Extra-territorial Jurisdiction claimed by the Courts of the United States

THE IMMUNITY OF STATES FROM THE JURISDICTION OF FOREIGN COURTS

A paper prepared by the ASIAN AFRICAN LEGAL CONSULTATIVE COMMITTEE

INTRODUCTION

A good deal of attention has been focussed in recent years in several countries including those in the Commonwealth on the question of the scope, extent and application of the doctrine of sovereign immunity in regard to claims to immunity by states from the jurisdiction of foreign courts. While the doctrine in its traditional form, based on the principle of par in parem non habet imperium, has been adhered to by a number of states over a long period, there has been a growing trend in some countries towards a restrictive application of the doctrine by carving out certain exceptions where immunity from jurisdictions were to be denied. This trend, which first became noticeable in the pronouncement of the courts the continental Europe in isolated cases even before the First World War, gradually gathered momentum in European practice in the inter-war years and more so during the past three decades with the progressive increase in state activities in the sphere of trade and other areas which could not be regarded as governmental functions in the traditional sense. Even in the common law countries, which had consistently recognised and applied the doctrine in its absolute form, a growing degree of public opinion had begun to emerge during the 'fifties about the need for a fresh look at the question faced with the phenomenal rise in the activities of states in the private law sphere. The question that came to be debated were basically three, namely:

(i) Should the doctrine of sovereign immunity continue to apply in the traditional form in the modern context having regard to the extension of state activities in numerous spheres?

(ii) If the doctrine is to be applied in a restrictive fashion, what should be the scope and ambit of exceptions where immunity would not be admissible? and

(iii) Should, and if so, to what extent, the property of a sovereign state be subject to attachment and execution if immunity were to be denied in certain classes of actions?

2. The United States government as early as in 1952 came out in favour of a restrictive application of the doctrine as enunciated in a letter from the Acting Legal Adviser of the Department of State to the Department of Justice popularly known as the Tate Letter. The issue of immunity, however, continued to be determined by the executive branch of the government with the courts being guided by such determination following the decision of the Supreme Court in the case of Republic of Mexico vs Hoffman[1] in 1945. However the enactment of the Foreign Sovereign Immunity Act in 1976 has now placed the matter squarely in the hands of the judiciary. In the United Kingdom the question of immunity was based on the common law as determined and applied by the Courts, and although individual judges had begun to express doubts about the applicability of the doctrine in its absolute form[2] it was not until 1981 that the House of Lords finally pronounced itself

in favour of the doctrine of restrictive immunity.[3] Legislation, however, was enacted in 1978 providing for a restrictive application of immunity on the basis of certain exceptions as specified in the Act.[4] Legislation on similar lines has also been enacted in Canada,[5] Singapore,[6] Australia,[7] Pakistan[8]. In Western Europe the restrictive doctrine became firmly embeded in the practice of states with the conclusion of the European Convention of Sovereign Immunity in 1972. The matter was also discussed in the Asian African Legal Consultative Committee (AALCC) in 1960 soon after its establishment, and the Committee by a majority recommended certain exceptions being made in regard to the classes of cases where immunity ought not to be claimed.[9] 1

3. Notwithstanding this growing trend towards a restrictive application of sovereign immunity in Western Europe and the United States, the view has continued to prevail in the Soviet Union, socialist countries and also in some developing nations that there ought not to be any encroachment on the question of immunity, which they regard as an essential element of state sovereignty itself. Notwithstanding the two divergent schools of thought, no firm position appears to have been taken by a vast majority of the members of the international community, especially those in Asia, Africa and the newly-independent states in other regions. There is little evidence of state practice and a paucity of judicial decisions, presumably due to the fact that may not have been many occasions when the executive branch of government or the judiciary has been called upon to express views on the issue of immunity within the relatively few years of their independence.

4. It is primarily for these reasons that the International Law Commission decided in 1977 to study the subject with a view to its progressive development and codification. The Special Rapporteur appointed by the Commission has until now presented seven reports containing a formulation of 28 articles out of which 17 articles have so far been provisionally adopted by the Commission. The draft articles proposed by the Commission generally follow a restrictive pattern for the grant of immunity, but the debates before the Sixth Committee on the draft have clearly shown that the divergence of views among those states which favour absolute immunity and those who do not, continues to persist. In the light of this it is felt that the Commission's work, even when completed, may not lead to anything more concrete than a set of recommendations by an authoritative body which will help in the formulation of governmental policies by nations who have yet to decide on a line of approach.

5. Whilst the matter continues to be pending before the Commission, certain developments have taken place during the past five years which have caused a degree of anxiety and concern about the possible impact of the restrictive doctrine on the state sovereignty itself. This is primarily in relation to the interpretation and application of the United States legislation entitled 'The Foreign Sovereign Immunity Act 1976', which was brought in force in 1977. This incorporates the restrictive doctrine and sets out a series of exceptions where immunity from jurisdiction would not be admissible. One such exception is actions in relation to commercial transactions. The expression 'commercial transactions' as defined in the Act has a wide connotation, and the nature of a transaction is to be judged from what it appears to be on the surface without any reference to the purpose for which a transaction has been entered into.

6. Furthermore the legislation contemplates that jurisdictional immunity of a foreign state will not be admissible in an action brought before the courts of the United States in respect of 'commercial activity' of a foreign state, even outside the territory of the United States, if any act in relation to such activity takes place in the United States or causes direct effect in the United States. This means that if a sovereign state enters into a contract with a company or corporation in the United States for such matters as construction of a plant or factory in its own territory, the courts in the United States can assume jurisdiction in an action arising out of such a contract. Such jurisdiction may well be assumed on the basis that a contract has been signed in the United States or on

the ground that it has a direct effect on the United States in as much as the profits are intended to be repatriated to the United States.

7. The type of cases where jurisdiction may be exercised is illustrated by two recent reported decisions, namely, the Texas Trading and Milling Corporation v Federal Republic of Nigeria[10] and Harris Corporation v National Iranian Radio and Television[11]. In the group of cases against the Federal Republic of Nigeria, jurisdiction was assumed on the basis of a certain nexus in the United States, namely, the opening of Letters of Credit in the United States. In the second case, where an injunction was granted against National Iranian Radio and Television, jurisdiction was exercised on the basis of the financial consequences of the transaction being in the United States. 10,11

8. The matter was brought before the AALCC when the United States Supreme Court by its decision in the case of Verlinden vs Central Bank of Nigeria[12] delivered on 23 May 1983, affirmed the jurisdiction of United States courts in regard to suits relating to transactions to be performed outside the jurisdiction on the basis of the remotest nexus and even at the instance of foreign plaintiffs. In that case the jurisdiction of the courts in the United States was sought to be invoked in respect of a dispute concerning a sale of cement by a Dutch Company to the Nigerian Government. This had no connection with the United States except that a bank guarantee was opened by the Central Bank of Nigeria through the Morgan Guarantee Trust Company in New York. The Verlinden case thus sought to place the seal of approval on the hundreds of actions where jurisdiction had been assumed under the 1976 legislation since 1981. 12

9. There were two major considerations behind the concern felt by developing countries with this recent application and interpretation of the United States legislation in 1976. In the first place, many of these countries have, by and large, a substantial volume of transactions with parties, whether individuals or corporations including multinations, who have a place of business or some other kind of link with the United States. Such transactions might include purchase of food grains by governments or their agencies, obtaining of supplies and material for defence forces, purchase of aircrafts for civil aviation, transportation and shipping contracts, etc. In addition, the governments often award contracts for the supply of plant and machinery, and the construction of factories and other development projects; they undertake purchases of cement and other materials for the building of infrastructue; and they acquire instruments and cables for communication systems and even fertilizer for agricultural use for food production. Most of these transactions, even though they appear at first sight to be of a commercial nature, are in fact undertaken for the fulfilment of the government functions of the state concerned. The performance of these contracts in many cases are basically outside the United Kingdom, except for perhaps some formal act or the shipment of supplies or the repatriation of profits. In several cases, particularly those related to development projects, Governments may have no option but to award contracts to United States corporations when projects are taken up under the Aid Assistance Programme of the United States on the pattern of tied credits.

10. Under international law and the prevailing practice of most states, transactions of the type mentioned above could well be regarded as public acts of a sovereign state in respect of which the state would be immune from the jurisdiction of the courts in a foreign state, even under the restrictive doctrine. But under the US legislation all such activities would be treated as 'commercial' and in respect of which the US Courts could assume jurisdiction on the basis of some kind of nexus, even though the contract was to be performed outside the United States. This is also likely to result in a conflict of jurisdiction with the courts of the country where the contract is to be performed.

11. The second matter causing concern was that even in respect of transactions which might fall squarely within the public functions of a sovereign state under the US legislation, parties may well be encouraged to file actions in the courts of that country for alleged grievances simply to bring pressure upon a sovereign state to meet the party's demands. This has indeed happened in certain cases against the Republic of Mexico, where a claim to immunity was upheld only after extensive and expensive litigation. Prior to the enactment of the US Foreign Sovereign Immunity Act 1976, what would have happened in such a situation is that the foreign government concerned would have approached the State Department. If that Department was satisfied that the transaction related to the activities of the state of a governmental or public law nature, the Department would have issued a 'suggestion' to the court that the government against whom an action had been brought was entitled to immunity in respect of that transaction. But since enactment of the 1976 legislation, a foreign government is now obliged to establish its claim to immunity before a court in the United States. Apart from the fact that such a procedure is in derogation of the dignity and sovereignty of a state, the process of litigation in the United States may often prove to be protracted through the various stages of appeals and it is certainly expensive beyond the capacity of smaller countries. In one instance, the government of a developing country had to spend as much as US$200,000 in legal costs for establishing its immunity before the Court of first instance alone. If costs at the appellate stages are calculated, the amount would have exceeded US$600,000.

12. The issues were initially considered at a meeting of the Legal Advisers of the members States of the AALCC held in November 1983. The Legal Advisers, whilst recommending certain follow-up action in monitoring further developments in the field, expressed the view that in the light of a divergence of state practice and the growing trend towards the enactment of national legislation in some countries restricting immunity, it was desirable that the law on the subject be settled authoritatively through the work of the International Law Commission so as to achieve a uniform approach towards the application of sovereign immunity. The matter was thereafter placed before the AALCC's annual session in Kathmandu in February 1985. It was then felt that, having regard to the divergent views expressed in the Sixth Committee on the draft articles prepared by the Commission and its Special Rapporteur, it was desirable that the AALCC itself should proceed to consider the subject with a view to making appropriate recommendations to its member governments, since governments by and large will have to decide for themselves their own approach and attitude in the matter of sovereign immunity. The topic was also discussed thereafter at the Committee's Arusha Session, held in February 1986.

13. In view of the fact that 17 governments[13] members of the AALCC or associated with it are also members of the Commonwealth, and that close co-operation exists between the Commonwealth Secretariat and the AALCC which was taken note of by the Commonwealth Law Ministers at their Colombo meeting, this paper has been prepared as the topic may be regarded as an appropriate area in which further co-operation between the AALCC and the Commonwealth Secretariat might be fruitful.13

14. It will be seen from the debates in the Sixth Committee, as also at the Arusha Session of the AALCC, that the countries which continue to advocate the application of sovereign immunity in its absolute form are those which basically follow a system where international trade and commerce as well as major activities in the field of production, distribution and transport services are all considered to be the essential functions of a government whether carried out through government departments or independent governmental agencies. The viewpoint of these nations, although sought to be supported on a doctrinal basis, nevertheless has an element of practical advantage to be gained for the state which undertakes commercial activities abroad on a large scale. The disadvantages of an indiscriminate application of the doctrine of sovereign immunity, or its extension into the private law sphere, as well as its impact on the average citizens, on the other hand, have been expressed in forceful terms not only in the debates by the representatives of

Western nations but also in the recent judicial pronouncements in the United Kingdom, the United States of America and certain other countries. In the modern context, it may not be wholly realistic to contemplate the jurisdictional immunity of states in its traditional form, and it is felt that there should be no serious obstacle to the acceptance in principle of the restrictive doctrine in so far as most Commonwealth countries are concerned. The question, however, is where to draw the line in order to strike a balance between the principle of state sovereignty and the interests of the citizen. Here, it is felt that even the restrictive doctrine must have some limitations, so that the sovereignty of a state in regard to what may in the present context be regarded as governmental functions, is not unduly encroached upon and governments are not subjected to the jurisdiction of foreign courts in respect of such activities. It will be seen from the discussions in the AALCC that the main concern of its member governments relates to two major areas namely:

(i) the extent to which the courts of a country should be permitted to exercise jurisdiction against foreign governments or governmental agencies in respect of transactions where the main elements of performance are to take place outside the country, even on a restrictive application of the doctrine of sovereign immunity; and

(ii) whether the term 'commercial transaction' (where the same is sought to be excluded from the application of sovereign immunity should include matters where the purpose of the transactions in question are primarily related to the exercise of governmental functions.

In addition, matters pertaining to the assumption of jurisdiction with regard to contracts of employment or to actions in tort - and the extent to which levy of execution or attachment on governmental property may be permitted - also arise for consideration in any examination of the scope and extent of the restrictive doctrine.

BACKGROUND

Position in common law

15. The traditional doctrine of sovereign immunity in its absolute form, developed over four centuries, based on nation state theory, was long recognised as a part of common law. It thus ensured foreign sovereigns complete immunity from jurisdiction of the English courts in regard to any suit, whatever may be the nature of the action. The first occasion when the doctrine was seriously tested before an English court was in 1820 in the Prins Frederik[14] case which arose from an admirality action in regard to a ship used for commercial purposes. In that case as also in a number of subsequent cases[15] the courts declined jurisdiction although in The Charkieh[16] a contrary decision was taken. In Christina[17] arguments were advanced for disallowance of immunity on the basis of the emerging practice in the continental Europe towards making a distinction between sovereign acts of states on the one hand, and non-sovereign or commercial acts on the other. Here again the claim to immunity was upheld by the House of Lords, although some doubts were expressed in the opinions delivered by three of the Law Lords. It is significant that the cases in the English courts before the Second World War arose mainly out of admirality actions, because the commercial activities of states by then had not reached substantial proportions. The common law doctrine was uniformly applied throughout the British Empire, except in the case of the Indian sub-continent where the Code of Civil Procedure, enacted in 1908, sought to leave some discretion in the hands of the executive branch of the

government. Section 86 of the Code provided that no foreign sovereign could be sued in the courts of British India without the permission of the Governor-General. This was no doubt in the context of the existence of a large number of princely states in the sub-continent under the suzerainty of the Crown, against whom suits in the British Indian Courts were not infrequent. The common law doctrine of absolute immunity was also applied in the United States of America until the beginning of the Second World War as evident from the judgment of Marshall C.J in The Schooner Exchange v M.C. Faddon.[18] The English practice was followed in Carlo Poma[19] and the doctrine of absolute immunity was reiterated in the Pesaro[20] and followed in The Navamar (1937). 14,15,16,17,18,19,20

Continental practice

16. In the continental Europe the doctrine of sovereign immunity in its absolute form was well rooted,[21] but beginning with decisions of the Belgian and Italian courts towards the later part of the nineteenth century and soon followed by the mixed courts in Egypt, a distinction began to be drawn between various classes of state activities for the purpose of according of immunity.[22] Whilst immunity was invariably allowed in regard to acts of a sovereign nature, various judicial criteria were evolved for denying immunity in regard to other types of state activities namely (i)dual personality of the state; (ii) dual capacity of the state; (iii) acta jure imperii and acta jure gestionis; (iv) public and private nature of state acts or activities; and (v) commercial and non-commercial activities. In later years, cases of restriction on immunity had been mainly based on the doctrine that trading or commercial activity constituted an exception to the rule of state immunity, but there had been wide divergence of views as to just what in fact constituted trading or commercial activity. After the First World War the trend in continental Europe began to tilt towards the restricted doctrine of sovereign immunity to a greater extent, as is evident from the decisions handed down by courts in France and Germany in addition to those of the Netherlands, Belgium and Italy, although the decisions were never uniform. It an be seen through the evolution of case law in various countries that the same court at different periods, and various courts of different systems, had all reached different conclusions regarding state immunity in the context of trade and commercial activities. This is due to the fact that the courts very often looked at the motivation of a particular transaction or contract, although the act on its surface may have been clearly commercial or of private law nature (such as in cases of contracts for purchase of supplies for the armed forces, or of food supplies for its population). The continuing trend towards the application of the restrictive doctrine led to the conclusion of a Convention for the unification of certain rules relating to the immunity of state-owned vessels in 1926, wherein the contracting states agreed to submit to the jurisdiction of the local courts in certain circumstances. 21,22

Developments since the Second World War

17. Since the Second World War the restrictive trends in continental Europe continued to develop and to be applied, culminating in the adoption of the European Convention on State Immunity of 1972. This provides that a Contracting State cannot claim immunity from the jurisdiction of a court in another contracting state if it has, in the territory of that state, an office, agency or other establishment through which it engages in the same manner as a private person in industrial, commercial or financial activity. The Convention, to which most of the states members of the Council of Europe are party, came into force in 1976. The restrictive doctrine is now well-accepted in the practice of Belgium, Italy, Switzerland, France, Austria, Greece, Romania, West Germany, Netherlands and Demark. The Scandinavian countries apply the restrictive doctrine in regard to state-owned vessels.

18. In the common law countries which had traditionally stuck to the principle of absolute immunity policy, changes were soon noticeable in the face of ever-growing activities of states in the fields of trade, commerce, transportation services and banking, either directly or through state organisations with separate juristic entities. In the United States a trend towards drawing a distinction between governmental acts and those agencies with separate juristic states (and denying immunity to the latter) was already noticeable in the inter war years.[23] The Governmental policy, too, was also began to show a distinct leaning towards the restrictive doctrine in response of public opinion by the 'forties, which culminated in the issue of the Tate Letter in 1952 enunciating a restrictive doctrine based on a differentiation between acta imperii and acta gestionis. In 1945 another important development took place following the decision of the Supreme Court in the case of Republic of Mexico v Hoffman[24] wherein Chief Justice Stone laid down that the courts would be guided by the decision of the executive branch of the government in the matter of allowance of jurisdictional immunity. The Mexico case, although subject to much criticism from the legal profession laid down the American policy that was to be followed for a period of 30 years: the courts treated as conclusive the suggestions filed by the State Department on the question as to whether a particular action was or was not to be non-suited by reason of a claim to immunity.23,24

19. In the United Kingdom the trend towards the application of the restrictive doctrine found forceful expression in the dictum of Lord Denning in the Nizam of Hyderabad[25] wherein serious doubts were expressed about the applicability of absolute immunity in all cases. The decision of the Privy Council in 1975 in The Philippine Admiral[26] and the decision in the Court of appeal in the case of Central Bank of Nigeria[27] in 1977 practically completed the process of a reversal of policy, and the House of Lords decision in 1981 in I Congresso del Partido[28] (in reversing the decision in Christina) had practically laid the doctrine of absolute immunity to rest. 25,26,27,28

20. The trends evidenced since the mid 'seventies in common law countries appear to be swinging away almost to the other extreme - from a doctrine of absolute immunity to one of strict restrictive practice - and this is achieved through legislation. The first step in this direction was initiated in the United States in 1976, followed by the United Kingdom, Canada, Australia and Singapore.

PRESENT NATIONAL POSITION IN SOME COUNTRIES

21. The development of the law relating to jurisdictional immunity of states in most countries of Europe and in the United States has by and large, been through a process of judicial interpretation, but more recently the trend in favour of enactment of legislation has been gaining ground in order to achieve a greater degree of uniformity in national positions than would have been possible had the matter been left in the hands of the courts. There are as yet only a few countries where legislation has been introduced; there are some where judicial pronouncements give a fair indication of the national positions; but in the large majority of countries the position is not clear since the instances of governmental policy announcements or court decisions are either very limited or even non-existent. Some of the national positions are set out below:

United States of America

22. The position is now governed by the Foreign Sovereign Immunity Act 1976 which came into force on 21 January 1977.

23. Although the decision of the Supreme Court in the Mexico case had been criticised by international lawyers, it was only in 1961 that the American Bar Association took up cudgels against the practice of the State Department's intervention in the Cuban expropriation cases. Agitation by the Bar culminated in the introduction of a Bill in 1973 (re-introduced in 1975) whose purpose was to define the scope and extent of sovereign immunity and also to place the matter squarely in the hands of the courts. In a letter submitted on behalf of the Department of State and the Department of Justice to the Speaker of the House of Representatives, it was stated that the broad purposes of the legislation was 'to facilitate and depoliticise legislation against foreign States and to minimise irritations in foreign relations arising out of such litigation' and to that end to entrust resolution of the question of sovereign immunity to the judicial branch of the government. The purpose of the legislation, it was stated, was to codify and refine the restrictive theory of sovereign immunity and to replace the absolute immunity accorded to foreign States from execution of judgment in a way conforming more closely with the restrictive theory of immunity from jurisdiction.

24. The 1976 Act set out a number of situations where a foreign State would not be entitled to claim immunity. These, apart from the traditional exceptions based on waiver and claims in relation to property, include three categories of cases which are set out below:

(a) an action 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;

(b) an action 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;

(c) a 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.

25. A Bill to amend the 1976 Act, introduced in July 1985, seeks to provide for another exception where immunity cannot be claimed, that is, in regard to any action to enforce an agreement to submit to arbitration contained in any agreement or contract between the parties.

26. It is of interest to note that the commercial activity of a State in regard to which immunity is denied is likely to include even governmental actions in acquiring its defence requirements or in feeding its population, since the definition of the term 'commercial activity' for the purposes of the Act clearly states that 'the commercial character of an activity shall be determined by a reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose'. The Bill introduced in the House of Representatives on 31 July 1985 to amend the 1976 Act seeks to extend the definition of commercial activity by including any promise to pay made

by a foreign State, any debt or security issued by a foreign State, and any guarantee by a foreign State of a promise to pay made by another party.

27. The Act also makes wide inroads into the immunity of States from attachment or execution by providing that the property in the United States of a foreign State used for a commercial activity shall not be immune from attachment or from execution. The same position applies to property in the United States of an agency or instrumentality of a foreign State engaged in commercial activity. The Act, however, enumerates certain types of property which are immune from execution.

28. The scope of the legislation, that is the matters on which a foreign State will not be allowed to claim immunity, is best illustrated from what was stated by the Department of State and the Department of Justice on a section-by-section analysis of the provisions of the Bill. The relevant extracts are quoted below:

> '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 'commerical activity (is) carried on in the United States by the foreign State'. This phrase is defined in Section 1603 (e) of the Bill. 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 US 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.
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> 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)'.

29. Dealing with the question of what is to be regarded as 'commercial activity', the analysis of the Department of State and the Department of Justice proceeds:

> 'Commercial Activity: Paragraph (c) of Section 1603 defines the term 'commercial activity' as including a broad spectrum of endeavour, from a individual commercial transaction or act to a regular course of commercial conduct. A 'regular course of 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'.
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> 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.

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 programme. 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 produce, its leasing of property, its borrowing of money, its employment or engagement of labourers, 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.

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. Sec. 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 (e.g. 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 contract beyond the occasioned simply by US citizenship or US residence of the Plaintiff.

<u>United Kingdom</u>

30. The position in the United Kingdom is governed by the State Immunity Act 1978. The Act, which is based on the restrictive doctrine, incorporates a number of exceptions where claim to immunity could not be invoked by a sovereign State. Such exceptions include the following:

(i) Proceedings in respect of which the State has submitted to the jurisdiction of the Courts of the United Kingdom expressly or by implication;

(ii) A commercial transaction enteed into by the foreign State or 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 subject to the proviso that immunity may be claimed if the parties to the dispute are States or have otherwise agreed in writing or 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;

(iii) Proceedings relating to a contract of employment between the foreign State and an individual when the contract was made in the United Kingdom or the work is to be wholly or partly performed there; and

(iv) Proceedings in respect of death or personal injury or damage to or loss of tangible property caused by an act or omission in the United Kingdom.

31. The other instances where the State is not immune from the jurisdiction of the Cuorts in the United Kingdom relate to matters concerning immovable property; patents, trade marks, design or plant breeders rights; memberhship of a body corporate or partnership; proceedings arising out of submission to arbitration; admiralty proceedings and actions in rem against a ship; and proceedings relating to liability for value added tax, duties or customs or excise, and rates in respect of premises occupied for commercial purposes.

32. The expression 'commercial transaction' in respect of which no claim to immunity would be admissible is widely defined to mean:

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

(b) any loan or other transaction for the provision of finance and any gurantee 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.

33. Although the areas where immunity will not be admissible under the United Kingdom legislation are, by and large, the same as those in the United States Sovereign Immunities Act 1976, the 'long arm jurisdiction' of the courts would appear to be less wide, since the courts would not assume jurisdiction in respect of a transaction merely on the basis of some kind of nexus, since the Act requires that a contract fall to be performed at least partly in the United Kingdom. Furthermore, an organ of a state having a separate juristic entity is entitled to claim immunity in relation to anything done by it in the exercise of sovereign authority. There is another important provision (section 15) which provides for reciprocity and enables Her Majesty by Order in Council to provide for restricting or extending the immunities and privileges under the legislation.

Other Commonwealth Countries

34. In Commonwealth countries such as Australia, New Zealand and Canada the common law doctrine of absolute immunity as applied by the courts in England was generally recognised and followed in judicial decisions. Nevertheless, the restrictive doctrine gradually gathered momentum in Canada following the trend in the United States, but there was no clear evidence of the restrictive practice either in Australia or New Zealand, or for that matter in any other Commonwealth country. Nevertheless Canada, Australia and Singapore have now promulgated legislation on the United Kingdom model. The AALCC is not aware of any Commonwealth Africa legislation on the topic.

35. In India, the Code of Civil Procedure, in section 86, provides that no ruler of a foreign State may be sued in any court except with the consent of the Central Government, that is to say, that the matter of immunity falls primarily to be determined by the political branch of the Government. If the Central Government gives its consent to a foreign State being sued, the courts may still be entitled to adjudicate on a claim to immunity if such a plea is raised in the proceedings. It is difficult to predict what the attitude of the courts would be in such a situation, i.e. whether it would adhere to absolute immunity or be in favour of the restrictive doctrine. If, however, the Central Government does not give its consent on the basis of its own determination, no court in the country would have jurisdiction to entertain the action. The Central Government has given no authoritative guidance as to the principles it would follow in its determination of the matter under section 86 of the Civil Procedure Code.

Pakistan

36. In Pakistan, the position until recently was the same as in India but it has now enacted legislation (State Immunity Ordinance 1981 followed by an Act) which restricts immunity for sovereign States on basically similar lines as in the United Kingdom Act of 1968. It was brought into force in 1979 but was expressly made applicable only to proceedings in respect of transactions which took place after the promulgation of the aforesaid legislation.

Soviet Union and Eastern Europe

37. In the Soviet Union, the principle of State immunity is regarded as absolute. Soviet legislation does not draw any distinction between 'public acts' and 'non public acts' of foreign States. The ships owned by a foreign State and employed in commercial service also enjoy immunity. The basic rule in this regard is contained in Article 61 of the Fundamentals of Civil Procedure which provides that an action against a foreign State may be permitted only with the consent of the competent authorities of that State. Section 3 of Article 61, however, provides:

> '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 representative'.

38. The civil procedure codes of the Union Republics contain a similar rule.

39. In Czechoslovakia, the doctrine of absolute immunity is generally applied and foreign states are not subjected to the jurisdiction of the courts. However, this is subject to the exception that in cases where the proceedings relate to immovable property located in Czechoslovakia, and in cases where foreign States voluntarily submit to the jurisdiction, the courts may entertain actions. Government ships operated for commercial purposes also enjoy immunity.

40. The position in Hungary and German Democratic Republic are basically similar to that in Czechoslovakia, whilst in Yugoslavia a trend is noticeable towards an approach of a distinction being drawn between different classes of state activity but without leaning completely in favour of the restrictive doctrine.

Middle East

41. In Egypt the question of sovereign immunity has been largely influenced by the decisions of the mixed courts, which had drawn up a distinction between sovereign and non-sovereign acts of States. The Egyptian courts have continued to follow that trend and the executive authority adhered to the doctrine that immunity was not absolute but limited to acts of sovereign authority. There is no specific legislation on the subject but the case law is in favour of a restrictive doctrine.

42. In the Syrian Arab Republic the principle of jurisdictional immunity of foreign States and their property is regarded as absolute. This is, however, subject to two exceptions, namely:

(i) where the foreign State gives its consent or where the consent is implied; and

(ii) where the national legislation of a foreign State does not accord immunity, the Syrian judiciary is not obliged to allow immunity to such a State.

43. In Lebanon the general trend has been similar to that in Egypt, in favour of a restrictive doctrine but with recent practice far from clear.

WORK OF THE INTERNATIONAL LAW COMMISSION

44. The International Law Commission took up the topic 'Jurisdictional Immunities of States and their Property' pursuant to General Assembly Resolution 31/151 of 19 December 1977, and decided to include the topic in its work programme at its thirtieth session in 1978. The Special Rapporteur appointed by the Commission for this topic, HE Dr Sompong Sucharitkul, has so far submitted seven reports containing formulations of proposed articles 1 to 28. The Commission has so far been able to conclude consideration of Articles 1 to 20, which have been provisionally adopted with the exception of Articles 4,5 and 6. Those three articles (dealing with 'Jurisdictional Immunities not within the scope of the present articles' ((Article 4), 'Non-retroactivity of the present articles' (Article 5); and 'the principle of State Immunity' (Article 6)) are to be considered again by the Commission after the conclusion of discussion on the entire topic.

45. The Commission's work is at present related to the question of immunities from the jurisdiction of the courts (i.e. the organs of a state which are entitled to exercise judicial functions). The articles formulated by the Commission are intended to be divided into four parts: Part I, entitled 'Introduction', will comprise five draft articles; Part II, entitled 'General Principles', will also comprise five draft articles. Part III, entitled 'Exceptions to State Immunity', which will comprise 10 articles, is by far the most important. Part IV will deal with the question of immunity with respect to state

property from measures of attachment and execution. This will comprise some eight articles (Articles 21-28) - the subject matter of the seventh report of the Special Rapporteur still to be considered by the Commission. The text of the articles provisionally adopted by the Commission (Articles 1-20) as also the text of eight articles proposed in the seventh report of the Special Rapporteur are annexed hereto as Appendix A.

46. The draft articles in Parts I and II have encountered fewer complications than those contained in Part III, which go into the root of the matter in identifying the types of cases where a state could not claim immunity from jurisdiction of the courts in another state. These relate to 'Trading or commercial activity' (Article 12); 'Contracts of employment' (Article 13); 'Personal injuries and damage to property' (Article 14); 'Ownership, possession and use of property' (Article 15); 'Patents, trade marks and intellectual or industrial property' (Article 16); 'Fiscal matters' (Article 17); 'Participation in companies or other collective bodies' (Article 18); 'Ships employed in commercial service' (Article 19); and 'Submission to Arbitration' (Article 20).

47. The draft articles prepared by the Commission represent by and large a compromise formulation which are perhaps more balanced than the position obtaining under some of the recent legislation. For example, in article 12 (which deals with the question of 'commercial contracts') the motivation behind the transaction entered into by a state is taken as a relevant consideration in appropriate cases. Moreover, the exercise of the 'long arm jurisdiction' of national courts would appear not to be contemplated. The Commission's draft can therefore be regarded as providing a good starting point for those drafting national legislation.

SOME CONCLUSIONS

48. In the light of the divergence of state practice and the increasing trend towards application of a restrictive doctrine in the countries where developing nations are obliged to undertake most of their activities in the private law sphere, a close examination of the doctrine of sovereign immunity and its application ought to be undertaken on an urgent footing. Whilst a certain degree of reciprocity could be contemplated in the matter of according jurisdictional immunity to foreign states, a uniform national approach would facilitate its implementation. As suggestd above, given the present level of governmental activity in extended fields, a restrictive doctrine might not be altogether out of place. But the question is the scope and the extent to which restrictions would be reasonable. It might be thought desirable that governments decide upon a firm policy, either through promulgation of legislation or through other appropriate means according to the constitutional practice of each state, rather than allow the matter to remain at large and to be decided by the judiciary on a case by case basis.

49. The following criteria are suggested in this connection:

(i) A plea of immunity may not be available in respect of actions or proceedings where a foreign State has waived its claim to immunity, expressly or by implication, such as by filing its defence or counterclaim or taking such other steps in the proceedings inconsistent with its claim to immunity. Immunity will also not be admissible in regard to a counterclaim or a claim by a party in regard to a transaction where the foreign State has itself invoked the jurisdiction of the court.

(ii) Immunity will not be admissible when the proceedings relate to ownership or possession including succession to property situated within the territories of the State of forum, provided that no action would be maintainable for eviction from premises used for the purposes of a diplomatic mission, consular post or any other governmental function as a supply mission.

(iii) A State may not claim immunity in regard to its activities which are of a commercial nature and undertaken for commercial purposes where the performance of the contract takes place or the preponderance of activities in relation to such performance are present within the territories of the forum State. A claim to immunity shall not be denied if the transaction in question is directly related to the sovereign functions of a State such as procurement of its defence requirements or maintenance of essential supplies for its population. No Court or Tribunal shall assume jurisdiction against a sovereign State solely on the basis of the transaction having a nexus with the territory unless the contract falls to be substantially performed within that State.

(iv) A State may not claim immunity in regard to a contract of employment to be performed in the forum State except when the employment relates to the functions of a Diplomatic mission, consular posts or a mission entrusted with the sovereign functions of a State.

(v) A State may not claim immunity in regard to a claim for compensation for death or personal injury where the accident has taken place within the territories of the forum State.

(vi) A State may not claim immunity in regard to transactions related to loans, debentures; participation in companies and corporations; trade marks and patents provided that the proceedings in relation to those transaction are based on the performance of rights and obligations within the forum State in accordance with the contractual provisions.

(vii) A State may not claim immunity in regard to any claim or proceedings related to ships operated for commercial purposes or its air transport services.

(viii) An organ of a State having a separate juristic entity under the laws of that State shall not be entitled to immunity save and except to the extent that it may be entrusted with the performance of sovereign functions. The onus of proof in this regard shall rest with the entity of the foreign State.

FOOTNOTES

1 324 U.S. 30

2 See the opinion of Lord Maugham in the Christina Case (1938) AC485; Lord Evershed M R in Dollfus v Bank of England (1950) 1 ch 333 and Lord Denning in Rahimtoola v Nizam of Hyderabad (1958) A.C. 379

3 I Congresso del Parlido (1981) 3 WLR 328

4 The State Immunity Act 1978

5 State Immunity Act 1981

6 State Immunity Act 1979

7 Foreign State Immunity Act 1984

8 State Immunity Act 1982

9 Report of the Third Session 1960

10 674 2nd 300 (2nd Cir 1981)

11 691 F. 2nd 1344 (11th Cir 1982)

12 461 US 480

13 The Commonwealth countries, members of the AALCC are Bangladesh, Cyprus, Gambia, Ghana, India, Kenya, Malaysia, Nigeria, Sierra Leone, Singapore, Sri Lanka, Tanzania, Uganda, Botswana, Mauritius; Australia and New Zealand have Permanent Observer status.

14 2 Dods 451

15 De Haber 'The Queen of Portugal (1851) QB 171
The Parlement Belge (1880) 5 PD 197 CA
The Porto Alexandre (1920) P 30 CA

16 (1873) LR 4 A & E 59

17 [1938] AC 485

18 (1812) 7 Cranch 116

19 (1919) 259 F 369

20 (1925) 271 U.S 562

21 See the decision of the French Court of Cassation in Le Gouvernement espagnol v Cassaux J.P 1849 - I - 166; The Campos (1919) Clunet Vol 47 p 747; The West Chatala RIDM (1922)

22 See for example the Havre Case (1879) PB 1879-II-175, the Peruvian Loan Case PB 1881-II-313 before the Belgim Courts; Guttieres v Elmilik (1886) Storelli v Governo della Republica Francese (1924) A.D 1923-24 before the Ialian Courts.

23. For example see United States v Deutsche (1930) 31 F. 2d. 199 Ullan v National Economy Bank AD 1938-0 Case No 74 Bradford v Director-General of Railroads Mexico A.D. 1925-26 Case No. 132

24 324 US 30

25 [1958] A.C. 379

26 [1977] A.C 373

27 [1977] 2 WLR 356

28 [1981] 3 WLR 328

DRAFT ARTICLES ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY, AS PROVISIONALLY ADOPTED BY THE INTERNATIONAL LAW COMMISSION

PART I

INTRODUCTION

Article 1

Scope of the present articles

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

Article 2

Use of terms

1. For the purposes of the present articles:

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

... *(see infra)*

(g) "commercial contract" means:

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

(ii) any contract for a loan or other transaction of a financial nature, including any obligation or guarantee in respect of any such loan or of indemnity in respect of any such transaction;

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

Article 3

Interpretative provisions

... *(see infra)*

2. In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made primarily to the nature of the contract, but the purpose of the contract should also be taken into account

if in the practice of that State that purpose is relevant to determining the non-commercial character of the contract.

(Articles 4 and 5 - see infra)

PART II

GENERAL PRINCIPLES

Article 6

State immunity 6/ *(see infra)*

Article 7

Modalities for giving effect to State immunity

1. A State shall give effect to State immunity [under article 6] by refraining from exercising jurisdiction in a proceeding before its courts against another State.

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

3. In particular, a proceeding before a court of a State shall be considered to have been instituted against another State when the proceeding is instituted against one of the organs of that State, or against one of its agencies or instrumentalities in respect of an act peformed in the exercise of governmental authority, or against one of the representatives of that State in respect of an act peformed in his capacity as a representative, or when the proceeding is designed to deprive that other State of its property or of the use of property in its possession or control.

Article 8

Express consent to exercise of jurisdiction

A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to any matter if it has expressly consented to the exercise of jurisdiction by that court with regard to such a matter:

(a) by international agreement;

(b) in a written contract; or

(c) by a declaration before the court in a specific case.

Article 9

Effect of participation in a proceeding before a court

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has:

(a) itself instituted that proceeding; or

(b) intervened in that proceeding or taken any other step relating to the merits thereof.

2. Paragraph 1 (b) above does not apply to any intervention or step taken for the sole purpose of:

(a) invoking immunity; or

(b) asserting a right or interest in property at issue in the proceeding.

3. Failure on the part of a State to enter an appearance in a proceeding before a court of another State shall not be considered as consent of that State to the exercise of jurisdiction by that court.

Article 10

Counter-claims

1. A State cannot invoke immunity from jurisdiction in a proceeding instituted by itself before a court of another State in respect of any counter-claim against the State arising out of the same legal relationship or facts as the principal claim.

2. A State intervening to present a claim in a proceeding before a court of another State cannot invoke immunity from the jurisdiction of that court in respect of any counter-claim against the State arising out of the same legal relationship or facts as the claim presented by the State.

3. A State making a counter-claim in a proceeding instituted against it before a court of another State cannot invoke immunity from the jurisdiction of that court in respect of the principal claim.

PART III

EXCEPTIONS TO STATE IMMUNITY 7/ *(Article II - see infra)*

Article 12

Commercial contracts

1. If a State enters into a commercial contract with a foreign natural or juridical person and by virtue of the applicable rules of private international law, differences relating to the commercial contract fall within the jurisdiction of a court of another State, the State is considered to have consented to the exercise of that jurisdiction in a proceeding arising out of that commercial contract, and accordingly cannot invoke immunity from jurisdiction in that proceeding.

2. Paragraph 1 does not apply:

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

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

Article 13

Contracts of employment

1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for services performed or to be performed, in whole or in part, in the territory of that other State, if the employee has been recruited in that other State and is covered by the social security provisions which may be in force in that other State.

2. Paragraph 1 does not apply if:

(a) the employee has been recruited to perform services associated with the exercise of governmental authority;

(b) the proceeding relates to the recruitment, renewal of employment or reinstatement of an individual;

(c) the employee was neither a national nor a habitual resident of the State of the forum at the time when the contract of employment was concluded;

(d) the employee is a national of the employer State at the time the proceeding is instituted;

(e) the employee and the employer State have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.

Article 14

Personal injuries and damage to property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from the jurisdiction of the courts of another State in respect of proceedings which relate to compensation for death or injury to the person or damage to or loss of tangible property if the act or omission which is alleged to be attributable to the State and which caused the death, injury or damage occurred wholly or partly in the territory of the State of the forum, and if the author of the act or omission was present in that territory at the time of the act or omission.

Article 15

Ownership, possession and use of property

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

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

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

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

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

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

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

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

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

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

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

Article 16

Patents, trade marks and intellectual or industrial property

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to:

(a) the determination of any right of the State in a patent, industrial design, trade name or business name, trade mark, copyright or any other similar form of intellectual or industrial property, which enjoys a measure of legal protection, even if provisional, in the State of the forum; or

(b) an alleged infringement by the State in the territory of the State of the forum of a right mentioned in subparagraph (a) above which belongs to a third person and is protected in the State of the forum.

Article 17

Fiscal matters

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State in a proceeding relating to the fiscal obligations for which it may be liable under the law of the State of the forum, such as duties, taxes or other similar charges.

Article 18

Participation in companies or other collective bodies

1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from the jurisdiction of a court of another State in a proceeding relating

to its participation in a company or other collective body, whether incorporated or unincorporated, being a proceeding concerning the relationship between the State and the body or the other participants therein, provided that the body:

(a) has participants other than States or international organizations; and

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

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

Article 19

State-owned or State-operated ships engaged in commercial service

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship engaged in commercial [non-governmental] service cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the operation of that ship provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

2. Paragraph 1 does not apply to warships and naval auxiliaries nor to other ships owned or operated by a State and used or intended for use in government non-commercial service.

3. For the purposes of this article, the expression "proceeding relating to the operation of that ship" shall mean, *inter alia*, any proceeding involving the determination of:

(a) a claim in respect of collision or other accidents of navigation;

(b) a claim in respect of assistance, salvage and general average;

(c) a claim in respect of repairs, supplies, or other contracts relating to the ship.

4. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the carriage of cargo on board a ship owned or operated by that State and engaged in commercial [non-governmental] service provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

5. Paragraph 4 does not apply to any cargo carried on board the ships referred to in paragraph 2, nor to any cargo belonging to a State and used or intended for use in government non-commercial service.

6. States may plead all measures of defence, prescription and limitation of liability, which are available to private ships and cargoes and their owners.

7. If in any proceedings there arises a question relating to the government and non-commercial character of the ship or cargo, a certificate signed by the diplomatic representative or other competent authority of the State to which the ship or cargo belongs and communicated to the court shall serve as evidence of the character of that ship or cargo.

Article 20

Effect of an arbitration agreement

If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a [commercial contract] [civil or commercial matter], that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates 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.

Notes

1/ *Official Records of the General Assembly, Fortieth Session, Supplement No. 10* (A/40/10).

2/ *Ibid.*

3/ *Yearbook of the International Law Commission, 1977*, vol. II (Part Two), p. 133, document A/32/10, para. 130.

4/ Provisional numbering.

5/ Provisional numbering.

6/ Article 6 as adopted provisionally at the thirty-second session read as follows:

"Article 6

State immunity

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

Notes (continued)

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

For the commentary to the article, see Yearbook ... 1980, vol. II (Part Two), pp. 141-142, document A/35/10, chap. VI.B.

Article 6 was further discussed by the Commission at the thirty-fourth session and still gave rise to divergent views. The Drafting Committee also re-examined draft article 6 as provisionally adopted. While no new formulation of the article was proposed by the Drafting Committee at the thirty-fourth session, the Commission agreed to re-examine draft article 6 at its future sessions. The Drafting Committee considered article 6 briefly during the thirty-seventh session, but, for lack of time, was unable to conclude its consideration of this article.

7/ The title of this part will be re-examined after the Commission has considered all possible exceptions.

PART III. EXCEPTIONS TO STATE IMMUNITY

Article 11

Application of exceptions in the present part
(revised version)

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

2. Nothing in the present part shall prejudice the question of extraterritorial effects of measures of nationalization taken by a State in the exercise of governmental authority with regard to property, movable or immovable, industrial or intellectual, which is situated within the territory.

PART IV. STATE IMMUNITY IN RESPECT OF PROPERTY FROM ENFORCEMENT MEASURES

Article 21

Scope of the present part

The present part applies to the immunity of one State in respect of its property or property in its possession or control, or in which it has an interest, from judicial measures of constraint upon the use of property, including attachment, arrest and execution in connection with a proceeding before a court of another State.

Article 22

State immunity from enforcement measures

A State is immune without its consent in respect of its property or property in its possession or control, or in which it has an interest, from judicial measures of constraint upon the use of property, including attachment, arrest and execution, in connection with a proceeding before a court of another State, unless the property in question is specifically in use or intended for use by the State for commercial and non-governmental purposes and, being located in the State of the forum, has been allocated to a specific payment or has been specifically earmarked for payment of judgement or any other debts.

Article 23

Effect of express consent to enforcement measures

1. Subject to article 24, a State cannot invoke immunity from judicial measures of constraint on the use of its property or property in its possession or control, or in which it has an interest, in a proceeding before a court of another State if the property in question is located in the State of the forum and it has expressly consented to the exercise of judicial measures of constraint on the property which it has specifically identified for this purpose,

(a) by international agreement, or

(b) in a written contract, or

(c) by a declaration before the court in a specific case.

2. Consent to the exercise of jurisdiction under article 8 shall not be construed as consent to the exercise of judicial measures of constraint under part IV of the present draft articles, for which a separate waiver is required.

Article 24

Types of property generally immune from enforcement measures

1. Unless otherwise expressly and specifically agreed by the State concerned, no judicial measure of constraint by a court of another State shall be permitted on the use of the following property:

(a) property used or intended for use for diplomatic or consular purposes or for purposes of special missions or representation of States in their relations with international and regional organizations protected by inviolability;

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

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

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

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

2. In no circumstances shall any property listed in paragraph 1 be regarded as property used or intended for use for commercial and non-governmental purposes.

PART V. MISCELLANEOUS PROVISIONS

Article 25

Immunities of personal sovereigns and other heads of State

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

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

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

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

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

Article 26

Service of process and judgement in default of appearance

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

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

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

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

Article 27

Procedural privileges

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

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

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

Article 28

Restriction and extension of immunities and privileges

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

PART I. INTRODUCTION

Article 2

Use of terms

1. For the purpose of the present articles:

(a)	"court" ...	(adopted)
(a)	"immunity" ...	(withdrawn)
(b)	"jurisdictional immunities" ...	(withdrawn)
(c)	"territorial State" ...	(withdrawn)
(d)	"foreign State" ...	(withdrawn)
(e)	"State property" means property, rights and interests which are owned, operated or otherwise used by a State according to its internal law ...	(revised)
(f)	"trading or commercial activity" ...	(withdrawn)
(g)	"commercial contracts" ...	(adopted)
(g)	"jurisdiction" ...	(withdrawn)

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meaning which may be ascribed to them in the internal law of any State or by the rules of any international organization.

Article 3

Interpretative provisions

1. In the context of the present articles, unless otherwise provided,

(a) the expression "State" includes:

(i) the sovereign or head of State,

(ii) the central government and its various organs or departments,

(iii) political subdivision of a State in the exercise of its governmental authority, and

(iv) agencies or instrumentalities acting as organs of a State in the exercise of its governmental authority, whether or not endowed with a separate legal personality and whether or not forming part of the operational machinery of the central government; (revised)

(b) the expression "judicial functions" includes:

(i) adjudication of litigation or dispute settlement,

(ii) determination of questions or law and of fact,

(iii) administration of justice in all its aspects,

(iv) order of interim and enforcement measures at all stages of legal proceedings, and

(v) such other administrative and executive functions as are normally exercised in connection with, in the course of, or pursuant to, a legal proceeding by the judicial, administrative or police authorities of a State. (revised)

2. ... (approved)

Article 4

Jurisdictional immunities not within the scope of the present articles

The fact that the present articles do not apply to jurisdictional immunities accorded or extended to:

(i) diplomatic missions under the Vienna Convention on Diplomatic Relations of 1961,

(ii) consular missions under the Vienna Convention on Consular Relations of 1963,

(iii) special missions under the Convention on Special Missions of 1969,

(iv) representation of States under the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of 1975,

(v) permanent missions or delegations of States to international organizations in general,

(vi) internationally protected persons under the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 1973, (added)

shall not affect

(a) the legal status and extent of jurisdictional immunities recognized and accorded to such missions and representation of States or internationally protected persons (under the above-mentioned conventions);

(b) the application to such missions or representation of States or international organizations, or internationally protected persons of any of the rules set forth in the present articles to which they would also be subject under international law independently of the articles; (revised)

(c) the application of any of the rules set forth in the present articles to States and international organizations, non-parties to the articles, in so far as such rules may have the legal force of customary international law independently of the articles.

Article 5

Non-retroactivity of the present articles

Without prejudice to the application of any rules set forth in the present articles to which the relations between States would be subject under international law independently of the articles, the present articles apply only to the granting or refusal of jurisdictional immunities to States and their property after the entry into force of the said articles as regards States parties thereto or States having declared themselves bound thereby. (revised)