation
 - Austria, 6
 - Canada, 8, 11
 - Pakistan, 26
 - South Africa, 35-40
 - records and correspondence
 - Barbados, 74
 - Canada, 75-78
 - Colombia, 79
 - Czechoslovakia, 83
 - Suriname, 91-92
 - United States, 98, 99-100
 - treaty provisions, 156
 - Romania
 - national legislation, 27
 - questionnaire response of, 594-596
 - treaty provisions, 139

- Senegal, questionnaire response of, 596-598
- Service on a foreign state or its agency
- domestic judgments
 - Japan, 340
 - United Kingdom, 441, 442
 - United States, 475-477, 480, 506
 - national legislation
 - Canada, 9
 - Czechoslovakia, 14, 15
 - Pakistan, 24
 - Singapore, 32
 - South Africa, 38-39
 - United Kingdom, 45-46
 - United States, 59-60
 - records and correspondence
 - United States, 114-116, 146
 - treaty provisions, 160-161, 164-165
- Singapore
- national legislation, 27-34
 - treaty provisions, 149
- Socialist countries
- agencies of a foreign state, 470-471
 - ownership of property, 472
 - treaty provisions, 134-150
- South Africa
- domestic judgments, 373-426
 - national legislation, 34-40
- Spain, questionnaire response of, 598-601
- Sudan, questionnaire response of, 601-602
- Suriname, records and correspondence, 91-92
- Sweden
- domestic judgments, 426-427
 - questionnaire response of, 602-604
- Switzerland
- domestic judgments, 427-440
 - treaty provisions, 144-145
- Syrian Arab Republic, questionnaire response of, 604-607
- Taxation
- domestic judgments
 - Canada, 222, 224, 226-231, 232-241
 - national legislation
 - Pakistan, 24, 26
 - Singapore, 32, 34
 - South Africa, 38
 - United States, 63-69
 - treaty provisions, 165
- Third party proceedings, 8
- Togo
- questionnaire response of, 607-610
 - treaty provisions, 149
- Torts, United States, 112
(*See also* Death and injury)
- Treaty on International Commercial Navigation Law, 177-178
- Treaty provisions, 129-178
- bilateral treaties, 131-150
 - domestic judgments
 - Italy, 325-329
 - Switzerland, 434-435
 - United States, 501-502
 - execution and attachment, 310-312
 - multilateral treaties, 150-178
 - national legislation
 - Argentina, 3
 - Pakistan, 20-21
- Trinidad and Tobago, questionnaire response of, 610-614
- Tunisia, questionnaire response of, 614-616
- Union of Soviet Socialist Republics
- national legislation, 40
 - questionnaire response of, 616-619
 - records and correspondence, 92
 - treaty provisions, 134-150
- United Kingdom of Great Britain and Northern Ireland
- domestic judgments, 441-468
 - national legislation, 41-55
 - questionnaire response of, 619-629
 - records and correspondence, 93-98
- United States
- domestic judgments, 468-553
 - national legislation, 55-69
 - questionnaire response of, 630-638
 - records and correspondence, 98-128
 - treaty provisions, 131-134
- Venezuela, questionnaire response of, 638-641
- Viet-nam. *See* Democratic Republic of Viet-nam
- Waiver of immunity
- domestic judgments
 - Austria, 185, 187, 196-198, 199-200, 202

- Czechoslovakia, 253
- Federal Republic of Germany, 292, 298-299, 308, 325
- France, 253-255, 258-260
- Italy, 328, 333
- Japan, 338-339, 340-341
- Madagascar, 342, 344
- United States, 485, 489-490, 522, 525
- national legislation
 - Canada, 7-8, 10
 - Hungary, 17-18
 - South Africa, 35
 - United States, 57, 62
- records and correspondence
 - Denmark, 83-84
 - Federal Republic of Germany, 87
 - German Democratic Republic, 84-85
 - United States, 109
 - treaty provisions, 151-152, 156-157, 157-172
- Yemen, treaty provisions, 150
- Yugoslavia
 - national legislation, 69-70
 - questionnaire response of, 641-645

