COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 04/08/05 CAHDI (2005) 5 Final

COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW

(CAHDI)

30th meeting
Strasbourg, 19-20 September 2005

PILOT PROJECT OF THE COUNCIL OF EUROPE ON STATE PRACTICE REGARDING STATE IMMUNITIES – ANALYTICAL REPORT

Secretariat Memorandum
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Introduction

The sovereign equality of States and the well established principle *par in parem non habet imperium* entail that States enjoy immunity before courts of foreign States and cannot be made a respondent in such proceedings. This rule was applied in its integrity at a time when States were hardly involved in private economic activities and trade.

However, with the increase of such activities already during the first half of the 20th century and with the growing need of the States to enter into transactions with private individuals, this formerly well established rule was challenged. These activities necessitated an equal treatment of States with private individuals before foreign national courts. Otherwise, States would enjoy an unjustified privilege in relation to private individuals; at the same time, financial institutions were hesitant to grant credits without a possibility to institute judicial proceedings against the debtor. Even the Soviet Union that emphasised absolute immunity since private individuals could not be put on the same level as States had to seek for ways and means to ensure that judicial proceedings before foreign national courts could be instituted against its organs responsible for its external commercial relations.

As a consequence of these needs absolute immunity withered away and was replaced by relative immunity according to which states could not enjoy exemption from legal process before foreign national courts for economic activities. The tendency was corroborated by the need to strengthen the accountability of States towards individuals insofar as one means to produce such an effect was the right of individuals to resort to judicial institution in cases against States. However, this change did not gain universal recognition so that a global uniformity of this rule was not achieved. The courts decided in very different ways and once they applied a relative immunity they based their decision on very different criteria.

Various international institutions made attempts to formulate a generally acceptable rule on State immunity. Under the auspices of international organizations conventions were drawn up, such as the European Convention on State Immunity of 1972, which entered into force on 11 June 1976, or the OAS Draft Convention on Jurisdictional Immunity of States 1982. However, the application of the European Convention has remained very restricted since, apart from its regional nature, it was ratified by only eight States (Austria, Belgium, Cyprus, Germany, Luxembourg, Netherlands, Switzerland and the United Kingdom). Several international scientific institutions also dealt with this issue, so, for instance, the *Institut de Droit International* already in 1891 (Hamburg), in 1954 (Aix-en-Provence) and 1991 (Basel), the International Law Association in 1982 (Montreal).

This situation existing still in the early 1990ies revealed large divergences of the views and positions held by States. These were not only views held by the delegates taking part in international discussions, but different positions adopted by their domestic authorities, including their national courts. The reason for this divergence was *inter alia* prompted by the fact that the national positions were still in some sort of development ensuing from the on-going shift of paradigms in international relations.

In order to achieve a universally acceptable regime, the ILC started in 1978 a codification process on this topic and submitted in 1991 a set of draft articles to the General Assembly. However, the position of State underwent a fundamental change at that time due to the break-down of the communist system and also due to the commencing change in the position of developing countries so that uncertainties arose as to the legal regime to be applied. Consultations conducted within the General Assembly during three years could not achieve a commonly acceptable solution on five central points so that the General Assembly decided to postpone further work. These five points related to the 1) Concept of a State for purposes of immunity; 2) Criteria for determining the commercial character of a contract or transaction; 3) Concept of a State enterprise or other entity in relation to commercial transactions; 4) Contracts of employment and 5) Measures of constraint against State property.

When the issue was reactivated by the General Assembly, the ILC worked out alternative solutions for these five points, which formed the basis for further consultations within the General Assembly. Finally, on 2 December 2004, the General Assembly adopted the text of a United Nations

Convention on Jurisdictional Immunities of States and Their Property as elaborated in the final stage under the chairmanship of Gerhard Hafner and opened it for signature by 17 January 2005 (Resolution A/RES/59/38).

There is an urgent need of a uniform and global regime in this regard: the issue of State immunity reaches out in the daily life of the cooperation of private companies and States and is therefore of utmost importance in order that international society can work smoothly. It establishes a linkage between the sovereignty of States and the necessities of modern life where States are acting in economic matters.

All parties involved in such dealings, private parties as well as States themselves, are acting within a given legal order and legal system. They need such a relatively uniform legal system since otherwise reasonable and economically sound activities would not be possible and neither legal security nor predictability or stability of the legal relations resulting from such activities could be achieved. Such a regime that is of universal nature and provides certain stability is therefore in the interest of the individuals and entities dealing with States as well as in the interest of the States themselves. It must not be overlooked that in recent years a shift of paradigms of universal effect occurred in international relations which required a fresh look at this issue.

Where on the one hand States are relying on their sovereignty, the nature of modern international relations, the increase in particular of economic interactions where States themselves are involved, the growing involvement of actors other than States in international relations, actors which do not enjoy sovereignty, the different legal parameters of State activities and their growing relations demand a fresh look at the question of jurisdictional immunities. No longer can it be said that a restricted immunity infringes upon the sovereign equality of States since there seems a universal tendency surfacing which reflects these changed conditions. Quite a large number of decisions of national courts from all over the world reflect and confirm this tendency. New developments emerged concerning denial of immunity in case of grave breaches of fundamental human rights.

The time has therefore come to reflect this tendency towards a universally acceptable regime. This is necessary even more so because of the modern rapidity of communication, the worldwide extension of various activities including those of States. Under present conditions no State can any longer escape the necessity of this worldwide extension of its activities; whether or not one likes the effects of modern globalization, no one could exclude itself therefrom. It would not be helpful if divergent regimes were continuously applied. Such a situation would undoubtedly be detrimental to predictability and stability in this field and certainly would harm the general issue of international law.

It must in particular be kept in mind that the issue of State immunity is of extremely practical importance for the national courts as proven by the great frequency of national decisions in this regard. It is in full accordance with all these tendencies and attempts of codification that the Council of Europe undertook it to collect and process the practice as provided by the European States in this respect. This material collected by the Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe during a period of almost two years and comprising materials delivered by 27 Member States of the Council of Europe as well as one Observer State does not only include decisions of national courts, but also relevant legislation and other acts. The purpose of the present report is essentially to compare state practice, mainly the decisions of judicial organs, with the relevant articles of the UN Convention, as well as the European Convention on State Immunity and the draft articles prepared by academic institutions such as the *Institut de Droit international* in 1991 and the International Law Association in 1994. Each of the ten chapters classifies the State practice in order to show common and divergent solutions applied in domestic jurisdictions.

The elaboration of this material was carried out by three institutions, the Department of European, International and Comparative Law of the Vienna University (by Prof. August Reinisch, Dr. Stephan Wittich and MMag. Ulrike Köhler in cooperation with Prof. Gerhard Hafner), the British Institute of International and Comparative Law (Dr. Susan Breau in collaboration with Mr. Joshua Brian) and the Graduate Institute of International Studies, Geneva (Prof. Marcelo Kohen and MMag. Sérgio Saba). This report is structured according to the structure the United Nations Convention in Jurisdictional Immunities of States and Their Property and is supplemented by a reproduction of

the latter Convention and the European Convention on State Immunity, by a digest of the State practice reflected in the files submitted to the CAHDI as well as of a reproduction of these files. The views expressed in this report are not necessarily those of the Council of Europe or its member States. The various authors are responsible only for the chapters assigned to them.

This review of State practice proves that the 2004 Convention of the United Nations on Jurisdictional Immunity of States and Their Property mostly coincides with the practice of the European States so that it is expected that the Convention will be very influential also on the future practice of States. The European Convention on State Immunity of 1972 did not have the intention to codify existing customary rules, but to provide common rules applicable amongst States parties. The result was a compromise that did not cope with the problem of giving effect to judgments pronounced against States. This probably explains the States' lack of eagerness to become parties. The national practice does not show any single application of the European Convention by domestic courts, although some decisions discussed the scope of some of its articles, even if the Convention was not applicable to the cases under scrutiny. Compared with the European Convention, the 2004 UN Convention is more streamlined as it does hardly contain heavily procedural rules. It is therefore to be hoped that a moment has been reached where a certain generally acceptable uniformity of the legal regime has been achieved to the mutual benefit of States and of the private persons being in relations with States.

Vienna, Geneva, London, 21 February 2005

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CHAPTER 1

The Definition of "State"

Marcelo G. Kohen

1. Introduction

1. The core of the subject of State immunity lies in the notion and scope of the term "State". The very foundation of the institution of immunity resides in the sovereign character of the subject to which it is granted. Only States are sovereign, allowing the maxim *par in parem non habet imperium* to be invoked and applied. Sovereign equality requires that State conduct should not be subordinated to the scrutiny and decisions of tribunals of other States. The rules and principles concerning State immunity have evolved over time as a consequence of the changing structure and role of the State at both domestic and international levels. The notion of the modern State, traditionally considered to have been born with the Westphalia Peace (1648), is characterised by its internal exclusive competence and by its independence in international relations.[1] Although the sovereign State is the main subject of international law, its creator and its main addressee, – or perhaps because of this – it has not generally been considered necessary to adopt precise rules determining what is or shall be considered as a "State".[2] The notable exception to this state of affairs is, precisely, the field of State immunity. What is at stake is the determination of the extension *ratione personae* of the immunity. In other words, the question turns on what are the entities that can claim the exemption to the exercise of the forum State's jurisdictional and administrative powers.[3] This matter was crucial during the period of acceptance – or at least coexistence – of the absolute immunity theory.[4]

2. National practice and international instruments have attempted to delineate the scope of the notion of State in the field of immunity. Hence, the notions adopted in international agreements or drafts, municipal case law or legislation in this area are understood to be applied only for the purpose of State immunity. In other words, those notions assume that in other fields of both domestic and international law, the notion of the "State" can be different, either broader or narrower.

3. In this section, national practice with regard to the scope of the notion of the State in the field of immunity will be compared with the relevant provisions of the UN Convention, the European Convention and drafts elaborated by different organs and institutions.

2. The Approach of International Instruments and Drafts

4. The European Convention on State Immunity does not include an article with a general definition of "State". It simply refers to the "Contracting States" and enumerates particular cases of entities for which immunity cannot be claimed, with some exceptions thereof.[5] By contrast, the draft articles elaborated by the International Law Commission take as a starting point such a definition.[6] The United Nations Convention on Jurisdictional Immunities of States and Their Property also follows this stance. Its article 2, paragraph 1 b) provides that "State" means:

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[1] See Max Huber's arbitral award in the *Island of Palmas case* (1928), 2 *RIAA* 829.

[2] The only international agreement that has attempted providing a definition is the American Convention on Rights and Duties of States adopted in Montevideo in 1933, which adopted a classical and rather unsatisfactory definition of State, based upon the so-called "constitutive elements" thereof and still repeated in doctrine and in contemporary practice. See Arbitration Commission of the European Conference on Yugoslavia (Badinter Commission), Advisory Opinion N. 1, 29 November 1991, 92 ILR 162.

[3] It is beyond the scope of this chapter to embark upon an analysis of the political and economic evolution of the State in recent times, or of its place in the contemporary and "globalised" international society.

[4] As was stated, "[u]nder the concept of absolute immunity, the only valid criteria for the immunity of a State was its identity with the foreign State. Since Courts refused to distinguish between sovereign and non-sovereign activities all that mattered was status. This required a structuralist approach under which such factors as incorporation, legal personality, capacity to hold property, capacity to sue and be sued and government control had to be taken into account." Christopher Schreuer, *State Immunity: Some Recent Developments*, Cambridge, Grotius Publ., 1988, p. 93.

[5] See articles 6, 7, 27 and 28. For comments on these particular cases, see below.

[6] The revised draft articles for a Convention on State Immunity adopted by the ILA in 1994 also contains a definition of "Foreign State" (article I, B). The resolution adopted by the *Institut de droit international* in 1991, on the contrary, follows the European Convention method (article 3).

"i) The State and its various organs of government;
ii) Constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of the sovereign authority, and are acting in that capacity;
(iii) Agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State;
(iv) Representatives of the State acting in that capacity".

5. The first of these meanings (point i) is not subject to controversy. It is understood that it refers to *sovereign* States and their traditional organs, i.e. the executive, legislative and judicial branches, although it is for the executive organs to play a leading role in this field. These are all the organs pertaining to the administration of the State, including the central government, its ministries and other departments or offices.

6. In the past, it was arguable whether protectorates could claim immunity. Practice seems to show that, even if protectorates were considered as not enjoying complete sovereignty, they were generally treated as States and hence, were candidates for immunity. The main point was whether these entities could be prosecuted before tribunals of the protector State. Since the latter was not sovereign over the protectorate but exercised the responsibility of defence and foreign relations with regard to it,[7] the answer was negative. In this sense, it was a foreign State. It must be noted, however, that different types of protectorates existed and that the above statement was only applicable to *protected States*, but not to other kind of protectorates, such as colonial protectorates. The latter were in fact political divisions under the sovereignty of the colonial power. Considered from the viewpoint of third States, the question was irrelevant. Indeed, the only problem in those cases would have been to identify who the State entitled to immunity was, but not the applicability of immunity itself. Another problem, which still arises, is the case of entities claiming to be States but not having recognition as such. This problem is not addressed in the present report.

7. The other meanings stated in the remaining points of paragraph 1 b) of article 2 of the UN Convention have raised considerably more discussion. These points, although following with slight changes the Draft Articles on Jurisdictional Immunities of States and Their Property adopted by the ILC in 1991, introduce nevertheless an important addition in comparison with the latter. Notably, the UN Convention has restricted the meaning of "State" by requiring the constituent units of a federal State, as well as political subdivisions, agencies, instrumentalities of the State or other entities that are entitled to perform acts in the exercise of sovereign authority, to *actually perform* them, something that did not exist in the ILC draft.[8] Indeed, the ILC draft contained a different wording in the English and the French texts regarding article 2, paragraph 1 b) iv). The French text refers to the agencies or instrumentalities of the State or other agencies "dans la mesure où ils agissent dans l'exercice des prérogatives de la puissance publique". The ILC Commentary to this article would seem to support the requirement depicted in the French text.[9]

8. The revised draft articles of the ILA adopted in 1994 also included a provision by which "[a]n agency or instrumentality of a foreign State which possesses legal personality distinct from the State shall be treated as a foreign State only for acts or omissions performed in the exercise of sovereign authority, i.e. *jure imperii*". Even if the final result is the same as that of the UN Convention, there is nevertheless a distinction from the point of view of the notion of the State. The performance of acts of agencies or instrumentalities must be done on a *jure imperii* basis for the purpose of being

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[7] *Nationality Decrees issued in Tunis and Morocco*, 7 February 1923, Advisory Opinion N. 4, PCIJ *Series B*., Rights of Nationals of the United States of America in Morocco, Judgment, I.C.J. Reports 1952, p. 185. See also *Case concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgement, ICJ Reports 2001*, p. 40; *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgement, ICJ Reports 2002*, p. 404, para. 205. See the commentary of the ILC to draft article 1, *Yearbook of the International Law Commission*, 1991, Vol. II, Part Two, p. 15.

[8] According to article 2(1)(b)(iv) of the ILC draft, the term 'State' means: "agencies or instrumentalities of the State and other entities, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State".

[9] Cf. ILC, .*supra* (note 7), pp. 17-18. See also Catherine Kessedjan and Christoph Schreuer, "Le projet d'articles de la Commission du droit international des Nations Unies sur les immunités des Etats", *RGDIP*, 1992, Vol. 96, p. 323.

treated *as a foreign State*, whereas the UN Convention requires that those agencies or instrumentalities act in this sense to be included within the meaning of "State".

9. There is, however, another way to envisage – and to resolve – this matter. The distinction between immunity *ratione personae* and *ratione materiae* has lost most of its importance since the general acceptance of the restrictive approach to immunity. In fact, the question at issue here is not whether such entities can or cannot be considered as part of the State, but whether the acts they perform have a *jure imperii* or a *jure gestionis* nature. The distinction between the State and its agencies was essentially a result of the Soviet insistence not to recognise the restrictive approach to State immunity, hence the possibility of considering these agencies as not being part of the State. This explains the paradox of States adhering to the restrictive approach embracing a wider concept of the State, and the States adopting the absolute doctrine of immunity as readily accepting a narrower one. After the generalised abandonment of the absolute approach, one could well question whether the problem of the determination of these agencies as being part or not part of the State is still an issue. What should really be the key element is the performance of sovereign activity, either by an organ of the State *stricto sensu* or even by an agency or entity not having such a character.[10] At the most, to decide whether these entities can be considered as part of the State could only facilitate the task of the judge, even though this would not amount to any kind of presumption with regard to the nature of the act performed by them. Nonetheless, since the UN Convention and State practice still take issue with the matter, the question will be analysed here.

10. If one follows the rationale of the ILC draft as well as the UN Convention, then the legal analysis for the granting of immunity is twofold. The first question to be resolved is with regard to the *personae*, i.e. whether the acts at issue can be attributed to a foreign State. If the answer is positive, then one must examine the nature of the act. It is only if this act is accomplished on a *jure imperii* basis that immunity will be deemed applicable. This chapter will only deal with the first part of this analysis, i.e. identifying the organs, entities, agencies, instrumentalities and representatives that can be considered as acting as or on behalf of the State. The distinction *ratione materiae*, that is between activity *jure imperii* and *jure gestionis* will be dealt with below.[11]

11. As stated above, some particular cases deserve special attention, since they are frequently the subject of international instruments, national legislation, case law and State practice in general. These are the cases of the constituent entities of federal States, other territorial or political subdivisions within the States, overseas territories or territories having a particular status, some particular agencies such as central banks or schools, as well as States totally or partially owned societies. In the subsequent paragraphs, both the legal instruments and case law concerning these particular cases will be examined.

3. Constituent Units of federal States and other Political or Territorial Subdivisions of States

12. Although international law generally does not pay attention to the internal configuration of States for the application of its rules, practice shows that the field of immunity constitutes an exception. In particular, the case of federal States raised the question whether their constituent elements (*Länder*, Cantons, States, Provinces or whatever their designation may be) should enjoy immunity. The reason for this debate is due to the fact that those entities are granted an extensive range of competences within the State and are even considered as "States" within the national framework, although non-sovereign ones. In general, these competences are more extended than those of the territorial subdivisions of centralised States. Two opposite solutions can be found in municipal case law, i.e. denying immunity to those units of federal States and granting it.

13. What was at the origin a particular problem concerning federal States later became a quasi-generalised problem, with the broadly developed phenomena – particularly in Europe – of transfer or extension of competences from the central government towards regional sub-divisions in non-federal States.

14. The ILC draft articles incorporated within the concept of the "State" the "constituent units of a federal State" without any other further requirement, whereas other "political subdivisions" of the

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[10] See Hazel Fox, *The Law of State Immunity*, Oxford, O.U.P., 2002, p. 237.

[11] See Chapter 2 of this Report.

State could only be included insofar as they were "entitled to perform acts in the exercise of the sovereign authority of the State". The reason for this distinction seems to be the fact that it is taken for granted that the constituent units of federal States are entitled to perform those kinds of acts.

15. The UN Convention departs from this approach. It treats the categories of "constituent units of a federal State" and "political subdivisions of the State" in the same manner, explicitly requiring both of them to be "entitled to perform acts in the exercise of the sovereign authority, and [….]acting in that capacity". As was stated above, it is only when these entities are actually performing acts in the exercise of sovereign authority that they can be considered as being the "State" for the purpose of the Convention.

16. The European Convention apparently follows a narrower approach. Its article 28, paragraph 1 states as a general rule that "the constituent States of a Federal State do not enjoy immunity".[12] The exception is provided by paragraph 2, which reads as follows:

> *"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".*

17. The practical consequence of this dual regime is that, on the one hand, it is for the federal State through its central organs to decide to invoke the immunity of its constituent States. On the other hand, in the case that a federal State made a declaration according to paragraph 2 of article 28, the constituent States could claim their immunity on their own. However, paragraphs 3 and 4 of the same article provide that only the Ministry of Foreign Affairs of the federal State will receive and produce the relevant documentation in proceedings brought against a constituent State. Equally, only the federal State can be party to proceedings pursuant to Article 34 of the Convention. Thus, "[w]here a federal State does not make the declaration provided for in Article 28, paragraph 2, its constituent States are considered as being entities in the sense of Article 27".[13] This situation means that they do not enjoy immunity *ratione personae*, but could be candidates for immunity *ratione materiae*.

18. To date, only 3 States have made the declaration under article 28, paragraph 2 of the European Convention. Their declarations reads as follows:

> Austria: "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."[14]
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> Belgium: "In accordance with Article 28, paragraph 2, of the Convention, the Kingdom of Belgium declares that the French Community, the Flemish Community and the German-speaking Community as well as the Walloon Region, the Flemish Region and the Brussels-Capital Region may invoke the provisions of the European Convention on State Immunity applicable to Contracting States, and have the same obligations".[15]
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> Germany: "The Federal Republic of Germany hereby amends its declaration relating to Article 28, paragraph 2, of the Convention to the effect that all constituent states (Laender) of the Federal Republic of Germany, namely Baden-Württemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Hesse, Mecklenburg-Western Pomerania, Lower Saxony, North-Rhine/Westphalia, Rhineland-Palatina, Saarland, Saxony, Saxony-Anhalt, Schleswig-

[12] However, this assertion is made "without prejudice to the provisions of Article 27", which means that the courts may not entertain proceedings in respect of acts performed by the constituent units of federal States in the exercise of sovereign authority *(acta jure imperii)*.

[13] Council of Europe, *Explanatory Report on the European Convention on State Immunity and Its Additional Protocol*, available at http://conventions.coe.int/Treaty/en/Reports/Html/074.htm.

[14] Declaration contained in its instrument of ratification, deposited on 10 July 1974. Period covered: since 11/6/1976.

[15] Declaration contained in a letter from the Minister of Foreign Affairs of Belgium, dated 4 September 2003, transmitted by the Permanent Representative of Belgium and registered at the Secretariat General on 23 September 2003. Period covered: since 23/9/2003.

Holstein and Thuringia shall be able to invoke the provisions of the Convention applying to the Contracting States and shall have the same duties as the latter".[16]

19. It should be noted that Switzerland, the other remaining federal State that is party to the European Convention, has not made such a declaration. Indeed, Swiss practice seems to reject immunity for the constituent States of federal States.[17]

20. The United Kingdom's State Immunity Act 1978 acknowledges the possibility of granting immunity *ratione personae* to the constituent units of federal States, giving effect to article 28 of the European Convention. This requires the British government to adopt secondary legislation by which it applies the provision of the SIA 1978 to those constituent units.[18] Reference can be made to the State Immunity (Federal States) Order 1979 (SI No 457/1979), by which the Austrian Provinces enjoy immunity, and the State Immunity (Federal States) Order 1993 (SI No 2809/1993), by which the German Länder enjoy immunity.

21. France has adopted the position of denying immunity to the constituent units of a federal State. In the *Neger v. Government of Land of Hesse* case[19], the *Tribunal de grande instance* of Paris, in its decision of 15 January 1969, considered that "*L'immunité de juridiction n'existe qu'au profit des Etats souverains, c'est à dire qu'ils 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.*" *A fortiori*, French tribunals do not recognise the immunity *ratione personae* of other territorial units or public communities.[20]

22. Hence, State practice seems to be contradictory. The limited number of parties to the European Convention, as well as the fact that the Convention itself provides for a dual regime, suggest that the general rule set up by Article 28 paragraph 1 is not authoritative. Remarkably, even amongst federal States there is not a common position. Nevertheless, as stated above, the fact that immunity applies to acts performed by those constituent units in the exercise of sovereign authority tends to diminish the practical importance of the existence of different traditions in this field.

4. Agencies or instrumentalities of the State and other entities

23. This subject heading is employed in the UN Convention as it was in the ILC draft articles. Again, a narrower approach is adopted by the European Convention in this regard. As mentioned above, agencies or instrumentalities of the State can be included within the notion of "State", provided that they are *entitled to perform* (ILC draft articles) and are *actually performing* acts in the exercise of sovereign authority of the State (UN Convention). By contrast, the European Convention provides in its article 27 that "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". However, paragraph 2 of the same article provides that "the courts may not entertain proceedings in respect of acts performed by the entity in the exercise of sovereign authority *(acta jure imperii)*". This implies the possibility of granting to those entities immunity *ratione materiae*, even though not *ratione personae*. The Resolution of Basle of the *Institut de droit international* in 1991 seems to adhere to the same perspective as that of

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[16] Declaration contained in a letter from the Permanent Representative, dated 3 June 1992, registered at the Secretariat General on 5 June 1992. This declaration was necessary in order to extend the previous declaration to the five new Länder incorporated into the Federal Republic of Germany on 3 October 1990. Period covered: since 5/6/1992.

[17] See Christian Dominicé, "Immunité de juridiction et d'exécution des Etats et chefs d'Etat étrangers", *Fiches juridiques suisses*, 1992, N° 934, at p. 26.

[18] SIA 1978, section 14: "(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". See H. Fox, *op. cit.* (note 10), at pp. 329-330.

[19] [F/4] *Neger v. Government of the Land of Hesse*, *Tribunal de Grande Instance* of Paris, 15 January 1969, *Revue critique de droit international privé*, 1970, pp. 99-101.

[20] Concerning the Colombian departments, see Chamber of Appeal of Paris, 11 July 1924, *Gazette du Palais*, 1925, 1, p.389.

the UN Convention and ILC draft articles, whereas the revised draft article of the International Law Association of 1994 focuses on the nature of the act performed, without adopting any position with regard to the immunity *ratione personae*.[21]

24. The terms "agencies" and "instrumentalities" are considered as synonyms and refer to entities having a public character, although not necessarily being organs of the State or part of the governmental structure. The reference to "other entities" is used in order to include private entities endowed with governmental authority and being able to perform acts in the exercise of the sovereign authority of the State.[22]

25. In considering whether or not such entities are part of the State for the purpose of immunity, legal instruments and case law have had to deal with the question of whether these agencies or instrumentalities have a different legal personality from that of the State. If it is not the case, they can be considered as part of the State for the purpose of immunity, according to the 1994 Buenos Aires ILA Resolution. In other words, the fact of having a separate legal personality was considered as a key element to deny immunity *ratione personae*. By contrast, the 1991 Resolution of the *Institut de droit international* does not consider the fact of an entity having a separate legal personality as precluding it from benefiting from immunity. As the Explanatory report of the European Convention states: "the criterion of legal personality alone is not adequate, for even a State authority may have legal personality without constituting an entity distinct from the State".[23] Thus, the European Convention sets down a double cumulative condition for entities not treated as part of the State: "(1) a distinct existence separate and apart from the executive organs of the State and (2) capacity to sue or be sued".[24] The utility of the second condition is questionable, since even State organs can often sue or be sued.

26. The United Kingdom's State Immunity Act 1978 provides in its section 14 (1) that "references to a State include references to (…) (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". This legislation seems to follow the European Convention, although it does not contain any reference to the requirement of a different legal personality.

27. Some case law supports the idea that entities having a distinct legal personality should not be granted immunity *ratione personae*. The following decisions can be cited as being reflective of this tendency.

28. In the *Trendtex Trading Corporation v. Central Bank of Nigeria* case[25], the English Court of Appeal, in its decision of 13 January 1977, considered that the question as to whether a separate legal entity of a foreign State is entitled to immunity depends upon the degree of control exercised by the State over that entity and the functions which the entity performed. The majority found that the Central Bank of Nigeria was not an emanation of the State entitled to claim immunity. It must

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[21] According to Article 3 of the Resolution on Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement of the *Institut de droit international* (1991), "1. The general criteria of competence and incompetence set forth above are applicable to the activities of the agencies and political subdivisions of foreign States whatever their formal designation or constitutional status in the State concerned. 2. The fact that an agency or political subdivision of a foreign State possesses a separate legal personality as a consequence of incorporation or otherwise under the law of the foreign State does not in itself preclude immunity in respect of its activities. 3. The fact that an entity has the status of a constituent unit of a federal State, or a comparable status of special autonomy, under the law of the foreign State does not preclude immunity in respect of its activities." On the other hand, Article 1, B) 3 of the Revised Draft Articles for a Convention on State Immunity of the International Law Association (1994) reads as follow: "The term 'foreign State' includes: (…) 3. Agencies and instrumentalities of the State not possessing legal personality distinct from the State. An agency or instrumentality of a foreign State which possesses legal personality distinct from the State shall be treated as a foreign State only for acts or omissions performed in the exercise of sovereign authority, i.e. *jure imperii*."

[22] See Commentary of the ILC, *loc. cit.* (note 7), p. 17, para. 15.

[23] See Explanatory Report, cited (note 13), para. 108.

[24] *Ibid*.

[25] [GB/12] *Trendtex Ltd v. Central Bank of Nigeria*, Court of Appeal, 13 January 1977, [1977] 2 WLR 356, 64 ILR 111.

be noted that this judgment was decided before the adoption of the State Immunity Act of 1978, which adheres to an opposite view.[26]

29. The *Bundesverfassungsgericht* (Federal Constitutional Court), in a decision of 12 April 1983, in the *National Iranian Oil Company v. British and U.S. firms* case[27], drew a distinction between the sovereign State and separate legal entities established under private law. It stated that "there is no general rule of international law requiring that a foreign State be treated as owner of receivables on accounts maintained with banks in the forum State kept in the name of an enterprise of the foreign State having legal capacity". The complaint by the National Iranian Oil Company, a joint stock company under Iranian law owned by the Islamic Republic of Iran, was thereby dismissed.

30. In the *Banco de la Nación v. Banca cattolica del Veneto* case[28], the First Court of Public Law of the Swiss Federal Tribunal, in its decision of 21 March 1984, confirmed its previous jurisprudence denying immunity *ratione personae* to corporations having a different legal personality than that of the State concerned, without prejudice to granting them immunity *ratione materiae* if they perform acts with sovereign authority. The Court held that such was not the case of the *Banco de la Nación* in this particular case. The Swiss Federal Tribunal justified its general view on the matter by analysing the scope of article 27, paragraphs 1 and 2 of the European Convention. Although not directly applicable to the case, the highest judicial authority in Switzerland considered the European Convention as reflecting "the expression of new trends of international law".[29]

31. In the past, the Swiss Federal Tribunal had expressed doubts about the solution just depicted, but in relation to a corporation having its own legal personality and being able to perform acts of public authority.[30]

32. Later on, in the *Kuwait v. X (corporation)* case, the Swiss Federal Tribunal rejected the request of immunity with regard to assets belonging to the Kuwait Investment Authority (KIA) impounded in Geneva in a judgment of 24 January 1994. Kuwait pleaded its immunity from execution since the owner of the assets was directly dependent on the Kuwaiti State. The Federal Tribunal did not consider it necessary to examine the nature of the activity giving rise to the debt, since the plaintiff did not argue that it had acted by virtue of sovereign authority. For the Tribunal, the key issue was to determine whether KIA could be assimilated to the State of Kuwait. The answer of the Tribunal was negative, based on the Kuwaiti law creating KIA (which considered it as having an "autonomous status") and the point of view of the plaintiff itself, who considered KIA as an "independent public authority". The Federal Tribunal dismissed as irrelevant the fact that KIA administers the funds put at its disposal by the State on its behalf in order to establish a fund for Kuwait's future generations once petroleum is exhausted, and that its directory is composed by the Finance and Petroleum Ministers, the Under-Secretary of the Finance Ministery and the Governor of the Central Bank, together with five other specialists. Since KIA itself did not invoke immunity, the Tribunal decided not to determine whether this entity could have claimed it, following the general criteria of article 27, paragraph 2 of the European Convention.[31] This interpretation of article 27, paragraph 2 of the EC and, more generally, the granting of immunity to these entities on

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[26] See considerations below.

[27] [D/11] *National Iranian Oil Company v. British and U.S. firms*, 12 April 1983, *Entscheidungen des Bundesverfassungsgerichts*, Vol. 64, at pp. 1 ff.. (German original); English extracts in: *Decisions of the Bundesverfassungsgericht – Federal Constitutional Court – Federal Republic of Germany*, Volume I/2: International Law and Law of the European Communities 1952-1989 (published by the Members of the Court), 1992, at pp.479 ff.

[28] [CH/13] *Banco de la Nación v. Banca Cattolica del Veneto*, First Court of Public Law of the Swiss Federal Tribunal, 21 March 1984, ATF 110 Ia 43, www.bger.ch. For the other decisions following the same reasoning, see: [CH/1] *Libya vs. Libyan American Oil Company (LIAMCO)*, First Court of Public Law of the Swiss Federal Tribunal, 19 June 1980, ATF 106 Ia 147, www.bger.ch; [CH/4] *Greece v. Banque Julius Bär & Cie*, First Court of Public Law of the Swiss Federal Tribunal, 6 June 1956, ATF 82 I 75, www.bger.ch; [CH/8] *United Arabic Republic v. X (individual)*, Swiss Federal Tribunal, 10 February 1960, ATF 86 I 23, www.bger.ch.

[29] Translation [German original: „als Ausdruck neuerer völkerrechtlicher Tendenzen"], *ibid.*

[30] [CH/20] *Central Bank of the Republic of Turkey v. Weston Compagnie de Finance et Investissement SA*, , First Court of Public Law of the Swiss Federal Tribunal, 15 November 1978, ATF 104 Ia 367, www.bger.ch

[31] *Revue suisse de droit international et européen* 5/95, p. 593.

that basis, seems misleading. If these entities can be considered as part of the State, then it is irrelevant whether it is the State or the entity itself that claims immunity on its behalf.

33. In the *Carlos Manuel Flores André and Miguel Carlos Parada André v. Spanish Institute in Lisbon* case[32], the Portuguese Supreme Court, in its decision of 17 June 1987, denied immunity on the basis that a foreign school is distinct and has autonomy from the foreign State and thus can be tried in Portuguese courts. However, in a later judgment by a lower tribunal, the Court of Appeal of Lisbon (Tribunal da Relação de Lisboa), decided that Portuguese courts are internationally incompetent to judge a law suit against the Spanish State.[33] It should be noted that the former case was brought exclusively against the Spanish Institute, whereas the latter was brought collectively against the same Institute, the Spanish Embassy and the Spanish State.

34. What is decisive in order to recognise immunity of the agencies and other instrumentalities of the State is the nature of the acts performed. If these acts have a *jure imperii* nature, then immunity to those entities are granted. Some particular legislation and decisions that support this contention follow.

35. The United Kingdom's State Immunity Act 1978 establishes in section 14 (2) that "[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".

36. In the case of *Cassa di risparmio della Libia v. Federazione italiana dei consorzi agrari and Consorzio agrario della Tripolitania,*[34] the Tribunal of Rome decided that immunity from jurisdiction applies to foreign public bodies only where they are entitled to have public law relations, but not in connection to private activities, such as the conclusion of contracts entailing property obligations.

37. In the *Special Delegate for the Vatican City State v. Pieciuckiewicz* case,[35] the Vatican Radio, a public broadcast, was sued before Italian tribunals. The Supreme Court of Cassation, in its judgment of 5 July 1982, decided that the competence of the Italian judge is excluded from adjudicating cases concerning supply of translation and speaker services for the Vatican Radio. According to the tribunal, these services clearly refer to the performance of the Vatican City's "mission in the world" and therefore are part of the tasks performed in order to attain the public goals of the Vatican State.

38. In the *PROCURA Impianti Srl vs. Alberta Agriculture Department* case,[36] which was brought against a Canadian Province, a Tribunal of Milan decided on 19 March 1992 that immunity from jurisdiction of foreign States is limited to functional aspects and does not cover relations in which States and employees of territorial autonomous bodies act as if they were private subjects, in an ordinary contractual framework. This case presupposes that this agency of a constituent unit of a federal State (Canada) can be considered as part of this State and consequently as being a candidate for immunity *ratione personae*. However, the fact of performing acts *iure gestionis* precludes its immunity *ratione materiae*.

39. In the *Douglas H. v. Korea Trade Center (KTC)* case,[37] brought before the Swedish Labour Court (*Arbetsdomstolen*), the case was decided on the basis of a statement requested to the Swedish Ministry for Foreign Affairs, who concluded that, given its activities and close connections with the Korean State, KTC acted as a public entity (*jure imperii*).

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[32] [P/5] *Carlos Manuel Flores André and Miguel Carlos Parada André v. Spanish Institute in Lisbon*, Supreme Court, 17 June 1987, *Boletim do Ministério da Justiça*, 1987, N. 368.

[33] [P/6] *Maria Cristina Silva v. Spanish Institute, Spanish Embassy and Spanish State*, Cour of Appeal of Lisbon (Tribunal da Relação de Lisboa), 9 November 1988, *Colectânea de Jurisprudência*, 1988, N. XIII-5.

[34] [I/57] *Cassa di risparmio della Libia v. Federazione italiana dei consorzi agrari and Consorzio agrario della Tripolitania*, Tribunal of Rome, 19 July 1961, *Diritto internazionale*, 1963, II, at p. 241.

[35] [I/33] *Special Delegate for the Vatican City State v. Pieciuckiewicz*, Supreme Court of Cassation, 5 July 1982, *Italian Yearbook of International Law*, 1985, at p. 179.

[36] [I/40] *PROCURA Impianti Srl vs. Alberta Agriculture Department*, Tribunal of Milan, 19 March 1992, *Rivista di diritto internazionale privato e processuale*, 1992, at p. 584.

[37] [S/4] *Douglas H. V. Korea Trade Center (DTC)*, Labor Court (*Arbetsdomstolen*), 4 May 1988, Riksarkivet (*National Archives*), Arbetsdomstolens arkiv, Inkomna mål 1987, Vol. EI:1219, målnr B 41/87, *Nytt Juridiskt Arkiv 1987*, *Avd I*, Case N. 1987:59 (partly published), www.infotorg.sema.se.

40. Following a request of Liechtenstein's society Cinetelevision International Registered Trust (Cinetel), in the *Egypt's Arab Republic v. Cinetel* case,[38] the President of the First Instance Tribunal of Geneva impounded the Egypt's Arab Republic Television and Broadcasting Federation's assets in Switzerland, as well as those of the Central Bank of Egypt and the National Bank of Egypt. The debtors were considered as State's organs forming a unique economic entity having the Egyptian State as its economic master. The pound affected essentially the *Office d'information et de tourisme (OIT)* of the Egypt's Arab Republic in Geneva. However, the Swiss Federal Tribunal concluded that the assets of the OIT were not subject to execution by virtue of the State immunity rules. For the tribunal, the OIT is "un organisme de l'Etat égyptien; quand bien même elle revêt un aspect économique, l'activité qu'il déploie, et à laquelle ses biens et avoirs sont – en partie du moins – affectés, constitue une tâche qui incombe à la RAE en sa qualité de puissance publique. La fonction que remplit l'OIT est en fait semblable à celle qu'assurent les offices cantonaux du tourisme ou ceux que la Suisse entretient à l'étranger, qui sont des organismes de droit public".

41. In the *GP (individual) v. Cypriotiska Statens Turistorganisation (CST) (Cyprus' Tourist Organisation)* case,[39] GP was a former employee of CST who sued the latter for damages on account of having been given notice to quit without grounds of fact. CST claimed State immunity. Considering the aims and activities of CST, the Stockholm City Court found that CST could enjoy immunity. Initially, the Labour Court considered that the investigations of the case revealed that CST was the kind of legal entity that may invoke immunity. Subsequently, the Court pointed out that immunity can only be invoked in disputes relating to sovereign acts as such, but not in disputes concerning matters of a commercial or private-law nature. In the decision of the Labour Court (*Arbetsdomstolen*) of 16 November 2001, the Court noted that the European Convention on State Immunity, had Sweden been a party to it, would not have constituted an obstacle to CST to claim immunity.

42. In the *Levant Express Transport Co. v. Iranian Railways* case,[40] the First Civil Chamber of the French *Cour de Cassation* assimilates foreign States and organs acting under their order and insisted that immunity is granted only when the acts performed by those entities have a sovereign character or are accomplished in the interest of a public service.

43. The First Chamber of the *Cour de Cassation*, in its decision of 12 May 1990 in the *Kuwait News Agency v. Parott* case,[41] affirms the previously cited case law. Accordingly, despite the fact of having their own legal personality, separate entities having acted "par l'ordre ou pour le compte" of a foreign State shall be granted immunity for sovereign acts and for those acts accomplished in the interest of the public service. *A contrario*, separate entities having acted "par l'ordre ou pour le compte" of a foreign State, although not having their own legal personality, shall not be granted immunity for acts *jure gestionis*. According to the *Cour de Cassation*, "*ne saurait porter atteinte aux intérêts protégés d'un Etat étranger justifiant l'immunité de juridiction, l'acte de gestion par lequel une agence de presse, fût-elle l'émanation de cet Etat, a licencié un journaliste nommé dans le cadre des activités propres de celle-ci et qui n'était chargée d'aucune responsabilité particulière*."

44. In the *Ms Naria X v. Saudi School of Paris and other* case,[42] the *Cour de Cassation* affirmed that only acts performed *jure imperii* are able to confer jurisdictional immunity to an instrumentality of a State. Accordingly, "*les Etats étrangers et les organismes qui en constituent l'émanation ne bénéficient de l'immunité de juridiction qu'autant que l'acte qui donne lieu au litige participe, par sa nature ou sa finalité, à l'exercice de la souveraineté de ces Etats et n'est donc pas*

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[38] [CH/23] *Egypt's Arab Republic v. Cinetel*, Chamber of Public Law of the Swiss Federal Tribunal, 20 July 1979, *ASDI*, 1981, at p. 206.

[39] [S/9] *GP (individual) v. Cypriotiska Statens Turistorganisation (CST) (Cyprus' Tourist Organisation)*, Labor Court (*Arbetsdomstolen*), 16 November 2001, *Arbetsdomstolens domar 2001*, Case AD 2001, Nr. 96, www.infotorg.sema.se.

[40] [F/1] *Levant Express Transport Co. v. Iranian Railways*, *Cour de Cassation* (First Civil Chamber), 25 February 1969, *Revue critique de droit international privé*, 1970, at pp. 102-103.

[41] [F/3] *Kuwait News Agency v. Parrott*, *Cour de Cassation* (First Chamber), 12 May 1990, *Revue critique de droit international privé*, 1991, at pp.140-147.

[42] *Ms Naria X v. Saudi School of Paris and another*, *Cour de Cassation* (*Chambre mixte*), 20 Juin 2003, Judgment N. 220, available at www.courdecassation.fr.

un acte de gestion". Therefore, even if the Saudi School of Paris does not have a distinct legal personality from that of Saudi Arabia, is entirely financed by this State and follows the programme and schedule of the schools of Saudi Arabia, it was not considered to benefit from immunity since the refusal of the Saudi School of Paris to declare Ms Naria X. before the French regime of social protection was considered an act *jure gestionis*.

45. The case of the *Ministerium für Aussenhandel der Deutschen Demokratischen Republik v. Riksförsäkringsverket (RFV)*,[43] decided by the Supreme Administrative Court (*Regeringsrätten*) on 4 March 1986, is an interesting case raised by the taxing of a foreign State agency for wages paid to its employees. RFV *(Swedish National Social Insurance Board)* charged the Ministry of Foreign Trade of the GDR with taxes for the employment of GDR citizens working at the DDR Handelszentrum (GDR Trade Centre) in Gothenburg, Sweden. The Ministry refused to pay and appealed to the Stockholm Administrative Court of Appeal. The Ministry claimed that what had been paid to the employees was not to be considered as salary and furthermore that the employees would not raise any social claims to the Swedish State. The Stockholm Administrative Court of Appeal established that the Ministry was a foreign employer that had employed staff in Sweden and therefore it was obliged to pay employment tax. On appeal, the Supreme Administrative Court requested the view of the Swedish Ministry of Foreign Affairs, which noted that in the agreement concerning the establishment of diplomatic relations between Sweden and the GDR, it had been stated that if a trading office would be established, it should not be seen as part of the diplomatic mission. Furthermore, the Ministry noted that in the said agreement there had not been included any regulation regarding immunity or privileges for a trading office. In the light of this statement, the Supreme Administrative Court found that the only question that remained to be decided was if the Ministry should be considered to enjoy such general immunity that might belong to foreign States' authorities. In this respect, the Supreme Administrative Court pointed out that the Ministry had not claimed immunity before RFV or before the Court of Appeal. In view of this, the Supreme Administrative Court was of the view that the Ministry had waived the immunity that it possibly could have been entitled to. Thus, the question remained open whether, should the Ministry of Foreign Trade of the GDR have raised the case before the Swedish tribunals appropriately, immunity should have been granted.

5. Central Banks

46. Central Banks seem to deserve special treatment, given their vital role in State policy. The interest of their situation in the field of immunity must be stressed, since in contemporary times these entities have become independent from the State structure in most countries. The UK's State Immunity Act 1978 states that "[p]roperty of a State's central bank or other monetary authority shall not be regarded (…) 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 [section 13] shall apply to it as if references to a State were references to the bank or authority".[44]

47. Consequently, in a decision of 11 April 2001, the High Court, Chancery Division (Companies Court), determined that the immunity from enforcement proceedings of a central bank, according to section 14(4) of the State Immunity Act, is a relevant factor for a Court to consider when deciding whether to exercise a discretion allowing proceedings to be served outside the jurisdiction".[45]

6. State owned companies

48. State owned companies have in general enjoyed immunity only if they performed acts with sovereign authority.[46]

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[43] [S/3] *Ministerium Fur Aussenhandel der Deutschen Demokratischen Republik v. Riksförsäkringsverket (RFV)*, Supreme Administrative Court (*Regenringsrätten*), 4 March 1986, *Regeringsrättens årsbok 1986*, Case N.. 1986 ref 66, http://www.infotorg.sema.se.

[44] UK SIA 1978, Section 14 (4).

[45] [GB/11] *Banca Carige Spa Cassa di Risparmio Geneva e Impera v. Banco Nacional de Cuba and another*, High Court, Chancery Division (Companies Court), 11 April 2001, [2001] 3 All ER 923.

[46] See also Chapter 6 f this Report.

49. In the *Re Rafidain Bank* case,[47] the English High Court on 9 July 1991 considered that in the context of the liquidation of a commercial company owned by a foreign State, monies owed by the company to that foreign State are not protected by State immunity and cannot therefore be paid out by the liquidators in preference to other creditors. The decision is based on section 6(3) of the State Immunity Act.

50. A striking exception to this generalised practice, in which the sole fact of being a State owned company was enough to confer immunity to it, is the *As Veli ja Veljed v. Republic of Estonia* case,[48] decided by District Court of Helsinki on 11 July 2001. The case concerned a breach of contract between two Estonian companies. The plaintiff was an Estonian company having a permanent place of business in Finland. The other party was a company (Püssi PPK) owned at the time the contract was concluded (1992) by the State of Estonia and being under the control of the Ministry of Trade and Energy of Estonia. The Court cited legal literature and made the point that the socialist countries used to consider that immunity was enjoyed not only with respect to acts *jus imperii,* but also with respect to state acts *jus gestionis*. Hence, the Court established that, due to the immunity of the State of Estonia from jurisdiction, it was not competent to consider the claim and ruled it inadmissible without considering the merits of the case.

51. Practice confirms that other entities performing acts of sovereign authority are also candidates for immunity. This category refers in particular to private persons, mostly private companies.

52. The First Civil Chamber of the *Cour de Cassation* decided, in the *Zavicha Blagojevic v. Bank of Japan* case, [49]on 19 May 1976, that a private entity can invoke jurisdictional immunity "*du moment qu'il est constaté que les actes qui lui sont reprochés correspondaient à l'objet même de la délégation de pouvoirs qui lui avait été conférée par l'Etat et qu'il n'est pas relevé [qu'il] eût agi dans un intérêt autre que celui du service*".

7. Representatives of the State

53. This category "encompasses all the natural persons who are authorised to represent the State in all its manifestations", as listed in the previous categories.[50] It is understood, as the ILC draft articles and the UN Convention make clear, that immunity applies when those persons are acting in that capacity. According to the ILC, the "reference to 'in that capacity' is intended to clarify that such immunities are accorded to their representative capacity *ratione materiae*".[51] Some of these persons, such as heads of State or government, ministers of foreign affairs and ambassadors and diplomatic agents enjoy also immunity *ratione personae*. The distinction between State immunity and diplomatic immunity will be dealt with below.[52]

54. The need for the inclusion of this category within the notion of "State" is justified on practical grounds. Sometimes, proceedings are instituted not only against the State or its agencies or instrumentalities, but also against their representatives. In the *Propend Finance Pty Ltd v. Sing and others* case,[53] the English Court of Appeal recalled that an official of a foreign State enjoys immunity in respect of his official acts on behalf of that State to the extent that that State would itself enjoy immunity in respect of those acts if the proceedings had been brought against it. Therefore, immunity is granted to State representantives in respect of official acts performed on behalf of the foreign State.

8. Conclusions

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[47] [GB/5] *Re Rafidan Bank*, High Court, Chancery Division, 9 July 1991, 101 ILR 332.

[48] [FIN/13] *As Veli ja Veljed v. Republic of Estonia*, District Court of Helsinki, 11 July 2001, Case N. 00/23021.

[49] *Zavicha Blagojevic v. Bank of Japan*, First Civil Chamber of the *Cour de Cassation*, 19 May 1976, *Revue critique de droit international privé*, 1977, at p.359.

[50] Comment of the ILC, *loc. cit.* (note 7), at p. 18, para. 17.

[51] *Ibid.*

[52] See Chapter 3 of the present Report.

[53] [GB/9] *Propend Finance Pty Ltd v. Sing and others*, Court of Appeal, 17 April 1997, 111 ILR 611.

55. The debate about the entities that deserve to be considered as part of the State in order to be granted immunity is largely due to application of the outdated absolute approach of immunity. This was because – according to this approach – the only criteria for the determination of immunity was the status of the entity, since no distinction regarding the sovereign nature of the activities was taken into account. Once the distinction between activities *iure gestionis* and *iure imperii* became widely adopted as the key criteria for the recognition of immunity, this debate became less important.

56. Only a minority of decisions continue to insist that the legal personality of the entity is the determining factor for considering whether it is or is not part of the State and thereby a beneficiary or not of immunity.

57. The notion of “State” has followed the tightening of the immunity *ratione materiae.* The last codification efforts reflect the view that organs performing acts *iure gestionis* are not considered as falling within the scope of the notion of “State”, even if they form part of it or are entirely or partially owned by it. At this stage, the question remains whether there is a problem regarding the scope of the notion of State or whether the nature of the act precludes the granting of immunity, no matter whether the organ accomplishing it is part of the State or not.

CHAPTER 2

The Definition of Commercial Acts

Stephan Wittich

1. Introduction

58. The commercial transaction exception is based on the general premise pervading the doctrine of restrictive immunity that States shall enjoy jurisdictional immunity before the courts and tribunals of other States only for "public" acts, i.e., acts in exercise of sovereign or governmental authority,[54] whereas they may not invoke immunity for their acts which are of a private or commercial nature. The commercial transaction exception accordingly applies the distinction between acts *iure imperii* (i.e., public acts in exercise of sovereign authority), and acts *iure gestionis* (i.e., private or commercial acts). This distinction, while widely accepted, is only begging the question as to how it is to be made. Rather than providing an answer, the plethora of different terms as well as tests are only evidence for the difficulty of finding generally acceptable as well as applicable criteria.

59. The rationale of the commercial transaction exception is clear. Where the State engages in business activities as partner or competitor of private individuals, it shall not enjoy a privileged position as compared with private traders and shall be accountable for this private commercial conduct in the courts of the country where the business is conducted.[55] Apart from this pragmatic justification, it is also argued that by engaging in commercial activities the foreign State implicitly waives its jurisdictional immunity. Whatever the theoretical foundations may be, the commercial transaction or activity exception has become one of the cornerstones of the theory of restricted immunity and has attracted a huge quantity of case law and great attention in doctrine.

2. International Instruments Addressing the Commercial Transaction Exception

2.1. The European Convention on State Immunity 1972

60. Apart from the case law of domestic courts which have developed the commercial transaction exception, the latter has also been incorporated into international instruments. As is well known, the European Convention on State Immunity, signed in Basle on 16 May 1972,[56] provides a catalogue of cases in which States do not enjoy immunity (Articles 4 to 14) and which all concern activities of a private law or commercial character. For present purposes, Articles 4, 6 and 7 are relevant.[57]

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[54] The equivalent in French is *actes de puissance publique.*

[55] Hazel Fox, *The Law of State Immunity* (2002), 272.

[56] Signed in Basle on 16 May 1972, entry into force on 11 June 1976, ETS No. 74, reprinted in 11 International Legal Materials (1972), 470.

[57] Articles 4, 6 and 7 read as follows:

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:

in the case of a contract concluded between States;

if the parties to the contract have otherwise agreed in writing;

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 6

1. A Contracting State cannot claim immunity from the jurisdiction of a court of another 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

61. Article 4 narrowly speaks of "obligation by virtue of a contract", for which States parties to the Convention cannot claim jurisdictional immunity. The exceptions of paragraph 2 further elucidate the term "contractual obligation" by exempting public law contracts from the application of the exception in paragraph 1. Article 4 however lacks a more specific definition of the phrase "obligation by virtue of a contract". Moreover, Article 4 is rather narrow in that it only covers obligations arising out of a contract and not also liability based upon other titles in connection with a commercial activity. Article 6 denies a State party jurisdictional immunity if it participates with one or more private persons in a legal entity having some link to the forum State. Various terms of Article 6 ("company", "registered office", "place of business") indicate that this relationship between the foreign State and the private person(s) is of a commercial nature. Article 7 provides that to the extent a State party to the Convention engages in some sort of commercial activity by means of an office, agency or other establishment, it cannot claim jurisdictional immunity. The key phrase here is that the State acts "in the same manner as a private person", an often used criterion to distinguish between acts *iure gestionis* and acts *iure imperii*.

62. The European Convention neither incorporates the principle of restrictive immunity in explicit terms, nor does it provide a general definition of the acts having a commercial character. Nevertheless, a great deal of activities of a commercial character will in fact fall within the scope of Articles 4, 6 and 7.

63. Although the European Convention has been ratified by only eight States, it was a significant step in recognizing the principle of restricted immunity on the international level. Moreover, even non-party States — albeit not adhering to it as norms binding upon them — have accepted the terms of the Convention as "an expression of the direction in which contemporary international law is developing".[58]

2.2. The International Law Association's Draft Articles for a Convention on State Immunity

64. The second international instrument addressing the issue of State immunity is are the Draft Articles for a Convention on State Immunity elaborated by the International Law Association[59]. The Articles first define "commercial activity" in Article I and then provide in Article III that a State shall not be immune for actions arising out of commercial activity.[60] According to Article I C., a

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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.

[58] CH/20, *Banque centrale de la République de Turquie* v. *Weston Compagnie de Finance et d'Investissement*, Swiss Federal Court, 15 November 1978, ILR 65, 417, 419. Note, however, that Switzerland has become a party to the Convention in 1982. Nevertheless Swiss courts have adhered to this assessment of the European Convention, see e.g. CH/10, *Espagne* v. *X SA*, Swiss Federal Tribunal, 30 April 1986, ATF 112, Ia 148.

[59] The International Law Association, Report of the 66th Conference held at Buenos Aires, 14-20 August 1994, 21.

[60] The relevant parts of Articles I and III read as follows:

Article I

Definitions

[…]

C. Commercial Activity

The term "commercial activity" refers either to a regular course of commercial conduct or to a particular commercial transaction or act. It shall include any activity or transaction into which a foreign State enters or in which it engages otherwise than in the exercise of sovereign authority and in particular:

Any arrangement for the supply of goods or services;

Any financial transaction involving lending or borrowing or guaranteeing financial obligations.

In applying this definition, the commercial character of a particular act shall be determined by reference to the nature of the act, rather than by reference to its purpose.

Article III

Exceptions to Immunity from Adjudication

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

[…]

B. Where the cause of action arises out of:

A commercial activity carried on by the foreign State, or

commercial activity is either a regular course of commercial conduct or a particular commercial transaction or act and includes any activity or transaction into which a foreign State enters or in which it engages otherwise than in the exercise of sovereign authority. Examples are any arrangement for the supply of goods or services or any financial transaction. The circularity of the definition is evident: commercial activity — as distinguished from a sovereign act — is a commercial conduct or a commercial transaction which is not carried out in the exercise of sovereign authority.

65. As is well known, the most difficult part in making the distinction between acts *iure imperii* and acts *iure gestionis* is which of the several proposed tests is to be applied. The two most common ways of making that distinction is, on the one hand, to scrutinise as to whether the *nature* of the act or conduct at issue is such as to warrant the assertion that the act is genuinely undertaken in the exercise of sovereign or governmental authority irrespective of which purpose the act is deemed to serve, or on the other hand whether the act legitimately serves any governmental or sovereign purpose so as to give rise to sovereign immunity. In that respect, the ILA Draft unambiguously adopts the nature of the purpose test.

66. Article III B. provides that a foreign State cannot enjoy immunity in the forum State if the cause of action arises out of a commercial activity by the foreign State or an obligation based on a contract, irrespective of whether this contract deals with a commercial transaction. Thus, from a formal point of view, a commercial activity does not necessarily entail a contract and, vice versa, a contract excluding State immunity need not regulate a commercial activity.

2.. The Draft United Nations Convention on Jurisdictional Immunities of States and Their Property

67. A further important international instrument is the United Nations Draft Convention on Jurisdictional Immunities of States and Their Property, elaborated by the United Nations International Law Commission until 1991. The Draft was then referred to an Ad Hoc Working Group set up by the Sixth Committee of the UN General Assembly. The Sixth Committee supported the conclusion of a convention in the terms of the finalized text of the Working Group in 2003.

68. The issue of commercial transactions and their definition has been a matter of dispute ever since in the work of the ILC and the Sixth Committee on jurisdictional immunities of States and their property. The result of the work is the definition of commercial transaction in Article 1 of the Draft and the commercial transaction exception in Article 10[61].

An obligation of the foreign State arising out of a contract (whether or not a commercial transaction but excluding a contract of employment) unless the parties have otherwise agreed in writing.

[61] The relevant part of Article 1 and Article 10 read as follows:

Article 1

Use of terms

1. […]

(c): "commercial transaction" means:

any commercial contract or transaction for the sale of goods or supply of services;

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

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

2. In determining whether a contract or transaction is a "commercial transaction" under paragraph 1 (c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.

Article 10

Commercial transactions

1. If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.

2. Paragraph 1 does not apply:

(a) in the case of a commercial transaction between States; or

69. Article 1(1)(c) includes a definition of "commercial transaction" which covers three categories.[62] The first category comprises any commercial contract or transaction for the sale of goods or supply of services. The second category consists of transactions of a financial nature, such as loans, credits, bonds, obligations of guarantee or indemnity. The third category is very comprehensive and includes a wide variety of areas of State activity. It covers any activity which is undertaken with the intention to realize profit.

70. Article 1(2) of the ILC Draft specifies the criteria to determine a "commercial transaction". In so doing, the ILC Draft adheres to the "nature of the act"-test, but the purpose of the act shall also be taken into account provided that the parties have so agreed, or if according to the practice of the forum State, the purpose is relevant to determine the character of the contract or transaction.

71. Article 10 provides that a State engaging in a commercial transaction cannot invoke jurisdictional immunity in the courts of other States unless this transaction is a commercial one between States or the parties to the transaction have expressly agreed otherwise. Furthermore, where a State enterprise with its own legal personality and capable of suing or being sued and of disposing of property is involved in a proceeding concerning a commercial activity of that entity, any possible immunity of the State shall not be affected.

3. Overview over the State practice in Europe

3.1. Some remains of absolute immunity

72. The overwhelming part of judicial decisions proceed on the general assumption of restricted immunity based on the distinction between acts *iure imperii* and acts *iure gestionis*. There are only a few decisions that might be taken so as to imply an adherence to absolute immunity. Surprisingly, not all of these cases were decided by courts of former socialist countries.

73. To begin with, the Superior Court in Prague, in a decision rendered in 1995, dismissed a claim by a provider of cleaning services against the Republic of South Africa for losses out of a cleaning contract.[63] This decision was based on the Act No. 97/1963 concerning Private International Law and the Rules of Procedure Thereto which provide that except for a few stated exceptions, foreign States enjoy absolute immunity in Czech courts.[64]

74. Similarly, the Supreme Court of Poland held in 1990 that "[n]o sovereign and independent state which is a subject of international law can be subordinated to the law of another state".[65] The case concerned a claim by private individuals against the Motor Vehicles Technology Centre (Centrum Techniki Samochodoweij) being an organisational unit of the Commercial Representation at the embassy of the Soviet Union in Poland. The function of this Centre was to cooperate in the maintenance of motor vehicles and other machines, in particular for construction and agricultural purposes. The Supreme Court stated:

> *Without considering the question whether or not the Motor Vehicles Technology Centre, within the framework of legal relations in the territory of the Republic of*

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

3. Where a State enterprise or other entity established by a State which has an independent legal personality and is capable of:

(a) suing or being sued; and

(b) acquiring, owning or possessing and disposing of property, including property which that State has authorized it to operate or manage,

is involved in a proceeding which relates to a commercial transaction in which that entity is engaged, the immunity from jurisdiction enjoyed by that State shall not be affected.

62 See commentary to Article 2, Yearbook of the International Law Commission 1991, volume II, part 2, 19-21, paras. 21-28.

63 CZ/7, Case No. 10CVmo 418/95-19, Superior Court in Prague, Decision of 31 August 1995.

64 CZ/1, Section 47 of Act No. 97/1963 concerning Private International Law and the Rules of Procedure Thereto, dated 4 December 1963 (as amended). The stated exceptions are proceedings concerning real property located in the Czech Republic and rights relating to such property, inheritance proceedings, proceedings concerning the pursuance of a profession or commercial activity of a foreign State or officials of a foreign State outside their official duties, and voluntary submission to the jurisdiction. See also CZ/2 and CZ3.

65 PL/1, *Polish Citizens* v. *Embassy of Foreign State*, Supreme Court of Poland, 26 September 1990, OSNCP 1991/2-3/17.-III PZP 9/90.

> *Poland, enjoyed a limited, i.e. special legal capacity granted to some legal persons, which extends beyond the scope of the legal problem as presented to the [Court], the Supreme Court has determined that the Centre, being an organisational unit of the Commercial Representation of the Soviet Union, did not fall within the national jurisdiction in the meaning of art. 64 § 1 of the Code of Criminal Procedure, and could not appear in the case as the defendant.*[66]

75. Thus the Supreme Court of Poland did not enter into an examination as to whether any commercial activity exercised by the subunit of the embassy of a foreign State could exclude the immunity of the sending State as defendant in the case but settled for the mere formal criteria of the Centre being a subunit of the embassy.[67] In 2000, however, the Supreme Court of Poland delivered a decision in a labour dispute in which it obviously applied the theory of restrictive immunity.[68]

76. More recently the Court of Appeal of Bucharest, in a statement issued in 2003, took the view that a foreign State may not be defendant in any dispute tried in Romania, irrespective of the nature of the dispute.[69] Despite this clear statement in favour absolute immunity, the Tribunal of Bucharest rejected the claim for immunity of a foreign State in a case concerning real estate, since the foreign State "acted […] as a civil moral person and therefore is deemed not to have immunity".[70]

77. Finally, the High Arbitration Court of the Russian Federation rejected a claim of a Russian construction company which sued the embassy of a foreign State for a debt arising out of a construction contract it had concluded with the embassy. The High Arbitration Court held that unless the Embassy had consented to the exercise of jurisdiction the foreign State enjoyed immunity.[71] It is unfortunately not clear from the documents as to whether the Arbitration Court referred to diplomatic or State immunity.

78. But other States than former socialist States as well have at times applied the principle of absolute immunity, although not in express terms. Thus, the Supreme Court of Portugal held that "[f]oreign States are entitled to immunity from jurisdiction as to the generality of cases that could be brought against them, even if acting as private law persons".[72] Although this decision dates back to 1962, it is considered to be of considerable importance for the Portuguese case law.[73] Thus, the District Court of Porto stated in a decision of 1981 that foreign States were entitled to immunity from jurisdiction and that this immunity encompassed not only acts *iure imperii* "but also cases where the State acts as a private law person".[74] Even more direct was the District Court of Lisbon,

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66 *Ibid*. It is not clear why the Supreme Court applied criminal law although the case concerned a civil law case. Likewise it is not clear what the relation between the plaintiffs and the defendant was and under what title they claimed compensation ("payment").

67 One reason for the Court's decision could be that the Centre was established in implementation of a bilateral agreement Poland and the Soviet Union but the decision is silent on that issue. See also *infra* 4.5.

68 PL/2, *Polish Citizen* v. *Embassy of Foreign State*, Supreme Court of Poland, 11 January 2000, OSNAP 2000/18/723 – IPN 562/99.

69 RO/1, Address from the chairman of the IIIrd Civil Section to the Chairman of the Court of Appeal of Bucharest, 29 May 2003.

70 RO/2, *G. M. & T. I.* v. *The Embassy of P in Bucharest*, Vth Civil and Administrative Section of the Tribunal of Bucharest, 9 March 2001, Address from the Chairman of the Tribunal of Bucharest to the Ministry of Foreign Affairs of Romania.

71 RUS/5, *Russian Co.* V. *Embassy of State X*, High Arbitration Court of the Russian Federation, Information letter of the Presidium of the High Arbitration Court of the Russian Federation No. 58, 18 January 2001.

72 P/1, *United States of America (State)* v. *Companhia Portuguesa de Minas, SARL (Private Company)*, Supreme Court of Portugal (Supremo Tribunal de Justiça), Appeal, 27 February 1962, Boletim do Ministéro da Justiça, 1962, No. 114.

73 See the introductory remark in the response by Portugal.

74 P/2, *Aurélio Moreira de Sousa (individual)* v. *Consulado Geral de Espanha no Porto (Consular mission)*, District Court of Porto (Tribunal da Relação do Porto), Appeal, 5 January 1981, Colectânea de Jurisprudência, 1981, No. VI-1.

when it stated that Portuguese courts were "internationally incompetent to judge a law suit against the Spanish State".[75]

79. However, the validity of this case law of the Portuguese courts is doubtful given its inconsistency[76] as well as the fact that in more recent decisions the courts, including in particular the Supreme Court, have explicitly adopted the principle of restricted immunity for acts *iure imperii*.

80. In a case brought before the District Court of Helsinki two Estonian companies disputed over an alleged breach of contract. The plaintiff had a permanent place of business in Finland whereas the respondent was owned by the State of Estonia and under the control of the Estonian Ministry of Trade and Energy at the time the contract was concluded. The latter was subsequently, i.e. after the conclusion of the contract, privatized. The Court referred to the prevailing view as to State immunity in Estonia and stated that the socialist countries used to consider that immunity was enjoyed not only with respect to acts *iure imperii* but also as regards acts *iure gestionis*. It found that since Estonia enjoyed immunity it had no jurisdiction and rejected the claim without considering the merits of the case.[77]

81. While this review discloses more decisions on absolute immunity than expected, practice with regard to absolute immunity is scarce the more so as most of the cases are not free from ambiguity, and are rather isolated or at least peculiar as to their factual background, or have been rendered obsolete by later jurisprudence. Nevertheless they show that still today the theory of absolute immunity plays a role — albeit a marginal one — in the practice of European States.

3.2. Domestic laws concerning the commercial transaction exception

82. Most States do not have specific laws dealing with the question of State immunity in general, even less concerning the commercial transaction exception. The situation as regards domestic laws concerning State immunity is nevertheless diverse. Pursuant to the material available, the States can be divided into four categories with regard to domestic legislation on State immunity: (1) States which have no legislation at all,[78] (2) those which have individual provisions referring to the rules of public international law,[79] (3) those having legislation dealing with particular aspects of the immunity of foreign States,[80] and (4) those having a more or less comprehensive legislation addressing the issue of State immunity in its entirety, even if not reflecting the current international practice.[81]

83. The only State having extensive domestic legislation on State immunity is the United Kingdom with its 1978 State Immunity Act.[82] This Act explicitly provides for a commercial transaction exception in its section 3.[83] Like the ILC and the ILA Drafts, the State Immunity Act

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75 P/6, *Maria Cristina Silva (individual)* v. *The Spanish Institute, the Spanish Embassy and the Spanish State*, District Court of Lisbon (Tribunal da Relação de Lisboa), Appeal, 9 November 1988, Colectânea de Jurisprudência, 1988, NO. XIII-5.

76 Thus the decision rendered in P/6 (*supra* note 75) is in clear contradiction to a decision of the Supreme Court of Portugal in a very similar case rendered only one year earlier and in which the Court held that a foreign school (*in casu* it likewise was the Spanish Institute) was distinct from the foreign State and thus could be tried in Portuguese courts. See P/5, *Carlos Manuel Flores André and Miguel Carlos Parada Andrè (individuals)* v. *Spanish Institute in Lisbon (foreign school)*, Supreme Court of Portugal (Supremo Tribunal de Justiça), 17 June 1987, Boletim do Ministério da Justiça, 1987, No. 368.

77 FIN/13, *As Veli ja Veljed (company)* v. *Republic of Estonia*, District Court of Helsinki, 11 July 2001, Case No. 00/23032.

78 E.g. France.

79 E.g. Austria, Croatia, Germany (D/1/LEG), The Netherlands, Spain (E/1).

80 E.g. Russia (RUS/1, RUS/2, RUS/3, RUS/4), Turkey.

81 E.g. the Czech Republic (CZ/1), Slovakia (SK/1).

82 For the text see International Law Reports, vol. 64, 718.

83 Section 3 reads as follows:

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

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

(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.

provides for both a general rule excepting commercial transactions from the scope of immunity, and for a definition of what a commercial transaction is. The Act also excludes from the scope of jurisdictional immunity proceedings relating an obligation arising out of a contract — whether a commercial contract or not.

84. In addition, it must be noted that in those States which have ratified the European Convention, the latter forms in principle part of the domestic law applicable by municipal courts and tribunals.

4. Elements of the commercial transaction exception

4.1. The distinction between sovereign acts and commercial transactions

4.1.1. Nature *v.* purpose, again

85. The most important and certainly most disputed aspect of the commercial transaction exception is the method of distinguishing acts in exercise of sovereign authority for which the State enjoys immunity, from commercial acts, for which immunity cannot be invoked. As is well known there has been continued controversy between those who favour the distinction to be made according to the nature of the act and those who support the purpose of the act as the decisive criterion. The ILA as well as the ILC Draft favour the nature of the act test, the ILA Draft more ("the commercial character of a particular act shall be determined by reference to the nature of the act, rather than by reference to its purpose")[84] than the ILC Draft ("reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account")[85].

86. The overwhelming majority of cases available clearly show that the courts of European countries prefer the nature over the purpose of the act test. The nature of the act at issue is the prime test employed by the courts of Austria,[86] Belgium,[87] Germany,[88] the Netherlands,[89] Norway,[90]

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(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 any other financial obligation;

(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.

84 See *supra* note 60.

85 See *supra* note 61.

86 A/4, *X. Y (individual)* v. *Embassy of X (State)*, No. 2 Ob 243/60, Supreme Court of Austria (Oberster Gerichtshof), 10 February 1961, 40 International Law Reports 73; A/7, *E. AG Wien (individual)* v. *L (State)*, No. 40/R7/01b, Regional Court Vienna as appellate court, 23 January 2001, 6 Austrian Review of International and European Law 313 (2001); A/8, *R. W. (individual)* v. *United States*, No. 8 ObA 201/00t, Supreme Court of Austria (Oberster Gerichtshof), 11 June 2001, 6 Austrian Review of International and European Law 304 (2001); A/10, *K. S. (individual)* v. *Kingdom of B. (State)*, No. 4 Ob 97/01w, Supreme Court of Austria (Oberster Gerichtshof), 14 May 2001, 6 Austrian Review of International and European Law 288 (2001); *Flughafen Linz (Airport Linz)* v. *United States of America*, Supreme Court of Austria, 2 Ob 156/03k, 28 August 2003, Austrian Review of International and European Law 8 (forthcoming 2003).

87 B/1, *Société anonyme des chemins de fer liégois-luxemburgois* v. *Etat néerlandais (Ministère du Waterstaat)*, Cour de Cassation, 11 June 1903, Pasicrisie 1903, I, 294; B/6, *Société de droit irakien Rafidain Bank et crts* v. *Consarc Corporation, société de droit américain et crts*, Cour d'Appel de Bruxelles, 10 March 1993, Journal des Tribunaux 1994, 787.

88 D/2/JUD, *Anonymous heating installation repair shop* v. *Iranian Empire*, Federal Constitutional Court (Bundesverfassungsgericht), 30 April 1964; D/08/JUD, *Argentine citizen* v. *Republic of Argentina*, Federal Labour Court (Bundesarbeitsgericht), 3 July 1996, Entscheidungen des Bundesarbeitsgerichts, vol. 83, 262.

89 NL/5, *Société Européenne d'Etudes et d'Entreprises en liquidité volontaire (SEEE)* v. *Socialist Federal Republic of Yugoslavia*, Supreme Court, 26 October 1973, RvdW (1973) No. 64, N.J. (1974) No. 361.4, Netherlands Yearbook of International Law (1972) 290; NL/12, *The Russian Federation* v. *Pied-Rich B.V.*, Supreme Court, 28 May 1993, NJ 1994, No. 329, Netherlands Yearbook of International Law (1994), 512; NL/13, *The Kingdom of Morocco* v. *Stichting Revalidatiecentrum "De Trappenberg"*, Supreme Court, 25 November 1994, NJ 1995, No. 650, Netherlands Yearbook of International Law (1996), 321

90 N/1, *Brødrene Smith Entreprenørforretning (company)* v. *den Sør-Afrikanske stat (South Africa)*, Eidsivating Court of Appeal (Eidsivating Lagmannsrett), 18. February 1992, Nordic Journal of International Law 70 (2001), 531.

Switzerland,[91] the United Kingdom,[92] and France[93]. The specific application of the nature test varies of course to a considerable degree but in all these cases the courts have explicitly resorted to the nature of the act in order to determine whether the act was one *iure imperii* or *iure gestionis*.

87. The main reason for the predominance of the nature over the purpose test is generally seen in the fact that invoking the purpose of a specific act may always be used by States to invoke immunity. As one distinguished author states:

> *The problem with the purpose test is, of course, that once we start inquiring into the underlying motives of the State partner to a transaction we will most probably end up with some political purpose somewhere. No matter how genuinely commercial an activity is, it can always be traced to some aspect of public welfare.*[94]

88. In this sense, the Dutch Supreme Court stated that the fact that an undertaking by a foreign State was given in order to promote its economic interests "does not mean that this act was clearly a government act. What was decisive was the nature of the act, not the motive".[95] It was also considered "irrelevant that the transaction has been concluded under an enabling Act" or that the contested activity had a military or strategic character.[96] On the other hand, acts *iure imperii* need not be accompanied by coercive means and it is immaterial whether there are technical or other rules that should be applied to them.[97]

89. Despite this great number of cases listed above, which apply exclusively the nature of the act test, the purpose of the activity is often also taken into account, either on an equal footing, or on a more subsidiary basis. Thus, the District Court of Helsinki has for instance held in a case concerning a financial guarantee made by a foreign State that "the nature and the purpose of the state transaction had conclusive significance" so as to exclude immunity.[98]

90. In a case brought before the Supreme Court of Japan the plaintiffs, who resided near a United States Armed Forces' air base close to Tokyo, requested the cessation of night time takeoffs and landings as well as compensation for their invasion of privacy. The Supreme Court affirmed the decision of the Tokyo High Court rejecting the claim and stated that "judging from the purpose or the nature of these activities, it is clear that they are sovereign acts".[99]

91. Also, Swedish courts tend to apply nature and purpose of the act on an equal footing. In 1999, the Swedish Supreme Court was faced with a dispute arising out of a contract between a

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91 CH/5, *R.* v. *République d'Irak*, 1ère Cour civile du Tribunal federal Suisse, 13 December 1994, ATF 120 II 408; CH/6, *Italie* v. *X. et Cour d'appel du canton de Bâle-ville*, 1ère Cour de droit public du Tribunal fédéral Suisse, 6 February 1985 ATF 111 Ia 52; CH/8, *République Arabe Unie* v. *Dame X.*, Tribunal fédéral Suisse, 10 February 1960, ATF 86 I 23; CH/11, *S.* v. *République socialiste de Roumanie et Cour des poursuites et faillites du Tribunal cantonal du canton de Vaud*, 1ère Cour de droit public du Tribunal fédéral Suisse, 19 January 1987, ATF 113 Ia 172; CH/12, *Banque Bruxelles Lambert et consorts* v. *République du Paraguay et Sezione speciale per l'assicurazione del credito all'esportazione*, 1ère Cour de droit civil du Tribunal fédéral Suisse, 20 August 1998, ATF 124 III 382; CH/20, *Banque centrale de la République de Turquie* v. *Weston Compagnie de Finance et d'Investissement*, Swiss Federal Court, 15 November 1978, ILR 65, 417, 419; CH/24, *République X.* v. *OFJ*, 1ère Cour de droit public du Tribunal fédéral Suisse, 25 June 2001 (unpublished).

92 GB/13, *Sengupta* v. *Republic of India*, Employment Appeal Tribunal, 17 November 1982, ILR 64, 352; GB/14, *1º Congreso Del Partido*, House of Lords, 16 July 1981, [1981] 3 WLR 328; GB/16, *Littrell* v. *USA (No. 2)*, Court of Appeal, 12 November 1993, [1994] 4 All ER 203, International Law Reports 100, 438.

93 F/1, *Société Levant Express Transport (entreprise privée)* v. *Chemins de fer du gouvernement iranien (administration gouvernementale)*, Cour de cassation (1er chambre civile), 25 February 1969, Revue critique de droit international privé (1970), 102.

94 Christoph Schreuer, *State Immunity: Some Recent Developments* (1988), 15.

95 NL/12, *The Russian Federation* v. *Pied-Rich B.V.*, Supreme Court, 28 May 1993, NJ 1994, No. 329, Netherlands Yearbook of International Law (1994), 512.

96 NL/5, *Société Européenne d'Etudes et d'Entreprises en liquidité volontaire (SEEE)* v. *Socialist Federal Republic of Yugoslavia*, Supreme Court, 26 October 1973, RvdW (1973) No. 64, N.J. (1974) No. 361.4, Netherlands Yearbook of International Law (1972) 290.

97 P/10, *Manuel Ventura Arroja* v. *Republic of Bolivia*, Supreme Court (Supremo Tribunal de Justiça), Appeal, 4 February 1997, Boletim do Ministéro da Justiça (1997), No. 464.

98 FIN/16, *Yrityspankki Skop Oy (company)* v. *Republic of Estonia (State)*, District Court of Helsinki, Case No., 95/1997, 21 January 1998.

99 J/3, *X et al.* v. *the United States of America*, Supreme Court of Japan, 14 March 2002, Hanrei Jihou No. 1786, 2002, Japanese Annual of International Law 46 (2003), 161.

local municipal authority and the Icelandic Ministry of Education and Culture. Pursuant to this contract, which itself was based on an intergovernmental agreement between the Nordic countries> The local authority had given flight-technician education to Icelandic students. After having given the education, the local authority sued the Republic of Iceland claiming that Iceland had to defray costs for the students according to the contract. Iceland for its part invoked State immunity.

92. In addressing the issue, the Supreme Court first stated that establishing criteria for a categorisation of the acts of a State was a controversial issue and referred to the form and nature of the act as well as its purpose. It admitted that it was difficult to formulate a distinction that was applicable in all circumstances, and that, with respect to this problem, it was equally difficult to speak of an established practice of States. For the Court, the most convincing solution, from a practical point of view, was to make an assessment in each particular case of the circumstances that support one position or the other. In the instant case, the Court was of the opinion that the contract between the Icelandic Ministry and the local authority "concern[ed] a subject that is typically of a public-law nature and has also been regulated by an intergovernmental agreement mentioned in the contract".[100]

93. Mention must also be made of a statement of the Swedish Ministry for Foreign Affairs to the Swedish Competition Authority regarding the question of State immunity in general as well as with respect to a specific case before the Authority. The case concerned the ferry service between Sweden and Estonia. A Swedish company had concluded an agreement in 1989 with the then Soviet Estonian Transport Committee which established a joint company being granted the exclusive right to run the ferry service between Stockholm and Tallinn without competition for ten years. The Estonian government later on decided to "transfer" the agreement to the Estonian Shipping Company. The Swedish Competition Authority investigated the matter according to Swedish competition law and made inquiries at the Foreign Ministry with regard to State immunity. In response, the Foreign Ministry took the view that according to the information available, it seemed as if the *purpose* of the disputed act mainly had been to establish a commercial ferry service. Therefore, the Ministry found that the acted seemed to belong to acts *iure gestionis*, wherefore it would be difficult for Estonia to invoke State immunity before a Swedish court.[101]

94. On the other hand, in a statement with regard to the ILC Draft Articles, the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) took the view that "in determining whether a contract for the sale of goods or the supply of services is commercial, reference should only be made to the nature of the contract and not to the purpose of the contract".[102] This statement would appear to shed a different light on the Swedish practice mentioned above.

95. There are also decisions in which it appears that the courts lay great emphasis on the purpose to be achieved without looking at all to the nature of the act. Thus, Italian courts have repeatedly invoked the purpose of the activity undertaken to classify it as commercial or in exercise of sovereign authority. For instance, the Tribunal of Rome held that foreign States enjoyed immunity "when, acting in their capacity as international law subjects or in the exercise of the powers of a public authority, [they] perform acts aimed at attaining public goals".[103] Likewise, the Supreme Court of Cassation stated that "foreign States are immune from jurisdiction and execution in the performance of the functions by which they pursue their institutional public goals".[104]

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100 S/CT/8, *Västerås kommun (The Local Authority of the Municipality of Västerås)* v. *Icelandic Ministry of Education and Culture*, Supreme Court of Sweden, 30 December 1999, Nytt Juridiskt Arkiv 1987, Avd I, Case No. 1999:112; see also Mahmoudi Said, "Local Authority of Västerås v. Republic of Iceland", American Journal of International Law 95 (2001), 192.

101 S/E/13, Statement of the Swedish Ministry for Foreign Affairs to the Swedish Competition Authority, 25 January 1996.

102 S/E/4, Comments of the Nordic Countries on the ILC Draft Articles on Jurisdictional Immunities of States, 21 December 1987, para. 2.

103 I/12, *Società immobiliare Corte Barchetto* v. *Morocco*, Tribunal of Rome, 29 April 1977, Italian Yearbook of International Law (1980-81), 222.

104 I/15, *Sindacato UIL-Scuola di Bari* v. *Istituto di Bari del Centro internazioale di studi agronomici mediterranei*, Supreme Court of Cassation, 4 June 1986, Rivista di diritto internazionale (1987), 182. See also I/26, *Mallavel* v. *Ministère des affaires étrangères français*, Pretore (lower court judge) of Rome, 29 April 1974, Italian Yearbook (1976), 322.

96. Italian courts do however not provide consistent case law. Thus, the Court of Appeal of Rome held that "[w]ith a view to recognising immunity, not the ultimate goal pursued by the foreign State, but only [the] private activity which could be performed by a private subject is relevant",[105] thus reversing a previous decision by the Tribunal of Rome.[106] Likewise, with regard to a dispute arising out of a lease contract concerning immovable property, the Tribunal found that "[n]ot even the public aim for which the contract was signed, i.e. the use of the immovable property as premises of the Embassy, could subtract the contract from the jurisdiction of the Italian State".[107]

97. In some cases the nature of the act test is considered inapplicable where the activity is inextricably linked with sovereign purposes, e.g. warships. Thus, the Dutch Supreme Court held:

> *As international law stands at present, foreign States are not subject to the jurisdiction of the Dutch courts in respect of claims arising in the Netherlands as the result of the operation of ships which belong to or are operated by them and which are used in the performance of a typical government function (such as military action). The nature of the act or event giving rise to the claim is not of importance in this connection.*[108]

98. The fact that sometimes the purpose is considered as important as the nature of the act, or even more important than the latter, is not surprising in view of the fact that "[e]very human activity can only be described in a legally meaningful way by reference to some purpose".[109] Thus in many cases it will be a valid method to also inquire into the motives of a specific conduct, in addition to a scrutiny of the nature of the act. In that regard, Article 1(2) of the ILC Draft seems justified, even though it confines the recourse to the purpose only in case of agreement or when the practice of the forum State so requires.

99. At times, the transaction consists of various individual acts having a different character. In such cases it is often difficult to identify, as it were, the focus of the act.[110] In a recent case the Austrian Supreme Court was faced with this problem when it was requested to adjudge the claim of a civil commercial airport in Austria against the United States whose air force used the airport within the framework of IFOR/SFOR operations on the Balkans. The airport company claimed the payment of the fees and charges due for landing and take-off. While the Supreme Court made it clear that the deployment of military aircrafts per se was an act *iure imperii*, it was faced with the question whether the landing and taking off at a civil airport were, according to their nature, acts of a private law character.

100. The plaintiff moreover argued that the military airplanes had been not on a military but rather on a humanitarian mission when using the civil airport. Such humanitarian missions however could also be carried out by private individuals. The Supreme Court affirmed the decisions of the lower courts rejecting the claim, holding that the specific conduct, i.e. the landing and take-off, only were auxiliary measures in carrying out a broader task, namely the implementation of a Resolution of the UN Security Council binding upon Austria under international law. Since the landing and take-off were inseparably linked with an act in exercise of sovereign authority, they could not be considered in isolation but, in terms of jurisdictional immunity, shared the fate of the broader activity of a *iure imperii* character. The Supreme Court added that acts carried out under an international treaty were always *iure imperii*. Resolutions of the UN Security Council binding upon

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105 I/22, *Morocco* v. *Società immobiliare Corte Barchetto*, Court of Appeal of Rome, 12 September 1979, Italian Yearbook of International Law (1980-81), 226.

106 I/12, *supra* note 103.

107 I/21, *Società immobiliare Corte Barchetto* v. *Morocco*, Tribunal of Rome, 29 April 1977, Italian Yearbook of International Law (1980-91), 222.

108 NL/16, *The United States of America* v. *Havenschap Delfzijl/Eemshaven (Delfzijl/Eemshaven Port Authority)*, Supreme Court, 12 November 1999, NJ 2001, No. 567, Netherlands Yearbook of International Law (2001).

109 Christoph Schreuer, *State Immunity: Some Recent Developments* (1988), 16. See also James Crawford, "International Law and Foreign Sovereigns: Distinguishing Immune Transactions", British Yearbook of International Law 54 (1983), 95; Hazel Fox, *The Law of State Immunity* (2004), 286.

110 As to the problem of individuation and change over time in activity see James Crawford, "International Law and Foreign Sovereigns: Distinguishing Immune Transactions", British Yearbook of International Law 54 (1983), 95 *et seq.*; Hazel Fox, *The Law of State Immunity* (2004), 286 *et seq.*.

member States under Article 25 of the Charter of the United Nations had to be equated with obligations under international treaties.[111]

4.1.2. Other criteria

101. A scrutiny of the material available reveals other criteria in addition to nature and purpose applied by courts in distinguishing commercial from sovereign acts. An often used formula is that according to which an act is considered *iure gestionis* when it could also be carried out by a private individual.[112] In its famous decision in *1º Congreso Del Partido* , the House of Lords (Lord Wilberforce) stated that "a private act means […] an act of a private law character such as a private citizen might have entered into".[113] Thus whenever the State acts like a private individual, it cannot invoke immunity.[114]

102. In a similar vein, courts frequently focus on the formal criteria of the conclusion of a contract which, according to its contents, is in principle subject to the private law of the forum State. In other words, when the foreign State resorts to "private instruments of domestic law", it cannot invoke immunity for a dispute arising out of this contract or other instrument.[115] The signing of an agreement was also considered as inferring that the foreign State acted as a private law subject within the jurisdiction of the forum State.[116] Due to the lack of detailed information, however, it could not be ascertained whether this case was truly an application of the commercial transaction exception or rather of the principle of implied waiver.

4.1.3. The pragmatic approach: The context and the circumstances of the case

103. A less formalistic and more pragmatic approach has been taken by the Swiss courts: in addition to the nature test they take a look at other criteria which are "external" to the act at issue. In particular they call for a balancing of the different interests that are at stake: the foreign State wants to benefit from immunity, the forum State has an interest in exercising its jurisdictional sovereignty and the individual wishes to obtain judicial protection of his rights.[117] Another "external criterion" taken into consideration by the Swiss courts is the place where the foreign State has acted which may furnish certain indications as to the classification of the act. In this sense, when a State enters into relation with an individual outside its boundaries on the territory of another State without the diplomatic relations with the latter being at issue, this is considered a significant indication that it carries out an act *iure gestionis*.[118] A further indication for the Swiss courts that the

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111 *Flughafen Linz (Airport Linz)* v. *United States of America*, Supreme Court of Austria, 2 Ob 156/03k, 28 August 2003, Austrian Review of International and European Law 8 (forthcoming 2003).

112 B/1, *Société anonyme des chemins de fer liégois-luxemburgois* v. *Etat néerlandais (Ministère du Waterstaat)*, Cour de Cassation, 11 June 1903, Pasicrisie 1903, I, 294 ; CH/8, *République Arabe Unie* v. *Dame X.*, Tribunal fédéral Suisse, 10 February 1960, ATF 86 I 23; A/4, *X. Y (individual)* v. *Embassy of X (State)*, No. 2 Ob 243/60, Supreme Court of Austria (Oberster Gerichtshof), 10 February 1961, 40 International Law Reports 73.

113 GB/14, *1º Congreso Del Partido*, House of Lords, 16 July 1981, [1981] 3 WLR 328.

114 B/6, *Société de droit irakien Rafidain Bank et crts* v. *Consarc Corporation, société de droit américain et crts*, Cour d'Appel de Bruxelles, 10 March 1993, Journal des Tribunaux 1994, 787; I/12, *Società immobiliare Corte Barchetto* v. *Morocco*, Tribunal of Rome, 29 April 1977, Italian Yearbook of International Law (1980-81), 222; GR/9, Judgment 12845/1990, Athens Court of Appeals, 1990, Elliniki Dikaiosyni 1992, 882; NL/13, *The Kingdom of Morocco* v. *Stichting Revalidatiecentrum "De Trappenberg"*, Supreme Court, 25 November 1994, NJ 1995, No. 650, Netherlands Yearbook of International Law (1996), 321; CH/20, *Banque centrale de la République de Turquie* v. *Weston Compagnie de Finance et d'Investissement*, Swiss Federal Court, 15 November 1978, ILR 65, 417.

115 I/38, *Libya* v. *Condor Srl*, Supreme Court of Cassation, 23 August 1990, Rivista di diritto internazionale (1991), 679; I/51, *Fincantieri SpA and Oto Melara SpA* v. *Irak*, Tribunal of Genoa, 9 December 1992, Rivista di diritto internazionale privato e processuale (1993), 413; I/44, *Fincantieri-Cantierie navali SpA and Oto Melara SpA* v. *Irak*, Cour of Appeal of Genoa, 7 May 1994, Nuova giurisprudenza civile commentate (1995), I, 661; GR/10, Judgment 13043/1988, 1988, Dike (Trial) 1990, 288; GR/12, *X. (individual)* v. *Japan*, Supreme Court (Areios Pagos) Chamber, No. 1498/1986, 1986, Elliniki Dikaiosyni (1987), 1029.

116 I/72, *Spain* v. *Chiesa die San Pietro in Montorio*, Supreme Court of Cassation, 6 May 1997, Rivista di diritto internazionale privato e processuale (1998), 605.

117 CH/5, *R.* v. *République d'Irak*, 1ère Cour civile du Tribunal fédéral Suisse, 13 December 1994, ATF 120 II 408; CH/11, *S.* v. *République socialiste de Roumanie et Cour des poursuites et faillites du Tribunal cantonal du canton de Vaud*, 1ère Cour de droit public du Tribunal fédéral Suisse, 19 January 1987, ATF 113 Ia 172.

118 CH/8, *République Arabe Unie* v. *Dame X.*, Tribunal fédéral Suisse, 10 February 1960, ATF 86 I 23; CH/11, *S.* v. *République socialiste de Roumanie et Cour des poursuites et faillites du Tribunal cantonal du canton de Vaud*, 1ère Cour de droit public du Tribunal fédéral Suisse, 19 January 1987, ATF 113 Ia 172

act is one *iure gestionis* is a *prorogatio fori* contained in the contract and in favour of Swiss courts.[119]

104. The Employment Appeal Tribunal of the United Kingdom also applied a variety of criteria in addition to the nature of a contract by asking the following questions: Was the contract of a kind which a private individual could enter into? Did the performance of the contract involve participation of both parties in the public functions of the foreign State, or was it purely collateral to such functions? What was the nature of the breach of contract or other act of the foreign State giving rise to the proceedings? Will the investigation of the claim by the Tribunal involve investigation into the public or sovereign acts of the foreign State?[120] In this context, mention must also be made of a decision of the Supreme Court of Sweden, which was already referred to above,[121] where the Supreme Court made an evaluation of all the circumstances at hand before assessing the character of the disputed act.[122]

105. In concluding we may state that while the majority of cases clearly speak in favour of the criterion of the nature of the act in order to distinguish commercial from sovereign acts, it would nevertheless appear that in many instances the respective courts or tribunals have considered the whole context against which the claim against the foreign State is made. In doing so, the purpose or motive of the act as well as the question whether a private individual could equally perform this act, facts external to the disputed act and many other criteria are applied.

4.1.4. Other aspects of the distinction

106. There are a few other important aspects when distinguishing commercial from sovereign acts. Thus the question arises who will determine whether the foreign State enjoys immunity. In general, this will of course be the court seised of the case, but other organs or authorities of the forum State may also be involved. Thus, the Council of State of the Netherlands stated:

> *We can […] concede […] that when interpreting and applying customary international law in particular, the courts should take account of the fact that the Government, as the representative of the State in dealings with other States, also helps to mould the law by disseminating its views on what the law is and by endeavouring to observe in its dealings the practice based on these views. Justice can be done to the Government's special position if the courts hear the Government's advisers on international law to ascertain its views on legal positions […] and accord deference to this opinion which is due on account of the special position.*[123]

107. In determining whether a foreign State enjoys jurisdictional immunity, courts and tribunals often are faced with the question which law they should apply in determining the commercial or sovereign nature of an act. Here the state practice examined is completely inconsistent. Some decisions reflect the view that a determination of the act has to be done in light of international law,[124] some clearly state that the distinction has to be made according to the law of the forum State,[125] others take the view that both the national law of the forum State and international law —

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119 CH/12, *Banque Bruxelles Lambert et consorts* v. *République du Paraguay et Sezione speciale per l'assicurazione del credito all'esportazione*, 1ère Cour de droit civil du Tribunal fédéral Suisse, 20 August 1998, ATF 124 III 382.

120 GB/13, *Sengupta* v. *Republic of India*, Employment Appeal Tribunal, 17 November 1982, ILR 64, 352. The case concerned an employment contract; therefore it will not be examined here.

121 See *supra* note 100 and accompanying text.

122 S/CT/8, *Västerås kommun (The Local Authority of the Municipality of Västerås)* v. *Icelandic Ministry of Education and Culture*, Supreme Court of Sweden, 30 December 1999, Nytt Juridiskt Arkiv 1987, Avd I, Case No. 1999:112.

123 NL/7, *M. K.* v. *State Secretary for Justice*, Council of State, President of the Judicial Division, 24 November 1984, KG 1987, 38, Netherlands Yearbook of International Law (1988), 439.

124 See e.g. A/5, *X. Y. (individual)*, v. *X (State)*, Supreme Court of Austria, 5 Nd 509/87, 23 February 1988, Austrian Journal of Public and International Law 39 (1988/89), 360. The Austrian Supreme Court has repeatedly affirmed this view, see most recently *Flughafen Linz (Airport Linz)* v. *United States of America*, Supreme Court of Austria, 2 Ob 156/03k, 28 August 2003, Austrian Review of International and European Law 8 (forthcoming 2003); NL/10, *M. K. B. van der Hulst* v. *United States of America*, Supreme Court of the Netherlands, 22 December 1989, RvdW (1990), No. 15, Netherlands Yearbook of International Law (1991), 379.

125 B/6, *Société de droit irakien Rafaidain Bank et crts* v. *Consarc Corporation, sociéte de droit américain et crts*, Cour d'Appel de Bruxelles, 10 March 1993, Journal des Tribunaux 1994, 787; D/2/JUD, *Anonymous heating installation*

at least international treaties to which the forum State is a party — are relevant.[126] Still others request the deciding authority of the forum State (i.e. the court or tribunal) to look at the public law of the foreign State invoking immunity — without however applying the foreign law —,[127] consider the practice of the foreign State,[128] or refer to the regulatory system of the foreign State[129].

4.2. Examples of commercial transactions

108. It is interesting to note that the cases scrutinized either concerned obvious commercial acts or clearly involved acts in exercise of sovereign authority. In other words and, quite surprisingly, there were only two borderline cases which, against a similar factual background, were decided in a contradictory manner.[130] Since the vast majority of cases are all free of doubt, they will be presented only in an exemplary way.

4.2.1. Sale of goods and supply of services

109. It belongs to the standard repertoire of practice that the constructing and operating of a railroad is an activity *iure gestionis*. This was decided by a Belgian court as early as 1903[131] and other States followed this example.[132] Other examples include the conclusion of a contract between the Ministry of Industry and Armament of a State and two foreign companies for the supply of specific materials for medical and research purposes,[133] construction or building contracts between foreign States and local companies,[134] the purchase of airplane tickets,[135] the supply of telephone services,[136] or a contract on the management and use of a hotel.[137]

4.2.2. Loan or transaction of a financial nature

110. With regard to transactions of a financial nature, the available case law is unambiguous. Among the activities that have been considered to fall under this category, and hence outside the scope of State immunity, are the granting of a guarantee by a foreign State to secure a credit opened by the export association of agricultural producers of that State with a private bank of

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repair shop v. *Iranian Empire*, Federal Constitutional Court (Bundesverfassungsgericht), 30 April 1964, D/8/JUD, *Argentine citizen* v. *Republic of Argentina*, Federal Labour Court (Bundesarbeitsgericht), 3 July 1996, Entscheidungen des Bundesarbeitsgerichts, vol. 83, 262; GR/4, *X. (individual)* v. *The Italian Republic*, Athens Court of Appeals, No. 5288/1993, 1993, Epitheorsisi Emborikou Dikaiou, vol. 53 (1994), 763; GR/12, *X. (individual)* v. *Japan*, Supreme Court (Areios Pagos) Chamber, No. 1498/1986, 1986, Elliniki Dikaiosyni (1987), 1029.

126 GR/15, *X.* v. *Japan*, Court of First Instance of Thessaloniki, Judgment 519/1981, 1981, Elliniki Dikaiosyni (1983), 704.

127 CH/6, *Italie* v. *X. et Cour d'appel du canton de Bâle-ville*, 1ère Cour de droit public du Tribunal fédéral Suisse, 6 February 1985 ATF 111 Ia 52; F/1, *Société Levant Express Transport (entreprise privée)* v. *Chemins de fer du gouvernement iranien (administration gouvernementale)*, Cour de cassation (1er chambre civile), 25 February 1969, Revue critique de droit international privé (1970), 102.

128 FIN/13, *As Veli ja Veljed (company)* v. *Republic of Estonia*, District Court of Helsinki, 11 July 2001, Case No. 00/23032.

129 FIN/16, *Yrityspankki Skop Oy (company)* v. *Republic of Estonia (State)*, District Court of Helsinki, Case No., 95/1997, 21 January 1998.

130 See *infra* 4.2.3.

131 B/1, *Société anonyme des chemins de fer liégois-luxembourgois* v. *Etat néerlandais (Ministère du Waterstaat)*, Cour de Cassation, 11 June 1903, Pasicrisie 1903, I, 294.

132 NL/12, *The Russian Federation* v. *Pied-Rich B.V.*, Supreme Court, 28 May 1993, NJ 1994, No. 329, Netherlands Yearbook of International Law (1994), 512; F/1, *Société Levant Express Transport (entreprise privée)* v. *Chemins de fer du gouvernement iranien (administration gouvernementale)*, Cour de cassation (1er chambre civile), 25 February 1969, Revue critique de droit international privé (1970), 102.

133 B/6, *Société de droit irakien Rafidain Bank et crts* v. *Consarc Corporation, société de droit américain et crts*, Cour d'Appel de Bruxelles, 10 March 1993, Journal des Tribunaux 1994, 787

134 DK/1, *Embassy of the Socialist Republic of Czechoslovakia* v. *Jens Nielsen Bygge-Entrepriser*, Supreme Court, 28 October 1982, Ugeskrift for Retsvaesen (1982), 1128; CH/10, *Espagne* v. *X SA*, Swiss Federal Tribunal, 30 April 1986, ATF 112, Ia 148.

135 DK/4, *Pakistans Ambassade* v. *Shah Travel ved Hermunir Hussein Shah (private travel agency)*, Supreme Court, 5 March 1999, Ugeskrift for Retsvaesen (1999), 939.

136 TR/5, *Individu* v. *Consulat des Etats-Unis d'Amérique*, Cour de cassation, 16 November 1989, Revue des décisions de la Cour de cassation (1990), S 6, at 882.

137 TR/8, *Société* v. *Ambassade du Turkménistan*, Tribunal de grande instance, 21 October 2002.

another State,[138] or loans of the State or the central bank issued on the general financial market and the granting of a time deposit.[139] With regard to the issuance of bonds under the guarantee of a foreign government, the Tokyo District Court held:

> *The issuance of bonds is an example of an economic activity being carried out largely and usually as an international financial transaction in international society at the present time. [I]t cannot be considered that a foreign State or the agency of a foreign State, which is acting as a subject in commercial transactions, is entitled to sovereign immunity and that this is affirmed under international customary law.*[140]

4.2.3. Any other contract or transaction

111. The survey of the material disclosed only two cases that can be subsumed under the residual proviso "any other contract or transaction of a commercial, industrial, trading or professional nature". These two cases were both decided by Portuguese courts, both concerned claims against foreign schools, but they were decided in a completely contradictory manner. In the first of these cases, the District Court of Lisbon held that Portuguese courts were internationally incompetent to judge a law suit against the Spanish State, which seems as an echo of absolute immunity.[141] In the second case, the Supreme Court of Portugal stated that the foreign school was distinct from the foreign State and enjoyed autonomy from it. Therefore, it could be tried in Portuguese courts.[142]

4.3. Non-immune transactions

112. The material examined has also revealed cases in which the court or tribunal has affirmed the invocation of State immunity. These cases concern acts which can be considered as textbook examples of acts in exercise of sovereign authority. They will be presented below.

4.3.1. Exercise of police powers

113. The German Federal High Court held that the exercise of police power was undoubtedly part of the sovereign activity of a State, it even was at the core of sovereign power. It further stated that "[f]ulfilling an obligation arising under an international treaty on police cooperation in criminal matters always amounts to an act *iure imperii*". Since the acts of Scotland Yard and its director were sovereign acts of the British State and the director did not act in his private capacity, it would undermine the unlimited immunity of foreign States with regard to their sovereign acts if German courts were to allow actions directly against the individual performing these sovereign acts on behalf of the State.[143] Similarly, the Irish Supreme Court established that the commissioner and an individual agent of the Metropolitan Police of the United Kingdom were also entitled to rely on the sovereign immunity of the State on whose behalf they acted.[144]

4.3.2. Military forces

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138 FIN/16, *Yrityspankki Skop Oy (company)* v. *Republic of Estonia (State)*, District Court of Helsinki, Case No., 95/1997, 21 January 1998.

139 CH/20, *Banque centrale de la République de Turquie* v. *Weston Compagnie de Finance et d'Investissement*, Swiss Federal Court, 15 November 1978, ILR 65, 417, 419.

140 J/4, *X.* v. *The Nauru Finance Corporation/The Republic of Nauru*, Tokyo District Court, 30 November 2000, The Japanese Annual of International Law 44 (2001).

141 P/6, *Maria Cristina Silva (individual)* v. *The Spanish Institute, the Spanish Embassy and the Spanish State*, District Court of Lisbon (Tribunal da Relação de Lisboa), Appeal, 9 November 1988, Colectânea de Jurisprudência, 1988, NO. XIII-5.

142 P/5, *Carlos Manuel Flores André and Miguel Carlos Parada Andrè (individuals)* v. *Spanish Institute in Lisbon (foreign school)*, Supreme Court of Portugal (Supremo Tribunal de Justiça), 17 June 1987, Boletim do Ministério da Justiça, 1987, No. 368.

143 D/4/JUD, *Scientology* v. *the Director of Scotland Yard*, Federal High Court of Germany (Bundesgerichtshof), 26 September 1978, Neue Juristische Wochenschrift (1979), 1101. The case concerned the request by the plaintiff for injunctive relief against the respondent in view of the fact that New Scotland Yard had issued a report on the "Scientology" movement accusing it of dishonest acts to the detriment of its members. This report had been sent to the Federal Office of Criminal Investigation *(Bundeskriminalamt)* upon its request and transmitted by it to all the state offices of criminal investigation *(Landeskriminalämter)*. Plaintiff claimed that certain factual allegations made in the report were untrue.

144 IRL/4, *Norbert Schmidt* v. *Home Secretary of the Government of the United Kingdom et al.*, Supreme Court of Ireland, 24 April 1997, Irish Reports (1997), vol. 2, 121.

114. There are a few cases which concerned the armed forces of a foreign State on the territory of the forum State. The Supreme Court of Japan clearly stated, without further examination or applying any criteria, that takeoffs and landings of military aircraft of the armed forces of a foreign State (the United States) were sovereign acts. The Court even stated that they were the "very public acts of the United States Armed Forces based in Japan".[145] Similarly, the Supreme Court of the Netherlands held that a foreign State enjoys immunity with regard to a warship which is used in the performance of a typical government function, such as military action.[146] The Supreme Court of Austria decided that while the landing and take-off of military aircrafts of a foreign State on a civil airport may arguably be considered as acts *iure gestionis*, they must nevertheless be seen in their context of carrying out a humanitarian mission in fulfilling a binding Resolution of the UN Security Council. Therefore, the landings and take-offs were in fact acts *iure imperii*.[147]

4.3.3. Granting of the right of permanent residence

115. The Tokyo High Court was faced with the peculiar question as to whether the recruiting of permanent residents by a foreign State by way of a newspaper advertisement and the conclusion of an agreement between a private individual and a foreign State "on the procedure for the programme of acquiring permanent resident status" of a third country amounted to an act in exercise of sovereign authority. The Court stated that the central and essential element of the obligation for the foreign State under the agreement was to grant the permanent resident status to the private individual. The Court concluded that "at least in civil law proceedings like the present one, where essentially public law acts of a foreign State such as the granting of permanent resident status are involved, it should be interpreted that Japan cannot extend its jurisdiction unless that State voluntarily accepts it".[148]

4.3.4. Expropriation

116. Acts of expropriation are unsurprisingly considered as acts *iure imperii* since they are not based on an agreement between the (former) owner and the State but on an act of sovereign authority by which the State takes the property in the public interest.[149] Likewise, the "acquisition by a State of goods belonging to foreigners through seizure is undoubtedly a public act".[150]

4.3.5. Seizure of specific objects

117. The Federal Tribunal of Switzerland has held that the seizure of certain objects having a historic or archaeological value by a foreign State amounted to an exercise of sovereign authority, even though the foreign State may have acquired a title to property over these objects because this transfer of ownership is not based upon a commercial act, such as a sales contract, but on the application of a legal provision to be found in the public law of the foreign State.[151]

4.3.6. Fulfilment of international obligations

118. In some cases, the courts took the view that a State when fulfilling an obligation arising out of international treaties *ipso facto* acts in the exercise of public or sovereign authority.[152] The same holds true for the fulfilment of binding Resolutions of the UN Security Council.[153]

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145 J/3, *X et al.* v. *the United States of America*, Supreme Court of Japan, 14 March 2002, Hanrei Jihou No. 1786, 2002, Japanese Annual of International Law 46 (2003), 161.

146 NL/16, *The United States of America* v. *Havenschap Delfzijl/Eemshaven (Delfzijl/Eemshaven Port Authority)*, Supreme Court, 12 November 1999, NJ 2001, No. 567, Netherlands Yearbook of International Law (2001). See also the quotation accompanying *supra* note 108.

147 *Flughafen Linz (Airport Linz)* v. *United States of America*, Supreme Court of Austria, 2 Ob 156/03k, 28 August 2003, Austrian Review of International and European Law 8 (forthcoming 2004). See in more detail paragraph accompanying *supra* note 111.

148 J/6, *X.* v. *Republic of the Marshall Islands*, Tokyo High Court, 19 December 2000, Jurist (2002), No. 1224.

149 CH/11, *S.* v. *République socialiste de Roumanie et Cour des poursuites et faillites du Tribunal cantonal du canton de Vaud*, 1ère Cour de droit public du Tribunal fédéral Suisse, 19 January 1987, ATF 113 Ia 172.

150 I/17, Supreme Court of Cassation, *SpA Imprese maritime Frassinetti and SpA Italiana lavori marittimi e terrestri* v. *Libya*, Supreme Court of Cassation, 26 May 1979, Italian Yearbook of International Law (1980-81), 262.

151 CH/6, *Italie* v. *X. et Cour d'appel du canton de Bâle-ville*, 1ère Cour de droit public du Tribunal fédéral Suisse, 6 February 1985 ATF 111 Ia 52

152 D/4/JUD, *Scientology* v. *the Director of Scotland Yard*, Federal High Court of Germany (Bundesgerichtshof), 26 September 1978, Neue Juristische Wochenschrift (1979), 1101.

4.4. The rules of private international law and the jurisdictional link

119. Another important aspect of the commercial transaction exception is the question whether a territorial or other nexus in terms of jurisdiction is required for the exception to be applicable. Thus Article 10 of the ILC Draft provides that the differences in which the issue of State immunity in the context of the commercial transaction arises must fall within the jurisdiction of a court of another State "by virtue of the rules of private international law". This is certainly but one aspect of the international rules governing the jurisdiction of States (and their organs) in general, which virtually always require some sort of nexus between the forum State and the dispute at hand. Such a general requirement in applying the commercial transaction exception is only to be found in the constant and rich case law of Swiss courts.[154]

120. It is interesting to note that the Dutch Supreme Court explicitly rejected the existence of such a requirement in international law in the context of State immunity:

> *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.*[155]

4.5. The exceptions to the exception

121. As provided for by Article 4(2) of the European Convention as well as Article 10(2)(a) of the ILC Draft Articles, States may invoke immunity even in case of a commercial transaction provided that this transaction is one as between States, or if the parties to the commercial transaction have expressly agreed to uphold immunity. While no practice with regard to the latter could be discerned, mention must be made of two cases which could be considered as falling under the former category. Both of them have already been addressed in a different context. Although in both of them the respective court has not expressed an opinion as to whether it was guided by any consideration as to the existence of a contract or transaction as between States, they shall be presented in this context.

122. The first case concerned the rejection by the Supreme Court of Poland of a claim by private citizens against an organisational subunit ("The Motor Vehicles Technology Centre") of the Embassy of the former Soviet Union. The aspect of the case which is interesting for present purposes is that this Technology Centre was established and carried out its commercial activities in implementation of arrangements forming part of a bilateral agreement between the Polish Government and the Soviet Union. Thus, while the Supreme Court did not expressly state so, it perhaps took into account the fact that the circumstances of the case, in particular that the activity carried out, to a certain extent, was governed by an international treaty between two States, so as to justify the assumption that the commercial activity carried out was one as between two sovereign States.[156] (this sentence is confusing)

123. The second case concerned a contract between the Ministry of Education and Culture of Iceland and a local authority in Sweden which provided for flight-technician education by the local authority to Icelandic students. Again, this contract was based on an intergovernmental Agreement on a Nordic Common Education at the Upper Secondary School Level concluded between the five Nordic countries (Denmark, Finland, Iceland, Norway and Sweden). This Agreement, in turn, was based on the 1971 Agreement on Cultural Co-operation between the Nordic countries, which included a very general provision on cooperation in the field of education. Thus, the Supreme

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153 *Flughafen Linz (Airport Linz)* v. *United States of America*, Supreme Court of Austria, 2 Ob 156/03k, 28 August 2003, Austrian Review of International and European Law 8 (forthcoming 2003). See in more detail paragraph accompanying *supra* note 111.

154 See, e.g., CH/4, *Royaume de Grèce* v. *Banque Julius Bär & Cie*, Chambre de droit public du Tribunal fédéral Suisse, 6 June 1956, ATF 82 I 75. This territorial nexus requirement is indiscriminately applied by the Swiss courts in immunity from jurisdiction as well as enforcement.

155 NL/5, *Société Européenne d'Etudes et d'Entreprises en liquidité volontaire (SEEE)* v. *Socialist Federal Republic of Yugoslavia*, Supreme Court, 26 October 1973, RvdW (1973) No. 64, N.J. (1974) No. 361.4, Netherlands Yearbook of International Law (1972) 290.

156 PL/1, *Polish Citizens* v. *Embassy of Foreign State*, Supreme Court of Poland, 26 September 1990, OSNCP 1991/2-3/17.-III PZP 9/90. It is however not clear from the facts what the crucial transaction was, since the position of the plaintiff is not set out in the case. See also *supra* note 65 and 66, and accompanying text.

Court of Sweden was perhaps guided by the fact that the activity carried out was one under an international treaty to which several sovereign States were parties and rejected the claim as falling within the scope of State immunity.[157]

5. Concluding remarks

124. In concluding it can be stated that the practice of European States with respect to State immunity and the commercial transaction exception follows the patterns well established in the practice of the international law of State immunity according to which there are no clear-cut criteria ready-made in all instances. While most States adhere to the nature of the act test which thus prevails over the test according to the object or motive of the act, courts tend to render a decision on a case by case basis taking into consideration the entire context and circumstances of each particular case.

[157] S/CT/8, *Västerås kommun (The Local Authority of the Municipality of Västerås)* v. *Icelandic Ministry of Education and Culture*, Supreme Court of Sweden, 30 December 1999, Nytt Juridiskt Arkiv 1987, Avd I, Case No. 1999:112. See also *supra* note 100 and accompanying text.

CHAPTER 3

The Distinction between State Immunity and Diplomatic Immunity

Marcelo G. Kohen

1. Introduction

125. Although State immunity and diplomatic immunity share the same terminology and share some practical consequences, they constitute – even if interrelated – two different regimes.

126. As explained above, State immunity refers to the entities that can claim an exemption to the exercise of the forum State's jurisdictional and administrative powers, whereas diplomatic immunity extends to the diplomatic staff and mission of the sending State. The purpose of State immunity is to protect the sovereignty of the State by exempting acts performed by a foreign State in its sovereign authority from the exercise of jurisdiction of the forum State: *par in parem non habet imperium*. The purpose of diplomatic immunity is to allow the State to exercise its diplomatic functions without any constraint: *ne impediatur legatio*. As will be shown below, diplomatic relations lead to the existence of immunities that go beyond those that apply to State immunity.

127. Apart from diplomatic immunities, there are also immunities that apply to a State's other agents, such as heads of State, heads of government, ministers of foreign affairs, consular staff, and armed forces abroad. Consequently, these immunities must also be distinguished from State immunity. Heads of State, heads of government and ministers of foreign affairs enjoy absolute immunity *ratione personae* while exercising their functions.[158] Consular staff benefit from immunity for acts performed in the exercise of their function only.[159] Armed forces abroad are subject to specific immunities stemming from the relevant agreements or resolutions upon which their presence is established. Article 31 of the European Convention on State Immunity 1972 expressly preserves this kind of immunity. With regard to the United Nations Convention on Jurisdictional Immunities of States and Their Property, the Chairman of the *ad hoc* Committee that elaborated it explained: "One of the issues that had been raised was whether military activities were covered by the Convention. The general understanding had always prevailed that they were not. In any case, reference should be made to the Commission's commentary on article 12, stating that "neither did the article affect the question of diplomatic immunities, as provided in article 3, nor did it apply to situations involving armed conflicts" (A/46/10, p. 114). It had to be borne in mind that the preamble stated that the rules of customary international law continued to govern matters not regulated by the provisions of the Convention".[160] The present chapter will only focus upon the distinction between diplomatic immunity and State immunity, although some references to consular immunity will be made when necessary.

128. The sources of the rules applicable to State immunity and to diplomatic immunity are different. Leaving aside the relevant customary rules, the former is governed in conventional law when applicable by the ECSI and, when it enters into force, the United Nations Convention on Jurisdictional Immunities of States and Their Property, and the latter by the Vienna Convention on Diplomatic Relations.

129. Both kinds of immunities have in common the fact of being an attribute of the State. This is the reason why the diplomatic immunity of an agent can be waived by the State, in a similar way as State immunity.[161]

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[158] *Case concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v. Belgium), *ICJ Reports 2002*, para. 54.

[159] Vienna Convention on Consular Relations (1963), art. 43.

[160] Statement of Mr. Hafner, 22 March 2005, United Nations, General Assembly, doc. *A/C.6/59/SR.13*, p. 6, para. 36.

[161] See the ILC commentary to its draft articles, *Yearbook of the International Law Commission*, 1991, Vol. II, Part Two, at p. 22, para. 5. Article 32 of the Vienna Convention of Diplomatic Relations reads as follows: "1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State. 2. Waiver must always be express. 3. The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under Article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim. 4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgement, for which a separate waiver shall be necessary." See Chapter 4 of the present Report.

130. Diplomatic and State immunities differ as to their scope. The latter is essentially governed by the distinction between *acta iure gestionis* and *acta iure imperii*, only the latter enjoying immunity. The former is determined on a *ratione personae* basis, irrespective of the nature of the act concerned.

2. Distinction between the scopes of both types of immunities in international instruments

131. International instruments dealing with State immunity have preserved other eventual types of immunities, by determining that the scope of these instruments is limited to State immunity and are without prejudice of the existence or governing principles of other immunities. Thus, the United Nations Convention on Jurisdictional Immunities of States and Their Property in its article 3 states that:

> *1. The present Convention is without prejudice to the privileges and immunities enjoyed by a State under international law in relation to the exercise of the functions of:*
>
> *a. Its diplomatic missions, consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences; and*
>
> *b. Persons connected with them.*
>
> *2. The present Convention is without prejudice to privileges and immunities accorded under international law to heads of State* ratione personae*. (…)*

132. The UN Convention follows the draft articles prepared by the International Law Commission in 1991, the Resolution on Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement adopted by the *Institut de Droit international* in the same year and the Revised Draft Articles for a Convention on State Immunity adopted by the International Law Association in 1994.[162]

133. Similarly, but less comprehensive in its description than the UN Convention, the European Convention on State Immunity provides in article 32 that "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."

134. Paragraph 1 of article 3 of the UN Convention has in mind immunities regulated by treaties such as the Vienna Convention on Diplomatic Relations of 1961, the Vienna Convention on Consular Relations of 1963, the Convention on Special Missions of 1969, the Vienna Convention on the Representation of States in their Relations with International Organisations of a Universal Character of 1975, the Convention on the Privileges and Immunities of the United Nations of 1946 and similar instruments related to specialised agencies and other international organisations.

135. The scope of diplomatic immunity covers both agents and property. Both of these are analysed in the sections that follow.

3. Immunity for acts involving diplomatic agents

136. Diplomatic agents are entitled to immunity *ratione personae*. According to article 31 of the Vienna Convention on Diplomatic Relations:

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[162] According to Article 3 of the ILC Draft Articles, "1. The present articles are without prejudice to the privileges and immunities enjoyed by a State under international law in relation to the exercise of the functions of: (a) its diplomatic missions, consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences; and (b) persons connected with them. 2. The present articles are likewise without prejudice to privileges and immunities accorded under international law to Heads of State *ratione personae*." Article 7, paragraphs 4 and 5 of the *Institut de Droit international* Resolution states that "4. The present Resolution is without prejudice to the privileges and immunities accorded to a State under international law in relation to the exercise of the functions of: (a) its diplomatic missions, consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences; and (b) persons connected with them. 5. The present Resolution is without prejudice to the personal privileges and immunities accorded to Heads of States under international law." Finally, Article IX, A) 2 of the International Law Association Resolution reads as follows: "A. This Convention is without prejudice to: […] 2. The rules of international law relating to diplomatic and consular privileges and immunities, to the immunities of foreign public ships and to the immunities of international organizations. […]"

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

a. a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

b. an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

c. an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

2. A diplomatic agent is not obliged to give evidence as a witness.

3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

137. Immunity of a diplomat agent for a given act does not necessary amount to State immunity. As a consequence of the distinction between both types of immunity, it can be that a given act accomplished by a diplomatic agent would allow proceedings against his or her State, while the agent him or herself could not be personally sued for his/her own act. This result would be achieved by applying State immunity rules in the first case and diplomatic immunity rules in the second one.

138. In a decision of 10 June 1997, the *Bundesverfassungsgericht*, leaving aside its decision with regard to the merits of this particular case – rightly summed up the distinction between State immunity and diplomatic immunity, when dealing with a complaint of a former ambassador against an arrest warrant issued for an act he had committed in his official function. According to the German Federal Constitutional Court, State immunity and diplomatic immunity represent two distinct concepts of international law, following their own rules, so that one can draw no conclusions from the limits of one notion as to the existence of similar limits on the other notion. This is because of the personal element involved in diplomatic immunity, which protects not only the sending State but also the diplomat personally. Even if a State does not enjoy immunity for non-sovereign acts, this does not mean that a diplomat involved in such acts is subject to the jurisdiction of the receiving State. The distinction between *acta iure imperii* and *acta iure gestionis* which characterises the concept of State immunity is unknown to the law of diplomatic relations. Thus, diplomatic immunity for official acts is not a mere reflection of the immunity of the sending State but has its independent basis in the special status of the diplomat.[163]

139. Similarly, and prior to the judgment of the *Bundesverfassungsgericht*, the Spanish Supreme Court had distinguished between diplomatic immunity and State immunity by overturning the decision of a lower tribunal having granted immunity for a conflict arising from an employment contract between a State and a Spanish citizen, on the basis of article 31 of the 1961 Vienna Convention. According to the Spanish Supreme Court, the reasoning adopted by the lower tribunal was tantamount to applying by analogy the immunities recognised by the Vienna Convention to diplomatic agents to the State. Rather, it is the distinction between *acta iure imperii* and *acta iure gestionis* that determines the extent of the State immunity.[164]

140. Diplomatic agents enjoy immunity even when they act in a private capacity to the extent determined by article 31 of the 1961 Vienna Convention. The Portuguese Supreme Court of Justice has also confused both kinds of immunities when deciding a case brought against French

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163 [D/16], Federal Constitutional Court (*Bundesverfassungsgericht*), 10 June 1997, *Entscheidungen des Bundesverfassungsgerichts*, vol. 96, p.68, at pp.85 ff.

164 [E/3] *Emilio M.B. v. Embassy of Equatorial Guinea*, Supreme Court (*Tribunal Supremo*), *Aranzadi*, 1986, N. 727.

diplomats for a contract of employment concluded with a domestic servant having Portuguese citizenship. According to its decision of 30 January 1991, "the State's immunity from jurisdiction contained in the Vienna Convention on Diplomatic Relations aims at ensuring the reciprocal independence of States and prevents States from being placed in the position of defendants in the courts of another State. This rule is applicable also to the diplomatic agents of a State, but only when the acts are practised on behalf of the State and for the purposes of the mission and not in case of acts in their private capacity. Hiring a domestic servant for the private residence of a diplomat is an act outside of the diplomatic functions of the agent and therefore not included in the immunity from jurisdiction".[165]

141. *A fortiori*, diplomatic agents enjoy immunity when they are sued for acts accomplished in the exercise of their function or as representatives of their State. Thus, in an application against an Ambassador and an Embassy on the issue of the payment of a rent that the plaintiff claimed the Embassy owed her, the District Court of Reykjavik in its decision of 30 June 1995 applied article 31 (1) of the 1961 Vienna Convention in order to dismiss the case.[166]

4. Immunity regarding property of diplomatic missions

142. In this particular field, immunity refers to the right of the State to have its property utilised in exercise of its diplomatic functions to be considered as immune and consequently not subject to measures of constraint. As will be shown below, both diplomatic and State immunities can apply simultaneously in this particular case, leading to the same result. The striking distinction with regard to the situation depicted above (with regard to diplomatic agents) is that embassies or other places of diplomatic representation do not have a distinct legal personality from that of the State. Hence, any action related to the property of diplomatic missions cannot but be an action against the State.[167] This is affirmed by the judgment of the Icelandic Supreme Court of 15 September 1995, in which proceedings against the Embassy of the United States of America were considered as addressed against the United States of America itself.[168]

143. In general, international instruments dealing with State immunity were obliged to include a provision according to which no measures of constraint should be directed against property affected for the use of diplomatic missions.

144. Thus, Article 21 of the UN Convention on Jurisdictional Immunities of States and Their Property refers to specific categories of property and provides as follows:

> *1. The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under article 19, subparagraph (c):*
>
> a. *Property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences*.[169]

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[165] [P/8] *Rosa de Jesus Lourenço Barros Fonseca v. Gilbert Buddig Larren and Madeleine Laurent Larren*,, Supreme Court of Justice (*Supremo Tribunal de Justiça*), 30 January 1991, *Boletim do Ministério da Justiça*, 1991, N. 403.

[166] [IS/1] *Guðrún Skarphéðinsdóttir v. the Embassy of the United States of America*, Supreme Court (*Hæstiréttur*), 15 September 1995, *The Supreme Court´s Collection of Court Rulings 1995* (*Dómasafn Hæstaréttar 1995*).

[167] Cf. Jean Salmon and Sompomg Sucharitkul, "Les missions diplomatiques entre deux chaises : immunité diplomatique ou immunité d'Etat?", *Annuaire français de droit international*, 1987, vol. XXXIII, pp. 168-169.

[168] [IS/1], cited *supra* (note 8).

[169] Other texts confirm this longstanding rule. Article 4, paragraph 2 of the 1991 *Institut de Droit international*'s Draft provides: "The following categories of property of a State in particular are immune from measures of constraint: (a) property used or set aside for use by the State's diplomatic or consular missions, its special missions or its missions to international organizations." Equally, the Revised Draft Articles for a Convention on State Immunity adopted by the International Law Association in 1994 states in Article VIII, C, amongst the Exceptions to Immunity from Attachment and Execution, that "attachment or execution shall not be permitted if: 1. The property against which execution is sought is used for diplomatic or consular purposes."

145. For its part, article 22, paragraph 3 of the Vienna Convention on Diplomatic Relations provides 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."

146. The provisions embodied in instruments related to State immunity suggest that in all cases this property must be considered as affected to acts accomplished *iure imperii*, insofar as they are used or intended for use in the performance of the functions of diplomatic missions. Applicable rules, either conventional or customary, in the field of diplomatic relations, signal that such property is immune, by virtue of its vital role in the accomplishment of the diplomatic functions.

147. However, a distinction must be made between immunity of jurisdiction and immunity from execution in cases related to leases of immovable property for diplomatic and consular missions. Measures of constraint are excluded with regard to those premises, but jurisdictional immunity does not apply with regard to actions related to contract relations concerning these goods, insofar as the regular activity of the diplomatic mission is not affected by these proceedings.

148. In a case submitted to the Turkish Court of Cassation, the plaintiff requested against the United States of America the payment of sums due for the use of the telephone and for what he considered to be a misuse of his estate, rented for the activities of a consulate. The defendant invoked the immunity granted by international law in general and the 1963 Vienna Convention on Consular Relations in particular. Since the lease is a contract of private nature, the Turkish Court dismissed the applicability of immunity from jurisdiction.[170] However, in another case, the Great Chamber of the same tribunal more controversially applied the rules related to immunity from jurisdiction to a case in which measures of constraint against the premises of an embassy were at stake, excluding immunity for acts accomplished *iure gestionis*.[171]

149. By contrast, in its judgment of 4 October 2002, in the *State of Iraq v. Vinci Constructions Grands Projets s.a.*, the Court of Appeal of Brussels stressed that :

> *la distinction éventuelle entre l'immunité d'Etat résultant du droit international général et l'immunité diplomatique résultant de l'article 25 de la Convention de Vienne de 1961 dont bénéficient les comptes de l'ambassade d'Irak auprès de Fortis Banque ne présente pas d'intérêt pratique pour la solution du présent litige puisque dans les deux cas, c'est le critère de l'affectation des biens saisis qui décide des limites de l'immunité d'exécution. (…) Les parties s'entendent également pour dire qu'en ce qui concerne l'immunité d'Etat, les comptes ne sont saisissables que s'ils sont affectés à des activités commerciales ou de droit privé, et qu'en ce qui concerne l'immunité diplomatique, ils ne sont saisissables que s'ils ne sont pas utiles ou nécessaires au fonctionnement de l'ambassade*.[172]

150. Given the existence of both types of immunities with regard to the impossibility of execution of property affected to the diplomatic mission, some national tribunals have faced difficulties in determining the applicable rule to cases concerning such property. In a decision of the District Court of Rotterdam of 14 May 1998, the tribunal seemed to refer to State immunity when affirming, on one hand, that "the starting point in this dispute is that – pursuant to (unwritten) international law – a foreign State is entitled to immunity from execution when execution measures are employed against the State concerned involving the attachment of property intended for the public service of that State. Establishing, maintaining and running embassies is an essential part of the function of government and hence of the public service. Moneys intended for the performance of this function must therefore be treated as property intended for the public service." On the other hand, the same decision seems to refer to diplomatic immunity when explaining that, even if the decision would jeopardise the administration of Dutch justice, "a higher importance should in principle be attached to the rules of international law than to the rules of Dutch law (in particular Dutch procedural law),

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[170] [TR/5] *X (individual) v. Consulate of the United States of America*, Court of Cassation, 16 November 1989, Y.13.H.D. E.1989/3896; K.1989/6648; T.16.11.1989, *Revue des Décisions de la Cour de Cassation*, 1990, S. 6, at pp. 882-883.

[171] [TR/1] *X (individual) v. Embassy of Lebanon*, Great Chamber of the Court of Cassation, 18 November 1991, HGK, E.1991/6-299, K.406, T.18.09.1991, *Prof. Çelikel & Prof. Nomer*, at pp. 450-452.

[172] [B/9] *State of Iraq v. Vinci Constructions Grands Projets s.a.*, Court of Appeal of Brussels (9th Chamber), 4 October 2002, *Journaux des Tribunaux*, 2003, at p. 318.

with the result that the interests of the uninterrupted functioning of a diplomatic mission should in this case prevail over the interests of executing (by expeditious means) a judgment given in the Netherlands."[173]

151. In some cases, the rules applied by tribunals are those pertaining to one or both fields of immunity. In a British House of Lords' decision of 12 April 1984, only rules related to State immunity were invoked when holding that "under customary international law the bank account of a diplomatic mission used for defraying the expenses of running the mission, enjoys immunity from execution in the receiving State [and that] The State Immunity Act should be construed so far as possible to accord with the requirements of customary international law".[174] The House of Lords expressly referred to section 13(4) of the State Immunity Act to recognise the immunity from execution of the bank account in question. It must be remembered that the 1961 Vienna Convention on Diplomatic Relations is given effect in English Law by the Diplomatic Relations Act 1964. In spite of this, no reference to diplomatic immunity rules was made in this decision.

152. In other cases, however, domestic tribunals have decided in a way opposite to that prescribed by international law, both in the field of State immunity and in the field of diplomatic immunity. In a decision of a Turkish Court of First Instance of 18 December 2002, for example, interim measures against bank accounts of the embassy and the consulate of the defendant State were adopted.[175]

153. The waiver of immunity by a State can raise the problem of the extent of this waiver. Diplomatic immunity must be waived in an explicit way. In a judgment of the Court of Appeal of Paris of 10 August 2000 it was decided that the renunciation of immunity from the execution of an arbitral award embodied in a contract cannot be constructed as implying a waiver of diplomatic immunity of execution, on the grounds of the 1961 Vienna Convention on diplomatic relations.[176]

154. Case law dealing with employment contracts for activities related to diplomatic missions has been contradictory. In the field of State immunity, some of these contracts are excluded from the benefit of immunity.[177] The situation is not regulated by the 1961 Vienna Convention on diplomatic relations. The Swiss Federal Tribunal, denying immunity to Egypt with regard to a contract of employment concluded with an Egyptian citizen in Switzerland for low-ranking activities accomplished at the Egyptian Mission in Geneva, applied the State immunity rule concerning *iure gestionis* acts, although using a rather confusing terminology borrowed from the law of both diplomatic and State immunities.[178]

155. By contrast, other tribunals have recognised immunity for working activities related to the organisation and operative structure of a consular office, as being the direct expression of the foreign State and expressing also a typical public activity of that State. This was the case of the Italian Supreme Court of Cassation's judgment in *Giaffreda v. France* of 18 November 1992, in which the employee was even Italian.[179]

156. In a similar case, the Court of Appeal (*Tribunal da Relação*) of Porto applied the immunity of a foreign State in a case involving a Portuguese subject. The tribunal clearly applied consular immunity, when stating that "immunity encompasses not only acts *ius imperii*, but also cases where

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[173] [NL/15] *State of the Netherlands* v. *Azeta B.V.*, District Court of Rotterdam, 14 May 1998, KG 1998, 251. English summary in NYIL, 2000, at pp. 264-267.

[174] [GB/2] *Alcom Ltd v. Republic of Colombia*, House of Lords, 12 April 1984, [1984] 2 All ER 6.

[175] [TR/7] *X (company) v. Embassy of Turkmenistan*, Court of First Instance, 18 December 2002.

[176] [F/10] *Embassy of the Russian Federation in France v. company NOGA*, Court of Appeal of Paris (First Chamber, Section A), 10 August 2000, *Journal du droit international*, 2001, N. 1, at pp. 116-127.

[177] See Chapter 5 of this Report.

[178] "*Il est admis, d'une manière générale, que le privilège de l'immunité diplomatique n'est pas une règle absolue. L'Etat étranger n'en bénéficie que lorsqu'il agit en vertu de sa souveraineté (jure imperii). Il ne peut, en revanche, s'en prévaloir s'il se situe sur le même plan qu'une personne privée, en particulier s'il agit en qualité de titulaire d'un droit privé* (*jure gestionis*)." [CH/7] *M. (individual). v. Republic Arab of Egypt*,, Federal Tribunal (First Civil Court), 16 November 1994, ATF 120 II 400, www.bger.ch.

[179] [I/49] *Giaffreda v. France*, Supreme Court of Cassation, 18 November 1992, *Rivista di diritto internazionale privato e processuale*, 1994, at p. 340.

States act as a private law person", and, since "a Consulate constitutes a representation of a foreign State and its acts are, whether of *ius imperii* or *ius gestionis*, acts of the State and thus Portuguese courts lack jurisdiction to judge them".[180]

5. Conclusion

157. Even if, from the theoretical viewpoint, the distinction between State immunity and diplomatic immunity can be easily determined, from the practical point of view, tribunals sometimes find it difficult to distinguish between them. This is particularly so when they have to solve a concrete case in which diplomatic agents or missions, or diplomatic immovable assets or other goods are involved. As a matter of fact, embassies, consulates or other State missions do not enjoy a separate legal personality to that of the State. This has been constantly underlined in the case law of different States where lawsuits had been brought against either ambassadors, consuls, or embassies, consulates or other missions. Consequently, the real defendant in those cases was considered as being the relevant State.

158. It emerges from the above analysis that State immunity and diplomatic immunities distinguish themselves by their nature. As seen, the former is subject to the distinction between *iure imperii* and *iure gestionis* acts, only the first type being covered by immunity. Diplomatic immunities, on the other hand, apply to persons in their capacity as diplomats or to property used in the exercise of diplomatic functions, no matter the nature of the act under scrutiny. Having different scopes, there is no possibility of contradiction between them. In this light, the comment on Article 32 of the ECSI made in the Explanatory Report, that "in the event of conflict between the present Convention and the instruments mentioned above [VCDR and VCCR], the provisions of the latter shall prevail" can be considered as unnecessary.

159. Taking into account the identity of consequences arising from State immunity and diplomatic immunity with regard to property related to diplomatic missions, State practice shows that in some cases immunity has been granted on the basis of diplomatic or consular immunity, in others on the basis of State immunity, and in others on the basis of both types of immunity. There are also cases in which immunity has been recognised without any explicit invocation of a particular kind of immunity. It is regrettable to note, however, that some of the decisions referred to above, by not acknowledging immunity, are in contradiction with relevant rules of international law.

[180] [P/2] *Aurélio Moreira de Sousa v. General Consulate of Spain in Porto*, District Court (*Tribunal da Relação do Porto*), 5 January 1981, *Colectânea de Jurisprudência*, 1981, N. VI-1.

CHAPTER 4

Waiver of Immunity

Susan C. Breau

1. Introduction

160. It is well established that a foreign State may waive its entitlement to state immunity before domestic Courts. It is also accepted that waiver of immunity may be express or implied by conduct, provided that the waiver is clear and unequivocal. An analysis of state practice in the member states of the Council of Europe reveals that the requirement that waiver be clear and unequivocal has given rise to some difficulty regarding the required method of waiver. This is particularly so with regard to arbitration, where it is unclear whether consent to arbitration also means consent to the supervisory jurisdiction of the domestic Courts.

161. This chapter discusses state practice on waiver in general. A discussion of waiver in arbitration is contained in Chapter 9 entitled 'Effect of an Arbitration Agreement'. This chapter will review first, the convention provisions and commentaries on waiver, and then, second, the case law of the Council of Europe countries on this issue.

2. Convention Provisions

162. Both the European Convention on State Immunity (ECSI) and the United Nations Convention on Jurisdictional Immunities of States and Their Property include provisions with respect to waiver.

2.1 European Convention on State Immunity 1972

163. The 1972 European Convention on State Immunity signed in Basle on 16 May 1972 is the first multilateral treaty to codify provisions with respect to waiver of immunity. Its three provisions are:

> ***Chapter I – Immunity from jurisdiction***
>
> ***Article 1***
>
> 1. *A Contracting State which institutes or intervenes in proceedings before a 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.*

164. According to the explanatory report to this convention, Article 1 extends to appeal proceedings. A state that submits to a lower court, by implication submits to the totality of the proceedings including any appeals. It will also include referral to another court should the original court decide, "on account of its own lack of competence" to do so.[181] It should be noted that this waiver extends only to jurisdiction, not enforcement which would be considered another and separate legal proceeding.

165. Another clarification of this provision is discussed in the commentary. If a state provides in its legislation or procedure for compulsory appearance, that does not constitute waiver and a state can claim immunity. According to the commentary this does not constitute intervention within the proceeding. It should be noted that the section itself is not clear, on its face, about this possibility.

166. Article 2 of ECSI specifies the circumstances in which a state can waive its immunity. In this respect, it provides that a State must expressly undertake to submit to the jurisdiction of a domestic court of a foreign State. This means submitting to the specific court in which the dispute is filed and any other courts to which the dispute is referred.

167. The second requirement is that any person or body empowered to conclude a written contract in the name of the State is also deemed to have the authority to submit that State to the jurisdiction of a foreign court. Finally, the consent to jurisdiction in a contract in writing is to exclude contracts concluded orally and any implication of a tacit consent.[182]

168. Article 3 could lead to difficulties in jurisprudence as it is unclear as to what standard the court may apply to determine when the "earliest possible moment" might be. However, the case law in Europe does not reveal this potential difficulty with this provision.

2.2 United Nations Convention on Jurisdictional Immunities of States and Their Property

169. The recently adopted UN Convention on Jurisdictional Immunities of States and Their Property, which is open for signature, also contains three similar provisions. They are:

Article 7

Express consent to exercise of jurisdiction

1. *A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case:*

   (a) by international agreement;

   (b) in a written contract; or

   (c) by a declaration before the court or by a written communication in a specific proceeding.

2. *Agreement by a State for the application of the law of another State shall not be interpreted as consent to the exercise of jurisdiction by the courts of that other State.*

Article 8

Effect of participation in a proceeding before a court

[181] Explanatory on the European Convention on State Immunity, Council of Europe

[182] .Ibid.

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

   (a) itself instituted the proceeding; or

   (b) intervened in the proceeding or taken any other step 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 took such a step, it can claim immunity based on those facts, provided it does so at the earliest possible moment.

2. *A State shall not be considered to have consented to the exercise of jurisdiction by a court of another State if it intervenes in a proceeding or takes any other step for the sole purpose of:*

   (a) invoking immunity; or

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

3. *The appearance of a representative of a State before a court of another State as a witness shall not be interpreted as consent by the former State to the exercise of jurisdiction by the court.*

4. *Failure on the part of a State to enter an appearance in a proceeding before a court of another State shall not be interpreted as consent by the former State to the exercise of jurisdiction by the court.*

Article 9

Counterclaims

1. *A State instituting a proceeding before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of any counterclaim 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 the court in respect of any counterclaim arising out of the same legal relationship or facts as the claim presented by the State.*

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

2.3 International Law Commission Final Draft Articles and Commentary

170. These Articles are identical to those contained within the 1991 International Law Commission (ILC) Final Draft Articles and Commentary so that the 1991 commentary can assist in the interpretation of these finalized articles. The key element is the presumption of the absence of consent by the state to jurisdiction, unless there is specific consent. A state proceeding against an absent state cannot presume consent unless there is a clear indication of such consent. The commentary to the 1991 articles indicates that this need to infer absence of consent is borne out by state practice.[183]

171. Article 7(1) (a) (b) and (c) of the UN Convention contains explicit provisions on the requirement for express consent. The first provision in subparagraph (a) reflects the established law of treaties; that a provision in a treaty can include consent to jurisdiction.[184] The provision in subparagraph (b) includes specific contract provisions and provides "easy and indisputable" proof of consent.[185] The provision in subparagraph (c) reflects first traditional common law that only submission in the face of the court would waive immunity in its provision "by a declaration before a

[183] Andrew Dickinson, Rae Lindsay and James P. Loonam, *State Immunity: Slected Materials and Commentary,* Oxford, Oxford University Press, 2004, p. 100 reproducing ILC Final Draft Articles and Commentary p. 100.

[184] *Ibid.,* p.103.

[185] *Ibid,* p.102.

court in a specific case". However, it also reflects the civil law principle of *forum prorogatum* which allows in (c) for an express written communication in a specific proceeding.[186] This avoids the necessity of a legal representative having to appear in the court. As with the European Convention, although this consent is only to the proceeding before the court, it extends to the exercise of jurisdiction by the appellate courts in any subsequent stage of the proceeding but not the execution phase.

172. Article 8 of the Convention deals with the issue of implied waiver arising from participation in court proceedings. It provides that a foreign State will be taken to have consented if it has instituted, intervened in, or taken steps relating to the merits of the proceeding. According to the commentary, this does not mean silence but a specific instance of conduct or action must be in evidence. A clear instance of conduct could be the filing of an appearance by or on behalf of the State contesting the case on its merits.[187]

173. This article in its second and third paragraph illustrates instances when a State can appear in a court but not subject itself to the jurisdiction of the court. The most usual way this might happen is for a state to appear to claim immunity. The commentary to this provision emphasizes that the state may have to argue some of the merits of the case in making such a claim but that is not held to be consent to jurisdiction.[188]

174. Article 8(2)(b) of the UN Convention contains a novel provision. This section provides that a foreign State will not be taken to have waived immunity where it appears to assert an interest in property where the state is not a party to the proceeding. However, if it takes steps to claim the property in the proceeding, then it has consented to the jurisdiction.[189] There are no known examples of state practice on this matter.[190]

175. Article 8(3) is another logical provision which sets out that attendance in a proceeding as a witness, even in the capacity as representative of a state, does not constitute consent to jurisdiction.

176. Article 8 also restates the long-standing rule that failure to appear in response to a writ is not treated as waiver.[191]

177. Article 9 of the UN Convention sets out rules regarding counterclaims. These are once again reasonable provisions that seem to comply with common sense and the process of litigation. Filing a counterclaim logically means embarking on the whole litigation not confined to the facts of the counterclaim. However, there is some difficulty about the scope of counterclaims, which the specific limitation of "arising out of the same legal relationship or facts as the principal claim", is meant to address. The question is whether this clause is clear enough or sufficient and covers every eventuality in the law suit including a defence by "set-off".[192] In the United States Foreign States Immunities Act (1976) the provision is more specific in limiting the immunity by prohibiting "relief exceeding in amount or differing in kind from that sought by the foreign state".[193]

3. State Practice

3.1 National Legislation

178. The United Kingdom is the only Party to the European Convention to have enacted legislation codifying the rules of state immunity based upon the provisions of the European

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[186] Greig, D.W., "Forum State Jurisdiction and Sovereign Immunity under the International Law Commission's Draft Articles" (1989) 38 *ICLQ* 243 p. 246.

[187] *Ibid.,* p.105.

[188] *Ibid.,* p.106.

[189] *Ibid.,* p.107.

[190] Greig, p. 250.

[191] Morris, Virginia, "The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property" 17 Den. J. Int'L. & Pol'y 395 at p.413; see also: *The Uganda Company (Holdings) Limited v Government of Uganda* [1979] 1 Lloyd's Rep 481; *Sengupta v Republic of India* [1983] ICR 221.

[192] Greig, p.253.

[193] Foreign States Immunities Act 1976 (USA) as discussed in Fox, p.266.

Convention. In this respect, the State Immunity Act (1978) ('State Immunity Act') was enacted for the purpose of bringing the United Kingdom into conformity with the obligations under the European Convention.

179. The Act does not distinguish between waiver and submission to jurisdiction as far as consequences for immunity are concerned. The rules in regard to submission to jurisdiction are set out in detail in section 2 of the State Immunity Act. With one exception, these rules reflect the previous law as it emerged from the decided cases in the United Kingdom. The exception concerns the rule in section 2(2) of the Act, which provides that a State may submit to jurisdiction by a prior written agreement. This section alters the rule that had prevailed under earlier decided cases that waiver to be effective had to take place 'before the court'— that is in respect of proceedings already begun.[194]

3.2 State practice

180. There is little state practice in Europe on this issue. The controversial legal issue is the matter of waiver of immunity and arbitration agreements to be discussed in Chapter 9. However, there are a few interesting cases in European state practice that can be considered**.**

181. In the case of *Ahmed v. Saudi Arabia* decided by the Court of Appeal in the United Kingdom, the issue of the criterion for a written waiver of immunity was considered. The court held that a solicitor's letter setting out that staff would have rights under English law for unfair dismissal did not constitute a waiver of immunity.[195] This case supports the necessity for express waiver and a finding that a clause in a contract specifying the law that governs the contract is not a specific waiver of immunity.

182. In the Italian case of *Cuba v. Sonnino*, the Supreme Court of Cassation declared that an Italian judge has jurisdiction when an embassy filed a civil claim against an Italian citizen.[196] The court declared that as a result of filing the claim the state was not able to enjoy the immunity provided in Article 31 of the Vienna Convention on Diplomatic Relations. In contrast, a United Kingdom case, *A Co. Ltd. V. Republic of X,* considered the relationship between jurisdiction and enforcement and state and diplomatic immunity. The court held that a contractual waiver of **s**tate immunity from jurisdiction and enforcement would not be sufficient to waive the inviolability and immunity of either the premises and/or property of a diplomatic mission, or the private residence and/or property of a diplomatic agent, enjoyed under, respectively, Articles 22 and 30 of the Vienna Convention on Diplomatic Relations.[197]

183. A Swedish case supported the argument that invoking immunity at a later stage in the proceedings is not going to be supported. In the case, which concerned the payment of employment tax by employees of the German Democratic Republic trading centre in Sweden, the Supreme Administrative Court held that due to the fact that in an earlier hearing the GDR had not claimed immunity, it could not do so at this late stage.[198] This is interesting, as neither the international nor European Convention contains specific provisions as to what may happen if a state withdraws its consent at a later stage in the proceeding. However, as discussed above, commentaries to the two Conventions seem to suggest it is not possible. A question remains as to what would happen if a state signified its consent but specified that the consent could be withdrawn at a later stage?[199] This would certainly pose significant difficulties for the court process as it did in this Swedish case.

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[194] See: *Mighell v. Sultan of Johore* [1894] 1 QB 149; *Duff Development Co. v. Government of Kelantan Government* [1924] AC 797; *Kahan v. Pakistan Federation* [1951] 2 KB 1003; Letter of 17 September 1980 from Legal Adviser, Foreign and Commonwealth Office (Sir I Sinclair) to Legal Counsel of the United Nations (E Suy)in reply to a questionnaire drafted by the Special Rapporteur of the International Law Commission on the topic of State Immunity (Ambassador Sucharitkul), reprinted in (1980) 51 BYIL 424 at 432.

[195] Ahmed v. Saudi Arabia, [1996] 2 ALL E.R. 248.

[196] [I/50] *Cuba v. Sonnino,* Supreme Court of Cassation, 1995.

[197] [GB/4] *A Co. Ltd. V. Republic of X,* High Court (Queen's Bench), 1989.

[198] *Ministerium Fur Assenhandel der Deutschen Demokratischen Republik v. Riksfösäkiringverket*, Supreme Administrative Court Sweden, 1986.

[199] Greig, at p. 248.

184. The issue of counter-claim was canvassed in a Russian decision. The High Court of Arbitration of the Russian Federation ruled that the Embassy of State X had lost its immunity by making a claim against a Russian company and that loss of immunity extended to the counter-claim brought against the embassy by the company.[200] In the Croatian case of *Company "S" Vinkovci, Croatia v. the Republic of Bosnia and Herzegovina, Ministry of Transport and Communications* heard in the Zagreb Commercial Court in 1999, the court held that the filing of a counterclaim waived immunity.[201]

185. A Swiss decision supported the principle of waiver of immunity both in initiation of an action and in filing a counterclaim. In *Universal Oil Trade Inc. v. République Islamique d'Iran,* Iran obtained from a Swiss Court an order for attachment of the assets of the Universal Oil Trade Company held in Geneva. The company brought an action to vacate the attachment due to the fact that Iran should be subject to immunity. The court dismissed the appeal holding that when a State initiated proceedings of its own volition before a court of another State it submitted itself to the principle of territoriality of that State by the very fact of having recourse to its jurisdiction. This applied in particular when a foreign State appeared as a claimant before the local courts. The court also addressed counterclaims by holding that the state submitted itself *ipso facto* to counterclaims related to the principal claim and henceforth would not be entitled to raise a plea of jurisdictional immunity against them.[202]

186. The only other cases provided in the summary are cases of waiver in financial guarantees or arbitration agreements and will be discussed in Chapter 9.

4. Conclusion

187. For the most part, the European case law on waiver of state immunity in consistently uniform and gives rise to few difficulties. However, as noted in Chapter 9, some uncertainty arises with respect to the interface between the rules on waiver and arbitration.

188. The UN Convention contains rules and principles that appear to be supported by the practice that emerges from the European case law surveyed in the Council of Europe project on state immunity.

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[200] [Rus/6] *Embassy of State X v. Russian Company,* High Court of Arbitration of the Russian Federation, 2001.

[201] *Company "S" Vinkovci, Croatia v. the Republic of Bosnia and Herzegovina, Ministry of Transport and Communications,* Zagreb Commercial Court,1999.

[202] [CH/20] *Universal Oil Trade Inc. v. République Islamique d'Iran,* 2éme Cour de droit civil du Tribunal Fédéral Suisse, 1981.

CHAPTER 5

State Immunity Regarding Employment Contracts

Ulrike Köhler

1. Introduction

189. In the case of a labour dispute between an individual and an employer State before the courts of another State, competing interests of the parties are involved. On the one hand, the individual seeks redress against his employer, and the forum State is interested in compliance with its labour laws and legal protection of persons under its jurisdiction, in particular its citizens in labour disputes. On the other, the forum State seeks to maintain good relations with the employer State. The employer State, however, has an interest in non-interference in its sovereign matters and seeks to avoid investigations of its activities performed in the exercise of its sovereign functions.

190. Employment contracts generally are qualified as acts *iure gestionis* and therefore no immunity is granted to the employer State (see Art. 5 (1) European Convention, Art. 11 (1) UN Convention). Nevertheless, these provisions introduce certain exceptions to this rule.

191. Before examining the judicial practice of national courts concerning employment matters, the approaches of the European Convention on State Immunity 1972, the United Nations Convention on Jurisdictional Immunities of States and Their Property[203], the Basel Resolution of the Institut de Droit International on "Contemporary problems concerning the immunity of States in relation to questions of jurisdiction and enforcement"[204] and the ILA Draft Convention on State Immunity[205] will be discussed.

2. The approaches of International Law instruments

2.1. The European Convention on State Immunity 1972

192. Article 5 of the European Convention on State Immunity 1972 deals with employment contracts between a State and an individual where the work has to be performed on the territory of the State of the forum.

193. In principle, States are not immune regarding employment matters (Art. 5 (1) European Convention), but section (2) and (3) of Article 5 provide for exceptions to this non-immunity rule. They set the following criteria determining immunity or non-immunity of the employer State: the nationality of the employee at the time when the contract was entered into, the nationality of the employee at the time when the proceedings are brought, the habitual residence of the employee at the time when the contract was entered into as well as the performance of the work in a commercial or non-commercial institution.[206]

194. The non-immunity rule of Art. 5 (1) applies to all cases in which the employee is not a national of the employing State at the time when the proceedings are brought, provided there was a territorial connection between the employee and the forum State at the time when the contract was entered into. In contrast, the employer State can invoke immunity in all cases in which either the employee is its national at the time when the proceedings are brought (Art. 5 (2) (a)), or there is no territorial connection between the employee and the forum State at the time the contract was entered into (Art. 5 (2) (b)), provided the employee had his or her permanent residence in the territory of the employer State at the time the contract was entered into (Art. 5 (3)). In all other cases, the immunity of the employer State depends on whether the employee has performed his or her work in a commercial or non-commercial institution. The employer State is more likely to enjoy

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[203] A/Res/59/38.

[204] Institut de Droit international, Session of Basel 1991, Annuaire de l'Institut de Droit International 1992, Vol. 64, Tome II, p. 388.

[205] Proceedings of the 66th Conference of the ILA (1994), at 22 et seq.

[206] A commercial institution is defined as an office, agency or other establishment on the territory of the State of the forum through which a State engages, in the same manner as a private person, in an industrial, commercial of financial activity (Art. 7 European Convention).

immunity when the employee performs the work in a non-commercial institution (see Art. 5 (3) European Convention).

195. The provision does not contain any reference to the status of the employee in the organisational structure of the employer institution or his functions in the exercise of governmental authority.[207] The European Convention does not refer to the object of the claim either, i.e. it does not distinguish claims relating only to economic aspects of the employment relationship from claims for recruitment or reinstatement. Thus, the European Convention does not take into account the fact that a judicial decision on the reinstatement of a former employee might be more likely to interfere with the sovereign rights of the employer State than a decision on the payment of outstanding wages.

196. Different views have been expressed on the applicability of Art. 5 on employment matters relating to diplomatic missions or consular posts: The Explanatory Report to the European Convention states that regarding "contracts of employment with diplomatic missions or consular posts, Article 32 shall also be taken into account."[208] Art 32 stipulates that nothing in the European 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. Therefore, a part of doctrine[209] and practice[210] interprets art. 5 as not being applicable to diplomatic missions due to Art. 32 of the European Convention. In this view, Art. 32 excludes diplomatic missions and consular posts from the non-immunity rule of Art. 5, because employment matters are part of the exercise of the functions of such missions. Instead of Art. 5 European Convention, State immunity rules of customary international law should be applied to employment matters relating to diplomatic/consular missions, as spelled out by the German Bundesarbeitsgericht:

> [A] state party to the European Convention of State Immunity of 1972 can claim sovereign immunity in labour contract disputes with employees of its embassies and consulates to a wider extent than in similar disputes with other employees. In particular, the international legal principle *ne impediatur legatio* applies in those cases.[211]

197. However, it has to be taken into account that the Explanatory Report regarding Art. 32[212] only speaks of "diplomatic and consular immunities" that shall not be affected by the European Convention, and further states that "[t]he considerations which underlie these privileges and immunities are different from those underlying the present Convention." Thus, in the light of the Explanatory Report, Art. 32 only refers to question of diplomatic and consular immunity, but not to questions of State immunity.

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[207] However, Art. 5 European Convention may indirectly relate to the status of the employee, as officers of high rank often are nationals of the employer State - which in accordance with the European Convention leads to immunity of the latter - and others are not, but this might not always be the case.

[208] European Convention on State Immunity (ETS No. 074), Explanatory report, para. 30.

[209] Ignaz Seidl-Hohenveldern, Staatenimmunität gegenüber Dienstnehmerklagen von Botschaftspersonal, in IPRAax 1993, at 191; Charles-Mathias Kraft, cited in Jean Salmon, Sompong Sucharitkul, Les mission diplomatiques entre deux chaises: Immunité diplomatique ou immunité d'État?, in: 33 Annuaire francais de droit international (1987) 163 - 194, at 178.

[210] E. g. FIN/2, Supreme Court (Korkein oikeus), Hanna Heusala (individual) v. Republic of Turkey (State), 30 September 1993, Korkeimman oikeuden ratkaisuja 1993 II at 563; D-JUD 12, German Federal Labour Court (Bundesarbeitsgericht), German citizen and former employee of the Belgian Embassy in Germany working in a branch office of this embassy vs. Kingdom of Belgium, 25 October 2001, Betriebs-Berater 2002, p. 787 et seq.

[211] D-12-JUD, German Federal Labour Court (Bundesarbeitsgericht), German citizen and former employee of the Belgian Embassy in Germany working in a branch office of this embassy vs. Kingdom of Belgium, 25 October 2001, Betriebs-Berater 2002, p. 787 et seq.

[212] Explanatory Report, Article 32:

"117. Diplomatic and consular immunities and privileges are already governed by rules of international law, notably those contained in the Vienna Conventions of 18 April 1961 and 24 April 1963, and in bilateral agreements. The considerations which underlie these privileges and immunities are different from those underlying the present Convention. The Convention cannot prejudice diplomatic and consular immunities, directly or indirectly. It is clear from Article 32 - and this is confirmed by Article 33 - that in the event of conflict between the present Convention and the instruments mentioned above, the provisions of the latter shall prevail."

198. *Salmon/Sucharitkul* regret the fact that the European Convention does not address more clearly the question of State Immunity concerning embassies:

> *A défaut de s'être exprimés clairement, les auteurs de la Convention de Bâle peuvent être considerés comme n'ayant pas voulu affecter les privilèges et immunités diplomatiques, mais, comme pour certains, ces derniers ne concernent – en tout cas pour l'immunité de juridiction – que les personnes et non la mission ou l'Etat, il n'en résulterait aucune immunité de juridiction de l'Etat dans le domaine diplomatique.*[213]

199. Furthermore, the European Convention neither applies to activities of armed forces (Art. 31), or to matters governed by special agreements in the field of State immunity (Art. 33).

2.2. The United Nations Convention on Jurisdictional Immunities of States and Their Property

200. According to the UN Convention on Jurisdictional Immunities of States and Their Property[214], an employer State cannot invoke immunity before the courts of the forum State (Art. 11 (1) UN Convention). Paragraph 2 of the said article introduces exceptions to the rule of non-immunity.

201. For the purpose of defining these exceptions, the UN Convention applies the following criteria in order to maintain a balance between the competing interests of the employer State and the State of the forum: the status of the employee, the nature of the employee's work, the object of the claim, security interests and the territorial nexus between the employee and the forum State.

2.2.1. The nature of the employee's work and the status of the employee

202. States can invoke immunity in proceedings concerning employees who have been recruited to perform particular functions in the exercise of governmental authority or enjoy diplomatic immunity (Art. 11 (2) (a)). Thus, the nature of the employee's work is a decisive criteria for the determination of the employer State's immunity.

203. The wording of this exception to the non-immunity rule regarding employment contracts has become more restrictive in the course of the drafting history: In order to circumscribe the cases in which immunity of the employer State should be retained, the text adopted by the ILC on first reading in 1986[215] used the expression "services associated with the exercise of governmental

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[213] Jean Salmon,Sompong Sucharitkul Les mission diplomatiques entre deux chaises: Immunité diplomatique ou immunité d' État?, in: 33 Annuaire francais de droit international (1987) 163 - 194, at 178.

[214] "Article 11 Contracts of employment

1. 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 a proceeding which relates to a contract of employment between the state and an individual for work performed or to be performed, in whole or in part, in the territory of that other state.

2. Paragraph 1 does not apply if:

a) the employee has been recruited to perform particular functions in the exercise of governmental authority;

b) the employee is:

i) a diplomatic agent, as defined in the Vienna Convention on Diplomatic Relations of 1961;

ii) a consular officer, as defined by the Vienna Convention on Consular Relations of 1963;

iii) a member of diplomatic staff of members of permanent missions to international organizations, of special missions, or is recruited to represent a State at international conferences; or

iv) Any other person enjoying diplomatic immunity;

c) the subject of the proceeding is the recruitment, renewal of employment or reinstatement of an individual;

d) the subject of the proceeding is the dismissal or termination of employment of an individual and, as determined by the head of state, the head of government or the Minister of Foreign Affairs of the employer state, such a proceeding would interfere with the security interests of that state

e) the employee is a national of the employer State at the time when the proceeding is instituted, unless this person has the permanent residence in the State of the forum; or

f) the employer State and the employee have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of a state of the forum exclusive jurisdiction by reason of the subject matter of the proceeding." (A/Res/59/38).

[215] Yearbook of the International Law Commission, 1986, Vol. II Part Two.

authority", while the text adopted on second reading 1991 refers to "functions closely related to exercise of governmental authority". According to the 1991 Commentary on the Draft articles[216], these functions are performed by "private secretaries, code clerks, interpreters, translators and other persons entrusted with functions related to State security or basic interests of the State", as well as officials of established accreditation. This interpretation would have comprised diplomatic agents as well as all the technical and administrative staff of an embassy. In the ILC report of 1999[217], the wording of Art. 11 (2) (a) remained unchanged. The text adopted by the General Assembly now limits immunity to employment contracts with employees with "particular functions in the exercise of governmental authority".

204. Additionally, it introduces an express exception for employees who enjoy diplomatic immunities (Art. 11 (2) (b)) and thus refers to the status of the employee.

2.2.2. The object of the claim

205. The object of the claim is taken into account insofar as in a proceeding whose subject is the recruitment, renewal of employment or reinstatement of an individual, the rule of immunity prevails (Art. 11 (2) (c)). This provision does not exclude claims for monetary compensation for wrongful dismissals.[218]

2.2.3. Security interests

206. The employer State enjoys immunity if the investigation of a dismissal or termination of employment would interfere with its security interests. The Understandings with respect to article 11 in the Annex to the Convention clarify "that the reference […] to the security interests of the employer State was intended primarily to address matters of national security and the security of diplomatic missions and consular posts." Whether a proceeding would interfere with the security interests of a State is determined by a superior State organ, namely the head of State, the head of Government or the Minister of Foreign Affairs of that State (Art. 11 (2) (d).

2.2.4. Nationality/Habitual residence

207. Like the European Convention, the UN Convention applies the criterion of nationality and habitual residence of the employee, but the nationality/habitual residence rules of those instruments lead to different results. For example, if an employee who works in a non-commercial institution is a national of the employer State and permanently residing in the State of the forum, the employer State will be considered immune in accordance with the European Convention, but not immune in accordance with the UN Convention.[219] According to the UN Convention, the employer State is immune only with respect to its nationals who do not have their permanent residence in the forum State (Art. 11 (2) (e)), whereas the nationality/residence system of the European Convention is far more complex.

208. Furthermore, the Understandings with respect to Article 11 state that under Art. 38 VCD and art. 71 VCC, "the receiving State has a duty to exercise its jurisdiction in such a manner as not to interfere unduly with the performance of the functions of the mission or the consular post." Finally, the UN Convention does not affect other international agreements relating to State immunity, such as Status of Forces Agreements (Art. 26 UN Convention), nor does it cover military activities.[220]

2.3. The Basel Resolution 1991 of the Institut de Droit International

209. The approach of the Basel Resolution 1991[221] of the Institut de Droit International on "Contemporary problems concerning the immunity of States in relation to questions of jurisdiction

[216] Yearbook of the International Law Commission, 1991, Vol. II Part Two.

[217] Yearbook of the International Law Commission 1999, Vol. II Part Two, Annex.

[218] Sixth Committee, Convention on Jurisdictional Immunities of States and Their Property, Report of the Working Group, 11 November 1993, A/C.6/48/L.4 para. 64.

[219] The wording of art. 11 (2) (e) UN Convention respects the principle of non-discrimination based on nationality. See Report of the International Law Commission on the work of its fifty-first session, 3 May-23 July 1999, para. 106.

[220] Introductory Statement by the Chairperson of the Ad Hoc Committee to the Sixth Committee, A/C.6/59/SR.13.

[221] Annuaire de l'Institut de Droit International 1992, Vol. 64, Tome II, p. 388.

and enforcement" to the question of State Immunity is to enumerate criteria which are indicative of the competence and incompetence of the relevant organs of the forum State.

210. According to Art. 2, each case is to be separately characterised in the light of the relevant facts and the relevant criteria: No presumption is to be applied concerning the priority of criteria of competence or incompetence. A contract of employment with a foreign State as the subject of a proceeding indicates the competence of the organs of the forum State (Art 2 (2)(c)). On the other hand, "[t]he organs of the forum State should not assume competence to inquire into the content or implementation of the foreign defence and security policies of the defendant State" (Art 2 (3) (d)).

2.4. The ILA Draft Convention on State Immunity

211. The ILA Draft Convention on State Immunity[222] introduces a basic presumption of non-immunity concerning employment matters in its article III C[223]. Similarly to the European Convention on State Immunity, the ILA Draft provides for exceptions to this non-immunity rule in cases where the employee is a national of the employer State at the time when the proceedings are brought (Art. III C (1)) or where there was no territorial connection between the employee and the forum State at the time the contract was entered into (Art. III C (2)).

212. Additionally, the principle of non-immunity does not apply if "[t]he employee was appointed under the public (administrative) law of the foreign State, such as, inter alia, members of the mission, diplomatic, consular or military staff." (Art. III C (4)). The Rapporteur of the ILA Committee on State Immunity, *Georg Ress*, explains the introduction of this exception of employees appointed under administrative law as follows:

> *The Committee was also uncertain as to whether the existing exceptions cover all the personnel which should be covered by immunity and proposed to add a clause which would make clear that the employment relationship of any and all diplomatic, consular and military staff or other members of the mission should be immune from the jurisdiction of the courts of the forum state.*[224]

213. It is questionable if the exception of all employees appointed under the public or administrative law of the foreign State covers "any and all" members of a diplomatic/consular mission. Administrative and technical personnel and domestic staff, who according to the definition of Art. 1 (c) VCD belong to the members of the personnel of the mission, may as well be appointed under private law[225], and in this case could not be subsumed under section 4 of Art. III C.

214. In summary, all international law instruments discussed in this article provide a general rule of non-immunity for employment matters, a rule which is subject to certain exceptions.

3. Analysis of State practice

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[222] Report of the Sixty-sixth Conference of the ILA, held at Buenos Aires, Argentina, 14 to 20 August 1994, p. 22 - 28.

[223] Article III C reads: "Article III Exceptions to Immunity from Adjudication

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

[…]

C. Where the foreign State enters into a contract of employment in the forum State, or where work under such a contract is to be performed wholly or partly in the forum State and the proceedings relate to the contract. This provision shall not apply if:

1. At the time the proceedings are brought the employee is a national of the foreign State; or

2. At the time the contract for employment was made the employee was neither a national nor a permanent resident of the forum State; or

3. The employer and the employee have otherwise agreed in writing; or

4. The employee was appointed under the public (administrative) law of the foreign State, such as, inter alia, members of the mission, diplomatic, consular or military staff."

[224] Georg Ress, Rapporteur, Final Report on Developments in the Field of State Immunity and Proposal for a Revised Draft Convention on State Immunity, in: International Law Association, Buenos Aires Conference (1994), International Committee on State Immunity, p. 452 - 499, at p. 495.

[225] See Hazel Fox, *The Law of State Immunity*, Oxford 2004, at p. 306.

215. Most cases submitted by the States to the Council of Europe concerned employment contracts relating to diplomatic missions or consular posts. Despite the fact that nearly all recent decisions are based on the relative immunity concept, some courts were reluctant to withdraw immunity from the employer States concerning embassies/consulates, as an investigation of the employment relations with personnel of diplomatic/consular missions before a local court could infringe the sovereign rights of the employer as well as the principle *ne impediatur legatio*. Taking account of this special situation, State practice regarding employment contracts relating to diplomatic/consular missions will be considered first. Thereafter, reference will be made to employment contracts relating to other State institutions.

3.1. State practice regarding employment contracts relating to diplomatic/consular missions

216. In the national courts' decisions, three main approaches can be found: Some courts declare employment contracts generally to be acts *iure gestionis*, at least as long as any contra-indications to this presumption do not exist in the case at issue. The location of the employment in a diplomatic or consular mission is not regarded as such a contra-indication.

217. Secondly, there are decisions which grant immunity to the employer State in all employment disputes concerning diplomatic and consular missions.

218. Thirdly, there are court decisions which classify the employment contracts as act *iure imperii* or act *iure gestionis* on a case-by-case basis.

3.1.1. Employment contracts, even in the context of embassies/consulates, in principle are considered acts *iure gestionis*

219. In a number of decisions, national courts do not grant immunity to the employer State, stating that employment contracts constitute acts *iure gestionis*. This corresponds with the general principle laid down in Art. 5 (1) European Convention as well as in Art. 11 (1) of the UN Convention.

220. It can be seen from the practice submitted, that most of the cases referred to in this chapter concern administrative and technical personnel of an Embassy, but also domestic service staff like drivers and house maids. In one case the claimant worked as head of the visa section of a Consulate. In most of the cases the employee was a national of the forum State.

221. The Polish Supreme Court stated that Polish courts have jurisdiction in the case brought by a Polish citizen against a foreign Embassy for reinstatement because of the private law character of the employment relation.[226] In this decision, the Polish Supreme Court departed from the absolute immunity concept and applied the restrictive immunity concept for the first time.

222. Similarly, in a case concerning the reinstatement of a Spanish citizen who worked as a driver at the Embassy of Equatorial Guinea, the Spanish Supreme Court adopted the restrictive immunity concept and established that Spanish courts are competent in cases related to labour law in 1986[227]. It affirmed this decision in a case concerning a bilingual secretary of the South African Embassy.[228]

223. The Austrian Supreme Court[229] did not grant immunity to a foreign State as regards an employment contract with a photographer at the Embassy of that State. The employee was recruited in the forum state, where she also had her permanent residence. The Court stated that foreign States enjoy jurisdictional immunity only for their sovereign acts, but not for their legal relationships under private law, the latter including employment contracts. The Austrian Supreme

[226] PL/2, Polish Supreme Court, Polish citizen against the Embassy of a foreign State, 11 January 2000, OSNAP 2000/19/723 - IPN 562/99.

[227] E/3, Spanish Supreme Court (Tribunal Supremo), Emilio M. B. (individual) v. Embassy of Guinea Equatorial (State), 10 February 1986, Aranzadi, 1986, No. 727.

[228] E/4, Spanish Supreme Court (Tribunal Supremo), Diana Gayle Abbott (individual) v. República de Sudáfrica (State), 1 December 1986, Aranzadi, 1986, No. 7231.

[229] A/3, Austrian Supreme Court (Oberster Gerichtshof), R. W. (individual) vs. Embassy of X. (State), 21 November 1990, No. 9ObA244/1990; see also A/6, Austrian Supreme Court (Oberster Gerichtshof), N.P. (individual) vs. R. F. (State), 14 June 1989, 9 ObA 170/89.

Court delivered a similar decision in the case of a French citizen who had worked at the French Consulate as head of the visa section.[230]

224. A Brazilian Court had to decide in a dispute related to pension contributions of a locally recruited housemaid of the official residence of the Finnish Embassy. Finland claimed immunity which was rejected by the Court. It was held that under the provisions of Brazilian law and case law, foreign missions could not in principle invoke immunity in labour disputes. Furthermore, the Court found that diplomatic immunity only applied to the members of the diplomatic staff and not to the mission itself.[231]

225. Portuguese courts adopted the restrictive immunity concept only in the last years. The former Portuguese judicial practice was influenced by a decision from 1962[232], according to which the absolute immunity rule constituted customary international law[233]. The absolute immunity rule regarding employment contracts with Embassies was confirmed still in 1999:

> *In view of such immunity from jurisdiction, a Portuguese citizen who worked as a driver at the French Embassy in Portugal cannot resort to judicial proceedings against the French State, in order to obtain the payment of alleged labour credits.* [234]

226. In 1997, however, a Portuguese court for the first time followed the concept of restrictive immunity by stating that immunity of foreign States is restricted to acts *iure imperii* only.[235] One year later, a court came to the conclusion that a foreign State was not immune concerning employment contracts, as they constituted acts *iure gestionis*.[236] In another decision in the year 2000, the Republic of Brazil was held to be not immune with respect to an employment contract with an individual who had worked in the Brazilian Embassy in Lisbon. The court considered the employment contract as act *iure gestionis*.[237]

227. To sum up, present Portuguese judicial practice shows a tendency to change to the restrictive immunity concept. Traditionally supporting the absolute immunity concept, courts have also taken decisions based on the restrictive immunity concept since 1997. Applying restrictive immunity, employment contracts, even in the context of embassies, have been qualified as acts *iure gestionis* and therefore not immune.

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[230] Austrian Supreme Court (Oberster Gerichtshof), French Consular Employee (individual) vs. France (State), 14 June 1989, 9 ObA170/1989, 31 ZfRVgl p. 300 with critical comment by Ignaz Seidl-Hohenveldern, = 86 ILR 583.

[231] FIN/3, Brazil Labour Court (Tribunal regional do trabalho – 10 regiaõ), Vilda Custodio de Carvalho (individual) vs. Republic of Finland (State), 3 July 2002.

[232] P/1, Supremo Tribunal de Justica – Appeal, United States of America (State) vs. Companhia Portuguesa de Minas, SARL (Private Company), 27 February 1962, Boletim do Ministério da Justica, 1962, No. 114.

[233] See also P/7, Tribunal da Relacao de Lisboa – Appeal, Bernadette Bravo (individual) vs. Republic of Zaire (State), 12 July 1989, Colectânea de Jurisprudência, No. XIV-4; *Correira, Sérvulo*, Portugals Stellung zur Frage der Staatenimmunität, in: 34 Archiv des Völkerrechts (1996), pp. 120 - 138.

[234] P/12, Supremo Tribunal de Justica – Appeal, A. (individual) v. France (State), 9 December 1998, Boletim do Ministério da Justica, 1999, No. 482; equally P/3, Tribunal da Relacao de Lisboa – Appeal, António Portugal e Castro (individual) vs. Estado Brasiliero (State), 6 July 1983, Colectânea de Jurisprudência, 1983, No. VIII-4, P/4, Supremo Tribunal de Justica – Appeal, A. (individual) vs. Ambassador in Portugal (State), 11 May 1984, Boletim do Ministério da Justica, 1984, No. 337 P/9, Tribunal da Relacao de Lisboa – Appeal, Anabela Catarina Ramos et al. (individuals) vs. US Government (State), 4 May 1984, unpublished; P/13, Tribunal da Relacao de Lisboa, Jorge Manuel Nunes Marques (individual) vs. Saudi Arabia Embassy (State), 23 February 2000, unpublished.

[235] P/10, Supremo Tribunal de Justica – Appeal, Manuel Ventura Arroja (individual) vs. Republic of Bolivia (State), 4 February 1997, Boletim do Ministério da Justica, 1997, No. 464.

[236] P/11, Tribunal da Relacao de Lisboa – Appeal, Rui Manuel do Couto Mendes Valada (individual) vs. Popular Republic of Angola (State), 5 March 1998, Colectânea de Jurisprudência, 1998, No. XXIII-2.

[237] P/14, Tribunal da Relacao de Lisboa – Appeal, Maria Aparecida Pereira de Melo Cunha Brazao (individual) v. Brazilian Embassy and Republic of Brazil (State), 13 December 2000, unpublished; see also the case submitted by Portugal to the Council of Europe concerning a driver of the Pakistan embassy who claimed damages for unfair dismissal: Court of Appeal (Tribunal da Relação de Lisboa), A. (individual) v. Islamic Republic of Pakistan (State), 23 June 2004, unpublished.

228. In several cases pending before Croatian courts[238], the Croatian Ministry of Foreign Affairs in applying the restrictive immunity concept has expressed its opinion that foreign States are able to be a party of court proceedings concerning employment contracts.

229. Belgian courts have considered to be acts *iure gestionis* an employment contract with a driver at the embassy of Upper Volta[239] as well as the employment contract with a language teacher at the Portuguese embassy[240].

3.1.2. Immunity regarding employment contracts with all members of the diplomatic mission

230. Among the judicial practice generally supporting the concept of restrictive State immunity, there are decisions that nevertheless consider immune all employment matters in the context of Embassies. In this view, Embassies belong to the sovereign sphere of a foreign State where no interference by the forum State's courts is appropriate, whatever kind of employment dispute there is at issue. Thus, foreign States are held immune from employment matters in the context of Embassies regardless of the circumstances of the legal relationship.

231. So for instance, the UK Court of Appeal decided that "[a] foreign State enjoys immunity from the UK courts in respect of proceedings arising out of employment contracts of all members of its diplomatic mission, including locally engaged members of the technical and administrative staff."[241]

232. This judicial practice corresponds to the UK State Immunity Act 1978: In its Section 4 (1), it provides a rule of non-immunity in employment matters: "A State is not immune as respects proceedings 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". According to Section 16 (1) (a), however, Section 4 does not apply to proceedings concerning the employment of members of a mission within the meaning of the Vienna Convention on Diplomatic Relations 1961.

233. The term "members of the diplomatic mission" in accordance with the VCD comprises the head of the mission, the members of the diplomatic staff, the members of the administrative and technical staff as well as the members of the domestic service staff of the mission (Art. 1 VCD). Thus, before UK courts States enjoy immunity from proceedings concerning employment contracts with all members of a diplomatic mission.

234. Even in the *Sengupta*[242] case which was not covered by the UK State Immunity Act, the Tribunal, applying common law, came to a similar conclusion. Mr. Sengupta, an Indian national, worked as a clerk at the Indian High Commission from 1975 until he was dismissed in 1981. He brought a claim against the Republic of India alleging unfair dismissal. The Employment Appeal Tribunal, applying the restrictive immunity theory, raised the following questions in order to determine whether a contract of employment was an act *iure imperii* or *iure gestionis*:

> *a) Was the contract of a kind which a private individual could enter into? b) Did the performance of the contract involve the participation of both parties in the public functions of the foreign State, or was it purely collateral to such functions? c) What was the nature of the breach of contract or other act of the foreign State giving rise to the proceedings? d) Will the investigation of the claim by the Tribunal involve investigation into the public or sovereign acts of the foreign State?*[243]

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[238] HR/03, Zagreb Municipal Court, J. Š. B. (individual), vs. the Embassy of Japan, 25 May 2001; HR/04, Zagreb Municipal Court, P. K. (individual) vs. the Embassy of the United States of America, 9 April 2001; HR/08, Zagreb Municipal Court, L. O. (individual) vs. Turkish Embassy, 9 April 2001.

[239] B/2, Tribunal du Travail de Bruxelles, Rousseau contre République de Haute Volta, 25 April 1983, Journal des Tribunaux du Travail (JTT) 1984, p. 276.

[240] B/3, Cour du Travail de Bruxelles, Queiros Magalhaes Abrantes vs. Portugal (State), 22 September 1992, Pasicrisie 1992, II, 104.

[241] GB/6, Court of Appeal, Ahmed v. Government of the Kingdom of Saudi Arabia, 6 July 1995, [1996] All ER 248.

[242] GB/13, Employment Appeal Tribunal, Sengupta v. Republic of India, 17 November 1982, 24 ILR 352.

[243] 64 ILR 352, at 360.

235. In its answers to these questions the Tribunal held that a private individual could in fact enter into this kind of employment contract. Nevertheless, it considered the contract an act *iure imperii*, as the plaintiff's employment as a clerical officer in the diplomatic mission of a foreign State would involve his participation in the public acts of a foreign sovereign "at however lowly a level". His dismissal was an act done in pursuance of a public function i.e. in the running of the diplomatic mission. An investigation into the fairness of that dismissal would involve the Tribunal in an investigation of, and interference with, a public function of a foreign sovereign. Therefore, "a State is immune from claims brought by employees at a diplomatic mission who are engaged on the work of that mission."

236. Interestingly enough, Ms Rosalyn Higgins as representative of Mr. Sengupta submitted that States should be granted immunity for employment matters concerning diplomatic staff only, as clerical staff such as Mr Sengupta had no confidential information and did not act as representatives of the foreign State. This distinction with regard to the status of the employee was rejected by the Tribunal for the above reasons, although it did "not exclude the possibility that (apart from the 1978 Act) employees who are solely concerned with providing the physical environment in which the diplomatic mission operates might be able to claim."

237. Similarly, a foreign State was held immune by the Irish Supreme Court on the ground that employment within an Embassy comes within the sphere of governmental or sovereign activity. In *Canada v. Burke*[244] Mr. Burke was employed as a driver with the Canadian embassy in Dublin and brought a claim against Canada for unfair dismissal. The Court applied the restrictive immunity concept to the case. However, it considered Mr. Burke's employment as a driver to be a contract of service requiring an element of trust and confidentiality, touching the actual business or policy of the foreign government. Generally, Judge O'Flaherty stated that "*[p]rima facie* anything to do with the embassy is within the public domain of the government in question."[245] Thus, Canada was held immune.

238. Some Italian decisions seem to point in the same direction. In *Malta vs. Dalli*[246]*,* the work of a typist at a foreign Embassy was considered as implying her participation in the public organisation of the State itself. "[I]t is performed in close connection with the officials' job, and therefore in a position of trust, due to his/her necessary knowledge of the State's institutional acts." Thus, Malta was held immune from Italian jurisdiction.

239. Some decisions of Finnish Courts reflect a similar attitude to employment with Embassies using Art. 32 of the European Convention to support the immunity of States in such cases. The case *Heusala v Turkey*[247] concerned a labour dispute between the Embassy of Turkey and a locally recruited employee, who had worked as a secretary and translator.

240. The Finnish Supreme Court held that the European Convention on State Immunity was a valid source when analysing the rules and principles of customary international law. The Court referred to Articles 5 and 32 of the European Convention and found that on the basis of Article 32 and customary international law,

> *[…] a foreign mission as an employer could invoke immunity from jurisdiction before a court of the receiving State when the labour dispute was closely related to the official duties of the mission. The Court held that the duties of the Plaintiff were meant to serve the official duties of a member of the diplomatic staff of Turkey and was thus closely related to the exercise of governmental authority of Turkey. Therefore, Turkey enjoyed jurisdictional immunity in the case and Finnish courts lacked subject matter jurisdiction*.

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[244] IRL/1, Irish Supreme Court, The Government of Canada (Applicant) v. The Employment Appeals Tribunal (Respondent) and Brian Burke (Notice Party), 12 March 1992, Irish Reports, 1992, Vol. 2, pp 484-502.

[245] IR 1992, Vol 2, at 458.

[246] I/62, Supreme Court of Cassation, Malta (State) vs. Dalli (natural person), 15 March 1989, Rivista di diritto internazionale privato e processuale, 1991, 474 .

[247] FIN/2, Supreme Court (Korkein oikeus), Hanna Heusala (individual) v. Republic of Turkey (State), 30 September 1993, Korkeimman oikeuden ratkaisuja 1993 II at 563.

241. Likewise, the District Court of Helsinki referred to *Heusala v Turkey* in a case concerning the termination/cancellation of an employment contract between the Embassy of Venezuela and its former chauffeur.[248]

242. In a decision of a court in Romania, employment matters with diplomatic missions were considered immune, because the court interpreted Art 31 VCD as conferring immunities to diplomatic missions. The case concerned an auditor at the embassy of P. in Romania which was abusively put to an end. The Court stated that

> *[t]aking into account art. 31 of the VCD which guarantees immunity of jurisdiction for diplomatic missions, the Embassy of P. in Romania may not be a Party in the present case.*[249]

243. However, the court obviously failed to notice that not the Embassy/Consulate itself, but the State represented by the Embassy is party to the employment dispute[250], and secondly that Art. 31 VCD and art. 43 VCR confer immunity to diplomatic and consular agents, and not to diplomatic/consular missions as such.[251]

3.1.3. Qualification of employment contracts in the context of embassies as acts *iure imperii* or acts *iure gestionis* on a case-by-case basis

244. In this third category of decisions, courts decided on the immunity of the employer State on a case-to-case basis whereby certain criteria were applied. Several decisions of the Swiss Federal Tribunal serve as an example.

245. In *S. v. India*[252]*,* an Italian national had been hired by the Indian Embassy in Berne to work as a radio-telegraph operator in 1957. In the course of time S. was moved from technical works to office work, including translation and correspondence. From 1976 his functions were limited to purely clerical duties. After his dismissal in 1979 he lodged a claim for 20.000 Swiss francs against the Indian State. Switzerland had ratified the European Convention on State Immunity.

246. The Swiss Federal Tribunal did not apply the European Convention to the case, because India was not party to the Convention. The Tribunal stated that the Convention did not reflect customary international law that could be applied to relations with third parties. Nevertheless, it considered Article 5 (1) European Convention to be an indication that employment contracts were acts *iure gestionis*. At the same time, it rejected the rule of Art. 5 (2) European Convention, because it considered the long-term duration of the employment (in the case at issue: 22 years) more decisive than the habitual residence of the employee at the time the contract was entered into.

247. The Swiss Federal Tribunal held India not immune. In its view, the location of work in an Embassy did not change the private law character of the contract:

> *Il ne suffit cependant pas d'admettre que le fonctionnement normal d'une mission relève des compétences souveraines de l'Etat et que le recrutement du personnel constitue dès lors un acte iure imperii. Le but d'un rapport juridique peut fournir un indice, mais n'est en soi pas un critère suffisant pour préjuger la nature juridique d'un rapport.*

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[248] FIN/14, Finland, District Court of Helsinki, Olivia Carrasco Ricardo (individual) v. Republic of Venezuela (State), 14 November 2000, Case No. 00/1467.

[249] RO/2, Romania, Tribunal of Bucharest, A. S. M. vs. the Embassy of P. in Romania, 5 June 2002.

[250] A diplomatic mission is no legal entity: "Embassies are subsidiary organs of the State, being part of the Ministry of Foreign Affairs or the Foreign Office of the sending State." YBILC 1991 Vol. II Part Two, p. 15 FN 30. See Ignaz Seidl-Hohenveldern*,* Staatenimmunität gegenüber Dienstnehmerklagen von Botschaftspersonal, in IPRax 1993, pp. 190 - 191, at 190; Werner Gloor, Employer states and sovereign immunity: the Geneva Labour Court practice, in: Wybo P. Heere (ed.), International law and The Hague's 750th anniversary, 1999, pp. 117-125, at 121, FN 28.

[251] See Claim Against The Empire of Iran Case, German Federal Constitutional Court, 30 April 1963, in: 45 ILR pp. 57 - 82, at 75.

[252] CH/2, 1ère Cour de droit civile du Tribunal fédéral Suisse, S. contre Etat indien, 22 May 1984, ATF 110 II 255, www.bger.ch, = 82 ILR 14 - 23; see also Jean Monnier, Note à l'arrêt de la première Cour civile du Tribunal Fédéral du 22 mai 1983 dans l'affaire S. contre État indien, in: 41 SJIR 1985, pp. 235 - 243.

248. According to the Tribunal, any private individual could have hired the claimant to work as a radio-telegraph operator. The recruitment of the employee outside the territory of the employer state is an indication that the legal relationship at issue is to be qualified as act *iure gestionis*. Given the subordinate functions of the employee, the submission to a foreign tribunal could not compromise the interests of the defendant. The Tribunal found it unreasonable for the employee to seek redress before Indian courts because he was not a national of the employer State and had no relations to India whatsoever. A precondition for Swiss jurisdiction was a sufficient link of the matter at issue to the forum state ("Binnenbeziehung"). This link has been established by the residence, recruitment and employment of the claimant in Switzerland.

249. In the same way, the Swiss Federal Tribunal held the Republic of Iraq not immune in the case of a Moroccan national who had been employed as translator/interpreter at the Iraqi Embassy.[253] It qualified the work of a translator as subaltern in spite of its confidential nature.

250. In the case of an Egyptian national working as a driver at the Egyptian Embassy[254], the Swiss Federal Tribunal again rejected the application of the European Convention because the defendant had not ratified the Convention. The fact that the employee was national of the employer State was not considered decisive:

> *Le fait que le demandeur est un ressortissant de l'Etat défendeur ne constitue dès lors qu'une circonstance parmi d'autres, qu'il convient de prendre en considération, non pas pour elle-même, mais bien plutôt dans le cadre de l'examen global de la situation. […]De plus, toutes les circonstances qui viennent d'être rappelées, notamment la nature de l'activité exercée par le demandeur et le fait que celui-ci a aussi travaillé comme chauffeur pour un pays tiers, confirment que la nationalité du travailleur ne revêt pas en l'occurrence une importance décisive pour trancher la question de l'immunité de juridiction.*

251. Thus, the Tribunal was in favour of a global examination of the case at issue, not giving a single criterion such as the nationality of the employee too much weight. Additionally, it considers the interests of the parties in a proceeding before a Swiss court:

> *Au surplus, le dossier ne révèle pas quel intérêt la défenderesse pourrait avoir à se prévaloir de son immunité dans ces conditions, alors que l'intérêt du demandeur à pouvoir plaider à Genève résulte déjà de simples considérations d'ordre pratique.*

252. For these reasons, the Tribunal did not grant immunity to Egypt, stating the conformity of this solution with the general tendency to limit the application of the State immunity doctrine.

253. Apart from the Swiss decisions, many other courts have also applied certain criteria to determine the immunity or non-immunity of the employer States. Chapter 4 deals with an examination of these criteria applied in the judicial practice.

3.2. State practice regarding employment contracts relating to other institutions

254. State institutions other than embassies or consulates, which fulfil their functions and enter into working relations on the territory of a foreign State, may include information or commercial offices, cultural agencies, educational bodies, trading corporations or armed forces.[255] In determining the (non-)immunity of the employer State, courts had to categorise the employment contracts as acts *iure imperii* or acts *iure gestionis*.

255. The juridical practice affirms the principle that employment contracts are qualified as acts *iure gestionis*. For instance, the Athens Court of First Instance had granted immunity to Italy in a case concerning a professor of Italian language, because it considered the Casa d'Italia to be a

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[253] CH/5,1ère Cour civile du Tribunal fédéral Suisse, R. c/ République d'Irak, 13 décembre 1994, ATF 120 II 408, www.bger.ch.

[254] CH/7, 1ère Court civile du Tribunal fédéral Suisse, M. c/ République Arabe d'Egypte, 16 novembre 1994, ATF 120 II 400, www.bger.ch.

[255] See also Richard Garnett, State Immunity in Employment Matters, in: ICLQ 46 (1997), 81 - 124, p. 108.

part of the Italian embassy.[256] This decision would have amounted to the granting of immunity based on the location of the employment. However, the Athens Court of Appeals stated that in cases where the employer State is situated "on an equal footing with private persons", such State does not enjoy sovereign immunity. Immunity would be granted as regards contracts in matters of civil service. Interestingly, the Athens Court of Appeals spelled out that the differentiation between acts *iure gestionis* and acts *iure imperii* is to be made in accordance with domestic law, stating that there was "no international norm establishing international jurisdiction of domestic courts on this matter".

256. In 1988, the Swedish Labour Court[257] still granted immunity to foreign States in employment proceedings based on the fact that the defendant exercised sovereign functions. For instance, the Swedish Labour Court found that the Korea Trade Centre was a public non-profit entity that was subordinated to the Korean Ministry of Commerce. The Centre was granted immunity in an employment proceeding on the grounds that it was a State entity. No further examination of the circumstances of the employment relationship was made. However, this judgement has to be considered against the background of the fact that the Swedish Supreme Court invoked the restrictive immunity concept only in 1999.[258]

257. In a recent decision of 2001, the Swedish Labour Court[259] had to examine the status of the Cyprus' Tourist Organisation. The case concerned a former employee of the Organisation who sued the latter for damages on account of having been given notice to quit without grounds of fact. The court found that the aims and activities of the Tourist Organisation were such as to provide a basis for its immunity before Swedish courts. Furthermore, it established that the notice given to the plaintiff was issued by Cyprus in its capacity as a sovereign State. In the following, the Court referred to the restrictive immunity concept and pointed out that the commercial or private-law nature of an act had to be assessed in each particular case. Despite Sweden not being a party to the European Convention, the Court nevertheless stated that this instrument would not have constituted an obstacle for the Cyprus Tourist Organisation to claim immunity. The Court further examined the position of the employee in the Organisation as well as other circumstances and finally held the Organisation immune.

258. The Italian Government further submitted several decisions concerning local employees of NATO members who were neither part of the armed forces nor of the civil element of the NATO forces. Courts referred to Art. IX para. 4 of the NATO SOFA and stated that this Convention "expressly reaffirmed the principle according to which working and employment relations concluded between the armed forces or a civil body of a member State of the Atlantic Alliance and a private citizen of the host State are governed by the legislation in force in the hosting State."[260] Thus, the States at issue could not invoke immunity in these cases.

4. The main criteria applied by the courts

259. The main criteria applied by the courts to determine the immunity or non-immunity of the employer state are: the location of the employment in an embassy/consulate (as described above), the nature of the employee's work, the status of the employee, the object of the claim, security

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[256] GR/8, Athens Court of First Instance, X. (Professor of the Italian language) v. (Casa d' Italia) The Italian Republic, Judgment 600/1992, Epitheorissi Ergatikou Dikaiou (in greek) Journal of Labour Law 1994 p. 806.

[257] S/4, Labour Court (Arbetsdomstolen), Douglas H (individual) vs. Korea Trade Centre (KTC), 4 May 1988, Riksarkivet (*National Archives*), Arbetsdomstolens arkiv, Inkomna mål 1987, Vol. EI:1219, målnr B 41/87; *Nytt Juridiskt Arkiv 1987*, *Avd I*, Case No. 1987:59 (partly published).

[258] See S/8.

[259] S/9, Labour Court (Arbetsdomstolen), GP (individual) vs. Cypriotska Statens Turistorganisation, CST (Cyprus' Tourist Organisation), 16 November 2001, Arbetsdomstolens domar 2001, Case AD 2001 Nr. 96.

[260] I/25, Court of Appeal of Venice, Pelizon (natural person) vs. SETAF Headquarters (body corporate), 19 April 1973, Italian Yearbook of International Law, 1977, p. 338; I/27, Supreme Court of Cassation, Bruno (natural person) vs. United States of America (State), 25 January 1977; Italian Yearbook of International law, 1977, p. 344; I/29, Tribunal of Naples, Di Palma (natural person) vs. Government of the United States of America (State), 13 October 1977, Foro napoletano, 1979, p. 51; I/65, Pretore (lower court judge) of Pisa, Greco (natural person) vs. United States of America (State), 4 May 1987, Rivista di diritto internazionale privato e processuale, 1988, p. 721; I/30, Supreme Court of Cassation, Gereschi (natural person) vs. United States of America (State), 14 October 1977, Italian Yearbook of International Law, 1978-79, p. 173.

interests of the employer State and the nationality/residence of the employee. This corresponds with the exceptions of Art. 11 (2) of the UN Convention (see above).

4.1. The nature of the employee's work and the status of the employee

260. There is judicial practice that distinguishes employment matters with respect to the status of the employee within the organisational structure of the diplomatic/consular mission or other institution. In this context, courts do not only consider the official position of the employee in the staff hierarchy or the denomination of his/her functions, but also the nature of the employee's work.[261] Labour contracts with officers of rank are considered *acta iure imperii*, whereas employment relations with employees who do not exercise governmental authority are considered *acta iure gestionis*. The nature of the employee's work and the status of the employee are referred to in Art. 11 (2) (a) and (b) of the UN Convention.

261. The French Cour de Cassation held Japan not immune in a labour dispute concerning a former porter of the Japanese embassy, because the employee had no responsibility in the exercise of public service.[262]

262. Italian Courts considered the nature of the employee's work as a distinctive element in several cases. In labour disputes with employees who carried out auxiliary functions, the employer State could not invoke immunity:

> *An Italian judge has jurisdiction on a dispute filed by a worker against the Embassy of a foreign State in Italy, in case the dispute deals with auxiliary and secondary functions. The fact the worker is a foreign citizen is insignificant [...].*[263]

263. In contrast, the employer State was granted immunity in cases where the personnel was carrying out activities aimed at achieving public and institutional objectives of a consulate or embassy:

> *In the field of working relations with the Embassy of a foreign State in Italy, the customary international principle of immunity from civil jurisdiction applies only to individuals employed to perform professional or clerk jobs. In fact, due to this reason, they are part of the public organisation of the State, contributing to attain its institutional goals.*[264]

264. In this context, the functions of a switchboard operator in a consular office were considered confidential and therefore not subject to investigation by the Italian court.[265] In *Belgium v. Esposito*[266], the Italian Court explains this idea as follows:

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[261] Werner Gloor, Employer states and sovereign immunity: the Geneva Labour Court practice, in: Wybo P. Heere (ed.), International law and The Hague's 750th anniversary, 1999, pp. 117-125. at 121; for the Italian practice, see Luigi Sbolci, Jurisdictional Immunity of Foreign States with Regard to Employment, in: 6 The Italian Yearbook of International Law (1985), pp. 177 - 189, at 187 et seq.

[262] F/2, Cour de Cassation (1er chambre civile), M. Saignie vs. Embassy of Japan, 11 February 1997, Revue critique de droit international privé, 1997, pp. 332-335.

[263] I/67, Italian Supreme Court of Cassation, Zambia (State) vs. Sendanayake (natural person), 18 May 1992, Rivista di diritto internazionale privato e processuale, 1993, 399; I/61, Supreme Court of Cassation, Brasil (State) vs. De Lucia (natural person), 17 October 1988, Rivista di diritto internazionale privato e processuale, 1990, 705; I/39, Supreme Court of Cassation, Norway (State) vs. Quattri (natural person), 28 November 1991, Rivista di diritto internazionale, 1991, 993; I/75, Supreme Court of Cassation, British General Consulate in Milan (State) vs. Sala (natural person), 27 May 1999, Rivista di diritto internazionale privato e processuale, 1999, 628; I/65, Pretore of Rome, Taha (natural person) vs. Egypt (State), 10 October 1991, Rivista giuridica del lavoro, 1992, II, 784; I/23, Tribunal of Rome, Parravicini (natural person) vs. Commercial Office of the Republic of Bulgaria (State), 22 September 1969, Rivista di diritto internazionale privato e processuale, 1970, p. 658; I/18, Supreme Court of Cassation, Iasbez (natural person) vs. Centre international de hautes ètudes agronomiques méditerranéens (body corporate), 21 October 1977, Italian Yearbook of International Law, 1977, p. 319.

[264] I/59, Italian Supreme Court of Cassation, United Kingdom (State) vs. Bulli (natural person), 19 May 1988; I/49, Supreme Court of Cassation, Giaffreda (natural person) vs. France (State), 18 November 1992, Rivista di diritto internazionale privato e processuale, 1994, 340; see also I/77, Supreme Court of Cassation, Canada (State) vs. Cargnello (natural person), 20 April 1998, Rivista di diritto internazionale privato e processuale, 1999, 1030.

[265] I/70, Italian Supreme Court of Cassation, United States of America (State) vs. Lo Gatto, 21 April 1995, Il Consiglio di Stato, 1995, II, 1771.

> *Working relations established in order to organise the proper functioning of a consular office are to be considered as acts performed by a foreign State and, since they concern typically public activities of the State itself, they are immune from Italian jurisdiction. In order to ascertain the public nature of the working relation established by the Consul, the existence of a link between the activity performed by the employee and the consular function is to be verified. This link can be reasonably found in the performance of qualified cooperation and collaboration tasks, implying the status expressly covered by Article 43 of the Vienna Convention of April 24, 1993 on consular relations, governing the treatment to be given to members of a consular office.*

265. Likewise, the United States Information Agency, which is part of the United States Information Service (U.S.I.S.) was considered a US government agency performing public functions. Therefore, the United States were held immune in a dispute concerning a librarian at U.S.I.S. in Naples.[267]

266. However, the Italian judicial practice is not uniform. In *Panattoni vs. Germany*[268], the Italian Supreme Court stated that a foreign country is exempt from the Italian jurisdiction with respect to disputes on employment contracts with an Italian citizen permanently working in the organisation of the diplomatic mission even if he/she carries out merely material functions.

267. In a decision concerning a domestic servant of the Ambassador's residence before the Portuguese Supreme Court[269], the employer State was not granted immunity, because the employee did not have independent and command functions in the organisation of the civil service or functions of authority and representation: "Such contractual labour relationship is ruled by Portuguese law similarly to other labour contracts for the performance of domestic services celebrated with any other private person."

268. The subordinate nature of the work of the employee was one of the criteria applied by Swiss courts in the case *S. v. India*.[270]

269. The German Bundesarbeitsgericht[271] stated that the distinction between *acta iure imperii* and *acta iure gestionis* turned not on the purpose of the act but on its nature; nevertheless, as a special exception an act had to be qualified as *iure imperii* if it was within the core area of sovereignty. In this case it was irrelevant if the employment relation at issue was based on a private law contract or on a sovereign act:

> *Although labour contracts are considered as private law contracts in Germany even if concluded on behalf of the state the pending case concerns acta iure imperii beyond the jurisdiction of the German courts. The reason is that plaintiff exercised consular functions (e.g., she issued Argentine passports and visas). These functions are within the core area of sovereignty. The concept of state immunity protects foreign states from German courts' interference in their sovereign functions. If an employee exercises sovereign functions as a consular official of a foreign state, the review of this employee's dismissal by German courts would interfere with the consular functions of this state and thus run counter to the principle* ne impediatur legatio*.*

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[266] I/19, Italian Supreme Court of Cassation, Belgian Consulate in Naples (State) v. Esposito (natural person), 3 February 1986, Rivista di diritto internazionale privato e processuale, 1987, 332.

[267] I/24, Italian Supreme Court of Cassation, De Ritis (natural person) vs. Government of the United States of America (State, 25 November 1971, Italian Yearbook of International Law, 1975, 235.

[268] I/58, Italian Supreme Court of Cassation, Panattoni (natural person) vs. Germany (State), 15 July 1987, Rivista di diritto internazionale privato e processuale, 1989, 109.

[269] P/15, Portuguese Supreme Court (Supremo Tribunal de Justica), A. (individual) v. Israel (State), 13 November 2002, unpublished.

[270] CH/2, 1ère Cour de droit civile du Tribunal fédéral Suisse, S. contre Etat indien, 22 mai 1984, ATF 110 II 255, www.bger.ch, = 82 ILR 14 - 23, see *supra*.

[271] D-8-JUD, German Federal Labour Court (Bundesarbeitsgericht), Argentine citizen and former employee of the Argentine Consulate General in Germany vs. Argentine Republic, 3 July 1996, Entscheidungen des Bundesarbeitsgerichts, Vol. 83, p. 262 et seq.

270. The Court bases its ruling on the respect for the sovereignty of a foreign State, on the principle of non-interference in the sovereign functions of a foreign State and on the principle *ne impediatur legatio*. The employee's involvement in the sovereign functions of the foreign State was decisive in this decision. The Court did not, however, discuss the fact that the employee was a national of the employer State.

271. Another case before the German Bundesarbeitsgericht[272] concerned a German citizen and former employee of the Belgian Embassy in Germany working in a branch office of this Embassy. The Court held that the plaintiff did in fact perform core consular functions at the branch office of the defendant's Embassy, because she was empowered to sign visas and to use the embassy seal. She was also put on the list of personnel with signing authority. In its decision, the Court relied on its earlier decision reported above and thus granted immunity to the Kingdom of Belgium.

4.2. The object of the claim

272. Several decisions refer to the object of the claim as a decisive criterion to determine the immunity of the employer State. States were held not immune in case the claims concerned only economic aspects of the employment relationship, on the grounds that the investigation of such claims would not interfere with the sovereign functions of an embassy or other State entity. However, States were held immune from claims the adjudication of which would intrude upon the sovereignty of the foreign State.

273. The object of the claim as a criterion is reflected in Art. 11 (2) (c) of the UN Convention, which provides immunity for the employer State if the subject of the proceeding is the recruitment, renewal of employment or reinstatement of an individual.

274. Italian courts have applied this criterion in connection with the criterion of the nature of the employee's work:

> *[I]mmunity from jurisdiction cannot be applied when the employee carries out manual or auxiliary jobs, or in case the dispute concerns property aspects not connected with the organisation of the offices of the foreign State concerned.*[273]

275. In contrast, decisions which would require an investigation of the internal organisation of an Embassy or the merits of a dismissal, like decisions on the renewal of an employment contract or the reinstatement of an employee, could interfere with the sovereign functions of a foreign State and therefore lead to immunity of the employer State.

276. An Italian court also granted immunity to employer States in a case in which the claim was brought not by an individual, but by a trade union who sought to protect collective trade union interests. In *SIMAC-CISL vs. United States of America*[274], a trade union requested the Court under Art. 28 of the Italian Workers' Statute (*statuto dei lavoratori*) to order the defendant State to change its recruitment procedure which allegedly infringed the union's collective rights:

> *In particular, if a court had to order a foreign State - as in the case under review - to alter its preordained procedures for hiring employees (even though employed on routine administrative, clerical or maintenance functions) so as to eliminate any aspect considered prejudicial to collective trade-union interests, then this would undoubtedly transgress upon the sphere within which the foreign State exercises its power to organize its offices and acts jure imperii [...]*[275]

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[272] D-12-JUD, German Federal Labour Court (Bundesarbeitsgericht), German citizen and former employee of the Belgian Embassy in Germany working in a branch office of this embassy vs. Kingdom of Belgium, 25 October 2001, Betriebs-Berater 2002, p. 787 et seq.

[273] I/65, Pretore (lower court judge) of Rome, Taha (natural person) vs. Egypt (State), 10 October 1991, Rivista giuridica del lavoro, 1992, II, 784; I/78, Italian Supreme Court of Cassation, Saudi Arabia (State) vs. Al Baytaty Khalil (natural person), 15 July 1999m Rivista di diritto internatzionale privato, 2000, 757.

[274] I/14, Pretura (lower court judge) of Milan, SIMAC-CISL (body corporate) vs. United States of America (State), 14 April 1981, Italian Yearbook of International Law, 1985, at 181.

[275] Ibidem, at 185.

277. In his commentary to this case, however, *Luigi Sbolci* expresses the opinion that there might be claims of trade unions under Art. 28 of the Workers' Statute - for instance, a claim concerning the workers' right to strike - which would not interfere with the sovereign rights of foreign States.[276]

4.3. Security interests

278. According to the Basel Resolution of the Institute of International Law (Art. 2 (3) (d)) and the UN Convention on Jurisdictional Immunities of States and Their Property (Art. 11 (2) (d)), courts shall not investigate alleged security interests of a foreign State. Security interests of the employer State as a ground for its immunity can also be found in the judicial practice.

279. The case *Van der Hulst vs. United States of America*[277] concerns immunity in respect of an employment dispute between the United States of America and a Dutch national, Ms Van der Hulst, who had worked as a secretary in the Foreign Commercial Service Department of the United States Embassy in The Hague since 1 July 1984. According to a "notification of personal action" from 26 June 1984, a final appointment of Ms. van der Hulst depended on the results of a security check. On 29 August 1984 she was dismissed "for security reasons".

280. The Dutch Supreme Court accepted that in principle States are not immune as regards employment contracts, and hereby refers to the European Convention on State Immunity and the ILC Draft Articles on Jurisdictional Immunities of States and Their Property. However, the Court stated that there were exceptions to this principle:

> *In carrying on its diplomatic mission and providing consular services in the receiving State, a foreign State should, for reasons of State security, be given the opportunity to allow the conclusion or continued existence of a contract such as the present one to depend on the result (which is not subject to the assessment of the other party or the courts of the receiving State) of a security check by stipulating a condition such as the present one. It cannot be assumed that a foreign State which enters into such a contract thereby loses its right to rely on immunity when terminating the contract on the ground of a security check of the kind mentioned above, no matter how much the contract itself is of a private law nature.*

281. The Dutch Deputy Minister of Justice has referred to this judgement in his Explanatory memorandum to the amendment of the Bailiff's Act[278] regulating the consequences of official acts by bailiffs that are incompatible with the State's obligations under international law.

4.4. Nationality/residence

282. The criterion of a territorial nexus (nationality/residence) between the employee and the employer State is referred to in Art. 11 (2) (3) UN Convention, Art. III C (1) and (2) of the ILA Draft Convention, as well as in Art. 5 European Convention. Art. 5 European Convention introduces the nationality and residence of the employee as the main criteria for the determination of the (non-)immunity of the employer State.

283. In the case *Arias vs. Venezuela*[279] before the Subdistrict Court of The Hague, Ms Arias was a double national of Argentine and the Netherlands (since 1987) and had been employed in the administrative service of the Embassy of Venezuela. Venezuela was held immune on the ground that at the time (1980) when the contract was entered into, Ms Arias was neither a national of the Netherlands or habitually resident in the Netherlands, notwithstanding that she was a Dutch national at the time when the proceeding was instituted. The Subdistrict Court of The Hague

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[276] Ibidem, at 189.

[277] NL/10, Dutch Supreme Court, M. K. B. van der Hulst vs. United States of America, 22 December 1989, RvdW (1990) No. 15, English summary: NYIL 1991, pp. 379 - 387, see the commentary to this case in Y. M. Schrevelius, Embassy employees and state immunity: the attitude of Dutch courts, in: Wybo P. Heere (Hrsg.), International law and The Hague's 750th anniversary, 1999, pp. 127-133, at 131.

[278] NL/4, The Deputy Minister of Justice, Explanatory memorandum to the amendment of the Bailiff's Act, 5 April 1993, Kammerstukken 23081. no. 3.

[279] Arias vs. Venezuela, District Court of The Hague, 4 February 1998, JAR (1998/67), see Y. M. Schrevelius, Embassy employees and state immunity: the attitude of Dutch courts, in: Wybo P. Heere (Hrsg.), International law and The Hague's 750th anniversary, 1999 S. 127-133, at 132.

advised Ms Arias to start proceedings in Venezuela. This holding is consistent with the provision of Art. 5 European Convention, but not consistent with Art. 11 (2) (e) UN Convention.

284. The Swiss Federal Tribunal[280] rejected the application of the territorial nexus - regime of Art. 5 European Convention and held that other circumstances of the case, like for instance the status of the employee, had to be considered as well. However, Swiss courts *inter alia* refer to the nationality and residence of the employee in order to establish the "sufficient relation of the matter at issue with the forum state" ("Binnenbeziehung") as a pre-condition of their jurisdiction.

4.5. Others

285. Some judicial decisions refer to other circumstances of the employment relationships than the ones discussed above.

286. So for instance, in *S. v. India*[281] the Swiss Federal Tribunal stated that the fact that the employer State recruited the employee outside of its territory indicates the qualification of the employment contract as an act *iure gestionis*.

287. In the same case, the Swiss Federal Tribunal considered the long-term duration of the employment more decisive than a territorial nexus between the employee and the employer State at the time the contract was entered into.

288. In *Younis v. Jordania*[282], an Italian court considered the criterion of a long term working relation between the employee and the embassy in order to determine the immunity of the foreign State:

> *An Italian judge has no jurisdiction on a working dispute filed by a driver employed by the Embassy of a foreign State. The long time of his/her working relation bears witness to his permanent integration in the Embassy, which is the requirement necessary to apply immunity, irrespective of the manual job performed by the worker.*

289. It is worth noticing that the criterion of the duration of the employment relation is excluded by the Commentary to the ILC Draft articles 1991, which stated that "[t]he employees covered under the present article include both regular employees and short-term independent contractors."[283]

5. Conclusion

290. In summary, one can say that there exists a rich and diverse judicial practice on State immunity regarding employment contracts. Most decisions submitted concern employment contracts with personnel of diplomatic/consular missions.

291. Taking the restrictive immunity concept as a basis, most national courts have accepted the non-immunity rule regarding employment contracts as reflected in international law instruments on State immunity.

292. However, concerning the personnel of diplomatic or consular missions, the courts have tried to find a balance between this rule on the one hand and the status of a diplomatic/consular mission and its sovereign functions on the other. In order to respect the sovereign rights of foreign States, a number of decisions granted immunity to the employer States. As regards other State institutions, courts have also applied various criteria in order to balance the different interests involved.

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[280] CH/7, 1ère Court civile du Tribunal fédéral Suisse, M. c/ République Arabe d'Egypte, 16 novembre 1994, ATF 120 II 400, www.bger.ch, see *supra*.

[281] CH/2, 1ère Cour de droit civile du Tribunal fédéral Suisse, S. contre Etat indien, 22 mai 1984, ATF 110 II 255, www.bger.ch, = 82 ILR 14 - 23, see *supra*.

[282] I/66, Pretore (lower court judge) of Rome, Younis (natural person) vs. Jordania, 17 October 1991, Rivista giuridica del lavoro, 1992, II, 785.

[283] YBILC 1991, Vol. II Part Two, p. 42 para. 4.

293. The exceptions to non-immunity rule regarding employment contracts established by national courts were based on various circumstances of the employment relationship, like the location of the work in an embassy/consulate ("anything to do with an embassy is within the public domain of the government in question"), the nature of the employee's work, the status of the employee, the object of the claim, security interests of the employer State as well as the nationality and the residence of the employee.

CHAPTER 6

Personal Injuries and Damage to Property

Sérgio Saba

1. Introduction

294. Initially, the tort exception was conceived in national case law to cover road and rail accidents, particularly the negligent use of motor vehicles by State officials, whether for a public purpose or otherwise.[284] It was subsequently extended to other cases. In the recent practice of European countries, cases related to State tortious conduct involve car accidents,[285] accidents involving war ships[286] or war aircrafts,[287] lack of due diligence,[288] and also violations of fundamental human rights.[289]

295. Generally speaking, the notion of torts involves either (i) death or injury to a person, or (ii) damage to or loss of tangible property, caused by an act or omission attributable to a State. "Personal injury" is not defined within the framework of international instruments on State immunity but the notion usually covers any disease or any impairment of a person's physical or mental condition.[290] Concerning the damage to or loss of property, the common requirement is that the property must be tangible.[291] Moreover, the exception extends both to State acts as well as to omissions. In contrast to the silence of the European Convention on State Immunity, the UN Convention makes an express reference to the fact that acts as well as omissions are covered by the exception.

296. Recently, the debate regarding torts and State immunity has been focused on cases related to breaches of fundamental human rights and on the question of whether State immunity should be lifted in such cases.

2. The approaches of international instruments

297. Both the European Convention and the UN Convention, as well as the drafts elaborated by scientific institutions such as the *Institut de Droit international* and the International Law Association, deal with State tortious conduct and provide that State immunity shall be abrogated in proceedings related to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission attributable to a State.

2.1. The European Convention on State Immunity 1972

298. Generally speaking, the ECSI codifies the law of State immunity taking into account the traditional distinction between *acta jure imperii* and *acta jure gestionis* in order to identify acts subject to State immunity. However, this is not the case with regard to tortious conduct, which is exempted from immunity. Article 11 reads as follows:

> *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*

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[284] Fox, Hazel, "State Responsibility and Tort Proceedings against a Foreign State in Municipal Courts", *Netherlands Yearbook of International Law*, vol. XX, 1989, pp. 3 ff., at p. 17. As Bröhmer noted, today these cases are of little practical relevance due to the practice of concluding agreements between the sending State and the host State, under which the vehicles must carry liability insurance and claims arising out of such accidents can be brought directly against the insurance company. Bröhmer, Jürgen, *State Immunity and the Violation of Human Rights*, The Hague, Martinus Nijhoff, 1997, at p. 20.

[285] [A/4]

[286] [TR/3]

[287] [TR/2]

[288] [TR/4]

[289] [GB/8], [GR/1], [GR/4], [GR/5] and [IRL/3]

[290] Dickinson, Andrew *et al.*, *State Immunity - Selected Materials and Commentary*, Oxford, Oxford Univ. Press, 2004, at p. 369.

[291] See Dickinson *et al.*, cited (note 7), at p. 369.

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.

299. According to the Explanatory Report,[292] Article 11 was drafted along the lines of Article 10(4) of the 1971 Hague Convention on the Recognition and Enforcement of Foreign judgments in Civil and Commercial Matters.[293] The exception from immunity applies when there is physical injury or damage to tangible property and does not cover the cases of non-material damage only, although resulting from the same acts. However, where there has been injury to the person or damage to property, the rule of non-immunity applies equally to any concomitant claims for non-material damage resulting from the same acts.[294] Both articles state two conditions under which State immunity may be abrogated: (i) the facts which occasioned the injury or damage have to have occurred in the territory of the forum State, and (ii) the author of the injury or damage had to be present in that territory at the time when those facts occurred. In any case, a close jurisdictional connection between the act/author of injury or damage and the forum State territory is necessary to lift State immunity.

300. As mentioned above, the distinction between *acta jure imperii* and *jure gestionis* does not apply to the characterization of State tortious acts. Similarly, the distinction between negligent and deliberate conduct is not relevant either. Thus, the element of fault has no influence in characterizing the tortious conduct.

301. It might be that some of the State conduct resulting in injury or damage is due to actions of its armed forces. In this regard, article 31 of the European Convention provides that:

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.

302. A similar provision does not exist in the UN Convention. Armed forces' acts resulting in torts have produced contradictory State practice, as will be discussed below. In this regard, it is worth noting that according to the statement of the Chairman of the *Ad Hoc* Committee introducing the report of the *Ad Hoc* Committee, military activities are not covered by the Convention. Therefore, rules of customary international law continue to govern situations involving armed conflicts.[295]

2.2. The Basel Resolution on State Immunity of the Institut de Droit international 1991

303. The *Institut de Droit international* passed a Resolution on State Immunity at the Basel Session in 1991. The Tort exception is contained in its Article 2(2)(e) which states that,

2. In the absence of agreement to the contrary, the following criteria are indicative of the competence of the relevant organs of the forum State to determine the substance of the claim, notwithstanding a claim to jurisdictional immunity by a foreign State which is a party: […]

(e) The organs of the forum State are competent in respect of proceedings concerning the death of, or personal injury to, a person, or loss of or damage to tangible property, which are attributable to activities of a foreign State and its agents within the national jurisdiction of the forum State.

304. Following the example of the ECSI, the tort exception in the framework of the IDI Basel Resolution does not take into account the distinction between *acta jure imperii* and *acta jure gestionis*. Domestic courts have jurisdiction over claims regarding State tortious acts notwithstanding the private or sovereign nature of the State conduct which caused the injury or

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[292] Available at http://conventions.coe.int/Treaty/en/Reports/Html/074.htm, at § 47.

[293] Article 10 (4) of the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters states: "The court of the State of origin shall be considered to have jurisdiction for the purposes of this Convention: […] (4) in the case of injuries to the person or damage to tangible property, if the facts which occasioned the damage occurred in the territory of the State of origin, and if the author of the injury or damage was present in that territory at the time when those facts occurred; […]".

[294] See Explanatory Report, cited (note 9), § 48.

[295] *Official Records of the General Assembly*, Fifty-ninth Session, Sixth Committee, 13th meeting (A/C.6/59/SR.13).

damage. In terms of jurisdictional connection, the provision requires a territorial nexus between the State tortious conduct and the forum State. Thus, the State acts which caused the injury or damage had to have occurred within the territory of the State of the forum, thereby excluding the possibility of a transboundary tort.

2.3. The ILA Draft Convention on State Immunity 1994

305. The International Law Association (ILA) Draft Convention on State Immunity adopted in Buenos Aires in 1994 follows the general rules of the previous ILA's 1982 Montreal Draft. According to Article III,

> *A foreign State shall not be immune from the jurisdiction of the forum State to adjudicate in the following instances, inter alia: […]*
>
> *F. Where the cause of action relates to:*
>
> *1. Death or personal injury; or*
>
> *2. Damage to or loss of property, and the act or omission which caused the death, injury or damage either occurred wholly or partly in the forum State or if that act or omission had a direct effect in the forum State. […]*

306. Like the ECSI and the IDI Basel Resolution, the ILA Draft Convention does not make any reference to the sovereign or private nature of the State conduct that caused the injury or the damage. In terms of jurisdictional connection, the conditions set down by the ILA Draft Convention are slightly more flexible than the ECSI since the exception is intended to cover a wider range of cases of tortious State acts. First, the facts which occasioned the injury or damage had to have occurred wholly *or partly* in the territory of the State of the forum. Secondly, there is a wider flexibility regarding facts that had a *direct effect in the forum State.*[296]

2.4. The UN Convention on Jurisdictional Immunities of States and their Property 2004

307. Regarding the tort exception, the 2004 UN Convention follows Article 12 of the 1991 ILC Draft proposal. According to Article 12 of the UN Convention,

> *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 a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.*

308. As is the case in the other international instruments mentioned above, the UN Convention does not mention the distinction between *jure imperii-jure gestionis acta* in order to characterize the tortious conduct that may lift State immunity. In terms of jurisdictional connection, there are two conditions under which State immunity may be revoked: (i) the act or omission which occasioned the injury or damage had to have occurred *in whole or in part* in the territory of the State of the forum, and (ii) the author of the injury or damage had to be present in that territory at the time when those facts occurred. Regarding the first condition, and compared to the ECSI, the UN Convention provides a slightly wider field of application of the tort exception since the tortious conduct may have occurred only *in part* of the territory of the State of the forum. However, the provision does not extend to cases where the tortious act or omission has *a direct effect* in the forum State but was committed outside its territory.[297]

3. The main judicial approaches

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[296] This may be case, for instance, for transboundary environmental torts. Indeed, as Brohmër notes, in some cases, when the injury or damage is caused later in time than the tortious conduct, one may doubt the jurisdictional connection. In the case of a letter bomb posted in one State which subsequently explodes in the forum State, if the fact of posting the letter is considered to be tortious conduct (and not the later explosion), the jurisdictional connection is not established. See Bröhmer, cited (note 1), at p. 131.

[297] This may be the case, for instance, for transboundary pollution. See Art. III(F)2 of the ILA Draft mentioned above.

309. Given the limited number of ratifications or accessions to the European Convention, the matter has essentially remained governed by customary rules. As a consequence, the general rules and principles of State immunity have been deeply influenced by the practice of domestic courts. Indeed, few, if any, chapters of international law have been more developed by the case law of domestic courts than State immunity.[298]

3.1. The traditional approach of domestic and international courts

310. Case law does not systematically follow the general rule concerning torts adopted by the instruments referred to above. In general, domestic and international courts apply to injury and damage the distinction between *jure imperii* and *jure gestionis acta* and may arrive at the conclusion that the State tortious conduct ought to be considered as a sovereign act and therefore State should be granted immunity.

3.1.1. The tort exception before domestic courts

311. The case law that reaches the same result as that of the instruments excluding immunity for tortious acts develops the rationale of this solution, i.e., that the acts of injuries and damages themselves cannot be viewed as *iure imperii*, no matter what was the purpose or the circumstance in which the acts were performed.

312. Two examples decided before the adoption of the relevant instruments illustrate this judicial approach. In *X. (individual) v. Embassy of X (State)* before the Austrian Supreme Court, the plaintiff's car was damaged in an accident with a vehicle owned by the Government of the United States (defendant). The defendant contended that since at the time of the accident the car was carrying diplomatic mail, the act was of *ius imperii* character and the case was therefore not subject to Austrian jurisdiction. The Supreme Court decided that a distinction must be drawn between *acta iure imperii* and *acta iure gestionis* and that in respect of the latter a foreign State is subject to Austrian jurisdiction. In determining whether an act was *iure imperii* or *iure gestionis*, the Court stated that the act itself and not the purpose for which it was performed had to be considered. In the case under examination, the US Government had operated a vehicle on a public road, an act which could be performed as well by an individual. Therefore the case was subject to Austrian jurisdiction.[299]

313. In *X. (individual) v. Austria*, the Turkish Supreme Court followed the same reasoning. The plaintiff was hurt by a bomb explosion apparently because of a lack of due diligence by the government of Austria, and brought a claim before Turkish courts for compensation. The Supreme Court affirmed the first judgment denying immunity on the basis of the distinction between *jure imperii* and *jure gestionis acta*.[300]

314. By contrast, when domestic courts granted immunity for injuries or damages caused by foreign States, this was done on the basis of the characterization of the State tortious act or omission as *jure imperii* conduct. This was the case in *X. (individual) v. USSR* [Turkey][301] and *X. (individual) v. Republic of Iraq* [Turkey][302] and *X. (individual) v. Federal Republic of Germany* [Greece][303].

315. Turkish courts have also denied the tort exception to State immunity. In both *X. (individual) v. USSR* and *X. (individual) v. Republic of Iraq* cases the Supreme Court applied the distinction

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[298] See Bianchi, Andrea, "Denying State Immunity to Violators of Human Rights", *Austrian Journal of Public International Law*, Vol. 46, 1994, pp. 195-229, at p. 195.

[299] [A/4] *X. (individual) v. Embassy of X (State)*, Supreme Court, 10 February 1961, Judgement n. 1Ob167/49 and 1Ob171/1950, *Grotius International Law Reports*, Vol. 40, p. 73 (see also http://www.ris.bka.gv.at, n. 2Ob243/60).

[300] [TR 04] *X. (individual) v. Austria*, Supreme Court, 7 July 1986, Y.4.H.D. E.1986/2254; K.1986/5420; T.07.07.1986; *Bulletin du droit international et du droit international privé*, 1986/2, pp. 209-210.

[301] [TR/3] *X. (individual) v. USSR*, [Turkey], Supreme Court, 12 October 1987, Y.4.H.D. E.1987/7309; K.1987/7373; T.12.10.1987, *Revue des décisions de la Cour de Cassation*, Vol. 14, S.I, 1988, p. 29.

[302] [TR/2] *X. (individual) v. Republic of Iraq*, [Turkey], Supreme Court, 17 March 1986, Y.4.H.D. E.1985/9190; K.1986/2436; T.17.03.1986, *Revue des décisions de la Cour de Cassation*, Vol. 9, 1986, p. 1271.

[303] [GR/1] *X. (individual) v. Federal Republic of Germany*, [Greece], Special Supreme Court, Judgement 6/2002, *Archeion Nomologias* (Archive of Case-Law in Greek), 2003, p. 40.

between *jure imperii* and *jure gestionis acta* in order to grant State immunity in case of tortious acts characterized as sovereign conduct.[304] In the first case, the plaintiffs who were Turkish nationals claimed compensation from the USSR for the deaths of their parents, which resulted from an accident involving a Soviet war ship and a Turkish war ship. In the second case, the plaintiff claimed compensation from Iraq for the deaths and the damages sustained due to an attack by Iraqi war aircrafts on the plaintiff's ship containing oil.

316. In the *X. (individual) v. Federal Republic of Germany* case,[305] the Special Supreme Court of Greece held that there is no rule of customary international law providing that a State may be brought before the tribunals of another State for civil liability arising from crimes committed either in wartime or in peacetime by its armed forces. The Court held that at the present stage of development of international law, there still applies a generally accepted rule of law that a State cannot be validly brought in civil proceedings before the courts of another State for damages resulting from any kind of tort which took place on the territory of the forum State, if the tortious conduct involved the military forces of the defendant State, either in time of peace or in time of war.[306] Hence, this case does not reflect a departure from the general rule denying immunity with regard to tortuous act, but rather, the application of the particular rule granting immunity to the acts performed by the armed forces.

317. The *McElhinney* case[307] concerned the acts of the armed forces. The claim was brought before the Irish High Court against a soldier and the British Secretary of State for Northern Ireland. The latter invoked State immunity. The Court held that sovereign immunity applies because the tortious acts of a soldier who is a foreign State's servant or agent are *jus imperii*. Accordingly, it was not established that, as a principle of public international law, immunity no longer applied in respect of personal injuries caused by the tortious act of a foreign State's servant or agent acting within the sphere of sovereign activity. The applicant did not pursue the proceedings against the soldier.[308]

318. The *Al-Adsani* case[309] does not present an example of departure from the rule embodied in the instruments mentioned above either. In this case, the English Court of Appeal applied a strict interpretation of the State Immunity Act 1978 in order to avoid the tort exception provided in Section 5 of the SIA.[310] Thus, a foreign State enjoys immunity in the UK in relation to proceedings

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[304] See references supra (notes 19 and 20).

[305] See note 21 above, and also Panezi, Maria, "Sovereign Immunity and Violations of *Ius Cogens* Norms", *Revue Hellénique de Droit International*, Vol. 56, 2003, pp. 199-214.

[306] It worth noting that this judgment represents a departure from earlier jurisprudence. See [GR/5] *Prefecture of Voiotia v. The Federal Republic of Germany*, [Greece], Judgement 11/2000, Supreme Court (Areios Pagos) Plenary, *Dike (Trial) Greek Journal of Civil Procedure*, 2000, at p. 696, where the Supreme Court (Areios Pagos) held that Germany had tacitly waived the privilege of immunity by the fact of violating peremptory norms of international law.

[307] The plaintiff, Mr. John McElhinney, an Irish police officer, accidentally drove into the barrier of a British army checkpoint when crossing from Northern Ireland into the Republic of Ireland. The vechicle which the plaintiff's car was towing apparently hit a British soldier, Mr. Anthony Ivor John Williams, who fired a number of shots. Fearing a terrorist attack the plaintiff drove on and stopped at a police station, where the soldier ordered him to get out of the car and stand against a wall with his hands up. When the plaintiff turned to explain that he was a police officer, the soldier attempted to fire his weapon which, nevertheless, jammed. The plaintiff was arrested by the Irish police on suspicion of having driven after consuming excess alcohol and was later convicted of having refused to provide blood and urine samples. The plaintiff claimed damages before the Irish High Court against the soldier and the British Secretary of State for Northern Ireland.

[308] See ECHR, judgement of 21 November 2001, below.

[309] The plaintiff, Mr. Sulaiman Al-Adsani, was a dual British/Kuwaiti national who served as a pilot in the Kuwaiti Air Force during the Gulf War and remained in Kuwait after the Iraqi invasion. He came into possession of sex videotapes involving a sheikh related to the Emir of Kuwait. According to the plaintiff, the sheikh, who held him responsible for the tapes entering general circulation, gained entry to his house along with two others, beat him and took him at gunpoint to the State Security Prison, where he was detained for several days and repeatedly beaten by guards. He was later taken at gunpoint to a palace where the was repeatedly held underwater in a swimming-pool before being taken to a small room where the sheikh set fire to mattresses soaked in petrol, as a result of which the applicant sustained serious burns. After returning to the United Kingdom, the plaintiffs instituted civil proceedings against the sheikh and the State of Kuwait.

[310] According to the State Immunity Act 1978, Section 5, "A State is not immune as respects proceedings in respect of (a) death or personal injury; (b) or damage to or loss of tangible property, caused by an act of omission in the United Kingdom." Since the Kuwaiti tortious acts were perpetrated within Kuwaiti territory, the case did no fall into British jurisdiction.

regarding torture committed outside the UK. The exception to immunity in respect of acts occasioning personal injury or death applies only when they are caused by acts or omissions committed within the UK. This is also a requirement in the European and the UN Conventions.[311]

319. In an opinion regarding damages caused by diplomatic missions, the Supreme Court of the Czechoslovak Socialist Republic considered that actions for damages directed against a foreign State could be heard in Czechoslovak courts only if the foreign State voluntarily submitted the case to their jurisdiction.[312] This attitude can be explained by the absolute theory of State immunity followed by communist governments.

3.1.2. The tort exception before international tribunals

320. Recently, on two occasions, the European Court of Human Rights (ECHR) had to deal with the tort exception to State immunity, and in both cases the Court affirmed, notwithstanding some dissenting opinions, national decisions granting immunity in case of tortious sovereign acts of States. The *McElhinney* and *Al-Adsani* cases[313] concerned the violation of Article 6(1) of the European Convention on Human Rights, which guarantees the right to access to a court[314], by the fact of granting State immunity for breaches of other provisions of the Convention.[315] According to the reasoning followed by the Court, State immunity prevails over the right to a court hearing because this right is not absolute but may be subject to limitations. Restrictions are permitted by implication since the right of access to court by its very nature calls for regulation by the State. The contracting State may limit the scope of Article 6 if such a restriction (i) pursues a legitimate aim, and (ii) there is a reasonable relationship between the means employed and the aims sought to be achieved.[316]

321. In both cases,[317] the courts held that the grant of State immunity in civil proceedings is to be considered a legitimate restriction to Article 6(1) in furtherance of "the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.[318]" As to the principle of proportionality, the Court stated the Convention should as far as possible be interpreted in harmony with other rules of international law, including those relating to State immunity. Thus, measures taken by a State which reflect generally recognised rules of international law on State immunity cannot be regarded as imposing a disproportionate restriction on the right of access to a court.[319]

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[311] See ECHR, judgement of 21 November 2001, below.

[312] [CZ/4] Supreme Court Opinion Cpjf 27/86 published as Rc 26/1987, 27 August 1987, *Sbírka soudních rozhodnutí* (Collection of Judicial Decisions), 1987, pp. 9-10. Although this Opinion is not a decision *in re*, it constitutes a commentary on and interpretation of Act n° 97/1963 concerning private international law and the rules of procedure relating thereto, as amended.

[313] *McElhinney v. Ireland* [GC], Judgement of 21 November 2001, n° 31253/96, *ECHR*, 2001-XI; *Al-Adsani v. The United Kingdom* [GC], Judgement of 21 November 2001, n° 35763/97, *ECHR*, 2001-XI. See below.

[314] Article 6 of the European Convention on Human Rights reads as follow: "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. […]"

[315] See also *Fogarty v. The United Kingdom* [GC], Judgement of 21 Nov 2001, n° 37112/97, *ECHR*, 2001-XI. The case concerned a claim brought by an Irish national against the United States embassy in London. The plaintiff was dismissed from her post as an administrative assistant by the US embassy, and when she applied unsuccessfully for other posts at the embassy she alleged that she was the victim of sexual discrimination. The US claimed immunity, and the Court followed the same reasoning developed in *McElhinney* and *Al-Adsani* to declare that State immunity is not contrary to the right to access to court embodied in Article 6(1) of the Convention. See considerations below.

[316] *Al-Adsani*, cited (note 29), § 53; *McElhinney*, cited (note 29), § 34.

[317] See also *Fogarty*, cited (note 31), §§ 33 ff.

[318] *Al-Adsani*, cited (note 29), § 54; *McElhinney*, cited (note 29), § 35.

[319] According to the Court, "the Convention, including article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account. The convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity." *Al-Adsani*, cited (note 29), § 55; *Mc Elhinney*, cited (note 29), § 36.

322. For the Court, the next question to consider was whether international law accorded State immunity in the cases brought before the ECHR. In *McElhinney*,[320] the Court first noted "a trend in international and comparative law towards limiting State immunity in respect of personal injury caused by an act or omission within the forum State." However, "this practice is by no means universal." Second, such a trend may primarily refer to "insurable" personal injury, i.e. incidents arising out of ordinary traffic accidents, "rather than matters relating to the core area of State sovereignty such as the acts of a soldier on foreign territory which, by their very nature, may involve sensitive issues affecting diplomatic relations between States and national security."[321] Therefore, according to the Court, the key criterion to determine whether or not a State should be granted with immunity before domestic courts remains the traditional distinction between acts *jure imperii* and acts *jure gestionis*. Thus, since the British soldier in question had acted in his official capacity, his conduct ought to be qualified as an act *jure imperii* and consequently the United Kingdom should be grant immunity.

323. In *Al-Adsani*,[322] even the characterization of alleged acts as torture in the meaning of Article 3 of the Convention and the *jus cogens* status of such a rule[323] did not lead the ECHR to accept that according to international law no State immunity should be granted in case of State tortious acts in violation of fundamental human rights. Accordingly, the Court was unable to discern "any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged."[324] Therefore, the claim was dismissed.[325]

3.2. The impact of injury or damage caused by violations of obligations stemming from peremptory norms of international law

324. Recent judicial practice has raised the difficult question of the relationship between State immunity and the violation of obligations stemming from *jus cogens* rules. In this regard, two recent cases brought before national courts (Greek and Italy) must be highlighted as well as the abovementioned decision of the ECHR in the *Al-Adsani* case, including the joint dissenting opinion of judges Rozakis and Caflisch.

3.2.1. Grave violations before domestic courts

325. Two recent cases before domestic courts illustrate a new trend regarding torts in the case of violation of fundamental human rights which have attained the status of peremptory norms. One case was brought before the Greek courts, and the other before the Italian tribunals. Both cases concern claims for compensation arising from tortious acts committed by German occupation forces in Greece and Italy during the Second World War.

326. The *Prefecture of Voiotia v. Federal Republic of Germany* case,[326] decided by the Hellenic Supreme Court (Areios Pagos), arose from the petition on cassation brought by Germany against the default judgment of the district court, which granted compensation for atrocities,[327] particularly

[320] For the facts, see note 17 above.

[321] *McElhinney*, cited (note 29), § 38.

[322] For the facts, see note 25 above.

[323] *Al-Adsani*, cited (note 29), § 60.

[324] *Al-Adsani*, cited (note 29), § 61. In conclusion, "the Court, while noting the growing recognition of the overriding importance of the prohibition of torture, does not accordingly find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State." *Al-Adsani*, cited (note 29), § 66.

[325] For a commentary on these decisions, see Garnett, Richard, "State Immunity Triumphs in the European Court of Human Rights", *The Law Quarterly Review*, Vol. 118, 2002, pp. 367-373; Tigrodoudja, Hélène, "La Cour Européenne des droits de l'homme et les immunités juridictionnelles d'Etats. Observations sur les arrêts *McElhinney*, *Fogarty* et *Al-Adsani contre Royaume-Uni* du 21 novembre 2001", *Revue Belge de droit international*, Vol. 34, 2001-2, pp. 526-548; Voyiakis, Emmanuel, "Access to Court v. State Immunity", *International and Comparative Law Quarterly*, Vol. 52, 2003, pp. 297-332.

[326] [GR/5] *Prefecture of Voiotia v. The Federal Republic of Germany*, [Greece], Judgement 11/2000, Supreme Court (Areios Pagos) Plenary, *Dike (Trial) Greek Journal of Civil Procedure*, 2000, at p. 696.

[327] See Bantekas, Ilias, "Prefecture of Voiotia v. Republic of Germany. Case n° 137/1997", *The American Journal of International Law*, Vol. 92, n° 4, 1998, pp. 765-768.

wilful murder and destruction of private property, committed by the German occupation forces in the village of Distomo in 1944 during the war.[328] The Supreme Court of Greece denied immunity to Germany for tortious acts *jure imperii* in breach of *jus cogens* obligations.

327. Initially, the Hellenic Supreme Court applied Article 11 of the ECSI as the codification of a pre-existing customary law regarding the tort exception to State immunity.[329] The Court then dealt with the question of the armed forces exception.[330] In this regard, the Court, referring to the laws and customs of war, noted that in case of military occupation crimes committed by organs of the occupying power in abuse of their sovereign power do not attract immunity.[331] Since the alleged torts were directed against specific persons limited in number who resided in a specific place, who had nothing to do with the resistance activity, Germany had abused its sovereign power. Moreover, given the fact that such acts were in breach of peremptory norms of international law, Germany had tacitly waived the privilege of immunity and thus Greek courts had jurisdiction over the case.

328. The Verbal Note from the Federal Government of Germany to the embassy of the Republic of Greece concerning Greek court decisions dealing with claims for compensation against Germany in connection with the German occupation during the Second World War must be mentioned here.[332] For the German Government, the basic principle of State immunity in international law hinders any proceeding before the courts of one State as far as the case is directed against a foreign State in relation to that State's sovereign action (*acta iure imperii*). Accordingly, proceedings before Greek courts concerning claims of Greek citizens against the Federal Republic of Germany based on incidents during the Second World War would not be consistent with international law and therefore any action before Greek courts against the Federal Republic of Germany was inadmissible.

329. Another claim for compensation arising from tortious acts committed by German occupation forces during the Second World War was brought before Italian courts. In the *Ferrini v. Federal Republic of Germany* case,[333] an Italian citizen had been deported from Italy to Germany for the purpose of forced labour. In the judgment, the Supreme Court first characterises the tortious acts as war crimes, and the norms relating to the prohibition of such crimes as peremptory norms of international law. Although the Italian Court arrives at the same conclusion of the Hellenic Supreme Court, i.e. that Germany should not be granted immunity, the reasoning developed by the Italian Court is quite different.

330. Indeed, regarding the question of the armed forces exception, the Supreme Court criticises the idea of a "tacit waiver".[334] First, the Court applies the principle of universal jurisdiction, which attaches to the international crimes committed to the civil claims arising from the same tortious/criminal acts. Second, the Court refers to Article 41(2) of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001 which provides that "no State shall

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[328] See Gavouneli, Maria and Bantekas, Ilias, "Prefecture of Voiotia v. Federal Republic of Germany. Case n° 11/2000", *The American Journal of International Law*, Vol. 95, n° 1, 2001, pp. 198-204.

[329] The Court considers as evidence of the customary nature of the tort exception to State immunity domestic legislation and the international instruments mentioned above. Regarding domestic legislation, the Court refers to Section 1605(a)(5) of the United States' Foreign Sovereign Immunities Act 1978, Section 5 of the United Kingdom's State Immunity 1978, Section 6 of the Canada's Sovereign Immunity Act 1985, Section 13 of the Australia's State Immunity Act 1985, Section 6 of the South Africa's Foreign State Immunity Act 1981, and Section 7 of the Singapore's State Immunity Act 1979.

[330] Article 31 of the ECSI, above.

[331] According to Article 43 of the Annex to the 1907 Convention on Laws and Customs of War (Hague IV), "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

[332] [D/6] Bundesregierung (Federal Government), [Germany], Verbal note from the Federal Government of Germany to the embassy of the Republic of Greece concerning Greek Court decisions dealing with claims for compensation against Germany in connection with the German occupation during World War II, *Grote, Völkerrechtliche Praxis der Bundesrepublik Deutschland* 1995, III, 18 (www.virtual-institute.de/de/prax1995/ praxb95_.cfm); *Röben, Völkerrechtliche Praxis der Bundesrepublik Deutschland* 1996, III, 18 (www.virtual-institute.de/de/prax1996/pr96_.cfm). See below.

[333] *Ferrini v. Federal Republic of Germany*, [Italy], Judgement n° 5044, 11 March 2004, Supreme Court, *Rivista di Diritto Internazionale*, Vol. 84, N° 2, 2004, pp. 539-555.

[334] See *Ferrini v. Federal Republic of Germany*, cited (note 49), § 8.

recognise as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation." Article 40 deals with the serious breach by a State of an obligation arising under a peremptory norm of general international law. Accordingly, the fact of granting State immunity in case of tortious acts which constitute serious breaches of *jus cogens* norms is contrary to this obligation of collective non-recognition by the international community as a whole of the legality of such situations.[335]

331. A further argument developed by the Italian Supreme Court relates to the fact that a certain category of human rights has recently acquired the status of "fundamental principle of the international legal order" which may allow a derogation from the fundamental principle of sovereign equality of States that lies at the basis of the doctrine of State immunity. The Court referred to the principle of systemic interpretation according to which a legal norm has to be read in a way that is consistent with the legal system to which it belongs. Thus, the rules and principles of State immunity should be interpreted in the light of this new fundamental principle of the international legal order, characterized moreover as a peremptory norm. This consideration leads the Court to the conclusion that a State should not be granted immunity in case of tortious acts which violate *jus cogens* norms.[336]

3.2.2. Dissenting opinions of the ECHR

332. In the *McElhinney* case, the joint dissenting opinion of judges Caflisch, Cabral Barreto and Vajić[337] considers that the tort exception has acquired the status of an international customary norm. The dissenting opinion cites domestic legislation[338] and the international instruments referred to above as evidence of the customary character of such a norm. It is worth noting that regarding Article 31 of the ECSI, which excludes from the field of application of the Convention acts committed by armed forces, the dissenting opinion argues that such a provision does not reflect customary international law. This exception shall be read as specific to the Convention and thus it has no general validity. Therefore, no State immunity should be granted in case of tortious acts.

333. The same reasoning was affirmed and further developed by judges Rozakis and Caflisch in their joint dissenting opinion in *Al-Adsani.*[339] The characterization of Kuwait's tortious acts as torture in the terms of Article 3 of the Convention and the peremptory norm status (*jus cogens*) of the prohibition of torture led the minority to argue that if the status of *jus cogens* has any meaning it must have the consequence of lifting State immunity in case of breach of such a norm. Hence, the basic characteristic of a *jus cogens* norm is to override any other rule which does not have the same status and, in the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails.

334. Since the Court confirmed the *jus cogens* status of the prohibition of torture but not that of the rules on State immunity, a State allegedly violating a peremptory norm cannot invoke hierarchically lower rules (those on State immunity) to avoid the consequences of the wrongfulness of its actions.[340] Further evidence that State immunity rules do not have a *jus cogens* status is the fact that, in many circumstances, States have waived their rights of immunity. Accordingly, norms on State immunity "do not enjoy a higher status, since *jus cogens* rules, protecting as they do the '*ordre public*' that is the basic values of the international community, cannot be subject to unilateral or contractual forms of derogation from their imperative contents."[341]

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[335] Idem, § 9.

[336] Ibidem.

[337] *McElhinney v. Ireland* [GC], Judgement of 21 November 2001, n° 31253/96, Joint Dissenting Opinion of Judges Caflisch, Cabral Barreto and Vajić, *ECHR*, 2001-XI.

[338] The Court refers to Section 5 of the State Immunity Act 1978 of the United Kingdom, Section 1605(a)(5) of the United States Foreign Sovereign Immunities Act 1976 and Section 13 of Australia's Foreign States Immunities Act 1985.

[339] *Al-Adsani v. The United Kingdom* [GC], n° 35763/97, Judgment of 21 November 2001, Joint Dissenting Opinion of Judges Rozakis and Caflisch Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić, *ECHR*, 2001-XI.

[340] *Al-Adsani* Dissenting Opinion, cited (note 55), § 3.

[341] *Al-Adsani* Dissenting Opinion, cited (note 55), § 2.

4. Conclusion

335. With respect to State immunity and torts, it is not possible to conclude from the analysis of the international instruments together with the judicial decisions both at the domestic and international levels the existence of a clear rule in this regard. On the one hand, international instruments tend to exclude State immunity in case of personal injuries and damage to property. Indeed, Article 11 of the ECSI and Article 12 of the UN Convention, as well as Article 2(2)(e) of the IDI Basel Resolution and Article III(F) of the ILA Draft, all exclude State immunity when the claim concerns a proceeding which relates to pecuniary compensation for personal injuries and damage to property caused by a State act. Accordingly, States can be sued for the redress of injury or damage under two precise conditions: (i) the facts which occasioned the injury or damage has to have occurred (in whole or in part) in the territory of the forum State, and (ii) the author of the injury or damage had to be present in that territory at the time when those facts occurred. An exception provided by Article 31 of the ECSI concerns the acts committed by armed forces either in wartime or in peacetime that can amount to injury or damage. As seen, it is precisely this situation that has led to opposite views between the Greek and Italian Supreme Courts on the one side and the German government, on the other.

336. On the other hand, judicial decisions both at domestic and international levels seem to establish some distinctions. Traditionally, courts have based their decision on whether to grant immunity or not in these cases on the distinction between *acta jure imperii* and *acta jure gestionis*. In most cases, especially those concerning accidents, they come to the right conclusion that it is the act itself that must be analysed and not the purpose of the act, hence denying the possibility of the State to invoke immunity. Recently, some domestic tribunals and international judges have begun also to advocate the denial of immunity in cases of serious violations of human rights.

CHAPTER 7

Ownership Possession and Use of Property

Susan C. Breau

(i) Tangible Property

1. Introduction

337. Two of the traditional exceptions to a state claiming immunity in national courts are: (a) the ownership, possession and use of immovable property; and (b) interests of a foreign state in movable or immovable property by way of succession, gift, or administration or insolvency. These exceptions derive from the commercial activity exception to state immunity **and are** based on the non-sovereign nature of the state activities that fall within the commercial sphere.[342] The commercial activity exception is discussed in detail in Chapter 2.

338. There are two main tests to ascertain whether an activity is commercial. The first is the nature of the act and the second is the purpose of the act. Although in many cases the courts may use the purpose of the transaction test to determine whether the action is commercial, in property cases there is a presumption that the activity in itself is commercial.

339. Although property disputes seem to be a settled area of the law of the state immunity, two interesting issues emerge from analysis of the state practice in Council of Europe States. The first is the status of the property of embassies and consular premises and whether there is immunity from adjudication with respect to that property. Although the consular or embassy premises are stated to be immune from execution as a result of the Vienna Conventions on Diplomatic and Consular Relations, it is not so clear in the case of adjudication. In conjunction with this section should be read Chapter 3, The Distinction between State Immunity and Diplomatic Immunity which also concludes that the case law is not settled in this area. The second issue is interference with property by nuclear emissions from another state in the important case of Dralle v. Czechoslovakia.

2. Convention Provisions

340. As with all of the areas canvassed in this book, two Conventions provide the benchmark for the consideration of state practice in Council of Europe states. These are the 1972 European Convention on State Immunity 1972 (ECSI)), and the United Nations Convention on Jurisdictional Immunities of States and Their Property (UN Convention). It is anticipated that the United Nations Convention will emerge as an authoritative treaty that codifies the relevant principles of international law concerning jurisdictional immunities. It should be noted at the outset that both conventions are predicated on the assumption that a foreign state enjoys immunity from the jurisdiction of the domestic courts of another state unless one of the criteria set out in these conventions were met. In this respect, the nature and scope of the exceptions set out in both conventions are based on the traditional distinction between commercial transactions and non-commercial transactions which is discussed in more detail in Chapter 2.

341. The convention provisions with respect to the property exception are fairly detailed and complex and the subject of extensive commentary.

2.1 The European Convention on State Immunity 1972

342. The relevant provisions concerning property in ECSI are:

> ***Article 9***
>
> *A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to: its rights or interests in, or its use or possession of, immovable property; or its obligations arising out of its rights or interests in,*

[342] Morris, Virginia, "Sovereign Immunity: The Exception for Intellectual or Industrial Property" (1986) 19 Vand. J. Transnat'L. 83 at p. 91.

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 20

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 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.

343. The Explanatory Report to the 1972 European Convention provides that Article 9 is to cover the following matters:

(a) proceedings against States concerning their rights in immovable property in the state of the forum,

(b) proceedings relating to mortgages whether the foreign State is mortgagor or mortgagee,

(c) proceedings relating to nuisance,

(d) proceedings arising from the unauthorized (permanent or temporary) use of immovable property including actions in trespass, whether an injunction is claimed or damages or both,

(e) proceedings concerning rights to the use of immovable property in the State of the forum, for example, actions to establish the existence or non-existence of a lease or tenancy agreement, or for possession or eviction,

(f) proceedings relating to payments due from a State for the use of immovable property, or a part thereof, in the State of the forum, with the exception of dues or taxes,

(g) proceedings relating to the liabilities of a State as the owner or occupier of immovable property in the State of the forum (for example accidents caused by the dilapidated state of the building, acto de electis vel effusis.

344. Article 10 of the 1972 European Convention includes also movable property with respect to the estate in bankruptcy or insolvency, administration of trusts of deceased estates and estates of those of unsound mind. Where the foreign state is in possession of, or claims an interest in

property, by virtue of a gift or alleged gift and the validity of its title or possession is challenged, it is provided that there should be no immunity.[343] The reason for the term *bona vacantia* is that in certain legal systems a State's right to undisposed goods of a deceased person is considered a right of succession and in others a right of forfeiture of goods without ownership (*bona vacantia).*[344]

345. The commentary to Article 10 to the Convention argues that in no other sphere of private international law are there such differences between legal systems as there are in determining the competent jurisdiction or the applicable law. Some States apply the law of the domicile of the deceased and other apply the law of the State of nationality and in the case of immovable property the law of the State where the property is situated.[345] Therefore, in Article 20(3) a special system had to be set up concerning the State's obligation to give effect to a judgment rendered against it with respect to the items enumerated in Article 10.

2.2 The United Nations Convention on Jurisdictional Immunities of States and their property

346. The United Nations Convention on Jurisdictional Immunities of States and their property has similar provisions. [346]

Article 13

Ownership, possession and use of property

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 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;

(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, such as trust property, the estate of a bankrupt or the property of a company in the event of its winding up.

Article 21

1. The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under article 19, subparagraph (c):

(a) Property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences.

Annex to the Convention

Understandings with respect to certain provisions of the Convention

The present annex is for the purpose of setting out understandings relating to the provisions concerned.

With respect to Articles 13 and 14

[343] Australian Law Reform Commission report on state immunity, 1984.

[344] Andrew Dickinson, Rae Lindsay and James P. Loonam, *State Immunity: Selected Materials and Commentary,* Oxford, Oxford University Press, 2004, p. 48 - Reproducing Explanatory Report on the European Convention on State Immunity.

[345] *Ibid.,* pp. 47- 48.

[346] United Nations Document A/C.6/59/L.16

The expression "determination" is used to refer not only to the ascertainment or verification of the existence of the rights protected, but also to the evaluation or assessment of the substance, including content, scope and extent, of such rights.

347. An important clarification exists in the commentary to the ILC Final Draft Articles and Commentary of 1991. The commentary argues that Article 13 lists various types of proceedings regarding any right or interest of a State in property but it is not intended to confer jurisdiction on any court where none exists. The competence of a court to adjudge the property at issue is decided according to the rules of private international law.[347]

348. As with the explanatory report to the European convention, the ILC Commentary reveals the complexity with respect to property litigation in various legal systems. This is particularly the case in determining the right or interest in property. In some systems there might be a right to property and in others there might be an interest in property. It is also noted that possession is not always considered a right unless it is adverse possession or *possession longi temporis* which could create a right or interest depending on the system.[348]

3. National legislation

349. The United Kingdom is the only State Party to the European Convention that has enacted legislation codifying rules of state immunity based upon the provisions of the Convention. Some other States Parties have enacted legislation that either incorporate principles of immunity recognized in international law or enabled ratification of the European Convention only.[349] The *State Immunity Act 1978* was enacted for the purpose of bringing the United Kingdom into conformity with the obligations under the European Convention. The provisions are very similar to the Convention.

350. Sections 6 and 7 of the Act are similar to Articles 13 and 14 of the European Convention. They provide that a State is not immune with respect to an interest of the State in immovable property in the United Kingdom or any patent, trade-mark or design registered in the United Kingdom.[350]

4. State Practice

351. There is little state practice in Europe regarding movable or immovable property. What little practice there is reveals a clear trend in favour of the continued application of the doctrine of restrictive immunity in property cases. The only disparity is in the issue of consular property, which is discussed below.

352. There has been discussion of the division between the former socialist counties on state immunity. However, it should be pointed out that in respect of property the Czech Republic in the Act No. 97/1963 in Section 47 - 'Exemption from the jurisdiction of Czechoslovak courts' provides that: "Foreign States and persons who under international treaties or other rules of international law or special Czechoslovak legal regulations" are immune from the jurisdiction of Czechoslovak courts and notarial offices. With respect to property, Section 47(3) grants jurisdiction where the foreign State or person voluntarily submits to jurisdiction, or the subject of the proceedings involves: such parties' real property, or rights thereto, located in the 'Czechoslovak Socialist Republic'; or an inheritance outside their official duties; or the pursuit of a profession or commercial activity outside their official duties. This legislation provides for jurisdiction over property located within the Czech Republic.

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[347] Dickinson et. al, p.128.

[348] *Ibid.,* p.128.

[349] *Germany,* German Act of Parliament required by Article 59(2) of the Basic Law to enable the Federal Republic of Germany to ratify the European Convention on State Immunity; *Cyprus,* Law 6/76; *Netherlands,* Act on General Provisions of Kingdom Legislation (*Wet Algemene Bepalingen*) NL/1, Article 13a, reproduced in CAHDI (2004) 5 Part II(A) rev 2.

[350] *Duff Development Company v. Government of Kelantan* [1924] AC 797; See also Mann, '*State Immunity Act 1978'* (1979) 50 BYIL 43 at 46; Fox (1988) 37 ICLQ 1, esp. 10-18; Fox (1996) 12 Arbitration International 89; Vibhute [1998] JBL 550-563.

4.1 Consular property

353. There seems to be divergence in the state practice for property used as diplomatic or consular premises. There is an Icelandic case and a British case that declare that properties used for diplomatic purposes are immune from jurisdiction.[351] These cases are at odds with other jurisdictions such as Austria, which in a similar case in 2001 stated that a conclusion of a rental lease is a relationship under private law, even if the rental was for an embassy.[352] Similar rulings were made in Denmark (trade office), Germany (military mission of Yugoslavia in Berlin), Italy (embassy, consular office) and Romania (eviction of an embassy from privately owned premises).[353]

354. The two Conventions on Diplomats are of relevance in this debate.

> ***The 1961 Vienna Convention on Diplomatic Relations***
>
> ***Article 22***
>
> *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.*
>
> ***The 1963 Vienna Convention on Consular Relations***
>
> ***Article 31***
>
> *INVIOLABILITY OF THE CONSULAR PREMISES*
>
> *1. Consular premises shall be inviolable to the extent provided in this Article.*
> *2. The authorities of the receiving State shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post except with the consent of the head of the consular post or of his designee or of the head of the diplomatic mission of the sending State. The consent of the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action.*
>
> *3. Subject to the provisions of paragraph 2 of this Article, the receiving State is under a special duty to take all appropriate steps to protect the consular premises against any intrusion or damage and to prevent any disturbance of the peace of the consular post or impairment of its dignity.*
>
> *4. The consular premises, their furnishings, the property of the consular post and its means of transport shall be immune from any form of requisition for purposes of national defence or public utility. If expropriation is necessary for such purposes, all possible steps shall be taken to avoid impeding the performance of consular functions, and prompt, adequate and effective compensation shall be paid to the sending State.*

355. Neither of these conventions specifically provides for actions for rent, eviction, or damages to the consulate property. Therefore, there is a divergence in the state practice, which is not clarified in any of the conventions in existence or the proposed UN convention. However, the bulk

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[351] [IS/1]*Guðrú Skarphéðinsdóttir v. the Embassy of the United States of America*, Supreme Court, 1995.

[352] [A/7] *E.AG Vien v. L* Regional Court Vienna as Appellate Court, 2001.

[353] [DK/2]*Dem Franske Republik v. Intra ApS,* Supreme Court, 1992; [D/7] *Vereingte Kalwerke Salzdetfurth AG v. Federative National Republic of Yugoslavia "Yugoslav Military Mission"* Federal Constitutional Court, 1962; [I/21, I/22] *Società immobiliare Corte Barchetto v. Morocco,* Tribunal of Rome 1977 , Court of Appeal 1979. [I/53] *Libya v. Riunione adratica di Sicurtà,* Supreme Court of Cassation 1990; [I/54] *Malta v. Società Nicosia Immobiliare SpA,* Supreme Court of Cassation, 1992, [RO/3] *G.M. & T.I. v. The Embassy of P in Bucharest,* Tribunal of Bucharest, 2001.

of the state practice maintains the doctrine of restrictive immunity for rental agreements for consular premises.

4.2 Interference with Property

356. Although there is only one case in this category, this interesting case came from the Austrian Supreme Court in 1988. The claimant as the co-owner of real property situated in three Austrian communities claimed that the defendant State X should be prohibited in the construction of a nuclear power plant alleging that the plant had not been commissioned legally. The real estate of the claimant was 115 km away from the plant. The argument was that the radionucliods were above the standard customary in the area, even in the course of normal operation. The concern would be that this would be much higher in the case of an accident. The claimant stated that the operation of this plant would not be possible without the emission of radiation, radioactive contaminated water vapour and warmth.[354]

357. The other state claimed immunity in the proceedings. The Supreme Court held that in claims of omission the Austrian jurisdiction under Article 81 of the Jurisdiktionsnorm which stated that the court in whose district immovable goods are situated has jurisdiction. The claimant requested that according to Article 28 of the Jurisdiktionsnorm, the courts of first instance had to be determined as being competent *ratione loci.* The court agreed and stated that positive or negative regulations of public international law do not exist in the case in question in regard to the defendant state. The court held that the construction and the operation of a power plant are not part of the area of *jure imperii* but *jura gestionis*. Therefore, the claim is not excluded from the national jurisdiction.

358. The fascinating aspect of this case is the location of the property itself. The property causing the emissions was in the other state and yet the Austrian court took jurisdiction as the property interfered with, was in its jurisdiction. The treaty provisions do not seem to contemplate such a claim for immunity in such circumstances. The other issue of some note is that it was held that the operation of a power plant was an action *jura gestionis.* Given the nature of the provision of energy as a state activity, it might well be that other jurisdictions would not agree with the interpretation given in this case.

5. Conclusion

359. In spite of these areas of potential controversy, the bulk of state practice supports the doctrine of restrictive immunity. The critical factor would be the commercial nature of most property transactions. The issue of consular property does not seem to be resolved and does reveal a divergence in state practice.

(ii) Intangible Property

1. Introduction

360. Intangible property is an area of growing practical importance. However, there is a complete lack of cases on intangible property in Europe with one reported in our materials but one other available for comparison.

2. Convention Provisions

361. Both conventions discussed here have similar provisions on intangible property.

2.1 The European Convention on State Immunity

Article 8

[354] Fishcher, P., Hafner G., "Supreme Court. Decision dated 23 Feburary 1988 *Aktuelle österreichische Praxis zum Völkerrecht* 360.

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.

2.2 UN Convention on Jurisdictional Immunities for States and their property

Article 14

Intellectual and industrial property

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 a proceeding which relates to:

(a) the determination of any right of the State in a patent, industrial design, trade name or business name, trademark, copyright or any other 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 of the nature mentioned in subparagraph (a) which belongs to a third person and is protected in the State of the forum

362. The exception falls between commercial transaction in Article 10 and property in Article 13. Intellectual and industrial property is a highly specialised form of property which is intangible but capable of ownership, possession and use. The three main types of property that are included are: patents and industrial designs which belong to the category of industrial property; trade marks and trade names which pertain more to the business world or to international trade; and copyrights or other forms of intellectual property.[355]

363. It is logical that state immunity might be waived in this instance as a registration of such a trade mark, patent or copyright implies submission to the regime of registration within that particular state.[356]

3. State Practice

364. Once again only the United Kingdom has separate legislation and section 7 of the *State Immunity Act 1978* and concerns rights in private property in commercial use including patents, trade marks, design, or plant breeders' rights.[357]

365. In the materials for the study only the Austrian case of *Dralle v. Czechoslovakia* was reported, even though this case was decided in 1950. There is another case decided in the High Court of Frankfurt in 1977, *X v. Spanish Government Tourist Bureau.*[358] These cases stand for the principle that state immunity does not preclude the exercise of jurisdiction in disputes over trademarks (Dralle) or copyrights (X) because the state activities were not "acts of sovereignty"(Dralle), commercial in nature, and placed the state in competition with other traders. These cases were analysed as such in a 1986 law journal article and there seems to be no

[355] Dickinson et. al. at p. 130.

[356] *Ibid.,* p.131.

[357] Hazel Fox, *The Law of State Immunity,* Oxford Unviersity Pres, Oxford, 2002, p.166.

[358] *X v. Spanish Government Tourist Bureau,* Germany, Oberlandesgericht Frankfurt, 30 June 1977, 65 ILR 141.

updated European state practice to add any new dimension to this issue.[359] This is surprising given the importance of industrial and intellectual property and the technological developments in international commerce.[360]

4. Conclusion

366. It is surprising that intangible property is not considered in more judicial decisions. Therefore, it is impossible to predict what legal issues might arise in these cases. The provisions reflect the belief that disputes over intellectual property are truly commercial and should not engage issues of *jus imperii.*

[359] Morris, see n. 1, at p. 101, interestingly, she had predicted many more cases would arise in this area.

[360] Another leading non-European case is *Chateau Gai Wines Ltd. V. Le Gouvernement et La Republique Française,* Canada, Exch. Ct. 612 2nd DLR 709, 53 ILR 284.

CHAPTER 8

Ships owned or Operated by a State

Susan C. Breau

1. Introduction

367. Shipping occupies a special and separate status in state immunity. The consideration of the issue of immunity of state-owned trading ships has been a feature of international law since the early 19th century.[361] It has been a long standing rule of international law that warships are immune from the legal process, execution or other jurisdictional measures of foreign authorities.[362] Nevertheless, shipping engaged in trading activity cases substantially contributed to the development of the law of restrictive immunity.

368. When a state engages in a commercial transaction, it ceases to act in public capacity; it acts as a trader, not as an independent sovereign state and consequently no immunity attaches to such commercial activities. Marshall CJ in *The Schooner Exchange* case recognized the immunity of a public warship of a foreign state; but he indicated that such implicit consent could not be construed to extend to a "merchant vessel who enters for purposes of trade" and that such vessels should be amenable to local jurisdiction, not 'being in national pursuits'.[363] In *The Philippine Admiral* case in 1977 the Privy Council held that foreign state-owned merchant vessels were not immune from suit in an admiralty action arising from their use in trade.[364]

369. A case of note that led to the development of a separate legal regime for shipping was the *Porto Alexandre* case in which a German motor vessel, a lawful prize of war, was used by Portugal in trading. The ship ran aground in the Mersey and was salvaged by three Liverpool tugs. In this case the Court set aside the writ for salvage charges but Lord Justice Scrutton commented that there would be a reluctance to engage in salvage for States that defaulted on their obligations. He stated that these matters had to be dealt with in negotiation.[365] Soon after, the Comité Maritime International adopted a resolution for the abolition of immunities for public vessels engaged in commercial activities and thereafter the Brussels Convention for the Unification of Certain Rules concerning the Immunities of Government Vessels was adopted on 10 April 1926. After this point the case law dealing with shipping stood as leading authorities for restricted or limited immunity.

2. Convention provisions

370. In the case of shipping there are specific international instruments in addition to the general convention. The 1926 Brussels Convention of 1926 for the Unification of Certain Rules relating to the Immunity of State-Owned Vessels and the 1982 Law of the Sea Convention. These conventions provide for the possibility of arrest of government ships operated for commercial purposes. The applicable provisions of these conventions are:

2.1 Brussels Convention for the Unification of Certain Rules relating to the Immunity of State-Owned Vessels 1926

> ***Article 1***
>
> *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*

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[361] *The Prins Frederik* (1820) 2 Dods 451, 165 ER 1543 *The Schnooner Exhange v. McFaddon* 11 US 116, United States Supreme Court, 1812, *The Parlement Belge* (1878-79) IV Prob. Div. 129, shipping also contributed to the development of the previous doctrine of absolute immunity see also *The Cristina* 1938 AC 485.

[362] Delpuis, Ingrid, "Foreign Warships and Immunity for Espionage", (1984) 78 A.J.I.L. 53 at p. 54 refers to the International Law Institute Stockholm rules of 1928 see extensive commentary on *The Parlement Belge* case in Hazel Fox, *The Law of State Immunity,* Oxford University Press, Oxford, 2002 pp. 104-107.

[363] *The Schooner Exchange v. McFaddon,* as at note 1.

[364] *The Philippine Admiral* [1977] AC 373, The Privy Council, 1977.

[365] *The Porto Alexandre* [1920] P 30 see discussion by Fox p.109.

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 2

As regards such liabilities and obligations, the rules relating to the jurisdiction of the courts, rights of actions and procedure shall be the same as for merchant ships belong to private owners and for private cargoes and their owners.

Article 3

(1) The provisions of the two proceeding 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.

Nevertheless, claimants shall have the right to proceed before the appropriate Courts of the State which owns or operates the ship in the following cases:

- *(i) Claims in respect of collision or other accidents of navigation;*
- *(ii) Claims in respect of salvage or in the nature of salvage and in respect of general average;*
- *(iii) Claims in respect of repairs, supplies or other contracts relating to the ship ; and the State shall not be entitled to rely upon any immunity as a defence.*

(2) The same rules shall apply to State-owned cargoes carried on board any of the above-mentioned ships;

(3) State-owned cargoes carried on board merchant ships for Government and non-commercial purposes shall not be subject to seizure, arrest or detention by any legal process nor any proceedings in rem.

Nevertheless, claims in respect of collisions and nautical accidents, claims in respect of salvage or in the nature of salvage and in respect of general average, as well as claims in respect of contracts relating to such cargoes may be brought before the Court which has jurisdiction in virtue of Article 2.

Article 4

States shall be entitled to reply on all defence, prescriptions and limitations of liability available to privately-owned ships and their owners.

Prescriptions and limitations of liability for the purpose of making them applicable to ships of war or to the State-owned ships specified in Article 3 shall form the subject of a special Convention to be concluded hereafter. In the meantime, the measures necessary for this purpose may be effected by national legislation in conformity with the spirit and principles of this Convention.

Article 5

If in any proceedings to which Article 3 applies there is, in the opinion of the Court, a doubt on the question of the Government and non-commercial character of the ship or the cargo, a certificate signed by the diplomatic representative of the contracting State to which the ship or the cargo belongs, communicated to the Court through the Government of the State discharge of any seizure, arrest or detention effected by judicial process.

2.2 Additional Protocol to the Brussels Convention 1934

The Government signatory to the International Convention for the Unification of certain Rules concerning the Immunity of State-owned Ships, recognising the necessity of making clear certain provisions of the Convention, have appointed plenipotentiaries, who, having communicated their respective full powers found in good and due form, have agreed as follows:

I. Whereas it has been doubted whether, and to what extent, the expression "Exploites" par lui " in Article 3 of the Convention extends or could be construed as extending to ships chartered by a State, whether for time or voyage, it is hereby declared for the purpose of removing such doubts, as follows: " Ships on charter to a State, whether for time or voyage, while exclusively engaged on governmental and non-commercial service, and cargoes carried therein, shall not be subject to any arrest, seizure or detention whatsoever, but this immunity shall not prejudice in any other respect any rights or remedies accruing to the parties concerned. A certificate given by a diplomatic representative of the State concerned in manner provided by Article 5 of the Convention shall be conclusive evidence of the nature of the service on which the ship is engaged. "

II. For the purpose of the exception provided by Article 3, § 1, it is understood that the ownership or operation of a ship acquired or operated by a State at the time when steps by way (of) seizure, arrest or detention are taken has the same legal consequences as ownership or operation at the time when the cause of action arises. That article may accordingly be invoked by States in favour of ships belonging to or operated by them at the time when steps are taken by way of seizure, arrest or detention, if the ships are engaged exclusively in Government and non-commercial service.

2.3 United Nations Convention on the Law of the Sea 1982

Article 28

Civil jurisdiction in relation to foreign ships

1. The coastal State should not stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship.

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

3. Paragraph 2 is without prejudice to the right of the coastal State, in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving internal waters.

Article 29

Definition of warships

For the purposes of this Convention, "warship" means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.

Article 30

Non-compliance by warships with the laws and regulations of the coastal State

If any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately.

Article 31

Responsibility of the flag State for damage caused by a warship or other government ship operated for non-commercial purposes

The flag State shall bear international responsibility for any loss or damage to the coastal State resulting from the non-compliance by a warship or other government ship operated for non-commercial purposes with the laws and regulations of the coastal State concerning

passage through the territorial sea or with the provisions of this Convention or other rules of international law.

Article 32

Immunities of warships and other government ships operated for non-commercial purposes

With such exceptions as are contained in subsection A and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes.

371. These two conventions provide a comprehensive regime for the operation of shipping. The Brussels Convention and Protocol came into force in 1936 and is still in force with 30 parties.

372. Fox argues that the reason that the Brussels Convention was not extensively accepted was the complexity of its provisions and the fact that its application depended on precise conditions. She contends that national courts are more prepared to rely on general principles of international law and to accept jurisdiction over claims of carriage of good or passengers on merchant ships owned or operated by states.[366] However, the Brussels convention and its emphasis on the nature of the activity of the shipping is a forerunner of the present immunity conventions.

373. The UNCLOS provisions are extensive with regard to international responsibility of the flag states of warships to coastal states even if they are subject to immunity.

374. Both the European Convention on State Immunity and the United Nations Convention included specific Articles for shipping but with very different effect. Article 30 of ECSI excluded shipping.

2.4 The European Convention on State Immunity 1972

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.

375. The explanatory report to the Convention contains an explanation of this provision:

"115. The purpose of this article is to exclude matters covered by the Brussels Convention of 10 April 1926 for the Unification of certain Rules concerning the Immunity of State-owned Vessels, and the Protocol of 24 May 1934. These instruments are in force between a fairly large number of member States of the Council of Europe. The expressions used in Article 30 should be interpreted in accordance with the interpretation generally given to them in these two instruments,"[367]

376. The drafters of the ECSI left the determination of the status of shipping to the regime in the Brussels Convention.

377. In contrast, the United Nations Convention includes shipping as an exception to state immunity and the key concept is that a state cannot invoke immunity for a ship if at the time the claim arose the ship was being used for "other than government non-commercial service" which would encompass non-military shipping. The Convention provisions derive from the Brussels 1926 Convention in the procedure for determining the character of the shipping.

2.5 United Nations Convention on Jurisdictional Immunities of States and their property

Article 16

Ships owned or operated by a State

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[366] Fox, pp. 86-87.

[367] *The Porto Alexandre* [1920] P 30, Probate Division, 1920.

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the operation of that ship if, at the time the cause of action arose, the ship was used for other than government non-commercial purposes.

2. Paragraph 1 does not apply to warships, or naval auxiliaries, nor does it apply to other vessels owned or operated by a State and used, for the time being, only on government non-commercial service.

3. 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 a proceeding which relates to the carriage of cargo on board a ship owned or operated by that State if, at the time the cause of action arose, the ship was used for other than government non-commercial purposes.

4. Paragraph 3 does not apply to any cargo carried on board the ships referred to in paragraph 2, nor does it apply to any cargo owned by a State and used or intended for use exclusively for government non-commercial purposes.

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

6. If in a proceeding there arises a question relating to the government and noncommercial character of a ship owned or operated by a State or cargo owned by a State, a certificate signed by a diplomatic representative or other competent authority of that State and communicated to the court shall serve as evidence of the character of that ship or cargo.

378. The International Law Commission's Final Draft Articles and Commentary of 1991 contained an extensive discussion of this article. In the first instance, the term ships include all types of seagoing vessels. Paragraph 1 and 3 of Article 16 is concerned with shipping engaged in commercial service, paragraph 2 with warships and naval auxiliaries and paragraphs 4 and 5 with cargo. One of the difficulties in drafting the provisions is that the English common law includes terms such as "suits in admiralty", "libel in rem", "maritime lien" and "proceedings in rem against the ship" which have no meaning in the context of other legal systems. Therefore, the commentary argues that the terms used in Article 16 were for more general application.[368]

379. The Commentary draws attention to the fact that the Convention provisions have altered the traditional dual criterion of "commercial and non-governmental" and "governmental and non-commercial use" contained in Brussels and in UNCLOS have been altered to a formula of "other than government non-commercial purposes". This eliminates the problem of the dual criterion.[369] However, this phrase might cause problems in definition in future interpretation of the convention as to what activities constitute this "other than government non-commercial purposes" as it is certainly broader than warships. It may include other government ships such as police patrol boats, customs inspection boats, hospital ships, oceanographic survey ships, training vessels and dredgers.[370]

380. Another important part of shipping emphasized in the commentary is the question of cargo. The carriage of goods is a very important topic in international trade law and has been the subject of study by UNCITRAL and a proposed convention. However, paragraph 3 of the Convention gives some clarification to the operation of merchant shipping and the distinction between cargo on government purposes shipping and government commercial shipping. It does not provide provision for such events as carriage of dangerous goods, the discharge of oil offshore, collision, salvage and repair.[371] The commentary does make clear that cargo involved in emergency operations such

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[368] I*LC Final Draft Articles and Commentary 1991,* found in Andrew Dickinson, Rae Lindsay and James P. Loonam, *State Immunity: Slected Materials and Commentary,* Oxford, Oxford University Press, 2004, p. 100 reproducing ILC Final Draft Articles and Commentary at pp. 136-141.

[369] *Ibid.,* p.137.

[370] *Ibid.,* p.139.

[371] *Ibid.,* p.138.

as food relief or transport of medical supplies should remain immune. In this case the intended use of the cargo is relevant. [372]

381. The matter of the distinction between a State and a State enterprise is also addressed in the commentary. Paragraph 1 is interpreted that in a case where a ship is owned by a State but operated by a State enterprise which has independent legal personality, it is the ship-operating State enterprise that should be brought before the court. The State might be a party only if there is a claim to repair and salvage as the State itself will benefit from the repairs.[373]

382. The procedure for the determination of the character of the shipping set out in the draft convention may also provide for interesting complications in future. Paragraph 6 provides that if a question arises relating to the government and noncommercial character of a ship owned or operated by a State or cargo owned by a State, a certificate signed by a diplomatic representative or other competent authority of that State and communicated to the court shall serve as evidence of the character of that ship or cargo. The provision does not specify if that evidence shall be held to be conclusive. The question arises as to whether these vessels might escape liability if a state is allowed to designate the character of the ship rather than the court. The commentary argues that this evidence can be rebutted in domestic courts, but the provision on its face is not specific as to how this evidence might be received.[374]

3. State Practice

383. In terms of state practice, there are very few shipping cases in the compilation of cases and those included do not raise any substantial issues of controversy. The practice in the European courts is to determine the nature of the activity of the ship at the time the dispute arose rather than relying on a statement from a diplomatic representative.

384. In the leading case, the United Kingdom case of *1°Congresso Del Partido* the House of Lords held a foreign State cannot claim State immunity in respect of acts *iure gestionis.* The court maintained that whether an act is *iure gestionis* or *iure imperii* should turn on the nature of the act, and not its purpose or motive. Nonetheless, the entire context in which the claim against the foreign State was made had to be considered. In this case the breaches by the Defendant State, as owner of the ships, of its obligations towards the owners of the two cargoes in this case, were acts *iure gestionis.*[375]

385. In the Netherlands case, *Wijsmuller Salvage B.V. v. ADM Naval Services*. a Peruvian warship got into difficulties during sea trials in the North Sea. Wijsmuller Salvage successfully assisted the vessel. It applied to the Amsterdam District Court for an injunction attaching the cruiser and to obtain payment of the salvage money. The claim was made for immunity in that the vessel belonged to a foreign power which was intended for use in the public service. The court reasoned that the decisive criterion was the status of the ship at the time of attachment. The claim failed as the court held that the ship was sailing under Peruvian command and was intended for use in the public service.[376]

386. *The United States of America v. Havenschap Delfzijl/Eemshaven*, the Supreme Court of the Netherlands again dealt with the issue of warships. A United States ship, Cape May caused damage to the quayside and incurred salvage costs while docked in Dutch port. The United States claimed immunity from payment as the ship had the status of warship or military supply ship, a public function. In this case, the court held that at time cause of action arose, the ship was used for typical government functions and therefore immunity was granted.[377]

387. In another case from the Netherlands, the court considered a claim of state immunity from the Russian Federation. A Dutch company, Pied-Rich B.V. concluded a tripartite contract with the

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[372] *Ibid.,* p.141.

[373] *Ibid.,* p.138.

[374] *Ibid.,* p.141.

[375] [GB/14] *1°Congresso Del Partido,* House of Lords, 1981.

[376] [NL/6] *Wijsmuller Salvage B.V. v. ADM Naval Services,* District Court of Amsterdam, 1987

[377] [NL/16] *The United States of America v. Havenschap Delfrzijl/Eemshaven*, Supreme Court, 1999.

Baltic Shipping Company and a number of Russian importers for the delivery of women's and children's wear. The company sold and delivered the goods to the Russian importers and payment was guaranteed by the Baltic Shipping Company and the Russian Ministry to which the Baltic Shipping Company was responsible. The payment was not made to the company. The company applied to District Court to seize a vessel belonging to the Russian Federation for payment of any arbitration award made. The Supreme Court in the Netherlands held that act of guaranteeing payment was not in nature of governmental act. The court argued that what was decisive was the nature of the act not the motive for it. There was no rule of unwritten international law to the effect that seizure of a vessel belonging to the State and intended for commercial shipping is permissible only if the seizure is levied for purpose of insurance or recover a maritime claim.[378]

4. Conclusion

388. The case law from the Council of Europe states with respect to ships does not reveal substantial difficulty with either the Brussels convention or general international law rules. It remains to be seen whether the ability to issue a certificate of non-commercial use will cause any problems in the jurisprudence.

[378] [NL/12] *The Russian Federation vs. Pied Rich B.V.*, Supreme Court, 1993.

CHAPTER 9

Effect of an Arbitration Agreement

Joshua Brien[379]

1. Introduction

389. Arbitration has become increasingly popular as a method for resolving commercial disputes between foreign States and private entities. Arbitration can provide an alternative to litigation before national courts that may be unfamiliar to one Party to a commercial dispute. A number of treaties that aim to enhance the effectiveness of the arbitration process have provided further incentive for recourse to arbitration as a means of settling such disputes.[380]

1.1 Arbitration, domestic courts and state immunity

390. An initial and important point is that issues of foreign state immunity are concerned almost exclusively with a foreign state's personal immunity from the jurisdiction of national courts. In general, issues of state immunity arise when the private party to arbitration seeks to invoke the supervisory jurisdiction of national courts to assist in the arbitration process, or to seek extra-arbitral sanctions from those courts.

391. State immunity is largely irrelevant to arbitral proceedings. It is generally accepted that immunity does not *per se* interfere with the legal relationship between parties to an arbitration as defined in a contract or arbitration clause. Indeed, international courts and arbitral tribunals have been consistent in rejecting attempts by States to unilaterally rescind an agreement to submit to arbitration on grounds of state immunity.[381] The typical outcome in such circumstances is that the arbitration proceeds unilaterally. It is therefore no surprise to find that it is increasingly rare that a State or a State entity raises state immunity before an arbitral tribunal in order to challenge the valid submission to arbitral jurisdiction.

1.2 Supervisory jurisdiction of national courts

392. Although arbitration and adjudication are two distinct procedures, arbitration cannot be divorced completely from national courts. Many States regulate, or exercise a measure of judicial control or supervision over arbitration in accordance with domestic legal policy.[382] It is also not uncommon where an arbitration award is not satisfied, for the successful party to seek to enforce an award through national courts in a jurisdiction where the losing party is believed to have assets. Against this background, it is interesting to examine the extent to which an agreement by a State to submit a dispute to arbitration may constitute a waiver[383] of state immunity.

393. In this regard, the prevailing view is that implied consent to the exercise of supervisory jurisdiction may be established where there is clear agreement by a State to submit to arbitration and a link between the procedure of arbitration and the internal legal system.[384] This view is

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[379] Materials for this chapter were also provided by Dhisadee Chamlongasdr.

[380] See for example: European Convention on International Commercial Arbitration (Geneva, 1961) 484 UNTS 364, No. 7041 (1963-64); Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 1965) 575 UNTS 159.

[381] See: *Sapphire International Petroleum Ltd. v. National Iranian Oil Co. Award*, March 15, 1963, 35 ILR 136, 170 (1967); *BP Exploration Co. (Libya) Ltd. v. Government of the Libyan Arab Republic Award,* October 10, 1973, 53 ILR 297, 311, and 356 (1979); *Texaco Overseas Petroleum Co./California Asiatic Oil Co. and the Government of the Libyan Arab Republic Award*, January 19, 1977, 17 ILM 3 (1978), 53 ILR 389 (1979), para. 10; *Libyan American Oil Co. [LIAMCO] v. Government of the Libyan Arab Republic, Award,* 20 ILM 1, pp. 78-79; Resolution No. 1803 (XVII) UNGA, 21 December 1952 (Section 1, paras. 1 and 4; Article 25, ICSID Convention.

[382] See: Australian Law Reform Commission Report 24, *Foreign State Immunity* (Canberra, Australian Government Publishing Service, 1984).

[383] The general concept of 'waiver' is discussed in Chapter 4.

[384] See: Delaume, '*State Contracts and Transnational Arbitration*' 75 AJIL 784 (1981); YBILC 1985, Volume I, p. 235 at 236.

reflected in the relevant provisions of the 1972 European Convention on State Immunity and the Draft United Nations Convention on Jurisdictional immunities, which are discussed in this report.

1.3 Relationship between state immunity and the Act of State doctrine

394. There is sometimes a confusing interaction between sovereign immunity and acts of state. The foreign act of state doctrine bars adjudication of claims or enforcement of an award resulting from an act done by a sovereign power of a governmental rather than a commercial nature.[385] The interplay between sovereign immunity and the foreign act of state doctrine may lead a national court to refuse to exercise jurisdiction even where it has jurisdiction on the basis of waiver of immunity where a State has agreed to arbitration, particularly where the claim is imbued with elements of a legislative act of state. Questions relating to the treatment of transactions under the act of state doctrine are however distinct from questions of state immunity, which is the subject of this Analytical Report.

2. The Conventions

2.1 Background

395. The 1972 European Convention on State Immunity and the UN Draft Convention of Jurisdictional Immunities are the only multilateral conventions that deal with immunity generally. Both Conventions establish regimes that proceed from the view that a State enjoys restrictive immunity, namely that jurisdictional immunity should only be available when a state undertakes a commercial activity. Both Conventions also distinguish certain non-immune transactions based upon the concept of implied consent to the supervisory jurisdiction of a court of another State which is otherwise competent to determine questions connected with the arbitration agreement.

396. The relevant convention provisions dealing with the interaction between arbitration and State immunity from jurisdiction and enforcement are discussed below.

2.2 1972 European Convention on State Immunity

2.2.1 Immunity from jurisdiction

397. Article 12 of the European Convention provides as follows:

> *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: the validity or interpretation of the arbitration agreement; the arbitration procedure; the setting aside of the award, unless the arbitration agreement otherwise provides.*
>
> *2. Paragraph 1 shall not apply to an arbitration agreement between States.*

398. Consistent with the other European Convention rules on non-immunity from jurisdiction, article 12 incorporates a rule on non-immunity based on the concept that immunity will not attach to State activities *jure gestionis*.[386] In this respect, paragraph 1 of article 12 provides that a Contracting State[387] to the European Convention cannot claim immunity from the jurisdiction of the Courts of another Contracting State if proceedings have been brought that relate to the validity or

[385] See for example: *Buttes Gas and Oil Co. v. Hammer (No. 3)* [1982] AC 888; *Maclaine Watson & Co. v. International Tin Council* [1988] 3 WLR 1169; *A Limited v. B Bank and Bank of X* [1997] FSR 165, 111 ILR 590.

[386] See Explanatory Report to the European Convention; Sinclair, '*The European Convention on State Immunity'* (1973) 22 ICLQ 254, at 270.

[387] Questions relating to the non-applicability of rules set forth in the European Convention to non-parties have arisen in a number of cases heard by national courts of States participating in the Pilot Study. In *Kingdom of Morocco v. DR* (Chronique de droit social 1992, p. 86; 115 ILR 421), the Labour Court of Brussels declared that rules set forth in the Convention were declaratory of customary international law. In *Seidenschmidt v. United States of America* (IPRAX 1993, p. 185; 116 ILR 531), the Supreme Court of Austria held that provisions of the Convention were applicable to a non-party. In *M v. Arab Republic of Egypt* ATF 120 II 400; RSDIE 1995, p. 600; 116 ILR 656), the Federal Tribunal of Switzerland commented that the jurisprudence of the Tribunal did not reveal any settled position as to whether or not the principles of the Convention could be relied upon as evidence of generalized State practice. None of the the abovementioned cases dealt specifically with article 12 of the Convention.

interpretation of an arbitration agreement, or to the arbitration procedure, or for the setting aside of an award, in cases 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, and the arbitration has taken or will take place on the territory or according to the law of the State of the forum.

399. There are some important limitations to the scope and application of article 12. Paragraph 1 of article 12 embraces the concept of party-autonomy and provides that the conditions for non-immunity will not apply to the extent that the arbitration agreement provides otherwise. Paragraph 2 of article 12 provides also that the rule stated in paragraph 1 does not apply to arbitration between States. It is clear also that the rules set out in article 12 have no application to arbitration between an international organization and a private party.

2.2.2 Immunity from execution

400. Article 23 of the European Convention provides as follows:

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

401. Thus, article 23 retains the rule of absolute immunity for execution against foreign states in the absence of consent, although it does commit parties to comply with judgements and to provide effective machinery for recognition of foreign judgements[388]. This undertaking is contained in article 20, paragraph 1, of the Convention. In this respect, an arbitration award covered by article 12 of the European Convention is assimilated to and treated as a judgement.[389]

2.3 UN Convention on Jurisdictional Immunities

2.3.1 Immunity from jurisdiction

402. Article 17 of the UN Convention provides as follows:

> ***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 transaction, 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, interpretation or application of the arbitration agreement;*
>
> *(b) the arbitration procedure; or*
>
> *(c) the confirmation or the setting aside of the award, unless the arbitration agreement otherwise provides.*
>
> ***With respect to article 17***
>
> *The expression "commercial transaction" includes investment matters."*

403. The development of article 17 was influenced by article 12 of the European Convention.[390] In this respect, article 17 adopts the approach of distinguishing and cataloging non-immune transactions. Not surprisingly, article 17 is similar also in scope, content and application to its European counterpart. Article 17 relates only to immunity from jurisdiction and not to enforcement jurisdiction.[391] This is intended to cover all the natural and logical consequences of the commercial arbitration including, the validity of the obligation to arbitrate, the interpretation and validity of the

[388] Articles 20, 21 and 23; Sinclair (1973) 22 ICLQ, 254, at 275.

[389] If this were not the case, article 20 would become meaningless in its application to article 12.

[390] See: 1985 YBILC, Volume I, p. 235 at 236.

[391] 1985 YBILC, Volume I, p. 235 at 236.

arbitration clause or agreement, the arbitration procedure and the setting aside of the arbitral awards.[392]

404. The rules set forth in article 17 are intended to apply with respect to arbitration of disputes between foreign states private entities. Arbitration between States or between States and international organizations, are not intended to be covered by article 17.[393] Also excluded from the scope of Article 17 are self-contained and autonomous forms of arbitration provided for by treaties such as the Convention on the Settlement of Investment Disputes between States and Nationals of other States.[394]

405. Article 17 refers to 'commercial transactions' as a touchstone for distinguishing non-immune transactions.[395] The definition of 'commercial transactions' was a matter of controversy during the drafting of the Convention. In this respect, some States considered only that the nature of the activity should be taken into account in determining whether it is commercial or not. Other States took the view that recourse should sometimes be had to the purpose of the activity in order to reach a conclusion on whether an activity is commercial or not. Although several different proposals were made as to how to integrate the two tests, no common solution emerged.

406. Paragraph 1(c) and paragraph 2 of article 2 represent an attempt to provide an integration of the two tests.[396] A non-exhaustive list of typical commercial transactions is set forth in Article 2(1)(c) of the UN Convention. The list refers to commercial contracts, transactions for the sale of goods or services, transactions of a financial nature or any other contract or transaction of commercial, industrial trading or professional nature. Paragraphs 2 and 3 of article 2 provide that the determination of whether a particular transaction falls within the ambit of a 'commercial transaction' is to be guided primarily by the nature of transaction. In addition, in certain circumstances, it will be necessary to consider also the purpose of a transaction in determining its character for the purposes of article 17.

2.3.2 Immunity from execution

407. Questions relating to immunity from execution are governed by Article 18 of the Draft Convention, which provides as follows:

> *1. No measures of constraint, such as attachment, arrest and execution, against property of a Stare may be taken in connection with a proceeding before a court of another State unless and except to the extent that:*
>
> *(a) the State has expressly consented to the taking of such measures as indicated:*
>
> *(i) by international agreement;*
>
> *(ii) by an arbitration agreement or in a written contract; or*
>
> *(iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen;*
>
> *(b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or*
>
> *(c) the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum and has a connection with the claim which is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed.*

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[392] See: 1985 YBILC Volume II, Part Two, p. 51 at 63-64; Morris, '*The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and their Property'* (1989) 17 Denver Journal of Internal Law and Policy 395 at p.437.

[393] See: 1985 YBILC, Volume II, Part Two, p. 51 at 64, paras. (7)-(8).

[394] See also: 1981 Iran-United States Agreement concerning the Settlement of Claims, 20 ILM 159 (1981); 1985 YBILC, Volume II, Part Two, p. 51 at 64, para. (4).

[395] 1985 YBILC, Volume II, Part Two, p. 51 at 63, para (3).

[396] See Report of the Working Group on Jurisdictional immunities of States and their Property, 1999 YBILC, Annex, para. 32, p. 6.

2. Consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint under paragraph 1, for which separate consent shall be necessary.

3. State Practice

3.1 Immunity from jurisdiction

3.1.1 National legislation

States Parties to the European Convention

408. The United Kingdom is the only State Party to the European Convention that has enacted legislation codifying rules of state immunity based upon the provisions of the Convention. Some other States Parties have enacted legislation that either incorporate principles of immunity recognized in international law or enabled ratification of the European Convention only.[397] A number of non-Party States participating in the Pilot Study also have legislation that addresses the interplay between immunity and arbitration to some degree.

United Kingdom—State Immunity Act 1978

409. The State Immunity Act 1978 was enacted for the purpose of inter alia bringing the United Kingdom into conformity with the obligations under the European Convention. The Act came into force on 22 November 1978.398 Although the Act is intended to constitute a comprehensive code, it does not replace the common law in its entirety.399 Accordingly, there have been cases in which common law authorities have been of assistance in interpreting and applying elements of the Act.400

410. Section 9 of the Act is based on Article 12 of the European Convention. It provides that where a state has agreed in writing to submit existing or future disputes to arbitration, that the state is not immune in respect of proceedings in the courts of the United Kingdom that relate to the arbitration. Section 9 alters the rule that emerges from earlier decided English cases that an agreement to arbitrate did not constitute a submission to the jurisdiction of the English Courts in respect of that arbitration.401

411. It is important to recognize that section 9 of the State Immunity Act is unorthodox in its treatment of immunity in the context of arbitration in that it deliberately extends beyond article 12 of the Convention. Unlike the European Convention, section 9 of the Act is not limited to disputes of a civil or commercial character. There is also no requirement under section 9 that the arbitration take place in the United Kingdom or according to the law of a part of the United Kingdom. In addition, the category of proceedings to which section 9 applies is limited only by the words 'which relate to the arbitration' and not to the more limited forms of supervision referred to in Article 12 of the European Convention.402 In this respect, it is unclear whether an English court may entertain applications outside the traditional bounds of 'supervisory jurisdiction' over arbitration on the basis of section 9.

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[397] *Germany,* German Act of Parliament required by Article 59(2) of the Basic Law to enable the Federal Republic of Germany to ratify the European Convention on State Immunity; *Cyprus,* Law 6/76;

Netherlands, Act on General Provisions of Kingdom Legislation (*Wet Algemene Bepalingen*) NL/1, Article 13a, reproduced in CAHDI (2004) 5 Part II(A) rev 2.

[398] *State Immunity Act 1978 (Commencement) Order 1978* (SI 1978/1572).

[399] *Rules of Supreme Court Practice (19 II, Part 14 – Miscellaneous Parties and Proceedings,* para. 4671; *Al Adsani v. Government of Kuwait* (1996) 107 ILR 536 at 542 (Stuart-Smith LJ); *R v. Bow Street Metropolitan Stipendairy Magistrate, ex parte Pinochet Ugarte (No. 3)*[2000] 1 AC 147 at 209 (Lord Goff).

[400] *Kuwait Airlines Corporation v. Iraqi Airways Co.* [1995] 1 WLR 1147, at p. 1159 (Lord Goff).

[401] *Duff Development Company v. Government of Kelantan* [1924] AC 797; See also Mann, '*State Immunity Act 1978'* (1979) 50 BYIL 43 at 46; Fox (1988) 37 ICLQ 1, esp. 10-18; Fox (1996) 12 Arbitration International 89; Vibhute [1998] JBL 550-563.

[402] A provision that would have excluded enforcement of arbitration awards from the scope of section 9 was deleted in the House of Lords (*Hansard,* H.L. Debs., vol. 389, cols. 1516-17, 16 March 1978). The extent to which this factor could be relevant to the interpretation of the Act is unclear.

Legislation of non-Party States

412. National legislation in the Czech Republic reflects a continued adherence to the principle of absolute immunity. The relevant legislation establishes a general rule that foreign States are not subject to the jurisdiction of the Czechoslovak courts and some exceptions including, where a foreign State submits voluntarily to the jurisdiction of the courts.[403] [404] Similar rules and exceptions are codified by Statute in the Slovak Republic.[405] There are no statutory exceptions relating to arbitration in either jurisdiction. The Russian Federation has a long historical connection with the doctrine of absolute immunity. However, there is evidence of a shift towards a more restrictive concept of immunity, with a new law on State immunity under active consideration.[406]

413. Slovenia, Spain and Sweden do not have comprehensive or codifying legislation on State immunity. The Greek Code of Civil Procedure provides that foreign States are not immune from judicial proceedings for acts that they perform in *fiscus.*[407] There is no codified exception from immunity relating to arbitration under Greek statute law. Primary and subordinate legislation in Iceland[408] provides for the application of principles of public international law concerning the rights of foreign States before national courts and tribunals.

3.1.2 Judicial decisions

414. Judicial pronouncements assume particular importance in this study given that the law remains un-codified in most jurisdictions participating in the Pilot Study.[409]

415. A considerable proportion of the cases examined adopt the view that consent to arbitration amounts to a waiver of immunity from jurisdiction consistent with article 12 of the European Convention. Examples include the courts of Austria, Federal Republic of Germany, France[410], the Netherlands and the United Kingdom.

416. In *Tekno-Pharma AB v Iran (State)*, the applicant company entered into a tenancy agreement with the respondent to provide office accommodation for the Iranian Embassy in Sweden. The agreement contained an arbitration clause that provided for arbitration of disputes in Sweden in accordance with a Swedish law. When the respondent failed to vacate the premises upon termination of the lease, the applicant claimed damages. When the respondent failed to appoint an arbitrator, the applicant applied for a Court-appointed arbitrator under the Swedish Arbitration Act. The respondent claimed immunity from proceedings. The County Administrative Board of Stockholm found that the respondent was entitled to invoke immunity notwithstanding its acceptance of the arbitration clause. In the Board's view, Iran's agreement to including an arbitration clause alone did not justify a finding that Iran had waived its right to invoke state immunity in any action to enforce the arbitration clause. Consequently, the board could not lawfully consider the request to appoint an arbitrator. An appeal by the company was dismissed by the Svea Court of Appeal, which agreed that the arbitration clause did not amount to a waiver of immunity. The decision of the Court of Appeal was upheld by the Supreme Court of Sweden.

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[403] Section 47, paragraph 1 of the Act on Private International Law No. 97/1963 (as amended by Acts No. 158/1969. 234/1992, 264/1992 and 125/2002), Collection of Laws of the Czechoslovak Socialist Republik reproduced in CAHDI (2004) 5 Part II(A) rev 2.

[404] Section 47, sub-paragraph (3)(d) of the Act on Private International Law No. 97/1963.

[405] Section 47, Law No. 97/1963 of 4 December 1963 on Private International Law and Rules of Procedure relating thereto as amended by Law No. 158/1969, No. 234/1992 and No. 264/1992.

[406] Article 127 of the Civil Code of the Russian Federation provides that 'Particular aspects of liability of the Russian federation and subjects of the Russian Federation in relations, regulated by civil legislation, with foreign entities, citizens or States are defined by a law on immunity of State and its property'. The law on immunity of State and its property, to which Article 127 of the Civil Code refers, is not yet adopted.

[407] Article 3, paragraph 1 of the Greek Code of Civil Procedure.

[408] *Iceland,* Civil Litigation Act No 91/1991, Article 16(1).

[409] The United Kingdom, which has enacted the State Immunity Act 1978, is the sole exception.

[410] *Socialist Federal Republic of Yugoslavia v. Société Européenne d'Etudes et d'Enterprises*, Tribunal de grande instance of paris, 6 July 1970 (Clunet, 1971, p. 131; 65 ILR 46); *Malagasy Republic v. Société Bruynzeel (Netherlands),* Tribunal de grande instance of Paris (summary jurisdiction), 3 May 1971 (La Semaine Juridique, 1971, II, 16811; 65 ILR 51);

417. The decision in the *Tekno-Pharma* case may be contrasted with a subsequent decision of the Svea Court of Appeal in *Libyan American Oil Company v Socialist People's Arab Republic of Libya* ('LIAMCO'). In that case, the Court of Appeal held that Libya had waived immunity from jurisdiction. If there is a need to reconcile the two cases, it may be said that the judgment in *Tekno-Pharma v Iran* was concerned with the direct exercise of jurisdiction over a foreign State, whereas the LIAMCO case was concerned with the enforcement of a foreign arbitral award.

3.2 Immunity from execution

3.2.1 National legislation

United Kingdom—State Immunity Act 1978

418. Proceedings for execution of an arbitral award are subject to the limitations imposed under section 13 of the Act.[411] The procedural requirements of Article 12 of the State Immunity Act apply equally to arbitration claims before the English Courts, including proceedings to enter judgment on an award or register an award for execution.[412] However, Fox argued that the potential width of section 9 (1) allowing for enforcement could be curtailed by an arbitration agreement incorporating enforcement provisions in accordance with the New York Convention of 1958 or the ICISID Convention.[413]

3.2.2 Judicial decisions

419. Once again, judicial pronouncements assume particular importance in this study given that the law remains un-codified in most jurisdictions participating in the Pilot Study.[414]

420. A review of cases judicially decided in Austria, England and France[415] reveals a trend toward limiting execution of arbitral awards based upon the distinction between commercial and sovereign acts. In general, courts in these jurisdictions have been prepared to allow execution of an arbitral award against a state's assets in respect of assets used for commercial activities, whereas execution has not been permitted against assets of a sovereign character, unless it has been established that the state at issue has waived its immunity from execution. Of course, there have been some decisions that depart from this approach. The decision in *Eurodif v. State of Iran*, discussed below, represented a marked departure from this general trend. In these jurisdictions, it appears that if assets of a state have been used for or allocated to the same economic or commercial activities that gave rise to the claim subject to arbitration, they will not be immune from execution. The only restriction to the application of this rule would appear to be that the transactions must be of a 'private law' character. The question of the conditions, if any, under which a claimant may obtain execution against a state's assets where they are not used in connection with the transaction that gave rise to the claim remains unclear.

421. French jurisprudence is by no means consistent regarding immunity from execution. A number of French judicial decisions dating from the judgement in *Englander v. State Bank of Czechslovakia*[416]have distinguished between sovereign and commercial assets for the purpose of

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[411] See Crawford *International Law and Foreign Sovereigns: Distinguishing Immune Transactions* , (1984) 54 BYIL 75; Dickinson, pp. 378-379; Fox (1988) 37 ICLQ 1, at 11-18; Fox, *The Law of State Immunity,* pp. 166-167.

[412] *Norsk Hydro ASA v. State Property fund of* Ukraine [2002] EWHC 2120 (Comm.) Gross J.

[413] Hazel Fox, *The Law of State Immunity,* Oxford University Press, Oxford, 2002 p. 167.

[414] The United Kingdom, which has enacted the State Immunity Act 1978, is the sole exception.

[415] Judicial decisions in France provide clearly that an absence of immunity from jurisdiction does not automatically remove immunity from execution (*Société Bauer-Marchal et Cie. v. Minister for Finance of Turkey*, decision of 10 February 1965, Cours d'appel Rouen, 1965 Revue Critique de droit International Prive 565; *Republic of Iran and Others v. Société Eourodif and Sofidif and Commissariat à l'Énergie Atomique* , Court of Appeal, Paris (First Chamber), 21 April 1982, Clunet, 1983, p. 145; 65 ILR 93)[415]. Conversely, the case of *Procureur de la République v. S.A. Ipitrade International,* decision of 12 September 1978, Tribunale de grande instance of Paris (summary jurisdiction)(1979 Journal du droit International 857; 65 ILR 75) stands for the proposition that an express waiver of sovereign immunity from execution is effective. On the distinction between assets used for commercial activities see Chapter 2.

[416] Decision of 11 February, 1969, Cour de cassation; See also: *Procureur de la République v. S.A. Ipitrade International.*

execution. In *Procureur de la République and Others v. LIAMCO and Others*[417] the Tribunal de grande instance refused to allow attachment to enforce an arbitral award rendered against Libya on grounds that Tribunal could not determine whether the attached assets were allocated for a sovereign or public service. The decision in *LIAMCO* has been criticised.[418]

422. However, in the landmark case of Eurodif v. Iran, the highest French court redefined the rules governing sovereign immunity and execution. The facts of the case were as follows:

> *Eurodif (a joint venture created by four European countries), commenced arbitration proceedings against Iran as stipulated in the contract. Pending the arbitration, Eurodif sought and obtained a conservatory attachment order from the Tribunal of Commerce of Paris as security for its claim. The attachment order authorised Eurodif to seize a debt. Iran appealed to the Cour de appel Paris, which held that Iran was entitled to sovereign immunity, noting that the attached debt was owed to the Iranian state whose future use of monies repaid as principal and interest was not subject to any restriction, and therefore the Iranian government would not be in a position to exercise its sovereign discretion as to the allocation of the funds to whatever government activities it chose. In theses circumstances, the Court held that immunity applied. The Cour de cassation reversed the decision of the Cour de appel.*[419]

423. In *Eurodif,* the *Cour de cassation* articulated a general rule to the effect that State immunity does not operate where execution is sought in respect of execution of assets of state that have been used for or allocated to the same economic or commercial activity that gave rise to the legal action and provided also that the transactions are of a 'private law' character. This case represented a considerable extension of the scope of execution.

4. Conclusion

424. The United Nations Convention in its current form will be limited to commercial arbitration agreements and will not resolve the issue of other arbitration agreements. The other unresolved issue is the major issue of enforcement. The area of enforcement and state immunity merits examination on a more general basis, not simply in the context of arbitration agreements.[420] The limited state practice would seem to lean slightly towards enforcement as being part and parcel of the arbitration agreement and therefore can constitute a waiver of state immunity for execution. As the general material on enforcement has revealed the courts of the European states have a more hesitant approach to enforcement measures against states.[421]

425. The treaty provisions are of little assistance in the issue of waiver of immunity. However, the European state practice would seem to be leaning in favour of an arbitration agreement constituting a waiver of state immunity.

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[417] *Procurer de la Republique v. LIAMCO*, decision of 5 March 1979, Tribunal de grande instance of Paris (Clunet, 1979, p. 857; 65 ILR 78).

[418] *Société Bauer-Marchal et Cie. V. Minister of Finance of Turkey,* decision of 10 February 1965, Cours d'appel Rouen; *Procurer de la Republique v. LIAMCO*, decision of 5 March 1979, Tribunal de grande instance of Paris.

[419] F/5.

[420] See special edition of the *Netherlands Yearbook of International Law 1979.*

[421] Reinisch, Chapter 6.

CHAPTER 10

State Immunity from Enforcement Measures

August Reinisch

1. Introduction

426. Judicial practice in the field of State immunity differentiates between jurisdictional immunity and immunity from execution. Immunity from jurisdiction refers to a limitation of the adjudicatory power of a national court, whereas immunity from execution restricts the enforcement powers of national courts or other organs.

427. While the courts of many European States have changed from an absolute to a restrictive jurisdictional immunity concept during the last half-century, a more hesitant approach still prevails with regard to limiting the immunity of States from enforcement measures. The traditional approach was that, contrary to "restrictive" or "relative" adjudicatory immunity concepts, immunity from execution has to be considered as absolute.

428. The main reason for this difference is usually seen in the more intrusive character of enforcement measures compared to merely adjudicatory powers.[422] However, also in the field of enforcement measures, immunity is no longer generally considered to be the unequivocal rule. A number of national courts have clearly expressed their opinion that enforcement immunity is equally no longer absolute. They do, however, wrestle with the precise conditions and criteria under which and how such enforcement immunity should be granted or denied.

429. In addition to the possibility of waiving enforcement immunity, the most important general trend seems to point towards opening up certain types of State property not serving public purposes to measures of execution. However, contrary to the requirements of immunity from jurisdiction, the distinctive criterion is not the nature of the act in issue but rather the purpose of the property to be subjected to enforcement measures.

2. The approaches of international instruments

2.1 The European Convention on State Immunity 1972

430. With regard to immunity from enforcement measures, the European Convention on State Immunity[423] does not codify existing customary law on the subject. Rather, it represents a compromise between States adhering to a rule of absolute immunity from enforcement measures and those permitting such measures under certain conditions "in that it combines an obligation of States to give effect to judgments with a rule permitting no execution."[424]

431. Article 23 of the European Convention provides:

> *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.*

432. At the same time the Convention requires that the Contracting States shall give effect to judgments rendered against them in accordance with the provisions of the Convention.[425] Only as between States which have made an optional declaration according to Article 24 of the Convention and with respect to judgments concerning industrial or commercial activities, enforcement

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[422] Cf. *Schreuer*, State Immunity: Some Recent Developments (1988), 126; *Sinclair*, Law of Sovereign Immunity – Recent Developments, RdC 167 (1980) 113, 218.

[423] European Convention on State Immunity 1972 (=European Convention), 16 May 1972, in force since 11 June 1976, ETS No.74; *reprinted in* 11 ILM (1972), 470.

[424] Explanatory Report on the European Convention on State Immunity, para. 92, available at http://conventions.coe.int/Treaty/EN/Reports/HTML/074.htm.

[425] Article 20 (1) European Convention provides: "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."

measures against property "used exclusively in connection with such an activity" remain possible.[426]

2.2 The ILA Draft Convention on State Immunity

433. The Draft Convention on State Immunity prepared by the ILA[427] comes closer to a codification of trends in the actual practice of State immunity law also with regard to enforcement measures. It provides, similar to the US FSIA, for three main exceptions to the general rule of immunity from enforcement measures[428]: waiver, property in use for commercial purposes and property taken in violation of international law.[429] The ILA Draft Convention also provides a list of property typically considered to serve sovereign purposes and thus being exempt from enforcement measures.[430]

2.3 The Draft UN Convention on Jurisdictional Immunities of States and Their Property 2004

434. The 2004 Draft United Nations Convention on Jurisdictional Immunities of States and Their Property[431] is based on the ILC Draft Articles on Jurisdictional Immunities of States and Their Property.[432] Both reflect the restrictive approach taken by many national courts to enforcement

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[426] Article 26 European Convention provides: "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."

[427] Revised Draft Articles for a Convention on State Immunity (=ILA Draft Convention), ILA Report of the 66th Conference (Buenos Aires 1994), 22.

[428] Article VII ILA Draft Convention provides: "A foreign State's property in the forum State shall be immune from attachment, arrest, and execution, except as provided in Article VIII."

[429] Article VIII A ILA Draft Convention provides:

"A foreign State's property in the forum State shall not be immune from any measure for the enforcement of a judgment or an arbitral award if:

1. The foreign State has waived its immunity either expressly of by implication from such measures. A waiver may not be withdrawn except in accordance with its terms; or

2. The property is in use for the purpose of commercial activity or was in use for the commercial activity upon which the claim is based; or

3. Execution is against property which has been taken in violation of international law, or which has been exchanged for property taken in violation of international law, and is pursuant to a judgment or an arbitral award establishing rights in such property."

[430] Article VIII A ILA Draft Convention provides:

"Attachment or execution shall not be permitted if:

1. The property against which execution is sought is used for diplomatic or consular purposes, or

2. The property is of a military character or is used or intended for use for military purposes; or

3. The property is that of a State central bank held by it for central banking purposes, or

4. The property is that of a State monetary authority held by it for monetary purposes, unless the State has made an explicit waiver with respect to such property."

[431] Draft United Nations Convention on Jurisdictional Immunities of States and Their Property (=UN Draft Convention), UN GAOR, 59th Session, Supp. No. 22 (A/59/22), Annex I; available at http://ods-dds-ny.un.org/doc/UNDOC/GEN/N04/275/41/PDF/N0427541.pdf?OpenElement.

[432] ILC Draft Articles on Jurisdictional Immunities of States and Their Property (=ILC Draft Articles), YBILC 1991 II (2), 12 (A/46/10), *reprinted in* 30 ILM (1991), 1565. See also *Kessedjian and Schreuer*, Le Projet d´Articles de la Commission du Droit International des Nations Unies sur les immunités des Etats, RGDIP 96 (1992) 299; *Heß*, The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and their Property, EJIL 4 (1993) 269; *Tomuschat*, Jurisdictional Immunities of States and their Property: The Draft Convention of the International Law Commission, Essays in Honour of Ignaz Seidl-Hohenveldern (1988) 603.

immunity. Article 18 of the ILC Draft Articles [433] provided for three main exceptions from enforcement immunity: 1) waiver, 2) property specifically set aside for the satisfaction of the underlying claim, and 3) assets serving commercial purposes, present in the forum State and connected with the underlying claim or defendant entity.[434] The new UN Draft Convention departs from this approach by introducing a basic distinction between "pre-judgment measures of constraint" and "post-judgment measures of constraint". With regard to the first type of measures the new Draft Article 18 of the UN Convention permits enforcement measures only in case of 1) consent and 2) concerning earmarked property.[435] With regard to post-judgment measures of constraint the UN Draft Convention has retained the three exceptions of the ILC Draft Articles. It did modify, however, the link criteria of the property serving commercial purposes by eliminating the "connection with the underlying claim."[436]

435. The UN Draft Convention further clarifies that a waiver of jurisdictional immunity does not imply a waiver of immunity from enforcement measures.[437]

436. Finally, the UN Draft Convention defines specific categories of property which are to be considered to serve governmental purposes and to be thus exempted from any potential enforcement measures.[438]

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[433] See *Byers*, State Immunity: Article 18 of the ILC's Draft, ICLQ 44 (1995) 882.

[434] Article 18 ILC Draft Articles provides: "1. No measures of constraint, such as attachment, arrest and execution, against property of a Stare may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) the State has expressly consented to the taking of such measures as indicated:

(i) by international agreement;

(ii) by an arbitration agreement or in a written contract; or

(iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen;

(b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or

(c) the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum and has a connection with the claim which is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed."

[435] Article 18 UN Draft Convention provides: "No pre-judgement measures of constraint, such as attachment or arrest, against property of a Stare may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) the State has expressly consented to the taking of such measures as indicated:

(i) by international agreement;

(ii) by an arbitration agreement or in a written contract; or

(iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or

(b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding."

[436] Article 19 UN Draft Convention provides: "No post-judgment measures of constraint, such as attachment, arrest and execution, against property of a Stare may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) the State has expressly consented to the taking of such measures as indicated:

(i) by international agreement;

(ii) by an arbitration agreement or in a written contract; or

(iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen;

(b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or

(c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed."

[437] Article 20 UN Draft Convention provides: "Where consent to the measures of constraint is required under articles 18 and 19, consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint."

3. The main judicial approaches to enforcement immunity

437. Today, most European courts adhere to the principle that not only immunity from jurisdiction, but also immunity from execution can no longer be considered absolute.[439] However, they have been far more reluctant to remove the traditional immunity shield in this area because enforcement measures are considered to constitute a far greater and more direct interference into a foreign State's sovereignty than adjudicatory jurisdiction. French courts were among the last to uphold an absolute immunity from enforcement measures until the 1970s.[440]

438. A number of European States, such as Greece and Croatia require authorization by the executive branch before any enforcement measures are taken.[441] Such a requirement[442] has been abolished in Italy.[443]

439. While most European courts today follow the commercial/public purpose distinction in order to establish whether immunity from enforcement measures should be granted or denied,[444] some courts have developed a case-law approximating enforcement to jurisdictional immunity. In particular, Swiss courts tend to treat enforcement as a "logical consequence" of jurisdiction and thus to deny immunity from execution where jurisdictional immunity had already been denied.[445] The resulting liberal approach in granting enforcement measures was only restricted by a rather rigid, judicially created requirement of a Swiss nexus of the underlying subject-matter of the dispute ("Binnenbeziehung") which goes beyond the requirement that the property subject to enforcement should be present in Switzerland.[446] Older Belgian[447] and Italian decisions equally relying on a

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[438] Article 21 UN Draft Convention see *infra* note 479.

[439] Cf. Irak c/ S.A. Dumez, Tribunal civil de Bruxelles, 27 février 1995, Journal des Tribunaux 1995, p. 565, B/5, holding that "en droit international public, le principe de l'immunité d'exécution n'a pas non plus une portée absolue."

In the famous Philippine Embassy Bank Account Case the German Constitutional Court formulated this idea slightly different: "At present there is no practice of States that would as yet be sufficiently general and supported by the necessary legal conviction as to establish a general rule of intern[ation]al law whereby the State having jurisdiction would be barred from execution against a foreign State absolutely." Bundesverfassungsgericht (Federal Constitutional Court), 13 December 1977, Entscheidungen des Bundesverfassungsgerichts Vol. 46, p.342, 65 ILR, 146; D/9.

[440] "A judge seized with an application for the vacation of an attachment order is obliged to acknowledge the absolute nature of the immunity from execution." Procureur de la République v. SA Ipitrade International, France, Tribunal de grande instance of Paris, 12 September 1978, Clunet, 1979, 857; 65 ILR, 75, at 77. See also Clerget v. Banque Commerciale Pour L'Europe du Nord and Others, France, Court of Cassation (First Civil Chamber), 2 November 1971, 65 ILR, 54.

[441] "The request for interim measures against a foreign State is not admissible if there is no previous decision of the Minister of Justice consenting to the request." Court of First Instance of the Island of Kos, Judgment 275/1982, 1982, GR/15; see also Court of First Instance of Thessaloniki, Judgment 1822/1981, 1981, GR/16; Execution Act, 28 July 1996, Official Gazette of the Republic of Croatia, No. 57/96, HR/2.

[442] Italy, Official Gazette, January 25, 1925, no. 223, I/1.

[443] Condor and Filvem (body corporates) vs. Ministry of Justice (governmental body), Constitutional Court, July 15, 1992, Rivista di diritto internazionale privato e processuale, 1992, 941; 101 ILR, 394; I/41.

[444] See infra .

[445] «Le Tribunal fédéral considère l'immunité d'exécution comme une simple conséquence de l'immunité de juridiction : l'Etat étranger qui, dans un cas déterminé, ne jouit pas de celle-ci ne peut non plus se prévaloir de celle-là, à moins que les mesures d'exécution concernent des biens destinés à l'accomplissement d'actes de souveraineté." République Arabe d'Egypte c/ Cinetel, Chambre de droit public du Tribunal fédéral suisse, 20 juillet 1979, ASDI 1981 p.206, 65 ILR (1984), 425, at 430, CH/23.

[446] République socialiste du peuple arabe de Lybie – Jamahiriya contre Lybian American Oil Company (LIAMCO), 1ère Cour de droit public du Tribunal fédéral Suisse, 19 juin 1980, ATF 106 Ia 142, CH/1 ; Royaume de Grèce contre Banque Julius Bär & Cie, Chambre de droit public du Tribunal fédéral suisse, 6 juin 1956, ATF 82 I 75, CH/4 ; République Arabe Unie contre dame X., Tribunal fédéral Suisse, 10 février 1960, ATF 86 I 23, CH/8 ; Banque centrale de la République de Turquie c/ Weston Compagnie de Finance et d'Investissement SA, Cour de droit public du Tribunal fédéral Suisse, 15 novembre 1978, ATF 104 Ia 367, 65 ILR, 417; CH/20 ; République Arabe d'Egypte c/ Cinetel, Chambre de droit public du Tribunal fédéral suisse, 20 juillet 1979, ASDI 1981 p.206, 65 ILR (1984), 425, at 430, CH/23.

[447] Socobel c/ l'Etat hellenique et la banque de Grèce, Tribunal civil de Bruxelles, 30 avril 1951, Journal des Tribunaux, 1951, p. 302, 15 ILR 3, B/7.

parallel treatment of jurisdictional and enforcement immunity have not been followed more recently.[448]

440. As far as one can tell from the cases reviewed, courts in European States are reluctant to deny immunity from enforcement measures entirely. Apparently, only Turkish courts generally deny foreign States immunity from execution.[449]

4. The differentiation between pre-judgment and post-judgment measures of constraint

441. While the ILC Draft Articles did not differentiate between the two types of forcible measures, the UN Draft Convention makes a very clear distinction between pre-judgment and post-judgment measures of constraint which it addresses in two separate articles. As a result of this newly introduced differentiation, pre-judgment measures will be only permissible in cases of consent or with regard to earmarked property;[450] they will not be available with regard to property serving commercial purposes.[451]

442. The most important pre-judgment measures of constraint are attachments of property in order to secure assets for the eventual enforcement of a subsequent judgment, followed by pre-judgment attachments for the purpose of establishing jurisdiction. Distinct immunity rules were introduced by the 1976 US Foreign Sovereign Immunities Act (FSIA) which generally requires an explicit waiver for any pre-judgment attachment.[452] Similarly, the 1978 UK State Immunity Act (SIA) calls for "written consent" for the "giving of any relief"[453] such as a *Mareva* injunction[454] prohibiting a defendant from removing funds from the forum State. Contrary to the *Trendtex Case*[455] which was decided under common law, the pre-judgment attachment of State property in use for commercial purposes is no longer allowed under the SIA.[456]

443. Other than in the UK, however, most European courts seem to disregard any such differentiation between pre- and post-judgment measures and use the same test with regard to the permissibility of both types of measures.[457]

5. The main types of exceptions to immunity from execution

5.1 Waiver of immunity from execution

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[448] "The immunity of foreign States from provisional measures and execution in the State of the *forum* is not a simple extension of immunity from jurisdiction." Condor and Filvem (body corporates) vs. Ministry of Justice (governmental body), Constitutional Court, July 15, 1992, Rivista di diritto internazionale privato e processuale, 1992, 941; 101 ILR (1995), 394, at 401; I/41.

[449] Société X c. / Etats-Unis d'Amérique, Cour de cassation, 11 juin 1993, TR/6 ; Société c. / La République Azerbaïdjan, Tribunal d'exécution, 21 février 2001, TR/9 ; Société X c. / Ambassade du Turkménistan, Tribunal de grande instance, 18 décembre 2002, TR/7 ; Société c. / Ambassade du Turkménistan, Tribunal de grande instance, 21 octobre 2002, TR/8.

[450] See Art 18 UN Draft Convention supra note 435.

[451] The exception of property that is "specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed" is only retained with regard to post-judgment measures of constraint addressed in the new separate Article 19 UN Draft Convention.

[452] Sec. 1610 (d) US FSIA, *reprinted in* 15 ILM (1976) 1388.

[453] Sec. 13 (2) and (3) UK SIA, 1978, c. 33 (UK), *reprinted in* 17 ILM (1978) 1123.

[454] Mareva Compania Naviera S.A. v.International Bulk Carriers Ltd., [1975] 2 Lloyd's Rep. 509.

[455] Trendtex Trading Corporation v. Central Bank of Nigeria, Court of Appeal, 13 January 1977, [1977] 2 WLR 356, 64 ILR 111, GB/12.

[456] *Fox*, The Law of State Immunity (2002) 409.

[457] Libia (State) vs. Condor Srl (body corporate), Italian Supreme Court of Cassation, August 23, 1990, Rivista di diritto internazionale, 1991, 679, I/38; Central Bank of Nigeria Case, Landgericht Frankfurt Germany, 2 December 1975, NJW 1976, 1044, 65 ILR, 131; National Iranian Oil Company Revenues From Oil Sales Case, Bundesverfassungsgericht (German Federal Constitutional Court), 12 April 1983, BVerfGE 64, 1, 65 ILR, 215, D/11; République Arabe Unie contre dame X., Tribunal fédéral Suisse, 10 février 1960, ATF 86 I 23, 65 ILR, 385, CH/8 ; Banque centrale de la République de Turquie c/ Weston Compagnie de Finance et d'Investissement SA, Cour de droit public du Tribunal fédéral Suisse, 15 novembre 1978, ATF 104 Ia 367, 65 ILR, 417, CH/20; République Arabe d'Egypte c/ Cinetel, Chambre de droit public du Tribunal fédéral suisse, 20 juillet 1979, ASDI 1981 p.206, 65 ILR, 425, CH/23.

444. Immunity from enforcement measures may be waived by a defendant State. This principle is upheld in international immunity instruments, such as Articles 18 and 19 Draft UN Convention,[458] in the European Convention,[459] the ILA Draft Convention,[460] as well as in national immunity legislation. It has been generally followed in national court practice even in countries otherwise adhering to an absolute immunity standard.[461]

445. Apart from the rather uncontroversial principle, courts found different answers to some specific issues regarding waivers, such as whether a waiver of immunity from jurisdiction encompasses a waiver of immunity from enforcement and whether there is room for implied waivers from execution.

446. The traditionally accepted rule that a separate waiver is required for purposes of enforcement measures and that a waiver of immunity from jurisdiction does not normally imply also a waiver of immunity from enforcement can be found in the UN Draft Convention,[462] the ILC Draft Articles[463] as well as in national legislation.[464]

447. Also national courts generally require an additional waiver of enforcement immunity.[465] A 1993 Croatian decision in which an implied waiver of immunity from jurisdiction was apparently interpreted to entail a waiver of enforcement immunity, thus probably has to be seen as the exception that proves the rule.[466]

448. Both the UN Draft Convention[467] and the European Convention[468] seem to require an express consent to enforcement measures. Only the ILA Draft Convention contemplates the possibility of an implied waiver of immunity from execution.[469]

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[458] The relevant, identically worded, exceptions of the two Articles (unchanged from Article 18 LC Draft Articles) provide: "(a) the State has expressly consented to the taking of such measures as indicated:

(i) by international agreement;

(ii) by an arbitration agreement or in a written contract; or

(iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen;"

[459] Article 23 European Convention provides: "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."

[460] Art VIII A 1 ILA Draft Convention.

[461] For instance, the old Soviet Civil Procedure Code provided that "[...] pre-judgement measures of constraint and attachment against property of a foreign State located on the territory of the USSR, may be taken only with the consent of the competent authorities of the respective State." Article 435 Civil Procedural Code of the Russian Soviet Federative Socialist Republic, Vedomosty of the Supreme Council of the RSFSR, 1980, No. 32, p.987, 11.06.1964 (as amended on 01.08.1980), RUS/1.

[462] Article 20 UN Draft Convention provides: "Where consent to the measures of constraint is required under articles 18 and 19, consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint."

[463] Article 18 (2) ILC Draft Articles provides: "Consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint under paragraph 1, for which separate consent shall be necessary."

[464] Sec 13 (3) UK SIA, dealing with enforcement immunity, states that "[...] a provision merely submitting to the jurisdiction of the courts is not to be interpreted as a consent for the purposes of this subsection."

[465] The Supreme Court of the Czechoslovak Socialist Republic (Nejvyšší soud Èeskoslovenské socialistické republiky) / Supreme Court Opinion Cpjf 27/86 published as Rc 26/1987, 27 August 1987, Sbírka soudních rozhodnutí (Collection of Judicial Decisions) 87, 9-10, CZ/4; An International Bank v. Republic of Zambia, High Court, Queen's Bench Division, (Commercial Court), 23 May 1997, 118 ILR 602, GB/10; Socialist Federal Republic of Yugoslavia *v.* Societé Européenne d'Etudes et d'Entreprises, France, Tribunal de grande instance of Paris, 6 July 1970, 65 ILR, 46, at 49.

[466] "The parties have previously agreed that any of their disputes would be subject to competence of the Zagreb Commercial Court. By doing so, the defendant (Republic of Bosnia and Herzegovina) did not bring up the issue of its immunity as an obstacle to settle the dispute before the Croatian court. The Court has decided and subsequently executed its decision on defendant's assets." Company "S", Vinkovci, Croatia vs. the Republic of Bosnia and Herzegovina, Ministry of Transport and Communications, Zagreb Commercial Court, 19 October 1993, H/5.

[467] Both Articles 18 (a) and 19 (a) UN Draft Convention require that a "State has expressly consented" to measures of constraint by the acts listed in the subsequent subparagraphs. The same requirement was found in Article 18 ILC Draft Articles.

449. Despite this restrictive language in such international instruments, French [470] and Swedish[471] courts have departed from their earlier jurisprudence[472] and found implied waivers of enforcement immunity in the acceptance of arbitration agreements.

5.2 Enforcement against property allocated or earmarked for the satisfaction of the underlying claim

450. The availability of earmarked property or funds for enforcement measures is acknowledged in the UN Draft Convention.[473] It is also generally accepted in the case-law of European courts. At least, there appear to be no contrary assertions. Even French courts that have long followed a rule of absolute immunity from enforcement measures held that immunity from execution can be ruled out in exceptional cases where the asset attached has been allocated by the wish of the foreign State for the accomplishment of a purely commercial operation carried out by it or by a body created by it for that purpose.[474] The exception of earmarked funds from enforcement immunity was also confirmed by the English House of Lords. It held that even an embassy bank account, if it is earmarked by the foreign State solely for commercial transactions, will not be immune from measures of execution.[475]

5.3 Measures against assets serving other than governmental non-commercial purposes

451. Most immunity instruments and the case-law of European courts provide for an exception from immunity for property serving non-governmental purposes. For instance, the UN Draft Convention exempts property which is "specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed" from immunity.[476] Similarly the ILA Draft Convention speaks of enforcement measures against property "in use for the

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[468] Article 23 European Convention requires that a "State has expressly consented" to enforcement measures "in writing in any particular case."

[469] Article VIII A 1 ILA Draft Convention provides for an exception to immunity if "[t]he foreign State has waived its immunity either expressly or by implication from such measures."

[470] "L'engagement pris par un Etat signataire de la clause d'arbitrage d'exécuter la sentence dans les termes de l'article 24 du règlement d'arbitrage de la chambre de commerce international implique renonciation de cet Etat à l'immunité d'exécution." Société Creighton (entreprise privée) contre ministre des finances de l'Etat du Qatar et autre, Cour de cassation (1re chambre civile), 6 juillet 2000, Bulletin civil I, n°207, F/9.

[471] Libyan American Oil Company vs. Libya (State), Svea Court of Appeal *(Svea hovrätt)* Decision, 18 June 1980, *Rättsfall från Hovrätterna 1981*, Case No. 76:81, S/2, where the the Svea Court of Appeal found that Libya had waived its immunity from the enforcement of an arbitral award by the approval of an arbitration clause.

[472] See République Islamique d'Iran et consorts c/ sociétés Eurodif et Sofidif, Cour d'appel de Paris, 1re chambre, section A, 21 avril 1982, RCDIP 1983, p.101; 65 ILR, 93, where the court had held: « … la stipulation d'une clause d'arbitrage ainsi que la référence à un règlement d'arbitrage prévoyant que les parties s'engagent à exécuter la sentence à intervenir n'impliquaient pas une renonciation à l'immunité d'exécution, laquelle ne peut résulter que d'actes manifestant de façon non équivoque la volonté de renoncer ». According to the appellate court the reference to the ICC arbitration rules « constitue seulement un engagement de se soumettre volontairement à la sentence et d'en reconnaître la force exécutoire, mais ne contient aucune allusion à l'immunité d'exécution dont une partie pourrait bénéficier ».

See also Tekno-Pharma AB vs. Iran (State), Supreme Court *(Högsta domstol*en) Decision, 21 December 1972, *Nytt Juridiskt Arkiv 1972*, *Avd.* I, Case No. 1972c434, S/1 (Sweden/Courts and Tribunals No. 1), where the Swedish Supreme Court refused to read an arbitration agreement as an implicit waiver of immunity with regard to the court appointment of an arbitrator in a situation where a foreign State refused to nominate its arbitrator.

[473] Articles 18 (b) and 19 (b) UN Convention provide for an exception from enforcement immunity "to the extent that [...] the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding." The same exception was contained in Article 18 (1)(b) ILC Draft Articles.

[474] République Islamique d'Iran et consorts c/ sociétés Eurodif et Sofidif, Cour d'appel de Paris, 1re chambre, section A, 21 avril 1982, RCDIP 1983, p.101 ; 65 ILR, 93, at 97.

See also more recently Société Creighton Limited (entreprise privée) contre ministère des finances et le ministère des affaires municipales et de l'agriculture du gouvernement de l'Etat du Qatar, Cour d'appel de Paris (1re chambre, section G), 12 décembre 2001, Revue de l'arbitrage, avril 2003, n° 2, pp. 417-425, F/6.

[475] Alcom Ltd v. Republic of Colombia, House of Lords, 12 April 1984, [1984] 2 All ER 6, GB/2.

[476] Article 19 (c) UN Draft Convention.

purposes of commercial activity."[477] The UK SIA provides for enforcement measures against property which "is for the time being in use or intended for use for commercial purposes."[478]

452. The principle that property used for *iure gestionis* or non-public purposes should be available for enforcement measures is recognized by a large number of European States unless they still adhere to an absolute immunity concept. For the precise identification of types of property serving non-governmental purposes courts have followed and refined a number of judicially created categories that are also reflected in recent codification attempts. Article 21 UN Draft Convention with its categories of 1. diplomatic, 2. military, 3. central bank, 4. cultural, and 5. scientific-historic property can serve as a useful point of departure when analyzing the case-law.[479]

5.3.1 Embassy premises and accounts

453. Diplomatic and consular premises as well as related property serving diplomatic or consular functions are the paradigmatic examples of property serving non-commercial purposes and of thus being immune from execution. This immunity, derived from the inviolability of such premises under diplomatic and consular law, is also expressly reaffirmed in a number of State immunity codifications other than the UN Draft Convention.[480]

454. Also court practice is relatively uniform in respecting the immunity of embassy premises and buildings.[481] This exemption from enforcement measures has been extended to cultural centres[482] and to information offices[483] which have also been equally considered to serve public purposes.

455. In addition to diplomatic and consular premises, also the bank accounts used for financing diplomatic and consular missions are deemed to serve non-commercial (public) purposes and are thus protected by immunity from execution measures, in particular immunity from attachment. In fact, cases dealing with embassy accounts range among the most frequent enforcement immunity problems.

456. In the *Philippine Embassy Bank Account Case* the German Constitutional Court stated the principle that "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

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[477] Article VIII A 2 ILA Draft Convention.

[478] Section 13 (4) UK SIA.

[479] Article 21 provides: "1. The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under article 19, subparagraph (c):

°°°(a) property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences;

°°°(b) property of a military character or used or intended for use in the performance of military functions;

°°°(c) property of the central bank or other monetary authority of the State;

°°°(d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale;

°°°(e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.

2. Paragraph 1 is without prejudice to article 18 and article 19, subparagraphs (a) and (b)."

[480] Article VIII C 1 ILA Draft Convention. See also *Schreuer*, 145.

[481] See Embassy Eviction Case, Greece, Tribunal of First Instance Athens, 1965, 65 ILR, 248; Ambassade de la fédération de Russie en France contre société NOGA (entreprise privée), Cour d'appel de Paris, première chambre, section A, 10 août 2000, Journal du droit international, 2001, n°1, pp. 116-127, F/10 (denial of attachment orders against Russian Embassy).

[482] Espagne c/ X SA, Office des poursuites du canton de Berne et Président du Tribunal d'arrondissement 4 du canton de Berne, 1ère Cour de droit public du Tribunal fédéral Suisse, 30 avril 1986, ATF 112 Ia 148 ; 82 ILR, 38 ; CH/10.

[483] République Arabe d'Egypte c/ Cinetel, Chambre de droit public du Tribunal fédéral suisse, 20 juillet 1979, ASDI 1981 p.206, CH/23.

and expenses are not subject to forced execution by the State of the forum."[484] English,[485] Austrian,[486] Spanish[487] and Dutch[488] courts have followed this reasoning. Swiss courts have decided that also accommodation costs for embassy personnel formed part of the protected assets used for the financing of a diplomatic mission.[489] Only few decisions depart from this generally shared consensus: In an older Dutch case the commercial nature of holding a bank account, instead of its public purposes, was decisive for the denial of immunity from attachment.[490] On the other hand, a more recent Czech court judgment required also for embassy accounts a waiver of immunity.[491]

457. A crucial issue for the practical application of the rule that embassy and other State owned accounts serving public purposes should be exempt from enforcement measures is the question who determines the non-commercial purposes of such accounts.

458. There appears to be a judicial trend to presume the public purpose of property, at least if claimed by the respondent State and not disproved by the applicant. Such a presumption of the *iure imperii* purpose of embassy accounts has been firmly established by the German Constitutional Court in the *Philippine Embassy Bank Account Case*:

> *Because of the problems of demarcation in assessing endangerment of that functionality and because of the latent possibilities of abuse, general international law draws the area of protection in favour of the foreign State very broadly and focuses on the typical, abstract danger, not on the specific endangerment of the functionality of the diplomatic representation.*
>
> *Receivables from a current ordinary bank account of the embassy of a foreign State existing in the forum State and intended to cover the embassy's expenses and costs are not subject to execution by the forum State.*
>
> *It would constitute interference contrary to international law in the exclusive affairs of the sending State for the enforcement agencies of the receiving State to demand that the sending State, without its assent, give details of the existence or of the earlier, present or future uses of credits on such an account.*[492]

459. Subsequent French[493], English,[494] Austrian,[495] Dutch,[496] Belgian,[497] and Swiss[498] court decisions equally adhered to the principle of a rebuttable presumption in favour of a non-commercial purpose of embassy accounts.

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[484] Anonymous landlord (creditor) and the Republic of the Philippines (debtor), Bundesverfassungsgericht (Federal Constitutional Court), 13 December 1977, Entscheidungen des Bundesverfassungsgerichts Vol. 46, p.342, 65 ILR, 146, at 150; D/9.

[485] Alcom Ltd v. Republic of Colombia, House of Lords, 12 April 1984, [1984] 2 All ER 6, GB/2.

[486] L-W Verwaltungsgesellschaft mbH&Co. KG (individual) vs. D V A (State), Austrian Supreme Court, 30 April 1986, Case No 3 O38/86, 77 ILR, 489; 116 ILR, 526; A/2.

[487] Diana Gayle Abbott (individual) v. República de Sudáfrica (State), Constitutional Court, 1 July 1992, Aranzadi 1992, No. 107, E/5; Maite G.Z. (individual) v. Consulado General de Francia (State), Tribunal Constitucional (Constitutional Court), 17.9.2001, Aranzadi 2001, no. 176, BOE, 19.10.2001, no. 251 (suplemento), E/8.

[488] State of the Netherlands *v.* Azeta B.*V.,* District Court of Rotterdam, 14 May 1998, KG 1998, 251, English summary: NYIL 2000, p. 264-267, NL/15.

[489] Z. v. Geneva Supervisoy Authority for the Enforcement of Debts and Bankruptcy, Federal Tribunal, 31 July 1990, Revue Suisse de droit international et de droit européen (1991), 546, 102 ILR, 205.

[490] The Kingdom of Morocco v. Stichting Revalidatie Centrum "De Trappenberg"*,* District Court of Amsterdam (summary proceedings), 18 May 1978, NYIL 1979, p. 444-445, 65 ILR, 375, NL/6.

[491] General Health Insurance Company of the Czech Republic / Embassy of the State of Palestine in the Czech Republic, District Court for Prague 6 / case No. E 1426/97, decision of 15 December 1997, 15 December 1997, CZ/6.

[492] Anonymous landlord (creditor) and the Republic of the Philippines (debtor), Bundesverfassungsgericht (Federal Constitutional Court), 13 December 1977, Entscheidungen des Bundesverfassungsgerichts Vol. 46, p.342, 65 ILR, 146; D/9.

[493] Société Eurodif (entreprise privée) contre République islamique d'Iran, Cour de cassation (1re chambre civile), 14 mars 1984, Revue critique de droit international privé, 1984, pp. 644-655, F/5.

[494] Alcom Ltd v. Republic of Colombia, House of Lords, 12 April 1984, [1984] 2 All ER 6, GB/2.

5.3.2. Military Property

460. Warships and other military equipment are generally regarded not available for enforcement measures. This exemption is also reflected in national legislation.[499] The scope of immunity of warships was held to extend also to such ships when not "on duty", e.g. while being repaired.[500]

461. While warships and other vessels serving public purposes are exempt from enforcement measures, it has long been established that State-owned ships in commercial service are subject to enforcement measures.[501] National courts have said that the non-governmental nature of State-owned commercial ships justifies such a denial of immunity[502] and that it is not limited to insurance or maritime claims.[503]

5.3.3 Central Bank Funds

462. The principle that property of central banks or other monetary authorities should be immune from enforcement measures is generally accepted by European courts.[504] Sometimes, however, they refuse to accept a blanket exception unless it was specifically demonstrated that the property in question served public purposes.[505] Another restriction of the broad immunity of central bank funds results from decisions concluding that certain central banks were not emanations of a State and thus not entitled to claim immunity.[506]

5.3.4 Other state property

463. While embassy or consular accounts serve as the basis for most of the litigation before European courts concerning execution against foreign State property, there is scant practice involving other types of assets mentioned in Article 21 (d) and (e) UN Draft Convention.

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[495] L-W Verwaltungsgesellschaft mbH&Co. KG (individual) vs. D V A (State), Austrian Supreme Court, 30 April 1986, Case No 3 O38/86, 77 ILR, 489; 116 ILR, 526; A/2.

[496] M.K. v. State Secretary for Justice, Council of State, President of the Judicial Division, 24 November 1986, KG 1987, 38; English summary: NYIL 1988, p. 439-443, NL/7; State of the Netherlands *v.* Azeta B.*V.,* District Court of Rotterdam, 14 May 1998, KG 1998, 251, English summary: NYIL 2000, p. 264-267, NL/15.

[497] République du Zaïre c/ d'Hoop et crts, Cour d'appel de Bruxelles, 8 octobre 1996, Journal des Tribunaux 1997, p. 100, B/4, reversing Zaire v. D'Hoop and Another, Belgium, Civil Court of Brussels, 9 March 1995, 106 ILR, 294; Etat d'Irak c. Vinci Constructions Grands Projets s.a. de droit français, Cour d'appel de Bruxelles (9ème chambre), 4 octobre 2002, Journal des Tribunaux 2003 p. 318, B/9, reversing Irak c/ S.A. Dumez, Tribunal civil de Bruxelles, 27 février 1995, Journal des Tribunaux 1995, p. 565, 106 ILR, 284, B/5 ; Leica AG c/ Central Bank of Iraq et Etat irakien, Cour d'appel de Bruxelles, 15 février 2000, Journal des Tribunaux 2001 p. 6, B/8.

[498] Z. v. Geneva Supervisory Authority for the Enforcement of Debts and Bankruptcy, Federal Tribunal, 31 July 1990, Revue Suisse de droit international et de droit européen (1991), 546; 102 ILR, 205, at 207.

[499] According to Swedish law, warships and other vessels for non-commercial purposes are immune from jurisdiction and execution measures. Swedish Parliament *(Sveriges Riksda*g) Act of Parliament, Issued on 17 June 1938, Swedish Statute-book, SFS 1938:470 *(Svensk författningssamling,* SFS 1938:470), S/23.

[500] Wijsmuller Salvage B.V. v. ADM Naval Services, District Court of Amsterdam, 19 November 1987, NL/8.

[501] See the 1926 Brussels Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels, 516 LNTS 82. See also national legislation such as Swedish Parliament *(Sveriges Riksda*g) Act of Parliament, Issued on 17 June 1938, Swedish Statute-book, SFS 1938:470 *(Svensk författningssamling,* SFS 1938:470), S/23.

[502] Société Paul Liegard v. Capitain Serdjuk and Mange, France, Tribunal de Commerce of La Rochelle, 14 October 1964, 65 ILR, 38, at 39.

[503] The Russian Federation v. Pied-Rich B.V, Netherlands, Supreme Court, 28 May 1993, NYIL 1994, p. 512, NL/12

[504] Banca Carige SpA Cassa Di Risparmio Geneva E Imperia v. Banco Nacional De Cuba and another, High Court, Chancery Division (Companies Court), 11 April 2001, [2001] 3 All ER 923, GB/11.

[505] République socialiste du peuple arabe de Lybie-Jamahiriya c/ Actimon SA, 1ère Cour de droit public du Tribunal fédéral Suisse, 24 avril 1985, ATF 111 Ia 62 ; 82 ILR, 30 ; CH/16. See also the earlier Swiss denial of immunity concerning Turkish Central Bank funds in Banque centrale de la République de Turquie c/ Weston Compagnie de Finance et d'Investissement SA, Cour de droit public du Tribunal fédéral Suisse, 15 novembre 1978, ATF 104 Ia 367, CH/20.

See also Central Bank of Nigeria Case, Landgericht Frankfurt, 2 December 1975, NJW 1976, 1044, 65 ILR, 131, at 137.

[506] Trendtex Trading Corporation v. Central Bank of Nigeria, Court of Appeal, 13 January 1977, [1977] 2 WLR 356, 64 ILR 111, GB/12.

464. An older Belgian decision concerning the attempted attachment of a film made to document an official visit of a foreign Head of State may be illustrative of the type of cases that could be subsumed. Though immunity was upheld because the property was considered to be in use for public purposes,[507] the documentary film could also be regarded similar to either property forming part of the "cultural heritage" or "archives" or property forming part of an exhibition of "historical interest".

5. Conclusion

465. The analysis of European court practice with regard to enforcement immunity confirms that absolute immunity is no longer the rule. Instead, a more restrictive approach which permits enforcement measures against property clearly serving non-governmental purposes, against earmarked property and in cases of waiver is pursued by many national courts.

[507] NV Filmpartners, Belgium, Civil Tribunal of Brussels, 27 July 1971, 65 ILR, 26, at 28.

ANNEX 1

United Nations Convention on Jurisdictional Immunities of States and Their Property

The States Parties to the present Convention,

Considering that the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law,

Having in mind the principles of international law embodied in the Charter of the United Nations,

Believing that an international convention on the jurisdictional immunities of States and their property would enhance the rule of law and legal certainty, particularly in dealings of States with natural or juridical persons, and would contribute to the codification and development of international law and the harmonization of practice in this area,

Taking into account developments in State practice with regard to the jurisdictional immunities of States and their property,

Affirming that the rules of customary international law continue to govern matters not regulated by the provisions of the present Convention,

Have agreed as follows:

Part I

Introduction

Article 1

Scope of the present Convention

The present Convention applies to the immunity of a 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 Convention:

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

(b) “State” means:

(i) the State and its various organs of government;

(ii) constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity;

(iii) agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State;

(iv) representatives of the State acting in that capacity;

(c) “commercial transaction” means:

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

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

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

2. In determining whether a contract or transaction is a “commercial transaction” under paragraph 1 (c), reference should be made primarily to the nature of the contract or transaction, but its

purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character

of the contract or transaction.

3. The provisions of paragraphs 1 and 2 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or in the internal law of any State.

Article 3

Privileges and immunities not affected by the present Convention

1. The present Convention is without prejudice to the privileges and immunities enjoyed by a State under international law in relation to the exercise of the functions of:

(a) its diplomatic missions, consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences; and

(b) persons connected with them.

2. The present Convention is without prejudice to privileges and immunities accorded under international law to heads of State *ratione personae*.

3. The present Convention is without prejudice to the immunities enjoyed by a State under international law with respect to aircraft or space objects owned or operated by a State.

Article 4

Non-retroactivity of the present Convention

Without prejudice to the application of any rules set forth in the present Convention to which jurisdictional immunities of States and their property are subject under international law independently of the present Convention, the present Convention shall not apply to any question of jurisdictional immunities of States or their property arising in a proceeding instituted against a State before a court of another State prior to the entry into force of the present Convention for the States concerned.

Part II

General principles

Article 5

State immunity

A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention.

Article 6

Modalities for giving effect to State immunity

1. A State shall give effect to State immunity under article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another State and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected.

2. A proceeding before a court of a State shall be considered to have been instituted against another State if that other State:

(a) is named as a party to that proceeding; or

(b) is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State.

Article 7

Express consent to exercise of jurisdiction

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case:

(a) by international agreement;

(b) in a written contract; or

(c) by a declaration before the court or by a written communication in a specific proceeding.

2. Agreement by a State for the application of the law of another State shall not be interpreted as consent to the exercise of jurisdiction by the courts of that other State.

Article 8

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 the proceeding; or

(b) intervened in the proceeding or taken any other step 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 took such a step, it can claim immunity based on those facts, provided it does so at the earliest possible moment.

2. A State shall not be considered to have consented to the exercise of jurisdiction by a court of another State if it intervenes in a proceeding or takes any other step for the sole purpose of:

(a) invoking immunity; or

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

3. The appearance of a representative of a State before a court of another State as a witness shall not be interpreted as consent by the former State to the exercise of jurisdiction by the court.

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

Article 9

Counterclaims

1. A State instituting a proceeding before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of any counterclaim 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 the court in respect of any counterclaim arising out of the same legal relationship or facts as the claim presented by the State.

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

Part III

Proceedings in which State immunity cannot be invoked

Article 10

Commercial transactions

1. If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial

transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.

2. Paragraph 1 does not apply:

(a) in the case of a commercial transaction between States; or

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

3. Where a State enterprise or other entity established by a State which has an independent legal personality and is capable of:

(a) suing or being sued; and

(b) acquiring, owning or possessing and disposing of property, including property which that State has authorized it to operate or manage, is involved in a proceeding which relates to a commercial transaction in which that entity is engaged, the immunity from jurisdiction enjoyed by that State shall not be affected.

Article 11

Contracts of employment

1. 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 a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State.

2. Paragraph 1 does not apply if:

(a) the employee has been recruited to perform particular functions in the exercise of governmental authority;

(b) the employee is:

(i) a diplomatic agent, as defined in the Vienna Convention on Diplomatic Relations of 1961;

(ii) a consular officer, as defined in the Vienna Convention on Consular Relations of 1963;

(iii) a member of the diplomatic staff of a permanent mission to an international organization or of a special mission, or is recruited to represent a State at an international conference; or

(iv) any other person enjoying diplomatic immunity;

(c) the subject matter of the proceeding is the recruitment, renewal of employment or reinstatement of an individual;

(d) the subject matter of the proceeding is the dismissal or termination of employment of an individual and, as determined by the head of State, the head of Government or the Minister for Foreign Affairs of the employer State, such a proceeding would interfere with the security interests of that State;

(e) the employee is a national of the employer State at the time when the proceeding is instituted, unless this person has the permanent residence in the State of the forum; or

(f) the employer State and the employee 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 12

Personal injuries and damage to property

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 a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.

Article 13

Ownership, possession and use of property

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 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;

(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, such as trust property, the estate of a bankrupt or the property of a company in the event of its winding up.

Article 14

Intellectual and industrial property

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 a proceeding which relates to:

(a) the determination of any right of the State in a patent, industrial design, trade name or business name, trademark, copyright or any other 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 of the nature mentioned in subparagraph (a) which belongs to a third person and is protected in the State of the forum.

Article 15

Participation in companies or other collective bodies

1. A State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates 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 has its seat or principal place of business in that State.

2. A State can, however, invoke immunity from jurisdiction in such a proceeding if the States concerned have so agreed or if the parties to the dispute have so provided by an agreement in writing or if the instrument establishing or regulating the body in question contains provisions to that effect.

Article 16

Ships owned or operated by a State

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the operation of that ship if, at the time the cause of action arose, the ship was used for other than government non-commercial purposes.

2. Paragraph 1 does not apply to warships, or naval auxiliaries, nor does it apply to other vessels owned or operated by a State and used, for the time being, only on government non-commercial service.

3. 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 a proceeding which relates to the carriage of cargo on board a ship owned or operated by that State if, at the time the cause of action arose, the ship was used for other than government non-commercial purposes.

4. Paragraph 3 does not apply to any cargo carried on board the ships referred to in paragraph 2, nor does it apply to any cargo owned by a State and used or intended for use exclusively for government non-commercial purposes.

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

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

Article 17

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 transaction, 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, interpretation or application of the arbitration agreement;

(b) the arbitration procedure; or

(c) the confirmation or the setting aside of the award, unless the arbitration agreement otherwise provides.

Part IV

State immunity from measures of constraint in connection with

proceedings before a court

Article 18

State immunity from pre-judgment measures of constraint

No pre-judgment measures of constraint, such as attachment or arrest, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) the State has expressly consented to the taking of such measures as indicated:

(i) by international agreement;

(ii) by an arbitration agreement or in a written contract; or

(iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or

(b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding.

Article 19

State immunity from post-judgment measures of constraint

No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) the State has expressly consented to the taking of such measures as indicated:

(i) by international agreement;

(ii) by an arbitration agreement or in a written contract; or

(iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or

(b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or

(c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.

Article 20

Effect of consent to jurisdiction to measures of constraint

Where consent to the measures of constraint is required under articles 18 and 19, consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint.

Article 21

Specific categories of property

1. The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under article 19, subparagraph (c):

(a) property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences;

(b) property of a military character or used or intended for use in the performance of military functions;

(c) property of the central bank or other monetary authority of the State;

(d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale;

(e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.

2. Paragraph 1 is without prejudice to article 18 and article 19, subparagraphs (a) and (b).

Part V

Miscellaneous provisions

Article 22

Service of process

1. Service of process by writ or other document instituting a proceeding against a State shall be effected:

(a) in accordance with any applicable international convention binding on the State of the forum and the State concerned; or

(b) in accordance with any special arrangement for service between the claimant and the State concerned, if not precluded by the law of the State of the forum; or

(c) in the absence of such a convention or special arrangement:

(i) by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned; or

(ii) by any other means accepted by the State concerned, if not precluded by the law of the State of the forum.

2. Service of process referred to in paragraph 1 (c) (i) is deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs.

3. These documents shall be accompanied, if necessary, by a translation into the official language, or one of the official languages, of the State concerned.

4. Any State that enters an appearance on the merits in a proceeding instituted against it may not thereafter assert that service of process did not comply with the provisions of paragraphs 1 and 3.

Article 23

Default judgment

1. A default judgment shall not be rendered against a State unless the court has found that:

(a) the requirements laid down in article 22, paragraphs 1 and 3, have been complied with;

(b) a period of not less than four months has expired from the date on which the service of the writ or other documents instituting a proceeding has been effected or deemed to have been effected in accordance with article 22, paragraphs 1 and 2; and

(c) the present Convention does not preclude it from exercising jurisdiction.

2. A copy of any default judgment rendered against a State, accompanied if necessary by a translation into the official language or one of the official languages of the State concerned, shall be transmitted to it through one of the means specified in article 22, paragraph 1, and in accordance with the provisions of that paragraph.

3. The time limit for applying to have a default judgment set aside shall not be less than four months and shall begin to run from the date on which the copy of the judgment is received or is deemed to have been received by the State concerned.

Article 24

Privileges and immunities during court proceedings

1. Any failure or refusal by a State to comply with an order of a court of another State enjoining it to perform or refrain from performing a specific act or to produce any document or disclose any other information for the purposes of a proceeding shall entail no consequences other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal.

2. A State shall not be required to provide any security, bond or deposit, however described, to guarantee the payment of judicial costs or expenses in any proceeding to which it is a respondent party before a court of another State.

Part VI

Final clauses

Article 25

Annex

The annex to the present Convention forms an integral part of the Convention.

Article 26

Other international agreements

Nothing in the present Convention shall affect the rights and obligations of States Parties under existing international agreements which relate to matters dealt with in the present Convention as between the parties to those agreements.

Article 27

Settlement of disputes

1. States Parties shall endeavour to settle disputes concerning the interpretation or application of the present Convention through negotiation.

2. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which cannot be settled through negotiation within six months shall, at the request of any of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

3. Each State Party may, at the time of signature, ratification, acceptance or approval of, or accession to, the present Convention, declare that it does not consider itself bound by paragraph 2. The other States Parties shall not be bound by paragraph 2 with respect to any State Party which has made such a declaration.

4. Any State Party that has made a declaration in accordance with paragraph 3 may at any time withdraw that declaration by notification to the Secretary-General of the United Nations.

Article 28

Signature

The present Convention shall be open for signature by all States until by all States until 17 January 2007, at United Nations Headquarters, New York.

Article 29

Ratification, acceptance, approval or accession

1. The present Convention shall be subject to ratification, acceptance or approval.

2. The present Convention shall remain open for accession by any State.

3. The instruments of ratification, acceptance, approval or accession shall be deposited with the Secretary-General of the United Nations.

Article 30

Entry into force

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to the present Convention after the deposit of the thirtieth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 31

Denunciation

1. Any State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations.

2. Denunciation shall take effect one year following the date on which notification is received by the Secretary-General of the United Nations. The present Convention shall, however, continue to apply to any question of jurisdictional immunities of States or their property arising in a proceeding instituted against a State before a court of another State prior to the date on which the denunciation takes effect for any of the States concerned.

3. The denunciation shall not in any way affect the duty of any State Party to fulfil any obligation embodied in the present Convention to which it would be subject under international law independently of the present Convention.

Article 32

Depositary and notifications

1. The Secretary-General of the United Nations is designated the depositary of the present Convention.

2. As depositary of the present Convention, the Secretary-General of the United Nations shall inform all States of the following:

(a) signatures of the present Convention and the deposit of instruments of ratification, acceptance, approval or accession or notifications of denunciation, in accordance with articles 29 and 31;

(b) the date on which the present Convention will enter into force, in accordance with article 30;

(c) any acts, notifications or communications relating to the present Convention.

Article 33

Authentic texts

The Arabic, Chinese, English, French, Russian and Spanish texts of the present Convention are equally authentic.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Convention opened for signature at United Nations Headquarters in New York on 17 January 2005.

Annex to the Convention

Understandings with respect to certain provisions of the Convention

The present annex is for the purpose of setting out understandings relating to the provisions concerned.

With respect to article 10

The term “immunity” in article 10 is to be understood in the context of the present Convention as a whole.

Article 10, paragraph 3, does not prejudge the question of “piercing the corporate veil”, questions relating to a situation where a State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim, or other related issues.

With respect to article 11

The reference in article 11, paragraph 2 (d), to the “security interests” of the employer State is intended primarily to address matters of national security and the security of diplomatic missions and consular posts.

Under article 41 of the 1961 Vienna Convention on Diplomatic Relations and article 55 of the 1963 Vienna Convention on Consular Relations, all persons referred to in those articles have the duty to respect the laws and regulations, including labour laws, of the host country. At the same time, under article 38 of the 1961 Vienna Convention on Diplomatic Relations and article 71 of the 1963 Vienna Convention on Consular Relations, the receiving State has a duty to exercise its jurisdiction

in such a manner as not to interfere unduly with the performance of the functions of the mission or the consular post.

With respect to articles 13 and 14

The expression “determination” is used to refer not only to the ascertainment or verification of the existence of the rights protected, but also to the evaluation or assessment of the substance, including content, scope and extent, of such rights.

With respect to article 17

The expression “commercial transaction” includes investment matters.

With respect to article 19

The expression “entity” in subparagraph (c) means the State as an independent legal personality, a constituent unit of a federal State, a subdivision of a State, agency or instrumentality of a State or other entity, which enjoys independent legal personality.

The words “property that has a connection with the entity” in subparagraph (c) are to be understood as broader than ownership or possession.

Article 19 does not prejudge the question of “piercing the corporate veil”, questions relating to a situation where a State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim, or other related issues.

ANNEXE 2

European Convention on State Immunity

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 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 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 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 or 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.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

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.

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 possibilites shall be final.

2 If the State intends to institute proceedings before its court in accordance with the provisions of paragraph 1 or 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 only if the party has not, within three months of receiving notice, instituted 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.

ANNEX 3

Summary of State Practice Regarding State Immunities in the Council of Europe

Susan C. Breau[508]

Introduction

1. The Committee of Legal Advisors on Public International Law instituted a pilot project on state practice regarding state immunities. As part of the project, Professor Gerhard Hafner of the University of Vienna, Professor Marcelo Kohen of the University of Geneva and Dr Susan Breau of the British Institute of International and Comparative Law prepared analytical reports of the compilation of the state practice in various European countries in state immunity.

2. This practice was reviewed within the framework of the *Convention on jurisdictional immunities of States and their properties* as agreed upon by the Ad Hoc Committee on Jurisdictional Immunities of States and their property. The countries participating in this pilot project are Austria, Andorra, Belgium, Croatia, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Spain, Sweden, Switzerland, Turkey, and the United Kingdom.

3. The Ad Hoc Committee on Jurisdictional Immunities of States and Their Property was established by the General Assembly in resolution 55/150 of 12 December 2000. In international law terms their work was very rapid and successful. The committee chaired by Gerhard Hafner of Austria and proceeded on the basis of a Working Group of the Whole which considered submissions of delegations and prepared the preamble and final clauses for a convention which was adopted by the Committee's 8th plenary meeting on 5 March 2004.

4. Another important framework for the analysis is the European Convention on State Immunity. The Convention and its Additional Protocols, was drawn up within the Council of Europe by a committee of governmental experts under the authority of the European Committee on Legal Co-operation (CCJ), and was opened to signature by the member States of the Council on 16 May 1972, at Basle, on the occasion of the VIIth Conference of European Ministers of Justice. Regrettably the convention has only been ratified or acceded to by eight European states. However, as with the International Convention the doctrine of restrictive immunity informs the convention.

Methodology

5. This annex is based on summaries of state immunity legislation, cases and executive decisions provided to the Council of Europe by the delegations of the various nations studied. For the purposes of our analysis the cases are labelled as follows: Jud for Judgement; LEG for Legislation; and EXE for executive decision. The cases are described by (a) court of case where decision made; (b) date of decision; and (c) brief summary of decision.

6. The annex will be divided into three main sections: jurisdictional immunity, immunity from execution and waiver of immunity. It should be noted that there were in certain jurisdictions (most particularly Italy) a large number of cases on diplomatic immunity governed by the two Vienna Conventions – 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations. These cases are not considered in this report as they are governed by a particular legal regime.

1. Jurisdictional immunities

7. The main portion of the report on jurisdictional immunities is concerned with the exceptions to state immunity as set out in the draft convention. The jurisdictional report will be

[508] This compilation would not have been possible without the assistance of several research fellows and interns at the British Institute of International and Comparative Law. They were; Hugo Warner, David Spivack, Maria Vogiatzi, Barbara Woodward, Richard Bonfatto, Jasmine Chada, Stephen Gray, Birgit Schlütter, Jana Muschalik, Rania Elgindy, Rosalind Sipos, Raphaël Dhont, Nathalie Raymond, Dhisadee Chamlongasdr.

divided into the key areas of exception within the doctrine of restricted immunity as set out in the Draft Convention.

8. These areas will be:

A. Commercial transactions – Article 10

B. Contracts of employment – Article 11

C. Personal injuries and damages to property – Article 12

D. Ownership, possession and use of property – Article 13

E. Intellectual and industrial property – Article 14

F. Participation in companies or other collective bodies – Article 15

G. Ships owned or operated by a State – Article 16

H. Effect of an arbitration agreement – Article 17

9. In each one of these categories the case law will be divided into two main headings, those cases in which absolute immunity is granted, and those cases in which limited immunity is granted. Each case will be reviewed for its coherence with the particular provision of the international convention.

2. Immunity from execution (measures of constraint)

10. In the case of execution, Part IV of the convention is relevant and the cases in Europe will be considered within the following categories.

A. Pre-Judgment measures of constraint – Article 18

B. Post-Judgment measures of constraint – Article 19 and Article 21

C. Effect of consent to measures of constraint – Article 20

In each one of these categories the case law will be divided into two main headings, those cases in which absolute immunity is granted, and those cases in which restricted immunity is granted. Each case will be reviewed for its coherence with the particular provision of the international convention.

3. Waiver of immunity both from jurisdiction and execution

11. This section will review those cases that find waiver of immunity but also repeats some cases on arbitration and the issues of waiver and arbitration are often heard together.

TABLE OF CASES:

1. <u>Jurisdictional Immunities</u>

Article 10

Commercial transactions

Absolute Immunity

<u>*Czech Republic*</u>

CZ/7 – JUD - *Petr Roith v. Embassy of the Republic of South Africa*

Superior Court in Prague – 1995 – The Plaintiff, a provider of cleaning services to the South African embassy, claimed payment for compensation for losses the plaintiff incurred by not being allowed to provide cleaning services for six months. The Regional Commercial Court halted the proceedings stating that the defendant was an inexistent entity. On appeal by the Plaintiff, The Superior Court in Prague agreed with the Commercial Court holding that the diplomatic mission of a foreign state is neither a natural nor a legal person and therefore has not the capacity to be a party. The court cited Section 47, para 1. of Act no. 97?1963 under which foreign states and individuals enjoy immunity.

<u>Finland</u>

FIN/13 – JUD – *As Veli ja Veljed (company) v. Republic of Estonia*

District Court of Helsinki – 2001 – The case concerned a breach of contract between two Estonian companies. The first party was an Estonian company having a permanent place of business in Finland. The other party was a company (Püssi PPK) owed at the time the contract was concluded, by the State of Estonia. The latter company was later privatized. The court held that when privatizing the Püssi PPK, the State of Estonia has not assumed liability for the contract under consideration. It also cited the practice of socialist countries to claim immunity with respect to both *jus imperii* and *jus gestionis*. The Court established that, due to the immunity of the State of Estonia from jurisdiction, it was not competent to consider the claim.

Portugal

P/1 – JUD – *United States of America v. Companhia Portuguesa de Minas, SARL* (private company)

Supreme Court – 1962 – In a civil suit concerning a contract, the court held that foreign states are entitled to immunity from jurisdiction as to the generality of cases that could be brought against them, even if acting as private law persons. Such immunity does not encompass the cases of express or tacit waver and cases related to immovable property or *forum hereditatis*. In this case tacit waiver not found as a counterclaim cannot be considered as amounting to such waiver.

P/10 – JUD – *Manual Ventura Arroja v. Republic of Bolivia*

Supreme Court – 1997 – In an appeal before the Supreme Court by an individual against the honourary Counsel to the Republic of Bolivia for a suit arising out of payment of debts, the court held that the state was immune from jurisdiction. The court held that according to customary international law, foreign States are entitled to immunity form jurisdiction, based on the principle *par in parem non habet imperium* in accodance with Article 8 of the Portuguese Constitution. Acts of a private nature – *acta jure gestionis* – are those comprised in an activity of the collective person, in the absence of the public power, acting in a position of parity with private persons, in the same conditions and regime that would apply to a private person, the private law rules being applicable.

Russia

RUS/5 – *Russian Co. v. Embassy of State X*

High Arbitration Court of the Russian Federation – A foreign embassy concluded a building contract with a Russian company. The Russian company applied to the arbitration court claiming recourse upon debt for the work done. The High Arbitration Court recommended to the lower court to apply Article 213(1) of the Arbitration Procedural Code of the Russian Federation and to stop the proceedings for the reasons of the immunity of the foreign state.

Limited Immunity

Belgium

B/01 – JUD - *Société anonyme des chemins de fer Liègois-Luxembougeois (SACFLL) v. Dutch State (ministry of Waterstaat)*

Cour de Cassation – 1903 - The SACFLL paid the share of the Dutch State in the extension expenses of the Railway station of Eindhoven and claimed the monies from the Dutch state. The Court of Appeal decided that it was incompetent to judge a foreign State. However the Court de Cassation adopted the principle of relative immunity. Basing its reasoning on the constitution and the Code Civil, the Court stated that a foreign power could be brought to court as a civil person on the same base as any foreign national when acting as a private party, there was no loss of sovereignty in being responsible for an act freely contacted that did not involve an inalienable prerogative. The Civil Code did not exclude foreign public personality from judicial accountability, knowing that intern public authority had been recognized a civil law responsibility. The nature of the act will determine the public or private nature of the dispute.

B/6 – JUD – *Société de droit irakien Rafidain Bank et crts v. Consarc Corporation*

Cour d'Appel de Bruxelles – 1993 – The Court of Appeal of Brussels held that a contract concluded between the Iraq ministry of industry and armament and the company involved was purely commercial and therefore immunity was not granted to the bank that had guaranteed the contract.

Denmark

DK/1 – JUD - *Den Czekoslovakiske Socialistiske Republiks Ambassade v. Jen Nielsen Bygge-Entepriser*

Supreme Court – 1982 – This case concerned a contract between an embassy and a private contractor. Upon the termination of the agreed work, the contractor initiated legal proceedings against the embassy for payment of additional work related to the contract. The Court held that the embassy was a legal entity against which legal actions could be brought. Neither the Vienna Convention on Diplomatic Relations nor the rules of public international law provided immunity in relation to proceedings based on a contract governed by private law including a clause that disputes were to be settled in a Danish court of law.

DK/4 – JUD – *Pakistans Ambassade v. Shah Travel ved Hermunir Hussein Shah*

Supreme Court – 1999- A travel agency brought a claim against the Embassy of Pakistan for payment of airline tickets. The tickets were booked for a member of the Embassy staff and his family and were used. The court held that the dispute concerned a commercial transaction and was governed by private that that the provisions of public international law concerning state immunity did not apply.

Finland

FIN/16 – JUD – *Yrityspankki Skop Oy (Company) v. Republic of Estonia*

District Court of Helsinki – 1999 – The case concerned a guarantee undertaken by the Estonian Soviet Socialist Republic. Estonia claimed immunity in the case claiming it had not become a successor to the Soviet republic. The Court stated that the Estonian Soviet Socialist Republic had undertaken a guarantee when the export association of agricultural producers had opened a credit with a private foreign bank. The Court held that the matter concerned commercial activities and the status of the guarantor had a private law character. The Court found that during the period of economic and political transition for Estonia the nature and purpose of the state transaction had conclusive significance. The Court was competent to hear the case.

France

F/1 – JUD – *Company Levant Express Transport v. Iranian Governmental Railway*

Court of Cassation – 1969 – During a transport, goods belonging to a French company were damaged in Iran. They were reimbursed by an Iranian guarantee which in turn sued the Iranian national railway company. This national company opposed its claimed state immunity. The Court held that foreign states or organizations under their direct order or acting in their benefits can use state immunity if the act in the heart of the conflict constitutes an act of public power *or* has been accomplished in the interest of the foreign state. The immunity is based on the nature of the activities, not on the quality of the organization. Railway transport is a private law contract, immunity is not available. This case creates the principle of relative immunity from jurisdiction of foreign state.

Germany

D/8 – JUD – *Heating installation repair shop v. Iranian Empire*

Federal Constitutional Court – 1963 – This case concerned the defendant refusing to pay the plaintiff for repair work done at the Iranian embassy in Cologne. In this case the Federal Constitutional Court adopted the theory of relative immunity. The court held that a rule of public international law whereby domestic jurisdiction for actions against a foreign State in relation to its non-sovereign activity is ruled out was not an integral part of federal law. The criterion for distinguishing between sovereign and non-sovereign State activity was the nature of the State's action. Classification as sovereign or non-sovereign State activity was in principle to be done according to national law.

Iceland

S/CT 8 – JUD – *Västerås kommun v. Icelandic Ministry of Education and Culture*

Supreme Court – 1999 – The Local Authority of Västerås had given flight-technician education to Icelandic students according to a contract between the Local Authority and the Icelandic Ministry of Education. After having given the education, the Local Authority sued the Republic of Iceland claiming that Iceland had to defray costs for the students according to the above mentioned contract. The court ruled that immunity could be invoked only in disputes relating to sovereign acts as such, but not in disputes concerning matters of a commercial or private-law nature. The Court also held that such a categorisation of states' acts should be through an assessment of the circumstances in each particular case. In this case the Supreme Court noted that the contract between the parties concerned a subject that is typically of a public-law nature and that it had also been regulated by an intergovernmental agreement mentioned in the contract. Therefore, the Court established that Iceland's act of concluding a contract with the Local Authority had to be considered as a sovereign act that gave Iceland the right of immunity. (absolute immunity granted but restrictive doctrine applies)

Norway

N/1 – JUD - *Brodrene Smith Entreprenoforretning (company) vs. the South African state*

Eidsivating Court of Appeal – 1992 – The court held that a lawsuit brought against a State in the latter's capacity as party to a contract would normally fall outside scope of state immunity. The fact that the construction work was supposed to be carried out on a building used for consular purposes had no bearing on the case.

N/2 – JUD – *Constructor Norge AS (company) vs. United States of America*

Borgarting Court of Appeal – 2001- The court held that Norwegian courts had the competence necessary to deal with a claim for compensation brought by a private party against the United States of America. In the case both the European Convention on State Immunity and the Draft UN Convention were mentioned in that judgment with the comment that the Court found that the restrictive immunity goes beyond these conventions.

N/4 – JUD – *Asker v. United States of America*

Eidsivating Court of Appeal – 1989 – This judgment confirmed a country court decision that a state is not granted immunity for acts regulated by private law or acts that have any form of commercial character.

Switzerland

CH/12 – JUD – *Banque Bruxelles Lambert and others v. Republic of Paraguay and Sezione speciale per l'assicurazione del credito all'esportazione*

1st Court of Public Law of the Swiss Federal Tribunal – 1998 – Two Italian construction societies entered into a contract with two Paraguayan companies, which obtained two loans from two Swiss banks, loans guaranteed by the consul of Paraguay in Switzerland and an Italian assurance company. The Paraguayan companies ceased reimbursing the loans. The Swiss bank turns to the guarantor, the state of Paraguay, which claimed immunity from jurisdiction. The Tribunal firstly says that no Convention can be used in the case, and so referred to the internal system. It used the established rule of limited immunity, using the distinction between acts of administration and acts of public power. In this case the guarantee by the Republic of Paraguay targeted a contract of industrial development, the document signed was a normal contract of guarantee, of the same type as any individual could have contracted, and so clearly categories an act *jure gestionis*. The immunity cannot be granted.

CH/14 – JUD – *G.O.C. c. autorité cantonale de surveillance en matière de poursuites et faillites du canton de Genève*

Chambre des poursuites et des faillites du Tribunal federal Suisse – 1991 – Two individuals went to court to start proceedings against an individual for debts. The debtor opposed the claim arguing that one of the creditors was a diplomatic agent, protected by a diplomatic immunity and so not

able to engage in civil proceedings. The Court notes that, the creditor being treated as a diplomatic agent, the Vienna Convention on diplomatic relations of the 18 April 1961, art 31 and 32, authorizes the agent to go in front of a tribunal, with the consequence of casting aside his immunity.

United Kingdom

GB/3 – *Maclaine Watson and Co Ltd v. Department of Trade and Industry, Maclaine Watson and Co Ltd v. International Tin Council*

In a case involving the contracts of the International Tin Council the court held that the issue of immunity must be determined as a preliminary issue. The contracts were held to be commercial transactions. If the plaintiffs had been able to establish either a primary or a secondary liability for the obligations of the ITC on the part of the member States they would not enjoy immunity. The EEC was not entitled to State immunity.

GB/14 - *1° Congresso Del Partido*

House of Lords – 1981 – In a case concerning the breaches by the Defendant State (Cuba) as owners of the ships, of its obligations towards the owners of the two cargoes in this case the issue of state immunity was raised. The court held that the restrictive doctrine of State Immunity in customary international law forms part of the common law. A foreign State can not therefore claim State immunity in respect of acts *iure gestionis.* In characterizing an act as *iure imperii* or *iure gestionis*, a court should in general consider the nature, rather than the purpose or motive, of the act in question. However, the Court must consider the whole context against which the claim against the foreign State is made. In this case the breaches were acts *iure gestionis*, notwithstanding their political motiviation.

Article 11

Contracts of employment

In both Conventions the provisions with respect to employment are complex. The key controversy is with respect to the residence of the employee. Article 4 of the European convention retained immunity for nationals of the employing state for all types of employment and this has been challenged in the Belgian and Swiss courts. An explanation for this provision is that the links between the employee and the employing state are closer than between the employee and the forum state.[509]

Article 11 of the Draft Convention retains a partial residency requirement by excluding suits from a national of the employer State at the time when the proceeding was instituted unless the person has permanent residence. Both conventions have specific provisions that include exclude employees of diplomatic missions. Therefore, the case law in Europe reflects disagreements about immunities and employees. Many of the cases that were reported were about employees of diplomatic missions covered by the Vienna Conventions and are excluded from this report.

Absolute Immunity

Italy

A number of cases are not included in this report of NATO employees where the doctrine of absolute immunity applied due to the London Convention 1951, Art. IX, Paragraph 4.

Poland

P/1 – JUD – *Andrzej B. and Wieslaw B. v. Embassy of the Soviet Union*

Supreme Court – 1990 – The court held that in a civil suit filed by individuals against the Motor Vehicles Technology Centre for payment could not be subject to the jurisdiction of the Polish Courts. The Motor Vehicles Technology Centre was an organisation unit of the Commercial Representation at the Embassy of the Soviet Union in Poland.

[509] Explanatory Report to the European Convention on State Immunity available on the Council of Europe website.

Portugal.

P/2 – JUD – *Aurelio Moreira de Sousa v. Consulado Geral de Espanha no Porto*

District Court -1981- An individual who was citizen of Portugal brought suit against the Spanish embassy. The court held absolute immunity – immunity encompasses not only acts jus imperii, but also cases where the State acts as a private law person. The Consulate constitutes a representation of a foreign state and its acts are, whether of *ius imperii* or *ius gestionis*, acts of the State.

P/3 – JUD – *Antonio Portugal e Castro v. Estado Brasileiro*

District Court – 1983 – In an action brought by an individual against the Brazilian state. The court held as he was employed with the Brazilian embassy, state immunity extends to labour law questions. The issue should be solved by diplomatic means.

P/4 – JUD – *A. v. Ambassador in Portugal*

Supreme Court – 1984 – The court held that a foreign state was entitled to immunity in a lawsuit against it by a Portuguese national fired by the Embassy where he was working.

P/6 – JUD – *Maria Cristina Silva v. Spanish Institute, Spanish Embassy and Spanish State*

District Court – 1988 – In a law suit by Portuguese individual against Spanish Institute, Spanish embassy and Spanish state the court held that Portuguese courts are internationally incompetent to judge a lawsuit against the Spanish state

P/7 – JUD - *Bernardette Bravo v. Republic of Zaire*

District Court - 1989 – In a case brought by an individual against the Republic of Zaire, the court held that Portuguese Courts are internationally incompetent to judge a civil or labour suit against a foreign state.

P/9 – JUD – *Anabela Catarina Ramos et al v. US Government*

District Court – 1994 – In claim brought by a group of individuals against the US government the issue of labour contracts entered into with the US Diplomatic Mission in Portugal was raised. The court held that Portuguese Courts not competent to judge labour contracts since this State has not waived its immunity.

P/12 – JUD – *A. v. France*

Supreme Court – 1998 – This case was an individual against France. Court stated that there was no convention binding Portugal regarding State immunities. The court was not bound by Article 5 (1) of the European Convention regarding State immunities that bars such immunities in the case of labour contracts. Customary law which is received by the Portuguese Constitution calls for immunity and therefore a Portuguese citizen who worked as a driver of the French embassy cannot resort to judicial proceedings.

P/13 – JUD – *Jorge Manuel Nunes Marques v. Saudi Arabia Embassy*

District Court – 2000 – In a claim brought by an individual against Saudi embassy it was held that the court could judge this case as Ambassador expressly rejected jurisdiction of Portuguese court. There was no international treaty binding for the Portuguese State that would remove such immunity with regard to labour contracts.

Romania

RO/2 – JUD – *A.S.M. v. the Embassy of P. in Romania*

2002 – The claimant who was employed as an auditor for the Embassy of P. in Romania alleged that his contract was abusively put at an end. The Court held that Article 31 of the Vienna Convention on Diplomatic Relations, which guarantees immunity of jurisdiction for diplomatic missions, the Embassy of P. in Romania may not be a party.

Limited Immunity

Austria

A/3 – JUD – *R.W. v. Embassy of X*

Supreme Court and Administrative Court – 1990 and 1994 - Employment contract between foreign missions in Austria (States) and Austrian employees are subject to Austrian jurisdiction. A suit brought by an individual employed locally as a photographer by a foreign embassy who had issued a notice terminating her employment was held to be an employment contract under private law in respect of which a foreign state was subject to Austrian jurisdiction.

A/6 – JUD – *N.P. (individual) v. R.P. (State)*

Supreme Court -1989 – An individual employed locally by a foreign consulate filed a suit against her employer for payment of overtime. The state claimed immunity pursuant to the Vienna Convention on Consular Relations. The court held convention not applicable as the plaintiff had a contract with the sending state not with the consular officer. The Court held that employment contracts of this kind were a legal relationship under private law in respect of which a foreign state was subject to Austrian jurisdiction.

A/8 – JUD – *R.W. (individual) v. US (state)*

Supreme Court – 2001 – The Plaintiff filed suit against her employer for damages arising out of her employment contract. In this case service not perfected. However, the state claimed immunity. The court repeated its view previously expressed that the act itself and not the purpose for which it was performed had to be considered.

Belgium

B/02 – JUD – *Rousseau v. High Volta Republic*

Tribunal du Travail – 1983 - The embassy of High Volta had an employment contract with a Belgian chauffeur. Following some absences, the embassy fired the driver, who sued the embassy for illegal breach of the contract. The tribunal made a distinction between the *imperium* power of a state and its involvement in a civil contractual situation. If the tribunal faces the latter case, the state act in the way as any citizen would and should be treated in the same manner, without immunity. The problem lies then in the nature of the act in conflict. In this case a contract with a chauffeur and acts taken on the base of it, are of a clear civil nature. The distinction was between *jus gestionis* and *jus imperii*.

B/03 – JUD – *Queiros Magalhaes Abrantes v. State of Portugal*

Cour du Travail – 1992 – Mr Abrantes worked as a language teacher for the embassy of Portugal and his contract was terminated. He sought indemnity for this breach. The Tribunal du Travail declared itself incompetent. On appeal the Cour du Travail quashed that decision. It reaffirmed the theory of relative immunity according to the nature of the act in question. However, the Court examined art 5.2 of the European Convention on State Immunity that Portugal had signed but not ratified. Art 5.1 dismissed state immunity for labour contract executed in the foreign country, art 5.2 introduced an exception. However, even if art 5.1 was the written version of an established custom, art 5.2 was not. Portugal having not ratified the Convention, it did not apply to the contract; the Court used the Belgian relative immunity test. The labour contract was an act of administration as opposed to authority, and coupled to the custom embodied by art 5.1, the Court recognizes its competence.

Croatia

HR/3 – *J.S.B. v. the Embassy of Japan*

Zagreb Municipal Court – 2001 – In this case the Zagreb Municipal Court had not made a final decision about state immunity. In this case the Ministry of Foreign Affairs established that in a labour dispute a foreign country was liable to be a party to the dispute because of limited state immunity in this category of cases. The Embassy of Japan argued absolute immunity and the case is still ongoing.

HR/4 - JUD- *P.K. v. The Embassy of the United States of America*

Zagreb Municipal Court **–** 2001 - The Zagreb Municipal Court still had not yet passed the final decision about state immunity involving labour issues. Nevertheless, the Ministry of Foreign Affairs established that in labour dispute, a foreign country was able to be a party to the dispute because of limited state immunity in this category of cases. The whole process is still ongoing. In this case the defendant the Embassy of the United States became involved in the dispute without challenging the competence of the Croatian court.

HR/8 – JUD – *L.O. v. Turkish Embassy*

Zagreb Municipal Court – 2001 - Based on a legal opinion given by the Ministry of Foreign Affairs via the Ministry of Justice of Croatia, the Zagreb Municipal Court established that in a labour dispute, a foreign country was able to be a party to the dispute because of limited state immunity in this category of cases.

Finland

FIN/2 – JUD – *Hanna Heusala v. Republic of Turkey*

Supreme Court – 1992 – The Court established that the Finnish courts were not competent to consider labour disputes involving local employees of foreign missions when duties of the employees were closely related to the exercise of governmental authority. This was a case of limited immunity as court held although Finland not a party the European Convention on State Immunity, it constituted a valid source of customary international law and referred to Article 32 exception for diplomatic missions.

FIN/10 – EXE – Minister for Foreign Affairs of Finland

2001 – Two members of Parliament asked a written question concerning the employment security of local employees working at foreign embassies in Helsinki. In his reply, the Minister for Foreign Affairs referred to the International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property. Finland had emphasized in the working group that the group of persons against whom an employer state can claim immunity should remain as limited as possible. Reference was also made to Article 38 of the Vienna Convention on Diplomatic Relations according to which other members of the staff of the mission and private servants who are nationals of or permanently resident in the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State. Finland had not admitted privileges or immunities for the local employees of foreign embassies. Consequently, the foreign embassies are not exempted from their obligations under social security or labour law.

FIN/14 – JUD- *Olivia Carrasco Richardo v. Republic of Venezuela*

District Court of Helsinki – 2000 – In a case concerning the termination/cancellation of an employment contract between the Embassy of Venezuela and its former chauffeur, Venezuela invoked immunity. The Court citing FIN/2 held that it was not competent to consider the case and rules the claim inadmissible.

France

F/2 – JUD – *Mr Saignie v. Embassy of Japan*

Court of Cassation – 1997 – An employee, having the duty to guard the premises, had his contract terminated. He sought damages for the breach of contract. On appeal the immunity of jurisdiction was recognized by the court. The Court of Cassation quashed the decision, on the ground that the employee did not have any particular responsibility in the exercise of a public power (gatekeeper); the termination of the contract was an act of management. Concerning labour contract, the immunity from jurisdiction depends on the nature of the work of the employee.

F/3 – JUD – *Kuwait News Agency v. Parrot*

Court de Cassation – 1990 – Immunity from jurisdiction cannot be used concerning a press agency, even if a branch of a foreign State, which dismissed a journalist employed for its own activity and having no particular mission; this act is an act of management. This case confirmed the rule that foreign states or organizations under their direct order or acting in their benefit could use state

immunity if the act in the heart of the conflict constitutes an act of public power *or* has been accomplished in the interest of the foreign state.

Germany

D/2 - LEG – Federal Government

1989 - German government draft of enabling Act of Parliament regarding ECSI - 1978 - supporting convention and adding pursuant Article 24 a declaration preserving the "jurisdiction of German courts in labour disputes between employees and the foreign states which employ them". Act passed 1990.

D/14 – JUD - *Argentine citizen (former employee of the Argentine Consulate General) v. Argentine republic*

Federal Labour Court – 1996 – The Plaintiff considered the termination of her labour contract as ineffective and sued the defendant seeking declaratory relief to the effect that her labour contract had continued. The defendant claimed state immunity. The court held that the immunity claim had to be evaluated according to the general rules of international law. Customary international law excluded the jurisdiction of German courts over sovereign acts of foreign states but not over their non-sovereign acts. The distinction turns not on the motive or purpose of the act but on its nature. The distinction is to be made according to the law of the forum state. Although labour contracts are considered as private law contracts in Germany, the pending case concerned *acta iure imperii* beyond the jurisdiction of the German courts. The reason was that the plaintiff exercised consular functions (she issued Argentine passports and visas). These functions are within the core area of sovereignty. (restrictive doctrine but absolute immunity granted in this case)

D/18 – *German Citizen v. Kingdom of Belgium*

Federal Labour Court – 2001 – The Plaintiff's labour contract was terminated for abusing the Embassy seal for private purposes. The court held that the defendant was not subject to the jurisdiction of the German Courts. The court relied on Article 31 of the European Convention on State Immunity which accorded priority to the Vienna Conventions on Diplomatic Relations and on Consular Relations. Thus a state party to the European Convention could claim immunity in labour contract disputes with employees of its embassies and consulates to a wider effect than with other employees. In this case the plaintiff did perform core consular functions at the branch office of the defendant's embassy. (restrictive doctrine in Article 5 of the European Convention accepted but absolute immunity granted in this case0

Greece

GR/6 – JUD - *X (Professor of the Italian language) v. (Casa d'Italia) The Italian Republic*

Athens Court of Appeals - 1993 – Foreign States are entitled to sovereign immunity in disputes arising out of disputed labour contracts concluded to fulfil functional needs of foreign State. In this case a Professor of the Italian Language sued the Italian Republic.

GR/7 – JUD - *I.G. v. The United States*

Athens Court of Appeals – 1992- In cases of labour contracts where a foreign State is a contracting party and stands on an equal footing with private persons, the State (here the U.S.) cannot raise the plea of sovereign immunity. That State is not immune from lawsuits arising out of these contracts.

GR/8 – JUD – *X (Professor of the Italian language) v. (Casa d'Italia) The Italian Republic*

Athens Court of First Instance - 1992 – Foreign States are entitled to sovereign immunity in disputes arising out of disputed labour contracts concluded to fulfil functional needs of foreign State. In this case a Professor of the Italian Language sued the Italian Republic.

GR/9 – *X v. Mediterranean Institute for Agriculture*

Court of Appeals of Crete - 1991- In cases of labour contracts between a private person and an international organisation, there is no State immunity in labour contract disputes between private persons and international organizations acting as private persons.

GR/10 – *X v. Mediterranean Institute for Agriculture*

Court of Appeal of Crete– 1991 – International Organisations are not entitled to immunity from jurisdiction of domestic Courts for acts they have performed as fiscus. Foreign States are not acting in their sovereign capacity when contracting labour contracts, and thus, private law rules apply and there is no State immunity.

GR/12 – Athens Court of Appeals Judgment 13043/1988

Athens Court of Appeals - 1988- Foreign States are entitled to sovereign immunity for acts performed *jure imperii.* In matters of labour law, foreign states are not acting in their sovereign capacity. They appear on an equal basis with the private person employed.

Ireland

IRL/1 – JUD – *The Government of Canada v. The Employment Appeals Tribunal*

Supreme Court - 1992 – A driver for the Embassy of Canada in Dublin was dismissed and brought a claim before the Employment Appeals Tribunal. The Tribunal rejected the claim for state immunity and proceeded. The Government of Canada appealed to the Supreme Court. The Supreme Court allowed the appeal and quashed the determination of the Employment Appeals Tribunal. The Court held that the doctrine of restrictive State immunity applies to court and administrative tribunal proceedings (Employment Appeals Tribunal) and applies to foreign State embassy employment contract case. In this case the Supreme Court held that the notice party was employed under a contract of service requiring an element of trust and confidentiality and creating a bond with his employers in the Government of Canada's public business organisation and interests, but which was not a trading or commercial contract of his employers and therefore the order of the Employment Appeals tribunal was quashed.

Italy

I/11 – JUD – *Luna v. Romania*

Supreme Court of Cassation -1974 - Article 10, Italian Constitution & CIL-A foreign country was immune from civil jurisdiction of Italian court in a suit by an individual employee against it as employer because the State was exercising 'the powers of a public authority, within its own legal system and within its territory, or even outside it, if the State acted as an international law subject.' Restrictive doctrine but immunity granted in this case see I/15.

I/14 – JUD – *SIMAC-CISL v. United States of America*

Pretura (lower court judge) of Milan – 1981 - Article 28 - Italian Statute of Worker's Rights – The court held that a foreign State is immune from jurisdiction of Italian courts in a suit brought by the trade union of employees of foreign consulates, under article 28 of statute of workers' rights. The statute affects the organisation functions of the foreign State. Restrictive doctrine but immunity granted in this case see I/15.

I/15 – *Sindicator UIL-Scuola di Bari v. Istituto di Bari del Centro internaxionali di studi agronomici*

Supreme Court of Cassation- 1986 - Article 10, Italian Constitution & CIL - Foreign States are immune from civil jurisdiction only when they act as sovereign bodies and not when they act as private subjects. They are not immune from employment disputes as broadly as provided in the European Convention on State Immunity as it had not been adopted at the time of this case.

I/16 – JUD – *Paradiso v. Istituto di Bari del Centro internaxionali di studi agronomici*

Supreme Court of Cassation -1986 - Article 10 Italian Constitution & CIL - In a dispute between an Italian individual and a body corporate (Italian state institute), the institute is immune from jurisdiction and execution to the extent it is performing State institutional goals.

I/18 – JUD – *Iasbez v. Centre international de hautes etudes agronomiques méditerranéens*

Supreme Court of Cassation – 1977 – CIL - Foreign States are immune from jurisdiction regarding employment relationships only where the employee is entrusted with co-operation and collaboration tasks because only such tasks entail participation in public functions of the foreign State.

I/23 – JUD – *Parravicini v. Commerical Office of the Republic of Bulgaria*

Tribunal of Rome – 1969 - Italian courts have jurisdiction over work disputes by "an employee carrying out auxiliary tasks only, having no legal relation to the institutional tasks of the office itself", i.e. "acts committing the State to property rights and obligations, at the same level as private contracting bodies". The foreign State therefore enjoys no immunity from civil jurisdiction

I/24 – JUD – *De Ritis v. Government of the United States of America*

Supreme Court of Cassation – 1971 - Claim of employee against employer, United States Information Service Agency in Naples is a claim against US government agency performing public functions broad and thus immune from jurisdiction of Italian courts. Restrictive doctrine but immunity granted.

I/26 – JUD – *Mallavel v. Ministère des affaires étrangères français*

Pretore (lower court judge) of Rome – 1974 - Foreign international law subjects, are immune from civil jurisdiction in Italian courts when acting in pursuance of their domestic institutional goals, i.e. exercising public activities or concluding contracts on the basis of their sovereignty. Restrictive doctrine but immunity granted.

I/32 – JUD – *Castagna v. United States of America*

Pretore (lower court judge) of Martina Franca – 1980 – As work and services were actually supplied to the Government of the United States, the US is to supply the economic and legal treatment due to the claimant employee.

I/33 – JUD – *Special Delegate for the Vatican City State v. Pieciuckiewicz*

Supreme Court of Cassation – 1982 - The Vatican State is immune from jurisdiction of Italian civil courts in a dispute regarding the supply of translation and speaker services to Vatican Radio under CIL and the Italian Constitution, article 10, para. 1. Such services are part of its 'mission to the world' and therefore part of tasks performed to attain public goals of the Vatican State.

I/40 – JUD – *PROCURA Impianti Sri v. Alberta Agricultural Department*

Tribunal of Milan – 1992 – Disputes between foreign States and employees of 'territorial autonomous bodies' [eg Italian corporation] are not immune from jurisdiction of Italian courts when they act as private subjects in an ordinary contractual framework.

I/46 – JUD – *Guinea v. Buzi Jannetti*

Supreme Court of Cassation – 1996 – Customary International Law (hereafter CIL) – When foreign States or foreign public bodies act as if they were private citizens, rather than in exercise of their sovereign powers, the host State's courts have jurisdiction to hear the case.

I/59 – JUD – *United Kingdom v. Bulli*

Supreme Court of Cassation – 1988 - In the field of working relations with the Embassy of a foreign State in Italy, the CIL principle of immunity from civil jurisdiction applies only to individuals employed to perform professional or clerical jobs. This is because they are part of the organisation of the State and contribute to its attaining its institutional goals.

I/61– JUD – *Brasil v. De Lucia*

Supreme Court of Cassation – 1988 – The jurisdiction of an Italian tribunal over disputes involving working relations of Italian citizens with a foreign state depends on the nature of the actual job carried out. The tribunal has no jurisdiction, when the employee participates in the state's public activities. However, mechanical or manual jobs, which cannot be considered as public activities of a State, are subject to the Italian jurisdiction.

I/63 – JUD – *Libya v. Trobbiani*

Supreme Court of Cassation – 1990 – Italian courts do not have jurisdiction over disputes on a working relationship with a foreign State where the employee-claimant asks the judge to deal with the functions carried out by an employee, and thus the autonomous activity of the State itself.

I/64 – JUD – *Ghana v. Barbini*

Supreme Court of Cassation – 1991 - In case of a dispute on a working relation with a foreign State, Italian courts have no jurisdiction when the dispute deals with confidential jobs carried out within a foreign organisation because it affects the sovereign powers of the foreign State.

I/65 – JUD – *Taha v. Egypt*

Pretore (lower court judge) of Rome – 1991 – CIL - In working relations, there is no immunity from jurisdiction when the employee carries out manual or auxiliary jobs, or where the dispute concerns property aspects not connected with the organisation of the offices of the foreign State.

I/67 – JUD – *Zambia v. Sendanayake*

Supreme Court of Cassation – 1992 - An Italian court has jurisdiction over a dispute filed by a worker against the Embassy of a foreign State in Italy where the dispute deals with auxiliary and secondary functions.

I/69– JUD – *Brasil v. Magurno*

Supreme Court of Cassation – 1993 – CIL - Italian courts have no jurisdiction over disputes involving working relations of the Italian personnel employed by foreign States concerning the performance of auxiliary activities and also regarding tasks closely connected to institutional functions.

Netherlands

NL/10 – JUD- *M.K.B. van dr Huist v. United States of America*

Supreme Court – 1989 – A secretary for United States Embassy was dismissed for security reasons. She sued for unjust dismissal. The judgement referred to the European Convention on State Immunity and draft UN convention and held that generally no immunity was given for employment law disputes. The general rule was not without exception – exception occurred in the present case – as the employment contract depended in this case on the result of a security check. The court held that foreign State had a right to rely on immunity when terminating the contract on the grounds of a security check, no matter if contract was of a private law nature.

Norway

N/5 – EXE - Letter to Embassy of Ukraine

1999 – This letter acknowledged that Norway was not bound by any convention on immunity but accepted the distinction between acts of a State in its sovereign capacity and those of private law or commercial character immunity not being grated for the latter.

N/6 – EXE- letter from Norwegian Ministry of Foreign Affairs

1998 – This letter acknowledged that distinction between acts of a state in its sovereign capacity (*acta jure imperii*) and those of a private law or commercial character (*acta jure gestionis*) immunity not being granted for the latter.

Poland

PL/2 – JUD – *Marciej K. v. Embassy of a Foreign State*

Supreme Court – 2000 – The Polish labour court has jurisdiction in the case brought by the Polish Citizen against a foreign embassy concerning the ineffectiveness of giving the notice terminating the employment. This was the first time the Supreme Court of Poland departed from concept of absolute immunity in favour of limited/functional/jurisdictional immunity. Acts in this case were not acts of public authority of a foreign state.

Portugal

P/4 – JUD – *Carlos Manuel Flores Andre and Miguel Carlos parade Andre v. Spanish Institute in Lisbon*

Supreme Court – 1987- A suit was brought by two individuals against a foreign school. The court held that a foreign school is distinct and has autonomy from the foreign State and thus can be tried in Spanish Courts.

P/8 – JUD – *Rosa de Jesus Lourenco Barros Fonseca v. Gilbert Buddig Larren and Madeline Laurent Larren*

Supreme Court – 1991 – A domestic servant sued diplomats from France. In this case Vienna Convention on Diplomatic Relations, which extended to diplomats did not apply. Hiring a domestic servant for the private residence of a diplomat was an act outside of the diplomatic functions of the agent and not included in immunity.

P/11 – JUD – *Rui Manuel do Couto Mendes Valada v. Popular Republic of Angola*

District Court - 1998 – In an action by an individual against Angola the principle of immunity from jurisdiction of foreign states did not apply when the State was sued in its quality of party to a private law contract. In this case the State in the labour contract was treated equally as the other private person.

* P/14 – JUD – *Maria Aparecida Pereira de Melo Cunha Brazao v. Brazilian Embassy and Republic of Brazil*

District Court - 2000 – In an action by an individual against Brazilian embassy the court held that immunity from jurisdiction must have a restrictive scope limited to acts of public power. When a State acts *jure gestionis,* there was no immunity. In labour contracts the foreign state was a mere contractual party acting without *jus imperii* and thus should be treated in equality with other private persons. However, the Republic of Brazil waived such immunity by accepting the local jurisdiction by refraining from invoking such immunity, having accepted to the cited and having appointed a lawyer to represent the State in court.

P/15 –JUD – *A. v. Israel*

Supreme Court – 2002 – A foreign state does not enjoy immunity from jurisdiction in a case brought against it by a domestic servant of the ambassador's residence claiming she was unlawfully dismissed. Such contractual relationship is ruled by Portuguese law similarly to other labour contracts for the performance of domestic services celebrated by any other private person.

P/Addendum October 2004 – JUD – A v. Islamic Republic of Pakistan

Court of Appeal – 2004 - A foreign State does not enjoy immunity from jurisdiction in a case brought against it by the driver of an embassy claiming that he was unlawfully dismissed. Such contractual relationship is ruled by Portuguese law similarly to other labour contracts for the performance of subordinate services celebrated with any other private person.

Russian Federation

Rus/7 – JUD – *M. Kalashnikova*

Constitutional Court of the Russian Federation – 2000 – A Russian citizen was dismissed from the Embassy of the United States and she applied based on the contract of employment that her dismissal was unlawful. The lower Russian court rejected her claim for reasons of immunity of an Embassy of a foreign State provided for in art. 435 of the Civil Procedural Code. However the Constitutional court held that the relevant provisions of the Civil Procedural Code were subsidiary to the provisions of the Labour Code in case of disputes arising from labour contracts. The lower court did not study the question of whether the application of Russian legislation by an Embassy of a foreign state could be considered as its consent for the jurisdiction of the Russian courts. The claim was to be considered by the lower court

Slovakia

SK/1 –LEG – National Council of the Slovak Republic

1963 - Act No. 97 - Private International Law and Rules of Procedure – Provision of exemption of foreign states from the jurisdiction of the Slovak courts except for immovable property situated in the Slovak Republic, inheritance, employment or commercial activity outside of official duties.

Spain

E/3 – *Emilio M.B. v. Embassy of Guinea Ecuatorial*

Social Chamber of the Supreme Tribunal- 1986 -The Tribunal accepts limited theory, and the distinction between *acta iure gestionis* and *acta iure imperii*. The judgement states that immunities arising from the Vienna Convention on Diplomatic Relations differ from those granted by internal law to States as such, and that a restrictive doctrine should be applied to the latter as concern jurisdictional immunities. The judgement also states that the rejection of jurisdictional immunities does not mean the automatic denial of the immunities of execution. In this case the court ruled that Spanish courts are competent in cases related to labour law where foreign states are sued.

E/4 – *Diana Gayle Abbott v. Republica de Sudafrica*

Social Chamber of the Supreme Tribunal -1986-The Supreme Tribunal reaffirms its previous judgment of 10 February 1986 establishing that Spanish courts are competent in cases related to labour law where foreign States are sued. The Tribunal confirms the restrictive scope of jurisdictional immunities for Spanish Courts and tribunals. It cites article 24 of the Spanish Constitution as an important argument for the recognition of the limited scope of jurisdictional immunities. The Tribunal also states that courts should take into account the distinction between immunity of jurisdiction and immunity of execution.

Sweden

S/ 4 – JUD – *Douglas H v. Korea Trade Center*

Labour Court – 1988 – In an employment dispute commenced by an employee of Korea Trade Centre court found that the Trade Centre enjoyed absolute immunity because of its connection with the Korean state and acted as a public entity *jure imperii.*.

S/ 9 – JUD – *GP v. Cypriotska Statens Turistorganisation*

Labour Court – 2001 – GP was a former employee of the Cyprus Tourist Organisation who sued for damages for unjust dismissal. The CST claimed state immunity. The Labour Court pointed out that immunity can only be invoked in disputes relating to sovereign acts as such, but not in disputes concerning matters of a commercial or private-law nature. The practical solution was to make an assessment in each particular case of the circumstances that support one position or the other. In this case absolute immunity granted to Cyprus as CST had dealt with the employee in its capacity as a sovereign state.

S/21 – EXE – Ministry for Foreign Affairs

1985 – In answer to a question by the Stockholm city court, the Ministry stated that the Korean Trade Centre enjoyed absolute immunity (see S/CT 4) as it was established by the State and subordinated to the Ministry of Commerce and staff paid by state.

Switzerland

CH/2 – JUD – *S v. Indian State*

1st Court of Public Law of the Swiss Federal Tribunal – 1984 – An Italian citizen was employed in Berne by the Swiss embassy and then dismissed. The employee sought payments of indemnities for the termination of the contract. The Indian embassy sought State immunity from jurisdiction to reject the competence of the Swiss tribunals. The Court held that the employee, even if protected by diplomatic immunity under the Vienna Convention of 1961, can use the jurisdiction of the court of the State where the embassy is located according to art.31 and 32.3 of this convention. It affirms that the immunity from jurisdiction only applies when the act in conflict is by nature an act of sovereignty. The Court of Appeal considered that it is an *acta jure gestionis*. The question is to ascertain if the State acted as a private individual. The Court of Public Law noted that anyone could have entered in such a contract and that in other cases a contract of rent was considered to be an act of administration. By analogy the Court views in the labour contract an *acta jure gestionis*.

CH/5 – JUD – *R. v. Republic of Iraq*

1st Court of Public Law of the Swiss Federal Tribunal – 1994 – A Moroccan citizen was recruited by the Iraqi diplomatic mission in the UNO, in Geneva, as a translator. His contract was terminated and he sought damages. The State of Iraq claimed immunity from jurisdiction. In deciding what is

an *acta jure gestionis*, the judges will have to look at the nature of the act, plus any other relevant factor such as the comparison of the interest of the foreign state to receive immunity and the interest of the individual to receive a judicial protection of his rights. The Court will then have to scrutinize the nature of the work, and so of the contract, of the translator. He translated documents, wrote letters and helped the children of the ambassador. He did not participated in the decision making of the embassy, and the fact that he had access to sensitive material is not enough to infer the public nature of his functions. Finally, the case shows a factor connecting the case to Switzerland, the translator having been recruited and having worked in Geneva.

CH/7 – JUD – *M v. Arab Republic of Egypt*

1st Public Law Court of the Swiss Federal Tribunal - 1994 – An Egyptian citizen was employed by the consulate of Saudi Arabia, then by the consulate of Egypt as a chauffeur. His contract was terminated and he sought compensation. Egypt refused the jurisdiction of the Swiss Tribunal on the ground of State Immunity from jurisdiction. The problem here is that there existed no convention between Switzerland and Egypt. The Tribunal reaffirmed the doctrine in matter of labour contract, that a subaltern position in an embassy is more likely to be categorised as an activity that any private person could have contracted than a *acta jure imperii*. The court has to look in details in the real activities of the employee. In absence of ratification of the Convention, the Tribunal, according to relevant case-law, decides that the Convention cannot be used against Egypt. In Swiss law, a labour contract is more likely to be an *acta jure gestionis* when he has a subaltern position; he is not a national of the employer's State and has been recruited in the state where the diplomatic mission is located. In this case, a chauffeur does not exercise public power; the contract is an act of administration. The additional connecting factor is present in this case, the chauffeur having been recruited in Switzerland, his only place of work, his nationality was not a decisive factor for his employment.

United Kingdom

GB/13 – JUD – *Sengupta v. Republic of India*

Employment Appeal Tribunal – 1982 – The Plaintiff claimed damaged for unjust dismissal. The plaintiff's employment as a clerical officer in the diplomatic mission of a foreign State would involve his participation in the public acts of a foreign sovereign. An investigation into the fairness of his dismissal would involve the Court in an investigation of, and interference with, a public function of a foreign sovereign. Restrictive doctrine employed but absolute immunity in this case.

Article 12

Personal injuries and damage to property

Absolute Immunity

Germany

D/6 – EXE- Federal Government

1995 – In a verbal note the Federal Foreign Office explained the German position on state immunity. The note stated "Proceedings before Greek courts concerning claims of Greek citizens against the Federal Republic of Germany based on incidents in World War II are not consistent with international law, and therefore any action before Greek Courts against the Federal Republic of Germany is inadmissible. The basic principle of state immunity in international law hinders any conduct of a case before the courts of one state as far as the proceeding is directed against a foreign state in relation to that state's sovereign action (*acte iure imperii).*

Ireland

IRL/3 – *McElhinney v. Anthony Ivor, John Williams and Her Majesty's Secretary of State for Northern Ireland*

Supreme Court – 1995 – In this case the Court established that sovereign immunity applied because the tortious acts of a soldier who is a foreign State's servant or agent are *jus imperii*. Upheld in the European Court of Human Rights McElhinney v. Ireland 21 November 2001.

IRL/4 – *Schmidt v. Home Secretary of the Government of the United Kingdom*

Supreme Court – 1997 – The Court established that the Commissioner and an individual agent of the Metropolitan police (United Kingdom) are entitled to rely on sovereign immunity.

Turkey

TR/2 – JUD – *Individual v. Iraq*

Cour de Cassation – 1986 – The plaintiff alleged that his boat containing petrol was attacked by the aircraft of Iraq which resulted in the death of two sailors and damage to the boat. The legal issue was the capacity of the Turkish court to judge Iraq. In this case the court referred to Article 33 of their law on Private International Law and held that a state would not be able to claim immunity for a private act but this was a sovereign act and the court could not take jurisdiction.

TR/03 – JUD – *Individual v. USSR*

Court of Cassation – 1987 – The family of a person killed in a boarding between a Turkish and a Soviet warship was seeking damages, the USSR claimed its immunity from jurisdiction. The principle of immunity from jurisdiction is based on the equality between States in the international order, and is absolute when concerning acts of sovereignty. Warships are the symbol of their flag state and so doing benefit from the immunity conferred to their respective States. Immunity of jurisdiction is also not applicable only when the act in conflict is an act of private law (art 33 of the Law on International Private Law and Procedure).

United Kingdom

GB/8 – *Al Adsani v. Government of Kuwait*

Court of Appeal – 1996 – In the claim of a Kuwaiti citizen against Kuwait for torture and personal injury the court held that a foreign state enjoyed immunity in the UK in relation to proceedings in respect of torture committed outside the UK. The exception to immunity in respect of acts occasioning personal injury or death in section 5 of the State Immunity Act only applied when they are caused by acts or omissions in the UK.

GB/16 – JUD – *Littrell v. USA (no. 2)*

Court of Appeal – 1993 – An American serviceman stationed at one of the American basis in the UK made a claim arising out of the standard of medical treatment he received. The Court held that the State Immunity Act did not apply to acts of the armed forces of a foreign State whilst present in the UK. The common law of state immunity had to apply. In applying the distinction between acts *iure imperii* and *iure gestionis*, the court should consider the nature of the act, rather than its purpose, but the nature of the act must be appreciated it its context. The context included the location of the act, the identity of the persons involved and the kind of act it was. The terms of the relationship between a foreign state and its own servicemen, and in particular the standard of medical care which that foreign State affords its servicemen, is a matter within its own sovereign authority.

GB/17 – JUD – *Holland v. Lampen Wolfe*

House of Lords – 2000 – A civilian lecturer made a claim in damages for defamatory statements against her in a written memorandum of a military officer on a base in the United Kingdom in British Courts. The Court held that a contract with a civilian of the sending state to teach members of a military base of the State on the territory of the UK, is a matter which is excluded from the State Immunity Act as it relates to armed forces present in the UK. It was therefore governed by common law. In determining whether it was an act iure imperii or iure gestionis, the defendant's assessment of the plaintiff's provision of educational service to members of the base had to be viewed in its context, including taking into account the persons involved and the place in which the acts took place. The impugned assessment of the plaintiff's related to the standard of education which the sending State afforded to its own servicemen. It was therefore a matter within its own sovereign authority. In recognizing the immunity of the sending state in this case, there was no violation of Article 6 of the European Convention of Human Rights. Article 6 provides procedural guarantees in relation to due process, but does not in itself provide a basis of jurisdiction where this is not permitted under international law.

Limited Immunity

Austria

A/4 – JUD – *X:Y. (individual) vs. Embassy of the United States*

Supreme Court – 1961 – The Plaintiff's car was damaged in a car accident with a vehicle owned by the Government of the United States. The Defendant claimed that car was carrying diplomatic mail and therefore the act was of a *ius imperii* character. In determining whether the act was *iure imperii* or *iure gestionis* the Court stated that the act itself and not the purpose for which it was performed had to be considered. In this case the act was operating a vehicle on a public road and therefore subject to Austrian jurisdiction.

France

F/4 – JUD – *Neger v. État de Hesse*

Paris Court of Appeal – 1969 – Mr. Neger instituted a writ in France against the President of the Council, as a representative of the Government of the Länder of Hesse for payment of sums in compensation for loss suffered due to damage done to the painting by Bonnard entitled 'Le Plaisir' which had been lent to the Darmstadt Museum. The State of Hesse claimed jurisdictional immunity. The court held that the Länder of Hesse did not possess international legal personality and therefore was not entitled to jurisdictional immunity.

Greece

GR/5 – *Prefecture of Boioteia vs. Fed. Rep. of Germany*

Areios Pagos (Hellenic Supreme Court) Plenary- Judgment 11/2000. The case arose from the petition on cassation brought by Germany against the judgment of the court of first instance (Polymeles Protodikeio Livadeias, Judgment no. 137/1997)[510], which awarded claimants damages of nearly $30 million, as indemnity for atrocities, including willful murder and destruction of private property, committed during WWII by the German occupation forces in the village of Distomo. The decision of the Court, by denying immunity to Germany for acts *de jure imperii* in breach of *jus cogens,* effectively upheld the decision of the court of first instance.[511] In more detail, Areios Pagos followed the well established distinction between acts *jure imperii* and acts *jure gestionis* with immunity provided only for acts falling under the first category. This was considered by the Court as a rule of customary international law and was applied as such in the Greek internal legal order, taking precedence over any contrary statutory provisions, according to Article 28 (1) of the Greek Constitution. Furthermore the Court recognized that the atrocities attributed to the German State may well constitute acts committed in situations involving armed conflicts for which immunity is retained. However, the Court went on and stated emphatically that according to the customary rule embodied in Article 43 of the Regulations Concerning the Laws and Customs of War on Land attached to the 1907 Hague IV Convention, occupation directly derived from armed conflict did not result in sovereignty, but the occupying power was still under the obligation to respect the law of the occupied state and more importantly that acts carried out by organs of the occupying power in abuse of their sovereign power were not covered by immunity. Additionally, the Court characterized the acts under question as a breach of *jus cogens* and as such excluded from acts *jure imperii* (Article 46 Hague IV Convention and Regulations). The Court concluded that Germany had tacitly waived the privilege of immunity and that Greek Courts had jurisdiction to hear the case. It should be noted that the above decision was adopted with a strong dissent. Dissenting Judge disagreed on a number of issues: first that there exists no rule of customary law regarding restrictive sovereign immunity, secondly even if there exists such a tendency towards restrictive sovereign immunity then it is not applicable to acts *jure imperii.* Four members of the Court also disagreed on the majority's interpretation of the armed conflict clause regarding violations of *jus cogens*.

[510] I. Bantekas, "Prefecture of Voiotia v. Federal Republic of Germany. Case No. 137/1997", 92 *American Journal of International Law* (1998), pp. 765-768.

[511] M. Gavouneli / I. Bantekas, "Prefecture of Voiotia v. Federal Republic of Germany. Case No. 11/2000 Areios Pagos (Hellenic Supreme Court) May 4, 2000", 95 *American Journal of International Law* 2001, pp. 198-204.

Note: See developments in *X v. Federal Republic of Germany* case GR/1 where the Special Supreme Court was asked whether the denial of State immunity for acts *jure imperii* (of Germany armed forces during WWII) inviolation of rules of *jus cogens* constituted a rule of customary law. This latter court held in that respect that "at the present stage of development of international law, there still applies a generally accepted rule of that law pursuant to which a State cannot be validly brought before the Courts of another State for compensation resulting from any kind of tort which took place on the territory of the forum, if in such tort were involved the military forces of the defendant State, either in time of peace of in time of war.

Netherlands

NL/6 – *The Kingdom of Morocco v. Stichting Revalidatie Centrum "De Trappenberg"*

District Court of Amsterdam – 1978 – The daughter of the cleaner of the Moroccan Consulate-General at Amsterdam was seriously injured in an accident at the Consulate. The rehabilitation centre applied for the court for a garnishment in order to secure funds held by Morocco in the Banque de Paris et des Pays-Bays. It was alleged that Morocco was liable in tort for failure to ensure that the caretaker was adequately insured. In this case the garnishment was granted as Morocco could not rely on immunity for the tort as it was an act or omission in which Morocco was involved in the same capacity as a private citizen.

NL/13 – *The Kingdom of Morocco v. Stichting Revalidatie Centrum "De Trappenberg"*

Supreme Court – 1994 – The court held that the nature of the undertaking by the ambassador of Morocco to pay the claim of De Trappenberg against B, a national of Morocco was in the employ of Morocco was not a clearly governmental act and could have been given by a private sector employer in a comparable situation.

Turkey

TR/4 – JUD – *Individual v. Austria*

Cour de cassation – 1986 – In this case the plaintiff was injured by an exploding package and demanded compensation from Austria. The court held that although Article 33 of the law of Private International Law gave immunity to sovereign acts this was not an act of state. The judgment against Austria would stand.

Article 13

Ownership, possession and use of property

Absolute Immunity

Iceland

IS/1 – JUD- *Guðrú Skarphéðinsdóttir v. the Embassy of the United States of America*

Supreme Court – 1995 – A landlord instituted legal proceedings against the Ambassador of the United States of America on account of the Embassy of the United States of America in Iceland regarding unpaid rent. The Court held that under the Icelandic rules of civil procedure a foreign embassy does not enjoy the status of being capable of acting as an independent party in a court case. Also the Court stated that in accordance with principles of public international law, a State cannot fall under the jurisdiction of judicial tribunals of another State, without the consent of the former.

IS/2 – JUD – *Þórðarson, Erlendsson et al. v. Government of the United States of America*

Supreme Court – 1998 – The plaintiffs commenced legal action submitting various claims related to the defendant's use of the plaintiff's land. The plaintiffs' land had been leased by the Government of Iceland and handed over to the United States Armed Forces to use. The Court dismissed the case on the grounds that neither the Defence Agreement between Iceland and the United States nor rules of public international law led to the conclusion that either the Government of the United States or the US Forces in Iceland should fall under the jurisdiction of Icelandic judicial tribunals in disputes over such matters.

IS/3 – JUD - *Þórðarson, Erlendsson et al. v. Government of the United States of America*

Supreme Court – 2002 – The plaintiffs commenced legal action against the defendants submitting various claims related to the defendant's use of land belonging to the plaintiffs. The Court dismissed the case on the grounds that neither the Defence Agreement between Iceland and the United States nor rules of public international law led to the conclusion that either the US Government or the US Forces in Iceland should fall under the jurisdiction of Icelandic judicial tribunals in disputes over such matters.

Limited Immunity

Austria

A5 – JUD - *X.Y.(individual) vs. X (state)*

Supreme Court – 1988 – the Plaintiff, the owner of real estate in Austria sought to prevent the construction of a nuclear power plant as it would have the effect of emitting radionuclids above the standard customary in the area. Although the other state claimed immunity the Supreme Court held that foreign states could be sued for acts *jura gestionis*. The construction as well as the operation of a power plant are not part of the area of *jure imperii* and therefore not excluded from the national jurisdiction.

A/7- JUD – *E.AG Vien v. L*

Regional Court Vienna as Appellate Court– 2001 - The conclusion of a rental lease by a foreign State is a relationship under private law, even if the rented real estate is used for the location of the embassy of that state.

Czech Republic

CZ/1 -LEG – *National Assembly of the Czechoslovak Socialist Republic*

1963 - Act No. 97/1963 - Section 47 - 'Exemption from the jurisdiction of Czechoslovak courts' which provides that: "Foreign States and persons who under international treaties or other rules of international law or special Czechoslovak legal regulations" are immune from the jurisdiction of Czechoslovak courts and notarial offices. Section 47(3) grants jurisdiction where the foreign State or person voluntarily submits to jurisdiction, or the subject of the proceedings involves: such parties' real property, or rights thereto, is located in the 'Czechoslovak Socialist Republic'; or an inheritance outside their official duties; or the pursuit of a profession or commercial activity outside their official duties.

Denmark

DK/2 – JUD - *Dem Franske Republik v. Intra ApS*

Supreme Court – 1992 – The French embassy had leased offices for its trade department from a private company. There was a dispute concerning the increase in rent and the private company initiated legal proceeding against the Embassy. The Court held that the leasing contract was governed by private law and that the rules of public international law concerning State immunity did not exempt foreign states for legal action in Denmark.

DK/3 – JUD – *Italien v. Amaliegade 21 A-D*

Eastern High Court – 1993 – The Italian Embassy constructed a garage on a shared courtyard without the permission of the co-owner. The co-owner initiated legal action. The Eastern High Court rejected a decision of the City Court granting immunity stating that the provisions of the title registration was governed by the rules of private law and that the principles of state immunity did not exempt foreign states from legal actions in such matters. The Italian state was ordered to pull down the garage.

Germany

D/7- JUD – *Vereingte Kalwerke Salzdetfurth AG v. Federative National Republic of Yugoslavia "Yugoslav Military Mission"*

Federal Constitutional Court - 1962 – The court held that Yugoslavia was immune from jurisdiction of German courts regarding its legation premises (Military Mission in Berlin) only to extent required

to carry out tasks of the diplomatic mission - not regarding property title disputes. This case was followed in a 1999 decision which concerned the transfer of an embassy compound to the heirs of the original owner who had been expropriated during the Nazi period.

Italy

1) I/21- JUD – *Società immobiliare Corte Barchetto v. Morocco*

Tribunal of Rome – 1977 - Contract to lease Embassy did not state the Embassy's "intention to enjoy the privileges of a body representing a foreign State". Therefore the court held that there was no immunity and treated the embassy as if a private body.

2) I/22 – JUD – *Morocco v. Società immobiliare Corte Barchetto*

Court of Appeal of Rome – 1979 - Lease of immovable property by foreign State is an act *iure privatorum* and not immune because it is a "private activity which could be performed by a private subject."

3) I/53 – JUD – *Libya v. Riunione adratica di Sicurtà*

Supreme Court of Cassation – 1990- CIL – Italian courts have jurisdiction over disputes over a contract for lease of immovable property hosting the premises of a consular office.

4) I/54 – JUD – *Malta v. Società Nicosia Immobiliare SpA*

Supreme Court of Cassation – 1992 - A foreign State is not immune from the jurisdiction of the Italian courts in the case of the conclusion of a contract of lease, even if the premises are to host the Embassy of a foreign State.

5) I/55 – JUD – *Guinea v. Trovato*

Supreme Court of Cassation – 1993 – CIL and Art. 30 VC on Diplomatic Relations Italian jurisdiction applies in a dispute over a preliminary contract aimed at the purchase of a building that will host the residence of a foreign Ambassador, as the contract was not subsequently sanctioned by an official document of the foreign state. Art. 30 of the Vienna Convention on Diplomatic Relations is not applicable. This case involves a dispute between the State of Guinea and an individual seller over a preliminary contract of sale and purchase for property and a building to host the residence of the State's Ambassador. The case appears to rule that the signing of the preliminary contract by an agent of the State does not grant the State immunity from the jurisdiction of Italian courts to judge a dispute over the validity of the contract in case the sale contract was not subsequently sanctioned by an official State document.

6) I/57 – JUD – *Cassa di reisparmio della Libya v. Federazione Italiana die consorzi agari and Consorzio agrario della Tripolitania*

Tribunal of Rome – 1961 - Immunity from jurisdiction applies to foreign public bodies only for acts carried out in their public but not in their private capacity, such as the conclusion of contracts entailing property obligations.

7) I/72 – JUD – *Spain v. Chiesa di San Pietro in Montorio*

Supreme Court of Cassation – 1997 - Italian courts have jurisdiction over disputes between the Italian Government and a church body on the property of a church. As the church body and the Italian government signed an agreement, it can be inferred that the body acted as a private law subject within the Italian law.

Norway

N/3 – JUD – *Scancem International ANS (private company) vs. Antoine Yazbeck etc. (private persons)*

Borgarting Court of Appeal – 1998 – In this case the legal issue was whether a private company registered in Norway was liable for damages suffered by a third party as a result of an expropriation carried out by the authorities in Sierra Leone. The claimants (respondents in Appeal) owned shares in a cement factory, which was nationalised by the Government in Sierra Leone and

later sold to the Norwegian company. The court ruled that it had the power to make a pre-judical assessment of the legality of the expropriation of the state.

Portugal

P/1 – JUD – *United States of America v. Companhia Portuguesa de Minas*

Supreme Court – 1962- In a dispute between United States of America and a private company it was held that the only exception to immunity is express or tacit waiver and cases related to immovable property or *forum hereditatis*. Tacit waiver presupposes a concrete will by the author of the waiver and resort to judicial proceedings by a foreign state, namely in the case of a counterclaim cannot be considered as amounting to such waiver.

Romania

RO/3 – JUD – *G.M. & T.I. v. The Embassy of P in Bucharest*

Tribunal of Bucharest - 2001- The object of this case is the evacuation of the Embassy of P from the building, which is owned by the private applicant. It was held that the state here can be a defendant as it has acted as a civil moral person and therefore deemed not to have immunity of jurisdiction.

Sweden

S/L 24– LEG – AIRCRAFT – Swedish Parliament

1939 – The provision states that aircraft used by foreign State exclusively for sovereign purposes may not be embargoed.

Switzerland

CH/6 – JUD – *Italie v. X. et Cour d'appel du canton de Bâleville*

1ère Court de droit public du Tribunal federal Suisse – 1985 – The Swiss authorities handed over to Italian authorities some historical gravestones as evidence for a trial. The Swiss owner of the gravestones applied to a Swiss court for their return. The Court ruled that Italy had immunity because a trial process is a natural task of a state. The question of whether the Italian refusal to return the gravestones was justified was not a matter for the Swiss court to rule on.

CH/8 – JUD – *United Arab Republic v. X.*

Swiss Federal Tribunal – 1960 – The UAR rented a villa in Vienna from a woman living in Zurich, rent payable to a bank in Switzerland. The rent being unpaid, the woman sought seizure of accounts hold by the UAR. This account was destined for the payment of an armament contract, however the other party to the contract ceased his commercial activities due to bankruptcy and the UAR was seeking in another instance the nullity of the contract. The UAR opposes to the seizure the immunity from execution and jurisdiction.

The court held that Immunity from jurisdiction was not an absolute rule, only effective when confronted with acts of sovereignty. If confronted with an act that the State passed in the same manner as a private individual would, an additional element is required to put aside the immunity, a connecting factor. To distinguish *acta jure gestionis* from *acta jure imperii*, judges must have regards not at the aim but the nature of the act (the renting contract of rent) to see if the act is characteristic of a public power or of a private individual capacity. Here the contract was clearly passed between two private individuals, or as such, nothing in the contract implies a public prerogative. And the connecting factor exists, the rent being payable in Switzerland. The immunity was not allowed. With respect to Immunity from execution:, contrary to other European countries, Switzerland does not have a major problem with immunity from execution, because of the necessary factor connecting the act to its internal system. The division *jure imperii* and *jure gestionis* applies here again. The foreign state has the liberty to use his funds to whatever end, and protect them by allocating them to public objectives, of which defence is a part. In the case the Tribunal has only check if the funds where indeed used as payment of weapons. The end of the contract with the armament society meant that the funds were left without direction for the will of the state cannot alone direct them to a goal, positive actions must be taken. The lack of direction,

falling neither under *jure imperii* or *jure gestionis* is however seen as a case casting aside the immunity from execution.

Turkey

TR/01 – JUD – *Individual v. Embassy of Lebanon*

Great Chamber of the Court of Cassation – 1991 – The Turkish State issued an order of eviction for a building owned by the embassy of Lebanon, which argued its immunity from jurisdiction. Turkish Tribunals have the power to order over any person, gifted with physical or moral personality, with the exception of foreign State and diplomatic agents. However this immunity is not absolute and does not work when confronted to an act of management, only with those originating from acts of sovereignty. Moreover Article 33 of the Law on Private International Law and Procedure states that a State should not benefit from immunity from jurisdiction for conflicts relating to private law. Also the Vienna Convention 18 April 1961 (to which Turkey is a party) creates immunity only to diplomatic agents, not the state himself.

TR/5 – JUD – *Individual v. Consulate of the United States of America*

Cour de Cassation – 1989 - A foreign state has immunity from jurisdiction only for acts *jus imperii*. Phone bills and others degradations of properties by the US consulates have to be paid to the owner of these properties and the USA cannot claim immunity from jurisdiction because it constitutes an act *jus gestionis*.

Slovakia

SK/1 –LEG – National Council of the Slovak Republic – 1963 - Act No. 97 - Private International Law and Rules of Procedure – This legislation sets out the exemption of foreign states from the jurisdiction of the Slovak courts except for immovable property situated in the Slovak Republic, inheritance, employment or commercial activity outside of official duties.

United Kingdom

1) GB/1- JUD- *Intrpo Properties (UK) Ltd. v. Sauvel and others*

Court of Appeal – 1983 – The Court held that a state is not immune from jurisdiction of UK courts in a proceeding relating to an apartment leased by a foreign state for use as the private residence of one of its diplomatic agents in the UK. The state is only immune if property used for diplomatic mission.

GB/7 – *Kuwait Airways Corp v. Iraqi Airways Co*.

House of Lords - 1995 – "The seizure and removal of property by a State-owned entity of a foreign State on the orders of that foreign State, in the context of an armed invasion of another State, was an act in the exercise of sovereign authority. The subsequent retention and use of that property by the State-owned entity, following a formal legislative act vesting the property in the entity, were not acts in the exercise of sovereign authority." Therefore the claim of the state for immunity was rejected in this case.

Article 14

Intellectual and industrial property

Limited Immunity

Austria

A/1 – *Hoffmann Dralle v. Czechoslovakia*

PATENTS AND TRADE MARK – Supreme Court - 1950 – This case concerned the use of trade marks of a German firm in Czechoslovakia which were registered in Hamburg, Germany and Vienna, Austria. Pursuant to international and Austrian law foreign States are exempted from Austrian jurisdiction only in relations to act of a *jus imperii* character. In this case the respondent's claim to immunity concerned commercial and not political activities of a foreign sovereign State and thus the respondent was subject to Austrian jurisdiction.

Article 15

Participation in companies or other collective bodies

Article 16

Ships owned or operated by a State

Limited immunity

Germany

D/1 - Federal Foreign Minister

1978 - Germany rejected the USSR's reservation, regarding waiver of immunity provision in the International Convention on Civil Liability for Oil Pollution Damage with respect to ships used for commercial purposes, and assertion of immunity from jurisdiction.

Netherlands

NL/8 JUD – *Wijsmuller Salvage B.V. v. ADM Naval Services*

District Court of Amsterdam – 1987 – A Peruvian warship got into difficulties during sea trials in the North Sea. Wijsmuller Salvage B.V. successfully assisted the vessel. It applied to the Amsterdam District Court for an injunction attaching the cruiser and obtain payment of the salvage money. The defence was that the vessel belonged to a foreign power which was intended for use in the public service. The decisive criterion is the status of the ship at the time of attachment. Claim failed as the finding was that the ship was sailing under Peruvian command and was intended for use in the public service.

NL/12 – *The Russian Federation v. Pied Rich B.V.*

Supreme Court – 1993 – A Dutch company Pied-Rich B.V. concluded a tripartite contract with the Baltic Shipping Company and a number of Russian importers for the delivery of women's and children's wear. The company sold and delivered the goods to the Russian importers and payment was guaranteed by the Baltic Shipping Company and the Ministry to which the Baltic Shipping Company was responsible. The payment was not made to the company. The company applied to District Court to seize a vessel belonging to the Russian Federation for payment of any arbitration award made. The Supreme Court held that act was not in nature of governmental act, what was decisive was the nature of the act not the motive for it. There was no rule of unwritten international law to the effect that seizure of a vessel belonging to the State and intended for commercial shipping is permissible only if the seizure is levied for purpose of insurance or recover a maritime claim

NL/16 – JUD - *The United States of America v. Havenschap Delfzijl/Eemshaven* Supreme Court - 1999 – A United States ship Cape May caused damage to the quayside and incurred salvage costs while docked in Dutch port. The United States claimed immunity from payment as the ship had the status of warship or military supply ship, a public function. In this case, at time cause of action arose, the ship was used for typical government functions and therefore immunity was granted.

Sweden

S/23 – LEG – SHIPS – Swedish Parliament

1938 – Regulations regarding State-owned vessels and their cargo. Although ships carrying commercial cargo are not immune, warships used for sovereign acts as well as cargo freighted with such ships and also cargo belonging to the foreign state that is freighted with merchant vessels for non-commercial purposes are immune both for jurisdictional immunity and immunity of execution.

Turkey

TR/3 – JUD – *Individual v. USSR*

Cour de Cassation – 1987 - A warship from USSR involved in a sea accident with Turkish ship has immunity from jurisdiction. It constitutes an act jus imperii from the Soviet Union.

United Kingdom

GB/14 – *1°Congresso Del Partido*

House of Lords - 1981 – Since the doctrine of State immunity in customary international law forms part of English common law, a foreign State cannot claim State immunity in respect of acts *iure gestionis*. Consideration of whether an act is *iure gestionis* or *iure imperii* should turn on the nature of the act, and not its purpose or motive. Nonetheless, the entire context in which the claim against the foreign State was made had also to be considered. The breaches by the Defendant State, as owner of the ships, of its obligations towards the owners of the two cargoes in this case, were acts *iure gestionis.*

Article 17

Effect of an arbitration agreement (THESE CASES ARE ALSO INCLUDED UNDER WAIVER)

Croatia

HR/5 - JUD – *Company "S" Vinkovci, Croatia v. the Republic of Bosnia and Herzegovina, Ministry of Transport and Communications*

Zagreb Commercial Court – 1993 - The parties have previously agreed that any of their disputes would be subject to competence of the Zagreb Commercial Court. By doing so, the defendant (Republic of Bosnia and Herzegovina) could not bring the issue of its immunity as an obstacle to settle the dispute before the Croatian court. The court has ruled and executed its decision on defendant's assets with the consent of the Ministry of Justice and the Ministry of Foreign Affairs..

Czech Republic

CZ/5 – EXE – The Government of the Czech Republic/ Guarantee Agreement between the Czech Republic and Kreditanstalt für Wiederafbau

2001 – This is an agreement between the Government of the Czech Republic and the Kreditanstalt für Wiederaufbau waiving Czech immunity for a loan to partially finance the rehabilitation of a railway corridor.

CZ/8 – EXE – The Czech Republic as Guarantor, AERO Vodochody a.s. (the Company

Credit Agreement – 1997 - By contract term in Credit Agreement, a Czech corporation and the Czech Republic's expressly agrees to waive any and all rights to immunity relating to any of the credit documents to the fullest extent permitted by United States Foreign Sovereign Immunities Act, 1976. This appears to be an opinion of the Ministry of Finance of the Czech Republic regarding a certain Credit Agreement rather than an actual judicial claim.

France

F/8 – JUD – *French State and others v. société européenne d'études et d'entreprises et autres*

Court of Cassation – 1986 – The former Yugoslavian government signed a contract with a French company for the construction of a railway line. The contract contained an arbitration (compromissory) clause. The foreign State did not pay the whole debt; the company sought the decision of an arbitrator and the enforcement of the decision. The state claimed immunity. The Court of Cassation rejected the claims, stating that the introduction in a contract of the compromissory clause meant the renunciation to its immunity.

F/9 – JUD – *Société Creighton v. Ministry of finance of the State of Qatar*

Court of Cassation – 2000 – An American company obtained a decision from an arbitrator following a breach of contract by the State of Qatar. In execution of the decision, the French tribunal ordered seizures of accounts of the foreign State which claimed immunity from jurisdiction. The Court of Cassation rejected the claim to immunity. By accepting the procedure of the Chambre de Commerce Internationale, including art 24 which included renunciation to any recourse, the Court concluded there was a renunciation of the right to claim state immunity. This solution is in contradiction with the traditional interpretation of this article 24, which could *not* have as a consequence renunciation to immunity.

F/10 – JUD – *Embassy of the Federation of Russia v. société NOGA*

Court of Appeal of Paris – 2000 – The mention, in the contract in conflict, that the borrower renounces to any right of immunity concerning the application of an arbitrator's decision, does not prove the intention to renounce diplomatic immunity from execution or that the State agrees to let a private company block the functioning and actions of its embassies and representations abroad. Bank accounts of diplomatic missions of foreign states benefit from diplomatic immunity according to the Vienna Convention on Diplomatic Relations. Renunciation to "any right to immunity" does not have for consequence the disappearance of diplomatic immunity.

Russia

Rus/2 – 2202 – State Duma of the Russian Federation – Arbitration Procedural Code of the Russian Federation – Article 251 – The provision states that a foreign state acting as a sovereign enjoys immunity from the jurisdiction of the court in respect of a claim brought against it in arbitration courts of the Russian Federation. Execution against property by a decision of an arbitration court is permitted only with the consent of the competent authorities of the relevant state unless provided by international treaty or a federal law. Judicial immunity of international organisations is determined by international treaties or a federal law. Renouncement from judicial immunity must be made in the order and in that case the arbitration court proceeds with the case according to the order

Sweden

S/1 – JUD – *Tekno-Pharma AB v. Iran*

Supreme Court – 1972 – Tekno-Pharma AB applied for the appointment of an arbitrator since the Embassy had failed to do so according to a mutual arbitration agreement between the company and the Embassy. The court held that arbitration clauses do not constitute a waiver of immunity. The arbitration claims was not equivalent to an explicit waiver of immunity.

S/2 – JUD – *Libyan American Oil Company v. Libya*

Svea Court of Apeal – 1980 – In an agreement for an oil license between the Company and the State an arbitration clause was included for the settlement of disputes. After a dispute had arisen and arbitration had taken place, the Company applied for the arbitration to be executed as a Swedish judgement. Libya raised objections and claimed immunity. Court of Appeal finds that Libya, by approval of an arbitration clause, has waived its immunity. Libya appealed to the Supreme Court whereupon the Company withdrew its case.

Switzerland

CH/1- JUD - *Socialist Libyan Arab Popular Jamahiriya v Libyan American Oil Company* (LIAMCO) (62 ILR 228)

1ére Cour de droit public du Tribunal fédéral Suisse – 1980- LIAMCO concluded a contract with the former Libyan empire on oil production in Libyan. The contract specified that in a case of a dispute a court of arbitration shall decide over the location of the arbitration proceedings. Geneva was chosen as the location of the arbitration. After the arbitrator awarded in favour for LIAMCO, all on Swiss bank deposited Libyan assets were seized by a Swiss court decision. The court on an application to vacate the order that Libya had not waived state immunity with the clause of arbitration.

CH/9 – JUD – *Groupement d'Enterprises Fougerolle et consort v. CERN (102 ILR 209)*

1ére Cour civile du Tribunal fédéral Suisse – 1992 – The European Organization for Nuclear Research (CERN) decided to construct a circular tunnel as the site for a large electron/positron collider. The work was awarded to a consortium of five companies known as the Groupement Fougerolle. The contract provided for any dispute to be submitted to *ad hoc* arbitration. After an arbitration award Fougerolle was unhappy with it applied to appeal to the Swiss Federal Tribunal. CERN claimed absolute jurisdictional immunity in relation to every form of legal process before national courts. The court held that CERN was entitled to jurisdictional immunity. In contrast to the position in relation to State, the submission of an international organization to an arbitration clause

did not constitute waiver in the absence of a specific derogation in the headquarters agreement or an express waiver.

GENERAL PROVISIONS OR CASES NOT FALLING INTO UNITED NATIONS CONVENTION PROVISIONS

Austria

A/9 – JUD – *A.W. v. J.(H). A.F.L. (Head of State)*

Supreme Court – 2001- An Austrian filed a paternity suit against an incumbent head of State as well as against his sister and two brothers and applied for a declaration of paternity. The court held that an essential principle of international law was that foreign heads of state by virtue of their office at least during the term of their office were exempt from the jurisdiction of other states. They were also exempt from the jurisdiction of other states with regard to private acts, *rationae personae*. The Supreme Court further stated that only if legal action against an incumbent head of State in his home country is impossible, the right of declaration of paternity might, under the aspects of humanitarian law, precede the relevant principles of international law concerning immunity of heads of state.

A/10 – JUD – *K.S. (individual) v. Kingdom of B. (state)*

Supreme Court – 2001 – An Austrian filed an action against the Kingdom of B, claiming damages for compensation which arose from sanctions imposed by Austria's 14 EU partners claiming that the call to boycott and the decision to impose sanctions on Austria were not *iure imperii* and that the Kingdom of B was subject to Austrian jurisdiction. The court held that the both the Kingdom of B and Austria were parties to the Austrian convention on State immunity but Article 11 of this convention was not applicable as it did not cover immaterial damage. Therefore the Kingdom of B was immune from Austrian jurisdiction according to Article XV of the Convention and that the mentioned acts were an activity in the field of foreign policy and therefore acts of a *ius imperii* character.

A/11 – 2002 – The Austrian government submitted a bill to amend the status of OSCE institutions in Austria. One of these provisions relates to State aircrafts which participate in observation flights within the airspace of Austria. This provision grants certain privileges and immunities to these aircrafts and their personnel when passing through Austria.

Belgium

B/10- LEG - 1976

This was the legislation that enacted the European Convention on State Immunity ratified by Belgium on 10 June 1976.

Croatia

HR/1 – LEG – House of Representatives of the Parliament of the Republic of Croatia

Civil Litigation Act of Croatia – 1991 – Article 26 states that in a dispute involving a foreign state or international organisation the relevant rules are those of public international law. In case of any uncertainties regarding the existence of the scope of state immunity, an executive body in charge of judicial matters gives an explanation.

HR/7 – EXE – Ministry of Foreign Affairs of Croatia

2000 – In a dispute between private parties the issue of inquiry on the premises used by the diplomatic mission of the foreign state was raised. The inviolability of such premises was not established since the premises in question were not the ones notified as such by that state's diplomatic protocol. The Ministry established that the exemption from acts of inquiry by the court of law is recognized only on the premises of the diplomatic mission notified as such by diplomatic protocol of the receiving country.

Czech Republic

CZ/2, CZ3 – EXE – The Government of the Czechoslovak Socialist Republic

1981 - Questionnaire from the United Nations answered by Permanent Mission of Czechoslovak Socialist Republic – answers described position of Czechoslovak Socialist Republic based on doctrine of absolute immunity.

CZ/4 – EXE – The Supreme Court of the Czechoslovak Socialist Republic

1987 – The Supreme Court issued a general opinion on the interpretation of Act no. 97/1963 that: a) foreign diplomatic missions in the republic cannot be sued because they are organs of a foreign state and have no legal personality; b) the damage actions directed against a foreign state can only be heard in Czechoslovak courts if the state voluntarily submits to the jurisdiction; and c) submission of the foreign state to the hearing does not imply that the foreign state submits to the jurisdiction regarding execution of the judgement.

France

F/4 – JUD – *Neger v. Land of Hesse Government*

Tribunal de Grande Instances de Paris – 1969 – The immunity form jurisdiction exists only to the benefit of the State, which posses the right to exercise national activities, to freely determine their own capacity in the limits drawn by Public International Law. It is not applicable to a state member of a Federation, by which it is supervised. More generally, French jurisdictions do not recognize a right to immunity from jurisdiction to parts or agencies of a foreign State.

Germany

D/3 – EXE – Permanent Representative of Germany to the Council of Europe

1990 – the Permanent Representative filed a declaration stating that "The Federal Republic of Germany declares in accordance with paragraph 1 of Article 24 of the Convention that, in cases not falling under articles 1 – 13 (of the European Convention on State Immunity), its courts are 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 Convention. Such a declaration is without prejudice to the immunity from jurisdiction which foreign States enjoy in respect of acts performed in the exercise of sovereign authority.

D/4 – EXE – Permanent Representative of Germany to the Council of Europe

1992 – the Permanent Representative filed a declaration concerning Article 28 of the European Convention on State Immunity indicated that the Federal Government intended to convey the benefit of state immunity with regard to sovereign acts to all the constituent states of Germany.

D/5 – EXE – Permanent Mission of Germany to the United Nations

1994 – Statement during the discussion on the ILC Draft Convention on Jurisdictional Immunities of States and their Property in the 6th committee of the United Nations General Assembly with respect to various provisions in the convention.

D/19 – LEG – Federal Parliament

1984 – Art. 4 of the Second Act Amending the Act on the Federal Central Register. S 20(2) of the Courts Act incorporated the general rules of international law concerning the immunity of States and their officials.

D/20 – EXE – Judiciary Committee of the German Federal Diet

1989 – Report and Recommendation on the Government Draft of Act of Parliament required ratifying the European Convention on State Immunity. The Committee approved of the European Convention as establishing general rules which specify the extent of immunity from jurisdiction.

D/21 – LEG – Federal Parliament

1989 – Act ratifying the European Convention on State Immunity passed on 28 September 1989.

Netherlands

NL/1 – LEG – Article 13a of the Act on General Provisions of Kingdom Legislation

Beatrix Queen of the Kingdom of the Netherlands - the jurisdiction of the courts and the execution of judicial decisions and the deeds are subject to exceptions recognised in international law.

NL/2 – LEG – Act of 26 January 2001 establishing the Bailiffs Act

Beatrix Queen of the Netherlands – 2001-Article 3a of the Bailiffs' Act empowers the State to intervene if it considers that the service of a notification would be contrary to the obligations under international law.

NL/3 – EXE – Explanatory memorandum to the Bill for the approval of the European Convention on State Immunity

The minister of Justice and Minister of Foreign Affairs – 1984- in Dutch case law the theory of restricted immunity has now been firmly established. Judgments against foreign property are in principle enforceable, but may not in any case be enforced against property destined for public use.

NL/4 – LEG- Explanatory memorandum to the amendment of the Bailiffs Act

Deputy Minister of Justice – 1993 – it is clear from the conventions and from the Supreme Court case law that it is important whether the matter at issue was an act performed in the context of societal relationships governed by private law – If so the Dutch courts have jurisdiction - Both in treaties and in customary international law, immunity from execution is more readily accepted than immunity from jurisdiction.

Norway

N/5 – EXE – The Norwegian Ministry of Foreign Affairs

1999 – the Norwegian Ministry of Foreign Affairs answered questions concerning Norwegian practice on state immunity. The Norwegian Ministry of Foreign Affairs stated that it had not adopted any general law concerning immunity but complied with public international law. The Norwegian authorities acknowledged the distinction between the acts of a state in its sovereign capacity (*acte jure imperrii*) and those of a private law or commercial character (*acta jure gestionis*), immunity not being granted for the latter.

N/6 – EXE – The Norwegian Ministry of Foreign Affairs

1998 – in a letter the Norwegian Ministry of Foreign Affairs acknowledge the difference between the acts of a state in its sovereign capacity (*acte jure imperrii*) and those of a private law or commercial character (*acta jure gestionis*), immunity not being granted for the latter.

N/7 – EXE – The Norwegian Ministry of Foreign Affairs

2002 – in a verbal note the Norwegian Ministry of Foreign Affairs expressed that it does not consider that customary international law provides for an obligation to effect service through diplomatic channels nor that a notice of 60 days is compulsory.

Romania

RO/1 – EXE – The Court of Appeal of Bucharest

2003 – in a letter to the Chairman of the Court of Appeal of Bucharest from the Chairman of the IIIrd Civil Section on the viewpoint of the magistrates from that section on the sphere of States immunity the Chair stated that foreign states, its representatives of the diplomatic mission may not be defendant in any dispute tried in Romania taking into account that they enjoy immunity according to article 31 of the Vienna Convention on Diplomatic Relations.

Russian Federation

Rus/1 – LEG - Supreme Soviet of the Russian Soviet Federative Socialist Republic – 1964 - Article 435 of the Civil Procedural Code – A claim against a foreign state may only be taken with the consent of the competent authorities of the respective state. Members of diplomatic missions and other persons indicated in the relevant laws and international treaties of the USSR may be subject to the jurisdiction of the Soviet courts in respect of civil proceedings only to the extent provided by the norms of international law or international treaties of the USSR

Rus/3 – LEG – State Duma of the Russian Federation

1994 – Civil Code of the Russian Federation – Article 127 – particular aspects of liability of the Russian Federation and subjects of the Russian Federation in relations, regulated by civil legislation, with foreign entities, citizens or States are defined by a law on immunity of States and their property.

Rus/4 – LEG - State Duma of the Russian Federation

2002 – Civil Procedural Code of the Russian Federation – Article 401 – A claim against a foreign state or arrest of property of a foreign state can be taken only with consent of the competent authorities of that state unless otherwise provided by international treaty of the Russian federation or by a federal law. This provision will replace Article 435 in Rus/1.

Spain

E/1 – LEG

Article 21 of the LOPJ – 1985 – This law regulates the jurisdiction of Spanish Courts and tribunals. This article recognises an exception to the jurisdiction of the Spanish courts based on immunity of jurisdiction and immunity of execution as established by the norms of Public International Law.

E/2 - LEG - Royal Decree 1654

1980 - Article 7 - This article establishes that public lawyers acting in defence of the Spain must invoke jurisdictional immunities whenever applicable. Any renouncement of jurisdictional immunity must have the approval of the Foreign Ministers Office.

Sweden

S/10 – EXE – Ministry for Foreign Affairs

1970 – The Ministry provide a preliminary statement before the Council of Europe concerning the Draft Convention on State Immunity.

S/11 – EXE – Ministry for Foreign Affairs

1983 – The Ministry prepared an internal memorandum with objections to articles 4, 15, 20, 32 of the European Convention on State Immunity and to the fact that the Convention is only applicable between the Contracting States.

S/12 – EXE – Ministry for Foreign Affairs

1986 – Follow up to previous memorandums above by a statement that the objections to the European Convention may now be less valid.

S/13 – EXE – Governments of Denmark, Finland, Iceland, Norway and Sweden

1987 – Comments of the Nordic countries on the ILC draft articles regarding articles 3, 6, 11, 18, 19, 21, 23 and 24 and also regarding the heading of Part II and the distinction between *acta jure imperii* and *acta jure gestionis*.

S/14 – EXE – Governments of Denmark, Finland, Iceland, Norway and Sweden

1992 – Observations of the Nordic Countries on the ILC draft articles and the possibility to draw up a convention whose aim according to the Nordic Countries should be to draw workable lines of distinction between *acta jure imperii* and *acta jure gestionis*.

S/15 – EXE- Ministry for Foreign Affairs

1992 – Internal memorandum with comments on Articles 2, 10, and 18 of the Draft Articles and also on a deleted article regarding fiscal matters.

S/16 – EXE – Ministry for Foreign Affairs

1992 – Fax of the comments on the Draft Articles sent to the Permanent Mission of Sweden to the United Nations in New York.

S/17 – EXE – Ministry for Foreign Affairs

1992 – internal memorandum with comments on the Draft Articles 1-3, 5, 6, 8, 10, 11, 16, 18-22.

S/19 – EXE – Ministry for Foreign Affairs

1982 – In an official letter from the Ministry to the National Tax Board in response to the Board's inquiry for a statement on the question of immunity for the Soviet airline company Aeroflot the Ministry stated that Aeroflot is to be regarded as a government-owned company. Regarding the question of State immunity it is found that Aeroflot should probably not be considered to enjoy such immunity since its acts are commercial and not public.

Switzerland

CH/13 – JUD – *Bancode la Nación, Lima v. Banca cattolica del Veneto, Vicenza*

1st Court of Public Law of the Swiss Federal Tribunal – 1984 – Corporations, enjoying legal personality depending on their national law, cannot seek the immunity from jurisdiction used by foreign states. Exceptions are possible only if such a corporation has acted on the base of a power of sovereignty.

United Kingdom

GB/15 – *R. v. Inland Revenue Commissioners ex parte Camacq Corporation*

Court of Appeal – 1989 – The case concerned questions of the application of direct taxation to foreign sovereigns and whether this falls outside of s.16(5) of the State Immunity Act. The court held that the Inland Revenue was entitled to refuse to pay the whole of a tax credit to a foreign Sovereign, where it was clear that the transaction in question are artificially arranged to take advantage of the UK tax rules. There is no binding rule that the Inland Revenue had to give consent to payment of the amount of the tax credit direct to a foreign State.

2. Immunity of Execution

In this section the cases are divided into the three sections in the Convention and then into the absolute or limited doctrine of state immunity. It is clear from the literature and state practice that states are much more likely to use the doctrine of absolute immunity for execution and abide by the principle that the property of another state is not likely to be attached. However, once again there is a shift in practice towards a more restrictive doctrine.

Pre-Judgment measures of constraint – Article 18

A. Absolute Immunity

Croatia

HR/2 – LEG - House of Representatives of the Parliament of the Republic of Croatia

Execution Act of Croatia – 1996 – Article 18 states that an act of execution or an act of securing cannot be issued against the property of a foreign State without previous consent of the Ministry of Justice of the Republic of Croatia, except when a foreign State agrees on execution on insurance.

Finland

FIN/9 -EXE- AIRCRAFT (in foreign territorial sea) – Minister of Foreign Affairs of Finland - 1998

In a reply of the Minister for Foreign Affairs to a written question from a Member of Parliament the Minister stated that under international law a Finnish government aircraft wrecked during WWII and lying in territorial sea of Russia is immune from jurisdiction of any state other than flag state. The leading principle was that the property which relates to the acts of government enjoyed immunity as an expression of the sovereignty of the flag state. During the war, the use of war equipment by the armed forces constitutes an act of government. (In this case decision not to make claim due to treaties in force between two countries.)

Germany

D/10 – JUD – *Religious association with legal personality as an association registered in Germany (branch of the Church of Scientology) v. Director of New Scotland Yard*

Federal High Court – 1978 – The Plaintiff brought an action for a permanent injunction against the defendant in view of the fact that New Scotland Yard had issued a report on the Scientology movement accusing it of dishonest acts to the detriment of its members. This report had been sent to the Federal Office of Criminal Investigation upon its request and transmitted by it to all the state offices of criminal investigation. The Plaintiff claimed the allegations were untrue. The action was dismissed because the German courts did not have jurisdiction in view of the defendant's sovereign immunity. According to German law the exercise of police power is undoubtedly part of the sovereign activity of states.

D/12 – JUD – *Asylum seeker v. Federal Government*

Federal Administrative Court – 1988 – Tamil asylum seeker from Sri Lanka moved for cross examination of the Indian Minister of defence to support his allegation that Indian troops had engaged in indiscriminate killings of Tamils in Sri Lanka. The motion was denied because of state immunity. On appeal the court ruled that the testimony of the Indian defence minister would be concerning the mission of Indian troops deployed in Sri Lanka, their motives and their official acts. These questions concerns sovereign acts and therefore the Minister was under no legal obligation to testify and was not even required to do so by a rule of international law.

D/17 -JUD – *State of Brazil*

Frankfurt District Court - 2000- Foreign States enjoy immunity from execution against their assets, which serve sovereign purposes even if located in the forum state. Here there was a government bond, which served for balancing of the Brazilian state budget

Ireland

IRL/2 – JUD- *Angelo Fusco v. Edward O'Dea*

Supreme Court – 1994 – The Plaintiff applied for an order joining the government of the United Kingdom as defendant to a proceeding seeking his release from custody and for an order permitting service upon that government of a motion for discovery. The court held that the application be refused that it was not appropriate or necessary to join the government as a party or to make an order for discovery. The Supreme Court held that the principle of state immunity applied and that discovery would seem to undermine the principle of immunity and that discovery could not be asserted unless immunity was waived.

Italy

I/1 – LEG – Italian Government

1925 – Art. 1 of Decree – Law No. 1621 of August 30, 1925, turned into law No. 1263 of July 15, 1926, as amended - The Law provides immunity from confiscations, distraints, executions over properties that belong to foreign States, without authorization of the Ministry of Justice. The immunity applies, as declared by Ministerial decree, only for States in reciprocity with Italy. The declaration cannot be appealed against.

Constitutional court – 1992 – The single Article of Royal decree No. 1621 of August 30, 1925 turned into Law No. 1236 of July 15, 1926 was declared unconstitutional. The law referred to enforcement measures on foreign states' assets in Italy, and subjected any conservation measures on foreign states' assets to the authorization of the Minister of Justice. This law was declared unconstitutional in the part in so far as it made it necessary to obtain the authorization of the Minister of Justice for measures of protection or execution against property belonging to a foreign State other than property which, pursuant to the generally recognized rules of international law, could not be subject to coercive measures.
Furthermore, the Constitutional Court confirmed that, according to article 10 of the Constitution, that law must be considered as tacitly abrogated in conformity with international law, with regard to assets belonging to foreign States destined for public purposes.

I/2 – EXE – Ministry of Justice

1953 – Declaration of Reciprocity with Yugoslavia

I/3 – EXE – Ministry of Justice

1958 – Declaration of Reciprocity with Great Britain

I/4 – EXE – Ministry of Justice

1958 – Declaration of Reciprocity with Saudi Arabia

I/5 – EXE – Ministry of Justice

1960 – Declaration of Reciprocity with Argentina

I/6 – EXE – Ministry of Justice

1963 – Declaration of Reciprocity with Hungary

I/7 – EXE – Ministry of Justice

1965 – Declaration of Reciprocity with Yugoslavia

I/17 – JUD – *SpA Imprese maritime Frassinetti and SpA Italiana lavori marittimi e terrestri*

Supreme Court of Cassation - 1979 - Article 13 – Libya enjoys immunity from Italian civil jurisdiction in a dispute concerning the seizure of goods carried out by Libya. The seizure is a public act attributable to the Libyan state and therefore immunity rules apply. Libya was immune from Italian civil court jurisdiction in dispute with two Italian corporations regarding seizure by Libya of goods (appendix says 'belonging to foreigners') because seizure is undoubtedly a public act and foreign States are immune from disputes originating from said acquisition.

I/37 – JUD – *CF SpA v. Libya*

Tribunal of Piacenza – 1990 - Para. 3 of the single Article of Royal Decree 1621 of 1925, Article 10 Italian Constitution and CIL – A foreign State is not immune from jurisdiction in cases where the dispute concerns a merely private activity, such as the supply of goods. Also, assets of a foreign State necessary to exercise sovereign functions or to attain public goals cannot be seized or subjected to compulsory enforcement. Thus, seizure of bank current accounts is excluded.

I/38 – JUD – *Libya v. Condor Sri*

Supreme Court of Cassation – 1990 – CIL – As long as assets of a foreign state are used in the exercise of public functions or to attain public goals, the foreign state is immune from provisional and executive measures. The state is therefore also immune in case of conservatory measures, as long as the state's activities are carried out in a public capacity. See also II.B. above. [A foreign State is exempt from jurisdiction of the territorial State only in cases of acts *iure imperii*, except where the State acts as Italian citizens resorting to private instruments of domestic law.]

I/47 – JUD - *Cecchi Paone v. Czechoslovakia*

Pretore (lower court judge) of Rome - Articles 22, paragraphs. 1 and 3, and 31, paragraph 1.a., VC on Diplomatic Relations, 1961 – Foreign Embassy premises are immune from the jurisdiction of the Italian courts in case a concrete measures are taken on immovable property.

I/60 – JUD – *Libya v. Longo*

Supreme Court of Cassation – 1988 – Italian judge lacks jurisdiction in a case for request for conservative measures of goods in Italy belonging to the Libyan State, aimed at safeguarding credits for news reporting activities carried out in favour of such state.

<u>Netherlands</u>

NL/8 – JUD- *Wijsmuller Salvage B.V. v. ADM Naval Services*

District Court of Amsterdam – 1987 - Peruvian warship – Dutch company applied for interlocutory injunction attaching the cruiser in order to secure its rights and obtain payment of salvage money. The court held that the Peruvian warship was immune from attachment due to the fact that the ship was intended for use in public service. The court held that the decisive criterion was the status of the ship at time of the attachment

Nl/11 –JUD – *W.L. Oltmans v. the republic of Surinam*

Supreme Court – 1990 – The petitioner Oltmans requested that the Republic of Surinam be declared bankrupt on the ground that it had not paid a debt to Oltmans. The court held that it did not have the jurisdiction to declare a foreign power bankrupt as it would constitute an unacceptable infringement under international law of the sovereignty of the foreign state.

Russia

Rus/2 – LEG – State Duma of the Russian Federation

2002 – Arbitration Procedural Code of the Russian Federation – Article 251 – foreign state acting as a sovereign enjoys immunity from the jurisdiction of the court in respect of a claim brought against it in arbitration courts of the Russian Federation – execution against property by a decision of an arbitration court is permitted only with the consent of the competent authorities of the relevant state unless provided by international treaty or a federal law – judicial immunity of international organisations if determined by international treaties or a federal law – renouncement from judicial immunity must be made in the order and in this case the arbitration court proceeds with the case according to the order

Spain

E/1 LEG - Judicial Powers Act - Art. 21- 1985

This article recognises an exception to the jurisdiction of the Spanish courts based on immunity of jurisdiction and immunity of execution, as established by the norms of Public International Law.

E/3 – JUD – *Emilio M.B. v. Embassy of Guinea Ecuatorial*

Social Chamber of the Supreme Tribunal- 1986 -The Tribunal accepts limited theory, and the distinction between *acta iure gestionis* and *acta iure imperii*. The judgement states that immunities arising from the Vienna Convention on Diplomatic Relations differ from those granted by internal law to States as such, and that a restrictive doctrine should be applied to the latter as concern jurisdictional immunities. The judgement also states that the rejection of jurisdictional immunities does not mean the automatic denial of the immunities of execution.

E/4 – JUD - *Diana Gayle Abbott v. República de Sudáfrica*

Supreme Court – 1986 – The Supreme Tribunal reaffirms its previous judgment of 10 February 1986 establishing that Spanish courts are competent in cases related to labour law where foreign States are sued. The Tribunal confirms the restrictive scope of jurisdictional immunities for Spanish Courts and tribunals. It cites article 24 of the Spanish Constitution as an important argument for the recognition of the limited scope of jurisdictional immunities. The Tribunal also states that courts should take into account the distinction between immunity of jurisdiction and immunity of execution.

E/5 – JUD – *Diana Gayle Abbott v. Republica de Sudafrica*

Constitutional Tribunal -1990 -The tribunal applies the limited theory of immunity to the execution of judgements following the distinction between *act iure imperii* and *iure gestiones*. According to the Constitutional Court the measures of constraint against bank accounts of the Embassies are in any case covered by the scope of the immunity of execution and not subject to an embargo by domestic courts.

Sweden

S/ 5 – JUD – *Prakikertjänst AB Pensionsstiftelse v. Kronofogdemyndigheten I Stockholm (Stockholm enforcement service)*

Svea Court of Appeal –1992 – Swedish enforcement service prevented from a summary application for collection of rent from an embassy until the question of sovereign immunity determined.

Switzerland

CH/4 – JUD – *Royaume de Grèce v. Banque Julius Bär & Cie*

Chambre de droit public du Tribunal Fédéral Suisse – 1956 – A Swedish Company granted a loan of one million pounds to the Greek State guaranteed by bonds. One of the bonds became property of Julius Bär bank whom upon default sued for attachment of all monies standing in Greece's

favour in Geneva banks. The court ruled that the order for attachment must be set aside. In this case even if Swiss courts could assume jurisdiction over act *jure gestionis,* it could only do so if those acts had a connection with the Swiss state which was not the case here.

CH/23 – JUD - *République Arabe d'Egypte v. Cinetel*

Chambre de droit public du Tribunal Fédéral Suisse – 1979 – In 1964 a Liechtenstein company, CINTEL, entered into an agreement for the lease of films to the Egyptian State Television Authority. A dispute arose over the agreement and CINETEL started proceedings in the Swiss courts, obtaining an attachment of Egyptian assets in Switzerland. They obtained orders of attachment against the Egyptian office of Information and Tourism in Geneva. On appeal by Egypt the attachments were vacated. The court held that there was a distinction between jurisdictional immunity and immunity from execution. They cited the European Convention on State Immunity in support of this proposition. In this case the assets were used by the Egyptian State in their public power. The funds were allocated for the performance of sovereign activity.

United Kingdom

GB/11 – *Banca Carige SpA Cassa Di Risparmio Geneva E Imperia v. Banco Nacional De Cuba and another*

High Court, Chancery Division (Companies Court) – 2001 – In an application to allow proceedings to be served outside the jurisdiction the court considered immunity. In this case the immunity from enforcement proceedings of a central bank (section 14(4) State Immunity Act), was a relevant factor for a court to consider when deciding whether to exercise their discretion allowing proceedings to be served.

B. Limited Immunity

Netherlands

NL/12 – *The Russian Federation v. Pied Rich B.V.*

Supreme Court – 1993 – A Dutch Company, Pied Rich B.V. concluded a contract with the Baltic Shipping Company for the delivery of women's and children's wear. The payment was not made to company. The company applied to District Court to seize a vessel belonging to the Russian Federation for payment of any arbitration award made. The Supreme Court held that act was not in nature of governmental act, what was decisive was the nature of the act not the motive for it. There was no rule of unwritten international law to the effect that seizure of a vessel belonging to the State and intended for commercial shipping is permissible only if the seizure is levied for purpose of insurance or recover a maritime claim.

Switzerland

CH/8 – JUD – *République Arabe Uni v. Mrs. X*

Tribunal Fédéral Suisse – 1960 – In an application by Mrs. X for a pre-judgment attachment order against the funds of Egypt held in a Swiss bank account the court held on appeal that the attachment order was valid. A foreign state enjoyed immunity from jurisdiction for sovereign acts (*iure imperii)* but not for acts performed in the exercise of a private right *(iure gestionis).*

CH/10 – JUD – *Espagne v. SA Office des poursuites du canton de Berne*

Tribunal Fédéral Suisse – 1986 – A Swiss court attached real property in Switzerland, the property of the Italian centre for education and culture. Immunity from execution granted in this case due to the public nature of the use of the property. The foreign State cannot use immunity from jurisdiction or execution when opposed a claim based on a works contract, for such a claim is obviously not linked to acts of sovereignty. However, if the foreign State wants to establish a centre for social and cultural activities to the benefit of its nationals, the affectation is comparable to an act of a sovereign. Immunity must be partially recognized.

CH/15 – JUD – *Ferdinand and Imelda Marcos v. Office federal de la police*

1st Court of Public Law of the Swiss Federal Tribunal – 1989 – The Swiss authorities have been notified by a request form American judicial authorities to deliver account details of a former president of Philippines. Marcos requested his immunity from jurisdiction as a former head of State.

The tribunal has to decide if the immunity was prescribed or annulled. It held that the immunity of head of state, obviously justified in international relations, is awarded in the interest of the State and it would be illogical to be allowed to use it against that State. The immunity is based on several international treaties, and concern any act done during the period where the person hold the office of head of State. The immunity is not prescribed by the end of the official position. However a limit exists, the State which awarded the immunity to his head of State can take it away from his agent by a clear statement. The immunity is not a gift from the State to a person but a way for the State to protect himself in international diplomacy. The statement must be valid according to Swiss internal law. The Philippines' Foreign Office issued a statement by which it withdrew the immunity of the former president. The statement was valid and so the accounts details could be communicated to the American judicial institutions.

CH/16 – JUD - *Socialist Republic of Libya-Jamahiriya c. Actimon SA*

1st Court of Public Law of the Swiss Federal Tribunal – 1985 – A forced execution is possible on properties belonging to a foreign State only if these properties do not serve the exercise of public power. The immunity in international public law can only be used when the seized good is affected in a recognizable way to a material goal comparable to the use of a public power.

CH/17 – JUD – *Banca del Gottardo v. Chambre de recours pénale du Tribunal d'appel du canton du Tessin*

1st Court of Public Law of the Swiss Federal Tribunal – 1987 – Administrators of an establishment of a foreign state do not benefit from a diplomatic immunity, neither do the goods of a foreign State saved in a Swiss Bank and not directly affected to the exercise of a public power.

CH/20 – *Banque centrale de la République de Turquie v. Weston Compagnie de Finance et d'Investissement SA*

Tribunal Fédéral Suisse 1978 – In 1977 Lloyds Bank International granted a "time deposit" (form of loan) to a Turkish bank, the repayment would be made through the intermediary of the Central Bank of Turkey. Repayment was not made and Lloyds Bank assigned its rights to Weston CIE. Weston obtained two attachment orders against bank deposits by the Central Bank held in Switzerland. The Central Bank appealed but the court upheld the attachments. An agreement for the provision of a "time deposit" between two commercial banks to which the state was not a party, was to be classified according to its nature as a contract under private law over which the Swiss courts had jurisdiction (provided there was a sufficient connection between the transaction and Switxerland).

CH/21 – JUD – *Marcos and Others v. Chambre d'accusation du Canton de Genève*

1st Court of Public Law of the Swiss Federal Tribunal – 1987 – The State of Philippines is seeking information about accounts hold by its former president in order to establish charges of corruption and other criminal offences. The money gathered from these illegal activities was saved on accounts in Switzerland. The former president argued his immunity as a head of State. The Tribunal held that State Immunity, embodied in the Vienna Convention art 31 and 37, is a privilege of the state when acting *jure imperii* and transmitted to its agents, in particular its judges and diplomatic agents. It is not a personal privilege. It would be contrary to the logic of the protection to let a private individual, once representing the state but not any more, oppose it against the interest of this State. Moreover it is not to the Swiss judge to decide if the immunity remains, but to the judge deciding the facts of the case, here the Philippine Judge.

CH/24 – JUD – *Republique X. v. OFJ*

1st Court of Public Law of the Swiss Federal Tribunal – 2001 – A Swiss judge opened an inquiry about corruption and misuse of national funds by dignitaries of the Republic X. The American authorities informed by the Swiss Federal Office of Justice (OFJ), opened an inquiry and asked to block the suspected accounts and deliverance of accounts details. A company negotiated with private investors the price for oil extraction, the money being put on a banc account and then redistributed on accounts of society belonging to dignitaries. But in the last minute all the money was transferred to the account of the Republic X in the same Bank. The foreign state argued its

immunity from execution, saying that the company was exercising a sovereign power, the money originating from an act “link to the development of natural resources”. The Tribunal reaffirmed the constant rule about immunity, included in the distinction *acta jure imperii* and *acta jure gestionis*. In order to determine the nature of the operation creating the funds, we must see if it could have been contracted by any individual or only by a state. The tribunal notes that the use of a private society upon which the state has no power is a clear indication of a *jure gestionis*. The fact that the funds were kept “waiting for a future use in a task dictated by the State” could not by itself justify immunities.

CH/25 - JUD – *D-A v. Elf Aquitaine et AS; O B c. Chambre d’accusation du canton de Genève*

1st Court of Public Law of the Swiss Federal Tribunal – 1999 – French judicial authorities opened an inquiry into unfair competition into the adjudication of oil extraction rights, suspecting corruption. They asked authorities in Switzerland to communicate details of an account opened (and closed) by a shell company founded by D-A (and dissolved after the transfer) through which the money should have been transferred. A-D is the husband of an ambassador, and he argues that the real beneficiary of the funds was the President of the Republic. Arguing his immunity to the communication of the details, D-A lost in first instance and appeal. The tribunal follows the Court of Appeal. The legal problem is can D-A and the President claim their immunity as “third parties seized”. The Tribunal says that even if the rule of proceedings of the Canton recognizes in exceptional circumstances the possibility for the former administrator or economic heir to oppose a judicial order when used against a dissolved society, it accepts the Court of Appeal vision that this rule did not apply here, D-A having used a shell society which, after being founded without term for dissolution, conveniently disappeared once the money transfer finished. So A-D could only access the Court as the administrator of the society, and so the immunity could not be used.

Turkey

TR/7 – JUD – *Société c. v. Embassy of Turkmenistan*

Tribunal de Grande Instance – 2002 - Movable and immovable properties of a state can be subject to conservatory measures.

TR/08 – JUD – *Company v. embassy of Turkmenistan*

Tribunal de Grande Instance – 2002 – A Company negotiated a contract with the State of Turkmenistan, which breached the contract. The company obtained a decision from an arbitrator and seeks the confirmation of the judgment, in so doing interim measures of Protection on properties of the State of Turkmenistan according to the Convention of New York. The tribunal accepts the measures. Interim measures of Protection are possible against property of a foreign State.

Post-Judgment measures of constraint – Article 19 and Article 21

A. Absolute Immunity

Belgium

B/04 – JUD –*Republic of Zaire v. d’Hoop and others*

Court of Appeal – 1996 – A Belgian citizen obtained the seizure of accounts belonging to the Republic of Zaire in civil proceedings. The Republic of Zaire applied to the Court of Appeal. The Court decided to lift of the seizure on the ground that accounts of a foreign state cannot be seized or any decision executed by force against the state. Deciding otherwise would threaten the peaceful relations that the immunity rule should protect, and using force would be contrary to the sovereignty and the independence of the foreign state, especially in time of peace, without considering the use of the funds, private or to accomplish actions of sovereignty. Moreover a foreign State should have the same privileges that the Belgian government, which is protected from seizure of accounts by the *Code judiciaire*. The accounts are clearly used and useful for the expression of sovereignty, a total seizure on them would threat the continuity of the state and public services.

B/09 – JUD – *State of Iraq v. Vinci Construction Grand Projets S.A*

Court of Appeal – 2002 – Appeal from the *Iraq v. S.A.Dumez* case (see below). Following a contract breached by the State of Iraq, the claimant tried to seize the accounts of the Iraqi diplomatic mission in Iraq. They won in 1995, but the State of Iraq appealed. The Court of Appeal allowed the appeal, refusing to allow the seizure of the accounts on the basis of state immunity from execution. The Court reaffirmed the rule that forced execution is allowed against diplomatic accounts when the funds are affected to a private or commercial use, Vienna Convention 1961 art.25. In addition the Court held that there was a presumption of public use for the funds, lack of such a presumption negating the immunity itself, forcing the state to always justify the use of his own money and undermining his judgment in affecting it, a clear breach of sovereignty. Moreover, according to the Vienna Convention on diplomatic relations 18 April 1961, the diplomatic mission does not have to provide a detail of its accounts activities in his duty to collaborate to the burden of proof, these accounts being totally protected by state immunity.

Croatia

HR/2 – LEG - House of Representatives of the Parliament of the Republic of Croatia

Execution Act of Croatia – 1996 – Article 18 states that an act of execution or an act of securing cannot be issued against the property of a foreign State without previous consent of the Ministry of Justice of the Republic of Croatia, except when a foreign State agrees on execution on insurance.

Czech Republic

1) CZ/6 – General Health Insurance Company of the Czech Republic v. Embassy of the State of Palestine in the Czech Republic

District Court for Prague 1997 - Contract – A Czech insurance company could not execute its judgment for sums owed it by Embassy of the State of Palestine in the Czech Republic against the debtor's (Embassy's) bank account. The Embassy is merely an authority of the State of Palestine and, as such, it cannot be subject to the jurisdiction of Czech courts unless it voluntarily submitted to such jurisdiction.

Germany

D/9 – JUD – *Anonymous landlord v. Republic of the Philippines*

Federal Constitutional Court - 1977 – The Court upheld Philippines' objection to an attempt by landlord to execute on default judgment received for rent arrears and repairs expenses by seizing Philippine Embassy bank accounts. The court held that a State was immune from execution against embassy bank accounts because related to sovereign acts (*acta iure imperii*). *Ne impediatur legatio.* Presumption in favour of the foreign State-receivables from a current ordinary bank account of foreign embassy in forum state intended to cover embassy's expenses and costs are not subject to execution by forum State without its assent. Re other or special accounts-depends on evidence regarding their treatment as sovereign or non-sovereign. General international law draws the area of protection in favour of the foreign State very broadly and focuses on the typical, abstract danger, not on the specific endangerment of the functionality of the diplomatic representation.

D/17 – JUD - Creditor v. State of Brazil

Frankfurt District Court – 2000 – The Creditor had two executory titles against the debtor state and commenced an enforcement procedure trying to attach claims of the debtor against a group of banks arising from a Brazilian government bond to which banks had subscribed. The court held that pursuant to a general rule of international law foreign states enjoy immunity from execution. Execution against their assets which serve sovereign purposes is inadmissible even if these assets are located in a foreign state. The claims arising from the government bond against which execution is directed are exempt from execution because they serve the balancing of the Brazilian state budget.

Netherlands

NL/7 – JUD - M.K. v. State Secretary for Justice

Council of State, President of the Judicial Division – 1986 – The petitioner instructed a bailiff in the Hague to attach a bank account of the Republic of Turkey at the Algemene Bank Nederland in Amsterdam by way of execution of a judgment for unjust dismissal by the Turkish embassy in 1985. The Council of State held that as a result of a note verbale from the Turkish embassy the funds were for the purposes of the operation of the embassy and to give a further or more detailed account of the funds in this account would amount under international law to an unjustified interference in the internal affairs of this mission. Vienna Convention on diplomatic relations referred to.

NL/14 – JUD – The United States of America v. A.F.W. Deisman

Supreme Court – 1997 – In this case an attempt to serve default judgment at a military base was ruled invalid. The court held that a foreign state has no office within the meaning of Article 1:14 of the Civil Code at its military bases and therefore is not domiciled there.

NL/15 – JUD – State of Netherlands v. Azeta B.V.

District Court of Rotterdam – 1998 – In this case Azeta had arranged for the credit balances of the Chilean Embassy in an account at ABN-AMRO Bank in Amsterdam be attached by way of execution of a Judgment against Chile. The Ambassador lodged a protest with the Dutch Ministry of Foreign Affairs. The District Court held that the starting point is that according to unwritten international law a foreign state is entitled to immunity from execution involving property of that state intended for the public service – establishment, maintaining and running embassies must therefore be treated as property intended for the public service. Statement by the deputy Foreign Minister stating that the credit balances were intended for the running of the Chilean embassy were sufficient. Onus was on the company to prove that this was not the case and they had failed to do so. The defence argued that recognition of the immunity would jeopardise the immunity of Dutch administration of justice but the court held that a higher importance should in principle be attached to the rules of international law than to the rules of Dutch law, the interests of the uninterrupted functioning of a diplomatic mission should in this case prevail over the interests of executing a judgment in the Netherlands.

Turkey

TR/8 – JUD – *Société c. v. Embassy of Turkmenistan*

Tribunal de grande instance – 2002 – In this case after an arbitration pursuant to the Convention of New York on a property dispute over a hotel, the company attempted to take conservatory measures against the Embassy of Turkmenistan. The court held the execution could not proceed. (reasons not given in summary)

United Kingdom

GB/10 – *An International Bank v. Republic of Zambia*

High Court, Queen's Bench Division (Commercial Court) – 1997 – The Court held that submission to jurisdiction and waiver of the privileges of a State in relation to service of proceedings, do not imply a waiver of immunities/privileges in relation to service of a default judgment against a foreign state and execution.

B. Limited Immunity

Austria

A/2 – JUD- Verwaltungsgesellschaft mBH & Co.KG v. D V A

Supreme Court – 1986 - Execution of a judgement of an Embassy is only exceptionally permitted if the plaintiff proves that the account serves exclusively for private purposes of the embassy.

Belgium

B/05 – JUD – *Iraq v. S.A.Dumez*

Tribunal Civil – 1995 – The French company Dumez received considerable compensation from an Iraqi tribunal in 1990 for non payment by the Iraq government of building work. Turning to accounts held in Europe, Dumez obtained in France seizure of Iraqi diplomatic accounts and tried to use the

judgment in Belgium. The Tribunal Civil refused the Iraqi argument of state immunity and recognized the execution of the judgment. Firstly the Court rejected the immunity from jurisdiction, on the bases that the French tribunal had decided that the State of Iraq had behaved like a private person and that this decision had been granted for execution. Secondly the Court rejected immunity from execution. The Court *for the first time* clearly stated that the immunity from execution of goods depends on the nature of their use. If the goods were affected to action linked with state sovereignty, they would be immune from seizure, otherwise not. The Court, through interpretation of the Vienna Convention, saw no contradiction with the convention in asking a foreign state to prove the link between the goods and actions of state sovereignty. The particular facts of the case (Iraqi War, hundreds of millions of francs in the bank, accounts in different currency) the amounts clearly exceeded the needs of an embassy. The judge would have to decide what the good were used for, state sovereignty, and so immune, and the others that are not (introducing a kind of presumption of private nature of the goods).

B/06 – JUD – *Société de droit Irakien Rafidain Bank and others v. Consarc Corporation and others*

Court of Appeal – 1993 – Consarc was seeking compensation for the impossibility to fulfil a contract with the State of Iraq, involving furniture and equipment. Consarc attempted to obtain payment through the American judicial system but the government refused, having seized all Iraqi accounts. Consarc then turned to Belgian obtain a Judgment that recognized the debt and execution concerning accounts held in Belgian. The Court refused to apply immunity from jurisdiction to the act of the Iraqi Ministry of Industry, saying that state immunity from jurisdiction depends on the nature of the act. In this case the Ministry clearly acted as a private person, immunity cannot apply. Concerning Immunity from execution, the Court underlines that this particular type of immunity is aimed at leaving out of forced seizure, goods of a foreign state. However the Court did not elaborate on the definition and extended state immunity from execution.

B/07 – JUD - *Socobel v. Greek State and Bank of Greece*

Tribunal Civil – 1951 – The Greek State negotiated a contract with Socobel to construct railways and upgrade existing ones in Greece. The Greek State did not pay assuming that this debt would be part of its external public date, under moratorium. The Belgium Company tried to get payment from accounts hold by the Greek State in Belgium. The Tribunal decides that the debt was of a pure commercial nature, and that state immunity did not apply to the accounts hold by a foreign state. The tribunal said that it was incorrect to apply by analogy the rule of immunity from execution in favour of the Belgian State to a foreign state for the reason that the justifications of general interest and protection of goods affected to public services applies only to the Belgian internal public order. Moreover trust is an important part of international transactions, allowing immunity would diminish the possibility of trust when contracting with a foreign nation, in a context where the sovereignty of State is recognized as relative because of the growing commercial and economical relationships between states. The tribunal drew a parallel between immunity from jurisdiction and execution, when the act was categorised as a *jure gestionis*, the state lost both immunities.

B/08 – JUD – Leica *AG v. Central Bank of Iraq and State of Iraq*

Appeal Court – 2000 – The State of Iraq negotiated a contract with Leica, and refused to pay. Leica attempted to seize Iraqi bank accounts, which claimed State immunity from this execution. In appeal, the Court decided that the accounts cannot be seized. It reaffirmed the principle that immunity from execution could only be used for goods affected to public use and not to any kind of private purpose. The Court interpreted art.22 para.3 of the Vienna Convention of the 18th of April 1961 which would apply, according to customary rules, the division *jure imperii* and *juri gestionis*.

<u>Finland</u>

FIN/8 – EXE – Ministry of Foreign Affairs of Finland

1999 – The Ministry issued a statement that an execution against Iraq by way of foreclosure of the receivables of Iraq from the bankrupt's estate of another Finnish company was valid as participation by state in commercial activities not to be considered an act of government.

<u>France</u>

F/5 – JUD – *Société Eurodif v. Islamic Republic of Iran*

Court de Cassation – 1984 – In the context of a Franc-Iranian nuclear cooperation, the State of Iran signed a contract with EURODIF for the help in a program of production of enriched uranium. In the meantime, a revolution overthrew the kingdom and established the Islamic Republic of Iran, which ended the cooperation program. EURODIF sought seizure for the loan due to Iran by France, established at the same time as the cooperation program. The Court of Appeal accepted Iranian claims of immunity from execution. The Court of Cassation rejected these claims, stating that the Court of Appeal should have researched the nature of the legal rights of Iran on France. A State benefits from immunity of execution as a principle. The exception is when the goods/funds to be seized relate to an economic or commercial activity of private law in the heart of the legal dispute. There is a presumption of public use to the goods; the person willing to seize the goods must prove by any means necessary that the goods are related to an economical or commercial activity of private law *OR* that the legal claim find its cause in this economical or commercial activity.

F/6 – JUD – *SociétéCreighton Limited v. Ministry of Finances, Ministry of municipal affairs and agriculture of the State of Qatar*

Court of Appeal of Paris – 2001 – In a case concerned with the seizure of funds belonging to a foreign State, the Court of Appeal decided that funds belonging to a foreign State, related to the satisfaction of his contractual engagements or reserved to it, *or in lack of it*, property belonging to the foreign State situated on the French territory or which were going to be used for commercial ends *could be lawfully seized*. There is no obligation to establish that the funds where affected to the governmental entity targeted by the judicial procedure. This decision is widening the rule in *EURODIF v. Islamic Republic of Iran*.

F/7 – JUD – *Company Sonatrach v. Migeon*

Court of Cassation – 1985 – A decision from court orders Sonatrach, an Algerian national company on transport and commercialisation of hydrocarbon, to pay damages for breach of contract to a former employee. The employee seeks seizure of title of debts due by Gaz de France to Sonatrach. The Algerian government argued immunity from execution. The Court of Cassation agreed that goods belonging to a foreign state are in principle protected from forced execution. However goods belonging to public organisations, gifted with legal personality or not, distinct from a foreign State, when the goods are affected to their main private law activity can be seized. The Court of Cassation makes a distinction between the legal treatments of goods attributed to the state itself or to one of its organisation. The burden to prove the funds were affected to public activity falls on the organisation.

<u>Germany</u>

D/11– *National Iranian Oil Company case*

– Federal Constitutional Court - 1983 – Execution on bank accounts - The Court dismissed an action by an Iranian corporation owned by Islamic Republic of Iran against attachment and distraint of receivables on accounts with banks pursuant to German court orders (petitioned by British & US firms). The court held that the corporation was not a sovereign State but a separate legal entity under Iranian private law. This is so irrespective of whether the credits on these accounts are at the free disposal of the enterprise or, according to foreign law, intended for transfer to an account of the foreign State with its central bank.

<u>Italy</u>

I/15 – JUD – *Sindacato UIL-Scuola di Bari v. Istituto di Bari del Centro internazionale di studi*

Supreme Court of Cassation -1986 - Article 10, Italian Constitution & CIL - Foreign States are immune from civil jurisdiction only when they act as sovereign bodies and not when they act as private subjects. They are not immune from employment disputes as broadly as provided in the ECSI as that had not been adopted at the time of this case.

I/16 – JUD – *Paridiso v. Istituto di Bari del Centro internazionale di alti studi agronomici mediterranei*

Supreme court of Cassation -1981- Article 10 Italian Constitution & CIL - In a dispute between an Italian individual and a body corporate (Italian state institute), the institute is immune from jurisdiction and execution to the extent it is performing State institutional goals.

I/41 – JUD – *Condor and Filvem v. Ministry of Justice*

Constitutional court – 1992 – The single Article of Royal decree No. 1621 of August 30, 1925 turned into Law No. 1236 of July 15, 1926 was declared unconstitutional. The law referred to enforcement measures on foreign states' assets in Italy, and subjected any conservation measures on foreign states' assets to the authorization of the Minister of Justice. Only assets were exempt that cannot be subjected to such measures according to general international law. The Italian Minister of Justice has the authority to authorise conservatory acts or enforcement measures on assets belonging to a foreign State, except for assets prohibited from enforcement by 'generally recognised international law measures'.

I/73 - JUD – *United Arab Emirates v. Pinto*

Supreme Court of Cassation – 1999 – The immunity of a foreign state can be adequately safeguarded by the appeal against execution.

I/74 – JUD – *Egypt v. Refaat Armina*

Supreme Court of Cassation – 1999 – The preventive rule of jurisdiction by which a foreign state claims immunity from jurisdiction on the seizure of sums of money is inadmissible. Therefore appeal against the execution is admitted.

Netherlands

NL/5 - *Societe Europeenne d'Etudes et d'Entreprises en liquidite volontaire v. Socialist Federal Republic of Yugoslavia*

Supreme Court - 1973 – The issue concerned a contract over the construction of a railroad in Yugoslavia. The company in the Netherlands wanted to enforce arbitration award on Yugoslav property in Netherlands. The court held that there was no rule of international law that there shall be no execution against foreign state-owned property situation in the territory of another state. The court ruled that the Kingdom of Yugoslavia entered into a private law transaction and it made no difference if railroad had military or strategic character.

NL/6 – JUD - *The Kingdom of Morocco v. Stichting Revalidatie Centrum "De Trappenberg"*

District Court of Amsterdam – 1978 – The daughter of the cleaner of the Moroccan Consulate-General at Amsterdam was seriously injured in an accident at the Consulate. The rehabilitation centre applied for the court for a garnishment in order to secure funds held by Morocco in the Banque de Paris et des Pays-Bays. It was alleged that Morocco was liable in tort for failure to ensure that the caretaker was adequately insured. In this case the garnishment was granted as Morocco could not rely on immunity for the tort as it was an act or omission in which Morocco was involved in the same capacity as a private citizen.

NL/9 –JUD – *Republic of Zaire v. J.C.M. Duclaux*

Court of Appeal of the Hague – 1987 - Hague Sub-District Court ordered the Republic of Zaire to pay arrears of wages to Duclaux who worked as a secretary at the Embassy of Zaire. Duclaux petitioned the District Court of the Hague to declare Republic of Zaire bankrupt to enable her to collect debt. The Court of Appeal rejected the bankruptcy, due to the fact that the bankruptcy would disrupt the diplomatic mission. Therefore, the sending State can invoke its immunity from execution in proceedings before the court in the receiving State.

Spain

E/6 – JUD – *Esperanza Jequier Beteta v. Embajada de Brasil*

Constitutional Tribunal – 1994 -The constitutional Court confirms the application of the limited theory of immunity to the execution of judgments following the distinction between acts *iure imperii* and *iure gestiones*. In this case the judgment appealed partially violated the right of the appellant

because it did not examine whether the execution sought was possible taking into account the relative theory of State immunities.

E/7 – *Emilio Biano Montero v. Embajada de Guinea Ecuatorial*

Tribunal Constitucional – 1997 - The Constitutional Court defined once again the fundamental right to a fair hearing and the rights to enforce judicial judgments. The enforcement is an integral part of the fundamental right provided for in article 24 of the Constitution. The Constitutional Court declared that the tribunals did not exhaust the possible ways of execution available, such as credits, aid or subsidies granted to the foreign state.

E/8- JUD – *Maite G.Z. v. Consulado General de Francia*

Tribunal Constitucional -2001 - Constitutional Tribunal applies once again the limited theory of immunity of execution. The Court affirms that the property of diplomatic and consular missions is absolutely immune against measures of execution.

Sweden

S/19 – EXE – Ministry of Foreign Affairs

1981 – In an Official Letter the Ministry sent to Jens Pederson in connection with an application for execution the Ministry wrote to him explaining that the practice of the Ministry was not to make a statement on immunity but referred him to Swedish universities. In connection with an application for execution the Enforcement Service had determined that Uganda did not enjoy immunity in consideration with the kind of dispute before enforcement service.

Switzerland

CH/3 – JUD – *Griessen v. Autorité de surveillance des offices de poursuite pour dettes et de faillite du canton de Genève*

Swiss Federal Tribunal – 1982 – Mr Griessen was the temporary consul for the Republic of Chad. However, he also had a commercial activity in the same address in Geneva, not separating the two activities in his accountability either. After a breach of contract his account was seized for payment of the debt. He argued that he was immune from execution thanks to his diplomatic status and functions in the embassy even if he used private funds to run it. The Tribunal, after reaffirming the rule that immunity of execution affects only state funding that are clearly used or going to be used for the running of the diplomatic mission or an act of public sovereignty, wonders if we should extend that protection to private funds used for the running of the embassy. The Tribunal does not answer that question, the problem being here that the consul mixed in the same account funds affected at the running of the embassy and the funds affected for his private commercial activities. In the incapacity to separate one from the other, the *Autorité* had no choice but to seize the totality of the account.

CH/8 – JUD – *United Arab Republic v. lady X.*

Swiss Federal Tribunal – 1960 – The UAR rented a villa in Vienna from a Lady living in Zurich, rent payable to a bank in Switzerland. The rent being unpaid, the Lady sought seizure of accounts hold by the UAR. This account was destined for the payment of an armament contract, however the other party to the contract ceased his commercial activities due to bankruptcy and the UAR was seeking in another instance the nullity of the contract. The UAR opposed the seizure claiming immunity from execution and jurisdiction.

Immunity from jurisdiction: (see above)

Immunity from execution: Contrary to other European countries, Switzerland does not have a major problem with immunity from execution, because of the necessary factor connection the act to its internal system. The division *jure imperii* and *jure gestionis* applies here again to the thing under forced execution but must be looked at differently in a restrictive view. The State has the liberty to designate its funds to whatever end, and protect them by allocating them to public objectives, of which defence is a part. In that case the Tribunal has only check if the funds where indeed designated to payment of weapons, and did not question the allocation by itself. The end of the contract with the armament society meant that the funds were left without allocation, for the will of

the state cannot alone designate it to a goal, positive actions must be taken. The lack of allocation, falling neither under *jure imperii* or *jure gestionis* is seen as casting aside immunity from execution.

CH/11 – JUD – *S v. Socialist Republic of Romania and Cour des poursuites et faillites du Tribunal du canton de Vaud*

1st Court of Public Law of the Swiss Federal Tribunal – 1987 – Mr S. left Romania, and so doing was obliged by law to sell his property to the State, a decree establishing that one might be the owner of a part of land only if living in Romania. Mr S returned to Switzerland where he asked for the seizure of the accounts of Romania, in order to quash the forced transaction. The Tribunal reaffirmed the rule of limited immunity from jurisdiction, based on the distinction between act of sovereignty and act of administration. The forced acquisition or transaction of property, comparable to nationalisation of goods, is to be seen as an act of sovereignty, being based on a decree and carried out by an official public power, the individual having no choice but to agree. Immunity was recognized.

CH/19 – JUD – *Universal Oil Trade Inc. v. Islamic Republic of Iran*

2nd Court of Civil Law of the Swiss Federal Tribunal – 1981 – The State of Iran, creditor of the Oil Company obtained a seizure of its accounts. The Company appealed, on the grounds that Iran, as a State and beneficiary of State Immunity, could not enter in a civil proceeding. The Tribunal says that contrary to the defendant's position, a State, even if protected as a defendant, could still use the judicial system of another state to enforce his rights. However, the consequence of such action is an implicit renunciation of its immunities concerning subsidiary claims attached to the main conflict.

Turkey

TR/01 – JUD – *Individual v. Embassy of Lebanon*

Great Chamber of the Court of Cassation – 1991 – The Turkish State issued an order of eviction for a building owned by the embassy of Lebanon, which argued its immunity from jurisdiction. Turkish Tribunals have power to order over any person, gifted with physical or moral personality, with the exception of foreign State and diplomatic agents. However this immunity is not absolute and does not work when confronted to an act of management, only with those originating from acts of sovereignty. Moreover Article 33 of the Law about Private International Law and Procedure states that a State should not benefit from immunity from jurisdiction for conflicts relating to private law. Also the Vienna Convention 18 April 1961 (to which Turkey is a party) creates immunity only to diplomatic agents, not the State.

TR/6 – JUD – *Société X v. United States of America*

Cour de Cassation – 1993 - A foreign state cannot invoke immunity from execution. Properties from a foreign state can be seized in Turkey.

TR/07 – JUD – *Company X v. embassy of Turkmenistan*

Tribunal de Grande Instance – 2002 – A company which entered into a contract with the state of Turkmenistan, is asking seizure of some state properties for lack of payment. The State tries to argue its immunity. The Court reaffirms the rule of the Court of Cassation that there is no immunity from execution in Turkish law.

TR/09 – JUD – *Company v. Republic of Azerbaïdjan*

Tribunal d'éxecution – 2001 – After obtaining the ca judgement against the foreign State according to Art 33 of the Law on International Private Law and Procedure, a company seeks seizure of some of its property. The tribunal does not accept the parallel between the immunity given to the properties of the Turkish State and the protection the foreign State claims. Seizure of property of foreign States is possible in Turkey without immunity available.

United Kingdom

GB/2 – *Alcom Ltd. V. Republic of Columbia*

House of Lords – 1984 – In an issue of execution on bank accounts the court held that the bank accounts of a diplomatic mission used for defraying the expenses of running the mission enjoy

immunity of execution. Since the account is indivisible, it is not property "in use or intended for use for commercial purposes" within section 13(4) of the State Immunity Act. The State immunity Act should be construed to accord as far as possible with customary international law.

GB/5 – *Re Rafiidain Bank*

High Court, Chancery Division – 1991 – The court referred to section 6 (3) of the State Immunity Act and held that in the context of the liquidation of a commercial company owed by a foreign State, monies owed by the company are not protected by State immunity and can not therefore be paid out by the liquidators in preference to other creditors.

GB/12 – *Trendtex Trading Corporation v. Central Bank of Nigeria*

Court of Appeal – 1977 – The restrictive doctrine of state immunity as recognised in customary international law is part of the common law. The Central Bank of Nigeria was not an emanation of the State entitled to claim immunity. Since the Bank was not immune, its funds were not immune from seizure or injunction.

Effect of consent to measures of constraint – Article 20

Croatia

HR/2 – LEG _ House of Representatives of the Parliament of the Republic of Croatia

Execution Act of Croatia – 1996 – Article 18 states that an act of execution or an act of securing cannot be issued against the property of a foreign State without previous consent of the Ministry of Justice of the Republic of Croatia, except when a foreign State agrees on execution on insurance.

3. Waiver of immunity

Croatia

HR/5 - JUD – *Company "S" Vinkovci, Croatia v. the Republic of Bosnia and Herzegovina, Ministry of Transport and Communications*

Zagreb Commercial Court – 1993 - The parties have previously agreed that any of their disputes would be subject to competence of the Zagreb Commercial Court. By doing so, the defendant (Republic of Bosnia and Herzegovina) did not bring the issue of its immunity as an obstacle to settle the dispute before the Croatian court. The court has decided and executed its decision on defendant's assets with the consent of the Ministry of Justice and the Ministry of Foreign Affairs.

HR/6 – JUD - *Company "S" Vinkovci, Croatia v. the Republic of Bosnia and Herzegovina, Ministry of Transport and Communications*

Zagreb Commercial Court – 1999 – In the dispute before the Municipal Court, the defendant did not raise the issue of state immunity and filed a counterclaim. The Zagreb Municipal Court gave a decision in favour of the plaintiff. In the same case the defendant lodged a complaint with the Zagreb District Court for reasons unrelated to state immunity and the process is still ongoing.

Czech Republic

CZ/5 – EXE – The Government of the Czech Republic/ Guarantee Agreement between the Czech Republic and Kreditanstalt für Wiederafbau

2001 – There was an agreement between the Government of the Czech Republic and the Kreditanstalt für Wiederaufbau waiving Czech immunity for a loan to partially finance the rehabilitation of a railway corridor.

CZ/8 – EXE – The Czech Republic as Guarantor, AERO Vodochody a.s. (the Company)

Credit Agreement – 1997 - By contract term in a credit agreement, a Czech corporation and the Czech Republic expressly agreed to waive any and all rights to immunity relating to any of the credit documents to the fullest extent permitted by United States Foreign Sovereign Immunities Act, 1976. This is an opinion of the Ministry of Finance of the Czech Republic regarding a certain Credit Agreement rather than an actual judicial claim.

Finland

FIN/11 – JUD – *Inkeri Kivi-Koskinen v. Kingdom of Belgium*

District Court of Helsinki – 1999 – In a case concerning the termination of an employment contract between the Embassy of Belgium and its locally recruited secretary, Belgium did not react to the claim and the Court entered default judgment. Belgium moved to the court to vacate the judgement claiming immunity but the case was not heard as the parties settled the suit and a friendly settlement was confirmed by the court and the earlier judgment was vacated.

FIN/15 – JUD – *Metra Oy Ab (company) v. Republic of Iraq*

District Court of Helsinki – 1999 – This case concerned a debt obligation of the State of Iraq towards a Finnish company. A default judgement was issued against Iraq who waived immunity.

France

F/8 – JUD – *French State and others v. société européenne d'études et d'entreprises et autres*

Court of Cassation – 1986 – The former Yugoslavian government signed a contract with a French company for the construction of a railway line. The contract contained a arbitration (compromissory) clause. The foreign State did not pay the whole debt; the company sought the decision of an arbitrator and the enforcement of the decision. The state claimed immunity. The Court of Cassation rejected the claims, stating that the introduction in a contract of the compromissory clause meant the renunciation to its immunity.

F/9 – JUD – *Société Creighton v. Ministry of finance of the State of Qatar*

Court of Cassation – 2000 – An American company obtained a decision from an arbitrator following a breach of contract by the State of Qatar. In execution of the decision, the French tribunal ordered seizures of accounts of the foreign State which claimed immunity from jurisdiction. The Court of Cassation rejected the claim to immunity. By accepting the procedure of the Chambre de Commerce Internationale, including art 24 which included renunciation to any recourse, the Court draws a renunciation to state immunity. This solution is in contradiction with the traditional interpretation of this article 24, which could *not* have as a consequence renunciation to immunity.

F/10 – JUD – *Embassy of the Federation of Russia v. Société NOGA*

Court of Appeal of Paris – 2000 – The mention, in the contract in dispute, that the borrower renounces to any right of immunity concerning the application of an arbitrator's decision, does not prove the intention to renounce to diplomatic immunity from execution. It also does not provide that the State agrees to allow a private company to block the functioning and actions of its embassies and representatives abroad. Bank accounts of diplomatic missions of foreign states benefit from diplomatic immunity according to the Vienna Convention on Diplomatic Relations (1961). Renunciation to "any right to immunity" does not have for consequence the disappearance of diplomatic immunity.

Italy

I/50 – JUD – *Cuba v. Sonnino*

Supreme Court of Cassation – 1995 - An Italian judge has jurisdiction when a foreign Embassy in Italy files a civil claim against an Italian citizen. It is not possible to enjoy immunity as provided for in Article 31 of the VC on Diplomatic Relations 1961.

Portugal

P/1 – JUD – *United States of America v. Companhia Portguesa de Minas*

Supreme Court – 1962 – In a dispute between the United States of America and a private company the court held that the only exception to immunity is express or tacit waiver and cases related to immovable property or forum hereditatis. Tacit waiver presupposes a concrete will by the author of the waiver and resort to judicial proceedings by a foreign state, namely in the case of a counterclaim, cannot be considered as amounting to such waiver.

P/14 – JUD - *Maria Aparecida Pereira de Melo Cunha Brazão v. Brazilian Embassy*

District Court – 2000- In the case of an individual against Brazilian embassy it was held that immunity from jurisdiction must have a restrictive scope limited to acts of public power. When a State acts *jure gestionis,* there is no immunity. In labour contracts the foreign state is a mere contractual party acting without jus imperii and thus should be treated equally with other private persons. However in this case, the Republic of Brazil waived such immunity by accepting the local jurisdiction by refraining from invoking such immunity, having accepted to the cited and having appointed a lawyer to represent the state in court.

Russia

Rus/2 – 2202 – State Duma of the Russian Federation – Arbitration Procedural Code of the Russian Federation – Article 251 – A foreign state acting as a sovereign enjoys immunity from the jurisdiction of the court in respect of a claim brought against it in arbitration courts of the Russian Federation. Execution against property by a decision of an arbitration court is permitted only with the consent of the competent authorities of the relevant state unless provided by international treaty or a federal law. Judicial immunity of international organisations is determined by international treaties or a federal law. Renouncement of judicial immunity must be made in the court order and in this case the arbitration court proceeds with the case according to the order

Rus/6 – JUD – *Embassy of State X v. Russian Company*

High Court of Arbitration of the Russian Federation -2001- A foreign embassy brought a claim from a building contract. There was a counterclaim in same case by the Russian company. The embassy claimed immunity but Court of Appeal revoked the decision of the lower court stating that the embassy had lost its right to invoke immunity by instituting the initial proceeding before the Russian Court.

Rus/7 – JUD –*M. Kalashnikova*

Constitutional Court of the Russian Federation – 2000 – A Russian citizen was dismissed from the Embassy of the United States and she applied based on the contract of employment that her dismissal was unlawful. The lower Russian court rejected her claim for reasons on immunity of an Embassy of a foreign State provided for in art. 435 of the Civil Procedural Code. However, the Constitutional court held that the relevant provisions of the Civil Procedural Code were subsidiary to the provisions of the Labour Code in case of disputes arising from labour contracts. The lower court did not study the question of the application of Russian legislation by an Embassy of a foreign state could be considered as its consent for the jurisdiction of the Russian courts. The Constitutional Court held that the claim was to be considered by the lower court

Sweden

S/1 – JUD – *Tekno-Pharma AB v. Iran*

Supreme Court – 1972 – Tekno-Pharma AB applied for the appointment of an arbitrator since the Embassy had failed to do so according to a mutual arbitration agreement between the company and the Embassy. The court held that arbitration clauses do not constitute a waiver of immunity. The arbitration claims was not equivalent to an explicit waiver of immunity.

S/2 – JUD – *Libyan American Oil Company v. Libya*

Svea Court of Apeal – 1980 – In an agreement for an oil license between the Company and the State an arbitration clause was included for the settlement of disputes. After a dispute had arisen and an arbitration had been passed, the Company applied for the arbitration to be executed as a Swedish judgement. Libya raised objections and claimed immunity. The Court of Appeal held that Libya, by approval of an arbitration clause, had waived its immunity. Libya appealed to the Supreme Court whereupon the Company withdrew its case.

S/3 – JUD – *Ministerium Fur Assenhandel der Deutschen Demokratischen Republik v. Riksfösäkringsverket*

Supreme Administrative Court – 1986 - The Deutschen Demokratischen Republik was found to have waived its possible immunity by not invoking immunity earlier than before the Supreme Administrative Court. The claim was for employment tax in Sweden for employees working for the DDR trading centre in Gothenburg. In earlier court hearing DDR did not claim immunity.

S/20 – EXE – Ministry for Foreign Affairs

1985 – in a statement to the Supreme Administrative court the Ministry stated that the DDR's trading centre in Gothenburg was not part of the Agreement concerning the establishment of diplomatic relations between Sweden and the DDR and there had been no provision for immunities or privileges for the trading office.

Switzerland

CH/1- JUD - *Socialist Libyan Arab Popular Jamahiriya v Libyan American Oil Company* (LIAMCO) (62 ILR 228)

1ÈreCour de droit public du Tribunal federal Suisse – 1980 - LIAMCO concluded a contract with the former Libyan empire on oil production in Libya. The contract specified that in a case of a dispute a court of arbitration shall decide over the location of the arbitration proceedings. Geneva was chosen as the location of the arbitration. After the arbitrator awarded in favour for LIAMCO, all Swiss bank deposited Libyan assets were seized by a Swiss court decision. The court on an application to vacate the order held that Libya had not waived state immunity with the clause of arbitration.

CH/20 – JUD – *Universal Oil Trade Inc. v. République Islamique d'Iran*

2éme Cour de droit civil du Tribunal Fédéral Suisse – 1981 – Iran applied for and obtained from a Swiss Court an order for attachment of the assets of the Universal Oil Trade Company held in Geneva. The company brought an action to vacate the attachment due to the fact that Iran should be subject to immunity. The court dismissed the appeal holding that when a State initiated proceedings of its own volition before a Court of another State it submitted itself to the principle of territoriality of that State by the very fact of having recourse to its jurisdiction. This applied in particular when a foreign State appeared as a claimant before the local courts. It thereby submitted itself *ipso facto* to counterclaims related to the principal claim and henceforth not entitled to raise a plea of jurisdictional immunity against them.

United Kingdom

GB/4 – *A Co. Ltd. V. Republic of X*

High Court (Queen's Bench) - 1989 – A contractual waiver of State immunity from jurisdiction and enforcement, will not be sufficient to waive the inviolability and immunity of either the premises and/or property of a diplomatic mission, or the private residence and/or property of a diplomatic agent, enjoyed under, respectively, Articles 22 and 30 of the Vienna Convention on Diplomatic Relations.

GB/6 – *Ahmed v. Government of the Kingdom of Saudi Arabia*

Court of Appeal – 1995 – The Court held that a foreign State enjoys immunity from the UK courts in respect of proceeding arising out of employment contracts of all members of its diplomatic mission, including locally engaged members of the technical and administrative staff. The requirement that a waiver of immunity must be by way of prior written agreement, must be an express and complete agreement to submit to the jurisdiction, made by the head of the diplomatic mission or some other person endowed with the authority of the sending State. The court held that a solicitor's letter setting out that staff would have rights under English law for unfair dismissal did not constitute a waiver of immunity.