STATE IMMUNITY: TOWARDS AN INTERNATIONAL LEGAL REGIME

Dissertation submitted to the Jawaharlal Nehru University
in partial fulfilment of the requirements for
the award of the Degree of
MASTER OF PHILOSOPHY

TULASI DAS PUROHIT

CENTRE FOR STUDIES IN DIPLOMACY,
INTERNATIONAL LAW AND ECONOMICS
SCHOOL OF INTERNATIONAL STUDIES
JAWAHARLAL NEHRU UNIVERSITY
NEW DELHI
1987

ACKNOWLEDGEMENTS

I am deeply indebted to my supervisor, Prof.R.P.Anand, for his inspiring supervision and guidance. His criticisms and suggestions have made this work a substantially better one than it would otherwise have been. I express my heart-felt gratitude to him.

I am also grateful to other teachers and researchers in the International Legal Studies Division of the School of International Studies. My discussions with them have always been a source of inspiration and guidance.

I shall be failing in my duty if I don't record my gratitude to my friends -- Manik, Parvaiz, Sahadevan, Stephen and Sudhi Ranjan -- who have helped me in more ways than one in the preparation of this dissertation.

I would also like to acknowledge with thanks the assistance and facilities extended to me by the staff of the libraries of JNU, ICWA, ISIL and the UN Information Centre. My thanks are also due to Mr Chand Sharma who typed this dissertation at a short notice.

This work of mine is based on the findings of a number of authors, jurists, Institutions, academic circles, etc. To them I express my sense of gratitude.

I don't have words to express my gratitude to my parents. But for their encouragement and support, I would not have been able to accomplish this work.

New Delhi
17 December 1987

Tulasi Das Purohit

CONTENTS

LIST OF ABBREVIATIONS

AALCC	Afro Asian Legal Consultative Committee.
AJIL	American Journal of International Law.
AIR	All India Reporter.
AYBIL	Australian Yearbook of International Law.
BYBIL	British Yearbook of International Law.
CJTL	Columbia Journal of Transnational Law.
FSIA	Foreign Sovereign Immunity Act, USA.
IJIL	Indian Journal of International Law.
ILC	International Law Commission.
ILM	International Legal Materials.
JT	Judicial Times.
LNTS	League of Nations Treaty Series.
Materials	Materials on Jurisdictional Immunity of States and their Property.
NYBIL	Netherlands Yearbook of International Law.
SIA	Sovereign Immunity Act, UK.
Topical Summary	Topical Summary of the Debates of General Assembly.
UNTS	United Nations Treaty Series.

Chapter I

INTRODUCTION

Chapter - I

I N T R O D U C T I O N

A. STATE IMMUNITY : THE CONCEPT

The doctrine of state immunity is an important rule of international law bearing on the rights and duties of states as well as the interest of individuals and non-state entities. It governs the legal status of sovereign states and their properties when they are engaged in various activities in the territories of foreign states. In its traditional form, the doctrine means that a state, on the basis of its sovereignty and dignity, cannot be subjected to the adjudicatory and enforcement jurisdiction of another state save with its own consent. It thus confers on foreign states and their property an unrestricted right of exemption from the jurisdiction of national authorities.

There is another version of this doctrine as well. Known as the doctrine of restricted immunity, it states that a sovereign state is entitled to immunity from the jurisdiction of foreign states only in respect of its public acts i.e., activities performed as a subject of political authority and not in respect of activities which are of private nature. It is assumed by this theory that when a state engages itself in activities of private law nature, it agrees to renounce immunities with respect to such transactions and places itself in the position of a private person.

B. THE HISTORICAL AND LEGAL DEVELOPMENT OF THE CONCEPT

The doctrine of immunity has developed principally from the judicial practice of states. Municipal courts have been primarily responsible for the growth and progressive development of a body of rules governing relations between nations in this particular regard. The first judicial recognition of this doctrine is found in the judgement of the US Supreme Court in the celebrated case, The Schooner Exchange V. McFaddon and Others (1812). In this case, a vessel owned by an American citizen had been seized in 1810 by Napoleon, the then Emperor of France, and had been commissioned as a public vessel of France. Thereafter, when the vessel entered the port of Philadelphia in the US, the original owner of the vessel lodged a suit in the US court seeking action against the vessel. Dismissing the claim of the plaintiff on the ground that the public character of the vessel exempted it from the jurisdiction of the court, chief justice Marshall of the US Supreme Court said:

> One sovereign being in no respect amenable to another, and being bound by the obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction

> of another, can be supposed to enter a foreign territory only under an express license, or in confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.
>
> This perfect equality and absolute independence of sovereigns, and this common interests impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to wave the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.(1)

The principle enunciated in the above case came to be accepted by a number of courts of other countries as well in the course of the nineteenth century. They uniformly refrained from entertaining any suit against foreign states irrespective of the nature and purpose of the activities which might give rise to them.[2] By the end of that century, the doctrine had become accepted as a rule of international intercourse established in the practice to states. However, at the same time, the scope of the doctrine had become a subject of controversy. Following the decline of the

---

1 Quoted in ILC Report 1980, p.145.

2 For an account of the practice of states in the nineteenth century, see ibid, pp.145-50.

laissez faire economics beginning in the latter half of the nineteenth century, the courts of some countries began to favour a restrictive application of the doctrine by carving out certain exceptions where immunity was to be denied to foreign states. This trend, which became first noticeable in the pronouncements of the courts in continental Europe in isolated cases before the first world war, gradually gathered momentum in the inter-war periods. Even in Common Law countries which had consistently recognised and applied the doctrine in its absolute form, a growing degree of public opinion began to emerge to have a fresh look at the question. By 1945, there had already developed a rift between those countries which had begun to apply the doctrine of restricted immunity and those states which continued to apply the doctrine of absolute immunity. [3]

C. THE PROBLEM

The controversy not only continued but aggravated after the second world war with the result that today there exist great divergences and contradictions in the doctrine and practice of states regarding the immunity of foreign states. While some countries adhere to the old theory of immunity, some others have adopted the restrictive theory.

---

3. Francis Deak, "Organs of States in their External Relations: Immunities and Privileges of States Organs and of the State" in Max Sorensen, ed., Manual of International Law, (London, 1968), p.426.

Even among the countries adhering to the same theory of immunity the state practice is not uniform and identical. Added to the problem of diverse practice among states is the problem of the absence of any clear provisions on this question in a large number of countries. In the absence of any clear law, the courts of these countries have passed contradictory judgements from time to time. On several occasions, it seems, the Governments of these countries have taken decisions regarding immunity on the basis of political expediency rather than in accordance with any consistent legal principle.

In the present state of international relations, which is marked by intense intercourse not only between states and states but also between states and non-state entities, the obtaining diversity and uncertainty in the practice of states regarding state immunity is bound to give rise to frictions and even serious disputes among states. To avoid such a situation, several efforts are being made by the international community, both at governmental and non-governmental levels, to find out a solution to the problem. The latest effort in this regard is the one made by the International Law Commission. In 1986, the Commission, after several years of debate and discussions, has adopted a set of draft articles on the topic of state immunity.

D. THE PURPOSE OF THE STUDY

The purpose of the study is to highlight the existing confusion and uncertainty in the practice of states regarding state immunity and to bring into focus the need for the development of an international legal regime. It is also proposed to examine the suitability of the draft articles prepared by the International Law Commission for the purpose of adopting a general convention on the subject.

E. PLAN OF WORK

The study begins by examining the practice of states with the help of different sources of state practice, such as national legislation, judicial decisions, administrative actions, and so on. The examination brings out not only the diversity in state practice but also the direction in which they are moving. The Indian state practice is dealt with separately.

The third chapter dwells in brief on the consequences of the existing diversity and uncertainty in the practice of states and, in that context, highlights the need for the development of an international legal regime. It also seeks

to make a review of all the efforts that have been made by various governmental and non-governmental bodies from time to time in this regard. A thorough examination is sought to be made of the draft articles adopted by the International Law Commission in the fourth chapter. The study concludes with an humble effort to give some suggestions regarding the solution of the problem under consideration.

Chapter II

STATE IMMUNITY : STATE PRACTICE

Chapter - II

STATE IMMUNITY : STATE PRACTICE

A. GENERAL OBSERVATIONS

An examination of the practice of states regarding the immunity of foreign states would be profitable in more ways than one. First, it would bring out the diversity and uncertainty that exist in the practice of states in this regard. Second, it would provide appropriate indications of the directions in which the practice of states is moving.

However, it would not be possible within the narrow confines of this study to examine the practice of each state separately or in detail. For the sake of convenience, therefore, states shall be divided into three groups viz., (1) Western countries; (2) Socialist countries; and (3) Third World countries; and efforts shall be made to find out the main trends in the practice of these group of states. Greater attention shall be paid to the examination of the scope and extent of immunity in the doctrine and practice of these countries. For, it is this aspect of the problem of immunity which has created much controversy. However, before we commence with the examination of state practice in the aforesaid manner, the following observations are needed to be made.

One vital source of the practice of states regarding any area of international intercourse is provided by international treaties, if any, existing on the issues in question There is, however, no general convention directly on the question of state immunity. The existing ones are either narrow in scope or membership or both.[1] They can be classified in three categories as follows:-

(i) Treaties directly on the subject and comprehensive in nature but having very limited membership;

(ii) Treaties directly on the subject but of a narrower scope and membership;

(iii) Conventions of universal nature but dealing with only one aspect of the problem and/or governing areas closely related to or even partially overlapping the subject of state immunity.

The European Convention on State Immunity signed in 1972 comes under the first category.[2] Its value as a source of state practice on the subject under consideration is very limited since it is ratified by only a few members of the

---

1 L.Bouchez, "The Nature and Scope of State Immunity from Jurisdiction and Execution", Netherland Yearbook of International Law (Hague), vol.10, 1979, p.3.

2 For the text see United Nations, Material on Jurisdictional Immunity of States and their Property, ST/LEG/SER-B/20, pp.157-172 (Hereinafter referred to as Materials.).

European community and governs their practice inter se.

Under the second category come (a) The International Convention for the Unification of certain Rules relating to the Immunity of State-owned Vessels (Brussels 1926) and its Additional Protocol of 1934,[3] which is the first international agreement codifying the law of state immunity relating to state owned vessels; and (b) The Bustamente Code of Private International Law[4] of 1928, a few Articles of which are devoted to the question of state immunity.

In the third category may be included (a) The 1938 Geneva Convention on the Law of the Sea, notably the convention on the Territorial Sea and the Contiguous Zone, and the Convention on the High Sea,[5] which contain provision confirming the principle of state immunity in respect of warships and state-owned ships employed in governmental and non-commercial services; (b) The 1961 Vienna Convention on Diplomatic Relations;[6] and the 1963 Vienna Convention on

---

3 For the text see Ibid, 176, LNTS, 199; pp.173-176.

4 For the text see Ibid, pp.160-151.

5 UNTS, vol.561. p.205. See inter alia Arts. 21-23. These two treaties assimilate the position of Government owned states operated for commercial purpose to that of non-governmental merchant ships. The UN Draft Convention on the Law of the Sea, 1982, preserves these provisions.

6 Ibid, vol.450, p.11, see inter alia, Arts 8 and 9.

Consular Relations,[7] which contain an endorsement of the principle of state immunity in respect of state property used in connection with diplomatic missions and consular missions respectively; (c) The 1969 Convention on Special Missions,[8] which treats in part some aspect of state immunity in respect of property used in connection with special missionsi and (d) The 1975 Vienna Convention on the Representation of States in their Relations with International Organisations of Universal Character,[9] which contains appropriate provisions maintaining the immunities of State property used in connection with the premises of missions or delegations of states in the territory of a host country to an international organisations.

There are several matters relating state immunity which have been subjects of litigation and doctrinal discussion but on which, it would appear, there are no relevant treaties. This relates in particular to that aspect of immunities which arise out of the increase in the economic

---

7 Ibid., vol.500, p.95. See inter alia, Arts.21,24 and 27.

8 General Assembly Resolutions 2530C (XXIV on December 1969), see inter alia, Arts. 25, 26 and 28.

9 Official Records of the United Nations Conference on the Representations on States in their Relations with International Organisations, vol.II, Documents of the Conference (United Nations Publications Sale No.75 VI2), p.207. See inter alia, Arts.23,25,27,55 and 57.

activities of states. Also, there appears to be no case law on this subject whether in arbitration or judicial settlement.[10] Therefore, for the determination of state practice, we have to depend mainly on national sources of state practice viz., (a) national legislations, (b) decisions of municipal courts and (c) governmental practices. In determining the practice of countries where there exist specialised legislation on the question of immunity, reliance will mainly be put on the provisions of such legislations. For countries where there have been no legislations but the judicial practice is developed and affords a decisive indication as to the substantive content of law and as to the actual practice of states, examination shall be made of the leading cases. And for the countries where there exist either none or very little judicial legislative practice, emphasis would be put on the pronouncements of the government and other governmental sources to determine the state practice.

With these general observations we may now proceed to examine the practice of the three groups to state separately. Since the doctrine of state immunity has originated and developed most in the jurisdictions of the capital-exporting and

---

10 ILC Report (1980), p.154.

free-economy western countries, it is appropriate that we begin our investigation with the practice of these countries.

B. WESTERN COUNTRIES

The traditional doctrine of immunity was well embedded in the practice of the countries of this group in the nineteenth century. In the late nineteenth and the early twentieth century when states began to enter the market place on an increasing scale, the courts of many of these countries became reluctant to grant immunity to foreign states in all cases. Prompted by considerations of fairness to private parties, (individuals and non-state entities) they started making a distinction between governmental and non-governmental activities of foreign states, denying immunity in the latter case. This trend, which became first noticeable in the pronouncements of the courts of Italy and Belgium even before the first world war in isolated cases, gradually gathered momentum in the European practice in the inter-war period. In 1926, several European states signed the International Convention for the Unification of Certain Rules Relating to the Immunity of State-owned Vessels which subjected vessels engaged in trade and owned or operated by foreign states to local jurisdictions as if they were private persons.[11]

---

11 UNTS, 176, 199; Belgium, Denmark, France, Greece, Italy, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, have ratified this convention. UN Doc.A/CN.4/376 Add.1, p.57.

This restrictive trend in the European practice continued to develop after the second world war and culminated in the adoption of the European Convention of State Immunity in 1972.[12] The Convention which came into force in 1976 and regulates the practice of signatory states *interse*, does not incorporate the restrictive theory in terms; It enumerates a variety of situations in which states cannot claim immunity from the jurisdiction of foreign courts. A major part of activities of commercial character will fall within those provisions.

The restrictive theory of immunity is now adopted by the courts of many countries of this group, namely, Italy, Belgium, France, Austria, West Germany, Switzerland and a few others are in the process of adopting it.[13] In the UK, the USA, Canada and Australia, special legislations have been passed in recent years incorporating the restrictive theory of immunity.[14]

---

12 So far Austria, Belgium, UK, Portugal, and Cyprus have ratified the Convention; the Netherlands is contemplating ratifying it. Ibid, p.38.

13 Ian Brownlie, The Principles to International Law (London, 1979),p.327; For a general survey of the judicial practice of these states see S.Sucharitkul, "Immunities of Foreign state Before National Authorities". Recuel Des Cours (Hague) 149,(1976),p.117.

14 In the US, Foreign Sovereign Immunity Act (1976); In the UK, Sovereign Immunity Act (1978), in Canada, State Immunity Act (1981), and in Australia, Foreign Sovereign Immunity Act (1985). For the texts, see Materials.

It is neither possible nor desirable here to discuss the practice to all these states. An examination of the practice of a couple of states will serve our purpose.

UNITED STATES

From 1812 to 1952, the US policy towards suit against foreign states was one of absolute immunity.[15] In 1921 in the case of Benizzi Brothers V. The S.S.Pesaro a subordinate US court refused to grant immunity to a foreign state basing on the distinction between acta jure imperii and acta jure gestionis. This ruling was set aside by the US Supreme Court in 1925.[16]

In 1945, an important development took place in the US practice. In the case of Mexico V. Hoffman, the US Supreme Court ruled that the courts would henceforth be guided by the decision to the executive branch of the government in matters of allowance of immunity to foreign states. Consequently, a foreign government sued in the US courts would apply to the State Department for recognition of its immunity.

---

15 Werthan M.L., "Jurisdiction over Foreign Governments: A Comprehensive Views of the FSIA", Vendenbeilt Journal of International Law (Tennesse, USA), No.1, 1986, pp.120-180.

16 Ibid, p.121.

If the State Department recognised the immunity, a "suggestion" of immunity would be presented to the court concerned by the Justice Department and the courts would accept the suggestion in deference to the president's constitutional responsibility.[17] Uptill 1952, the State Department routinely recommended immunity to foreign states irrespective of the nature and purpose or activities that might give rise to action against them. But as the demand for restricting the immunity of foreign state in the US gained momentum in the forties, it had to modify that practice. From the year 1952 onwards, it recommended immunity foreign states only in respect of acts of government, jure imperii. However, the recommendations of the State Department were not always consistent. Occasionally, it yielded to diplomatic pressures from friendly foreign nations and granted them immunity even in relation to acts of commercial nature, jure gestionis.

This inconsistency in the "suggestion" of the executive led to demands from many quarters, especially the American Bar Association, to codify the law on foreign state immunity. As a result, the Foreign Sovereign Immunity Act (FSIA) came into being in 1976. The courts of the US are now left on their own to decide the question of immunity without the

---

17 Ibid.

suggestion from the Department of State.[18]

The FSIA (1976) incorporates the doctrine of restrictive immunity. Section 1605 of the Act, sets out the general circumstances in which a claim of sovereign immunity by foreign states, their political subdivisions and instrumentalities would not be recognised by the US courts. These exceptions include any case where :-

(1) The foreign state has waived its immunity;

(2) The foreign state has commercial activities with a nexus with US;

(3) Rights in property taken in violation of International law are in issue in certain circumstances involving a foreign state or agency or instrumentality of a foreign state;

(4) Rights in immovable, inherited and gift property are concerned;

(5) Non-commercial tort occuring in the US that might give rise to money damages; and lastly,

(6) A suit in admirality is brought to enforce a maritime lien against a vessel or cargo of the foreign state and which maritime lien is based upon a commercial activity of the foreign state.

---

18 Ibid, p.23.

In the Act, the term commercial activity is given a wide connotation. Section 1605 (a)(2) mentions three situations in which a foreign state would not be entitled to immunity with respect to a claim based upon commercial activity:

(1) Where commercial activity is carried on in the US by foreign state;

(2) Where an act performed in the US is in connection with a commercial activity of the foreign state elsewhere; and

(3) Where an act performed outside the territory of US in connection with a commercial activity of a foreign state causes a direct effect in the US.

It would be of interest to learn that the act clearly states that the commercial character of a transaction should be determined by a reference to its nature rather than its purpose.[19] Hence, the term commercial activity is likely to include even governmental transactions in acquiring defence requirements or in feeding its population. Dealing with the question as to what is to be regarded as commercial activity, the analysis of the Department of State and the Department of Justice States that activities such as a foreign governments

---

19 See Sec. 1603 (3),(d) with FSIA, 1978.

sale or service of a product, its leasing of property, its borrowing of money, its employment or engagement of labourers, clerical staff on public relations or marketing agent, and its investment in securities or American corporations would be among those included within the definition of commercial activities.[20]

Section 1606 to the Act provides that a foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances. However, a foreign state, except its agency or instrumentality, would not be subjected to punitive damages.

The Act also makes wide inroad into the immunity of states from attachment or execution by providing that the property in the US of foreign states used or intended to be used for commercial activities shall not be immune from execution and attachment. It, however, exempts certain types of property from measures of constraint. Assets of the Central Bank of a foreign state and other monetary authorities come under this category.[21]

---

20 See the interpretation given by the Department of State and the Department of Justice of the Government of USA to the term "Commercial Activity", Materials, p.631.

21 See Section 1610 of the Act.

Recent practice in the US has been noted for the liberal interpretation that the US courts have been prepared to give to the wordings of the FSIA.[22] In the case of British Shipping Corporation V. Embassy of Union of Republic of Tanzania (1980), it was held by the court that the burden lay on the foreign embassy concerned to furnish proof that the bank account to be attached was for the purpose of operating the embassy and that a mixed account was liable to attachment and therefore unprotected by state immunity.[23] To cite another instance, in its decision delivered in the case of Verlinder V. Central Bank of Nigeria on May 23, 1983, the US Supreme Court affirmed the jurisdiction of the US courts in regard to suits relating to transactions to be performed outside its jurisdiction on the basis of remote nexus even at the instance of foreign plaintiff. In the case, the jurisdiction of the US court was sought to be invoked in respect of a dispute concerning sale of cement by a Dutch Company to the Nigerian Government which had no connection with United States except that the bank guarantee was opened by the Central Bank of Nigeria through the

---

22 For a detailed account of the interpretation of the Act by US Courts see Mark Feldman, "State Immunity Act in the US Court 1976-86", Venderbeilt Journal of International Law, vol.19 (1986), pp.1-18.

23 UN Doc.A/CN.4/376, p.28.

Morgan Guarantee Trust Company in New York.[24]

UNITED KINGDOM

The courts in the UK adhered to the principle of absolute immunity until recently. Although arguments were made for restricting immunity only to public acts of foreign states on the basis of the emerging practice in continental Europe,[25] and serious doubts were expressed about the continued applicability of the doctrine of the traditional theory of immunity in the changed situations, even by judges,[26] it was not until 1975 that the courts gave recognition to the restrictive theory of immunity.[27] The first occasion when an English court denied immunity to a foreign state was in the case of Philipines Admiral. In the case, the privy council denied immunity to a vessel owned by a foreign state on the ground that the vessel was engaged

TH-2455

---

24 Materials, p.543.

25 See the Cristina case, 1938 AC 485.

26 In the case of Nizam to Hyderabad V. Rahimtoola (1958) Lord Denning delivered a dissenting judgement favouring the restrictive theory, 1958 AC. 379.

27 For a detailed account of the British case law see Ian Brownly, n.13, pp.336-39.

DISS
341.26
P975 St
TH2455

DISS
Z,1 GN8
M7

in "ordinary trading transactions".[28] The decision of the court of Appeal in the case of Central Bank of Nigeria in 1977 practically completed the process of reversal of the policy of absolute immunity so far jealously followed by the British courts. In that case, the court of appeal unanimously held that the doctrine of state immunity no longer applied to ordinary trading transactions and that the restrictive doctrine would apply to action in personem as well as actions in rem.[29]

In 1978, the British parliament gave statutory recognition to the restrictive theory of immunity by passing the state immunity Act. The British state practice is now governed by the provisions of the Act. Except for a few exceptions, the areas where immunity will not be admissible under the British legislation are by and large the same as in the US Act of 1976.[30] Unlike the US Act, the British Sovereign Immunity Act does not provide for the exercise of "long arm jurisdiction" by the courts merely on the basis

---

28 Ibid, p.337.

29 Ibid, p.338.

30 See the Articles 3 to 11 of the act and compare them with section 1605 of the US Act.

of some kind of nexus. The latter requires that in order that jurisdiction could be exercised over a foreign state, a transaction must fall to be performed at least partly in the UK. Also, unlike it's American counterpart, the UK Act does not provide for denial of immunity to a foreign state where "rights in property taken in violation of international law are in issue in certain circumstances involving a foreign state or the agency or instrumentality of a foreign state".[31]

The British Act does not in so many words direct the courts to have regard to the nature of the transaction while determining their commercial character, but the exceptions to immunity which are set in sections 3 to 11 of the Act are formulated in such a way that the attention of the courts would be directed to the objective nature of a particular transaction and not to its purpose.

Prior to the Act, there was no case in which the UK courts permitted forcible execution of any judicial decision against foreign states. Section 13 of the SIA has however altered the position. Under the act, execution against property in use or intended to be used for commercial purposes

---

31 See Section 1605 of the US Act.

is permitted with certain safeguards. It is provided that the property of a Central Bank or other monetary authorities are not to be regarded as used or intended to be used for commercial purposes.[32] The Act also pays some regard to the principle of reciprocity. Section 15 of the Act enables the "Order in Council" to restrict immunities and privileges where a lower degree of immunities are accorded by the law of the concerned states, or to increase it if such an action is required to give effect to a treaty or other international agreement to which a foreign state and UK are parties.

It would be pertinent here to mention that both Canada and Australia have passed legislations on the model of the British Sovereign Immunity Act. The Canadian State Immunity Act came into force in 1981,[33] and the Australian Foreign State Immunity Act, in 1985.[34]

ITALY

Italian courts were the first to delimit the application of state immunity. The highest courts in Italy, the

---

32 See Arts. 13 & 14 of the Act.

33 For the text see Materials.

34 For the text see International Legal Material, vol.XXV, (1986) No.3, pp.715-724.

Corte de cassazione of the various regions and subsequently the Corte di cassazione for the whole nation, adopted the restrictive doctrine more than a decade before the end of the nineteenth century. They have assured jurisdiction over foreign states in a variety of situations since then, such as when the state is sued as an ente civile (juristic or private person) as opposed to ente politico; or when the state has acted in the domain of private law and not under public law, or if the state's act is one jure gestionis as opposed to jure imperii, or again, if the state is presumed to have consented to submit to the jurisdiction of Italian courts e.g., by conducting in Italy a trading enterprise. Several practical working limitations have been adopted in the Italian practice.[35]

As early as 1886, the distinction between the state as political power and juristic person was recognised by the Corte di Cassazioni di Finenze in Guttieres C.Elmilik. Denying immunity in an action for service rendered to the Bay of Tunis, the court held that when the government as a civil body descends into the sphere of contracts and transactions so as to acquire rights and assure obligations, just as a

---

35 For a detailed survey with Italian jurisprudence, see the UN Doc. A/CN.4/357 paras 56-57.

private person might do, it must submit to the rules of jus commune.[36] The distinction between acts of private nature and public nature was recognised and applied also in the case of personal sovereigns and ambassadors. In Perrucchetti C. Puig Y Cassauro (1928) an action was allowed to proceed against the Mexican Ambassador in connection with a contract for the purchase of property to be used for embassy building. The court assumed jurisdiction against the ambassador during his term of office in respect of government act performed by him in the capacity of a state agent. Although the contract touched in instrumentom legati, it was held to be private law transaction for the acquisition of private rights.[37]

The illustration of the application of the doctrine of restricted immunity based on the distinction between jure imperii and jure gestionis is found in the well-known Tesinis case (1925). In the case, a suit was originally brought by the Soviet Commercial Agency on a contract for delivery of silk cocoons to an Italian firm, who sought an injunction against the plaintiff concerning their disposal. The Supreme Court refused immunity to the Soviet Trade Delegation on the

---

36 S.Suchanitkul, n.13, p.127.

37 Ibid., p.128.

ground that the foreign agency had renounced immunity by embarking upon commercial or industrial activity in Italian territory. The court observed that the "Soviet Government's monopolisation, for political ends, of foreign trade, can not .... divest the transactions ... from their character of trading operations .... involving all its consequences, not excluding that of an implied renunciation of jurisdictional immunity".[38] The same attitude was adopted by the Corte di Appello Genova in Governo francese C. Senna (1925).[39]

The Italian courts have been somewhat hesitant to exercise jurisdiction over foreign states in respect of matters, such as contract of employment.[40] However, recent judgements of the courts show that they are inclined to making a distinction between disputes arising out of contractual obligations regarding employment or personal service and those relating to the appointment or designation, or dismissal of a state agent or employee. Thus, recently, the Italian court, ceremonial Diplomatico Della Republico, intervened on two occasions involving the embassies of Algeria and Iran concerning actions for payment of social security and other emoluments

---

38 Ibid, p.129.

39 Ibid, p.129.

40 See Ibid, pp.130-131.

to the employees of the embassies. The court went to the extent of ordering the attachment of the bank accounts of the embassies with a view to give effect to the terms of contract to employment.[41]

AUSTRIA

The practice of Austria started with unqualified immunity in the nineteenth century, and changed over to restrictive immunity from 1907 until 1926, when absolute immunity was once revived and followed. Since 1950, however, the absolute doctrine has been finally discarded.[42] The Supreme Court of Austria in the case of Dralle V. Government of Czechoslovakia (1950) rejected the claim of immunity put forward by the Czecho-Hair Tonics National Enterprises. The court further upheld an injunction forbidding the defendants to utilise trade mark in Austria belonging to a firm which had been confiscated by the foreign state. Reviewing the authorities in international law the court observed "....foreign states are subject to Austrian jurisdiction in all contentious matters arising out of legal relations within the sphere of private law".[43]

---

41 UN Doc. A/CN.4/376,p.28.

42 UN Doc.A/CN.4/343/Add.2, pp.33-37.

43 UN Doc.A/CN.4/376, p.35.

In another case decided in 1961, Holubek V. United States, the Supreme Court refused immunity to the Government of the United States in an action of tort against the latter. In the case, the complainant, a citizen of Austria, was injured by a mail carriage employed by the US embassy in Austria.[44]

In a more recent case concerning violation or liquor monopoly, the District Court of Appeal of Vienna held that "whenever a business undertaking owned in Austria by a foreign government violates domestic regulations in a way entailing confiscation or certain items, belonging to that government, the latter may not involve extra territoriality provisions to avoid seizure to loss of items, at the hands of the local authority.[45]

Reviewing the state practice of Austria, S.Sucharitkul concludes that Austria courts have finally foresaken absolute immunity and adopted a restrictive doctrine limiting state immunity in regard to acta jure gestionis.[46]

---

44 UN Doc.A/CN.4/363, p.10.

45 S.Sucharitkul, n.13, p.50.

46 Ibid.

C. SOCIALIST BLOCK COUNTRIES

Socialist countries consider the immunity of States from the jurisdiction of foreign courts to be absolute. Since all States are equal before law, thus runs their argument, no State has the right to adjudicate on the activities of any other sovereign State. Assumption of jurisdiction by the Courts of a country over foreign States save with the latter's consent would amount to violation of the principles of sovereignty and sovereign equality of States, they point out.

The functional theory of immunity which says that a state which engages in commercial activity in foreign states can be sued and its property subjected to enforcement measures as in the case of individuals, is unacceptable to them. They contend that, "there is no rule in contemporary international law identifying possible exception from the immunity of States for certain areas of their activities, e.g., economic, finance and trade."[47] For them, it is impossible to split a state into two subjects: a sovereign

---

47 Analysis of the topic of Jurisdiction and Immunity of State and their property submitted by the Government of Czechoslovakia, Materials, p.83.

power and an entity subject to private law rules. They believe that the economic activities of a state constitute an inherent component of the realisation of its sovereignty, and are thus, essential element of its activity for which it is entitled to be granted immunity.[48]

This is the formal stand the socialist countries take on the question of state immunities.[49] This, however, does not mean that these countries never submit themselves to the jurisdictions of foreign courts. In practice, they have frequently waived immunity inherent in their broad concept of sovereign authority. Such waiver of immunity has often been provided in bilateral trade agreements concluded by them with other countries, both developed and developing, and even amongst themselves.[50]

The Soviet Union has signed trade agreements with a number of developed, developing and socialist countries

---

48 F.Endurllin, "The Immunity of State Property from Foreign Jurisdiction and Execution : Doctrine and Practice of the German Democratic Republic", Netherlands YBIL, vol.10 (1986), p.115.

49 See the letters and answers to questionnaire sent by Socialist countries to the UN Secretariat, Materials.

50 Ibid, pp.131-77.

subjecting its Trade Delegations to local jurisdictions.[51]

Given below is a specimen of agreements signed by the USSR:

> Union of Soviet Socialist Republics and India Trade Agreement (with schedule and exchange of letters) signed at New Delhi on 2 December 1953.
>
> EXCHANGE OF LETTERS
>
> New Delhi
> the 2nd December,1953
>
> 3. It was agreed that the commercial transactions entered into or guaranteed in India by members of the Trade Representations including those stationed in New Delhi shall be subject to the jurisdiction of the court of India and the laws thereof unless otherwise provided by agreements between the contracting parties to the said transactions. Only the goods, debt demands and other assets of the Trade Representation directly relating to the commercial transactions concluded or guaranteed by the Trade Representation shall be liable in execution of decrees and orders passed in respect of such transactions. It was understood that the Trade Representation will not be responsible for any transactions concluded by other Soviet organisation direct, without the Trade Representation's guarantee". (52)

The USSR has concluded similar agreements with Bolovia, Brazil, Costarica, Egypt, Ghana, Iraq, Singapore,

---

51 Trade delegations are organs of external relations introduced into international intercourse by Soviet Union to carry out its functions in the field of foreign trade and other types of external economic activities. Apart from USSR other socialist countries also possess Trade Delegations abroad, G.I.Tunkin, ed., International Law (Moscow, 1986), p. 289.

52 Materials, p.148.

Togo, Yemen, Austria, Denmark, Finland, West Germany, China, Italy, Japan, Netherlands, Albania, German Democratic Republic, DPR Korea, Vietnam, Mongolia, Romani, Czechoslovakia, Bulgaria and Hungary.[53]

Like the USSR, a few other socialist countries have also signed similar treaties with a few countries. Czechoslovakia has signed a trade agreement with Switzerland in 1953[54] and Poland has one with Czechoslovakia signed on 4th July 1947.[55] To this list may be added the Romania - Iraq Exchange of Notes of 24th December 1958.[56]

Apart from having these treaties providing for restrictive immunity in some areas of their State activities, some socialist countries also allow the application of the Principle of Reciprocity in this matter which, given the practice of restrive immunity by an increasing number of States, results in a kind of practice which is largely at variance with their theoretical stand.

---

53 For the texts, see Ibid. pp.131-77. Despite these agreements waiving immunity, the USSR has refrained from expressing any formal acceptance of the restrictive theory of immunity.

54 J.Crawford, "A Foreign State Immunities All for Australia?", AYBIL, vol.8 (1983), pp.79-80.

55 Materials, p.134.

56 405 UNTS 263.

The immunity legislation in the Soviet Union depends on reciprocity with foreign states in question. If that state is applying a restrictive immunity, then so may Soviet Union in cases concerning it. Though the Soviet courts do not raise the reciprocity question on their own initiative, matters are settled by law decrees passed by the executive department of the government.[57] In Hungary, the law decree passed in 1979 recognises the application of the principle of reciprocity. Section 72 para (1) of the law decree makes it possible for the Hungarian court to recognise and implement decisions passed in actions instituted abroad against the Hungarian state and its organs if, inter alia, reciprocity exists with those foreign courts in question.[58]

Asked whether in the Hungarian practice any distinction is made between the public acts and non-public acts of foreign states for the purpose of immunity, the Hungarian government replied, "The Law decree does not make any distinction between public acts and non-public acts of a foreign

---

57 Boguslavsky M., "Foreign State Immunity : Soviet Doctrine and Practice", 10 Netherlands YBIL (1979), pp.166, 170-1.

58 Replies to the questionnaire, Materials, p.576.

state. Nevertheless, this distinction will probably develop in the judicial practice as a result of the fact that on the basis of reciprocity the Hungarian authorities will have an opportunity to do that".[59] The principle of reciprocity also play an important role in the state practice of Poland. In one of its ruling, the Supreme Court of the country has held that, "In deciding upon the question of immunities with regard to foreign states, one should base directly on the generally recognised principles accepted in international jurisprudence, outstanding among which is that of reciprocity among states.[60]

The doctrine and practice of Yugoslavia differ from those of the other socialist block countries. In that country, the immunity of foreign states is not considered to be absolute but limited only to "relationships concerning public acts and interests of foreign states which are linked to the actions of state as a bearer of sovereign and public authority".[61] Immunity is accorded only in such cases where it is possible to establish from the circumstances of the case that the foreign state acted as a bearer of

---

59 Ibid.

60 Ibid, p.90.

61 Ibid, p.642.

sovereignty and public authority.[62] Unlike those of other socialist countries, Yugoslav government does not say that execution and attachment of property of foreign states are not permissible under international law. It says that the execution and attachment of property of a foreign state can not be affected without the consent of a competent federal organ of Executive authority, and that, while considering such request for permission the latter will take into account "the provisions of a number of International Conventions which prohibit the execution of specific types of property of a foreign state or property serving the specific purposes".[63]

Although the Chinese government's attitude towards state immunity is the same as other socialist countries, its practice differs slightly from that of the latters. In the state practice of China a distinction is made between foreign states and state owned enterprises having independent legal entity. With respect to civil law suits arising from commercial activities of state-owned enterprises in their capacity as independent legal persons, the Chinese government,

---

62 Ibid, p.641.

63 Ibid, p.643.

in principle, does not favour their enjoyment of immunity from the jurisdiction of competent foreign courts.[64]

A large number of socialist countries apply restrictive immunity in the area of shipping. A few of them, namely, Hungary, Poland, Romania, Yugoslavia and Estonia have signed the Brussels Convention and its additional protocol.[65] As for the immunity of states from the fiscal liabilities in a foreign country, there is hardly any difference between the practice of the socialist countries and that of the western countries.

In the absence of reciprocity, they all subject the foreign states to duties and taxes applicable to them under the domestic law.[66]

D. THIRD WORLD COUNTRIES

Practice in Nineteenth Century

Unlike the western countries there is little evidence of state practice in these countries during the nineteenth

---

64 Afro Asian Legal Consultative Committee, Jurisdictional Immunity of States, AALCC/XVI/13, pp.47-8.

65 UN Doc., n.24, p.57.

66 See the "Replies to the Questionnaires", Materials, pp.559-545.

century. The reason is not far to seek. Most of these countries were under colonial rule from which they emerged only recently. Even the countries that maintained their sovereign independence throughout the nineteenth century and all through their national history did not escape subjugation to the so-called capitulation regimes. The question of state immunity was relatively insignificant for these countries as extraterritorial rights and powers were recognised in favour of foreign states and even their ordinary citizens.[67]

Present Practice

The state of law and practice continue to be a matter of uncertainty in most of these countries even today. In a large number of countries, there exist either very little or no legislation and/or judicial decision to guide state practice in this regard. There are only a few countries where the existing judicial decisions or legislations, separately or both taken together, afford any

---

67 For an account of the State practice of these countries in the Nineteenth century, see ILC Report (1982), pp.147 ff.

indication as to the substantive content of law and as to the actual practice of states. The reasons for such a situation are many. With most of the centres of international commercial arbitration and litigation being situated in the western countries, there have not been many occasions when the judicial or executive branches of the governments of these countries have been called upon to express their views on questions of immunity within a few years of their independence. Perhaps due to this reason as well, the governments in these countries have not felt the need for developing a consistent and comprehensive policy in this regard. Another plausible reason for the lack of initiative on the part of the governments in this regard could well be that they might be hoping that one day a multilateral treaty would come up on the subject, now that the International Law Commission is busy developing a draft Convention.[68]

Before saying anything about the positions of the states where there exists little or no evidence of state practice it seems pertinent to give a brief account of the practice of states where the existing legislation and/or

---

68 See the letter sent by the Government of Barbados to the Secretariat, Materials, p.78.

judicial decisions offer some indications of state practice.

In Pakistan and Singapore, special statutes modelled on the British Sovereign Immunity have been enacted in recent years.[69] The Courts of these countries are now guided by their respective legislations. Like their counterpart in the UK, these legislations incorporate the restrictive immunity theory and contain detailed provisions regarding all aspects of the problem of state immunity, including procedural measures. They also subject foreign states to measures of constraint in respect of their properties used or intended to be used for commercial purposes. In Sudan, there exist a piece of legislation which recognises the absolute immunity principle. But as this code does not contain only provision regarding procedural matters, the Sudanese courts apply English Common Law regarding them.[70]

In Mexico, there exists a commercial code Article 14 of which regulate the immunities of foreign states relating to their commercial activities. It subjects the

---

69 In Pakistan, State Immunity Ordinance (1981) 1; In Singapore, State Immunity Act (1979); For the texts see Materials.

70 The Immunities and Privileges Act, Materials, p.601.

foreign states to the jurisdiction of domestic courts in relation to their commercial activities.[71] Chile and Ecuador have ratified the Bustamante Code of private international law and have promulgated it as the law of the state.[72] The said code is not a special convention on state immunity; only a few Articles of it deal with the problem. Those articles forbid the courts to exercise jurisdiction over foreign states except in a few circumstances.[73]

The case laws of Egypt provide a fair indication of the state practice in this matter. The Egyptian Courts, like the courts of other countries, used to grant immunity to foreign states in respect of all their activities. But in a judgement delivered on 29th March, 1947, the commercial Tribunal of Alexandria held that immunity of foreign states from the jurisdiction of the Egyptian courts was limited to acts done in the exercise of sovereign power. Since then, the Egyptian courts have consistently adhered to the doctrine

---

71 Ibid, p.584.

72 Ibid, pp. 12 and 567.

73 For the text of the Code see Ibid, p.12.

of restrictive immunity.[74] Examining the decisions of the Egyptian courts, S.Suchanitkul remarks,

> ...they have adopted every possible limitation of immunity as evolved through the practice of the Italian and Belgian courts. The limitation includes various distinction between State acts, commercial exploitation, implied submissions and covering also execution of judgement against foreign governments.(75)

The case law of Chile appears to have firmly recognised the Principle of State Immunity without drawing any distinction between the activities of foreign states. Recent decisions have confirmed a uniform, broad and unrestricted recognition of the immunity of foreign states.[76] In recent years, the judicial practice of Argentina provide the available example of acceptance of restrictive immunity.[77]

As for the countries of this group where there exist little evidence of state practice and the existing legislations and judicial decisions do not provide any clear indication as to the substantive practice of state,

---

74 Fourth Report of the Special Rapporteur, UN Doc. A/CN.4/357 paras 60-61.

75 S.Suchanitkul, n.13, p.140.

76 Ibid, p.91.

77 Ibid.

it is generally thought that they favour the doctrine of absolute immunity. But that is not true. An examination of the views of the governments of these countries reveals that many of them are in favour of denial of immunity to the commercial activities of state.

In the first session of the Asian African Legal Consultative Committee (AALCC) held in New Delhi in 1957, all the delegations except Indonesia were of the view that a distinction should be made between different types of state activities and that immunity to foreign states should not be granted in respect of their activities which might be called commercial or of private nature. As for the State trading organisations having a separate entity under the municipal laws of the states, all the delegations, including Indonesia, agreed that immunity should not be available to them.[78]

Further evidence of the acceptance of the restrictive doctrine by a few other developing countries is found in the replies sent by them in response to the questionnaire sent by the UN Secretariat. In its letter, the Government

---

78 R.Whiteman, Whiteman's Digest of International Law, vol.6, 1968, p.571.

of Surinam said:

> The Government is of the opinion that the principles of absolute immunity has become obsolete in international law and favours in general restrictive immunity. Immunity will not be granted to a foreign state in cases acta Jure gestionis and acta Jure privitorium. The Government recognises the difficulty that arise in trying to draw a distinction between acta Jure impirii and acta Jure questionis, but holds the view that these difficulties do not impair a casualistic application of the principle of restrictive immunity. As the granting of restrictive immunity is incorporated in the practice of many states, this principle can be considered to be the leading one in international law on the topic of state immunity.
>
> With regard to the question of execution the Government is of the opinion that execution against a foreign state is /contrary to /not international law.(79)

Similar views have also been expressed by the governments of Banbados,[80] and Ecuador.[81]

Although they take their stand on absolute immunity, a few countries of this group do not disapprove of reciprocity in this matter. Take the case of Chile, which regard

---

79 Materials, pp.91-2.

80 Ibid, pp.74-5.

81 Ibid.

state immunity to be absolute. One of its recently proclaimed decrees says, "Any foreign state and its organs, institutions and enterprises may apply in Chile for immunity from jurisdiction and execution, as the case may be, on the same terms to the same extent and with the same exceptions as its own legislation grants to the state of Chile or its organs, institution or enterprises".[82] Given the adoption on restrictive immunity by an increasing number of states, the time is not very far when Chile will be practising the restrictive immunity principle. So will be the other states who believe in the principle of reciprocity.

While pronouncing upon the state practice of the developing countries regarding any area of international intercourse, it should not be forgotten that many countries of this group were under the colonial rule of Great Britain. During their colonial days, they had adopted the British Legal system which they retained after their independence. The courts of these countries look forward to the British case law for guidance, and honour the judicial decisions of British courts even today. The views of such courts on immunity of foreign state is bound to change now that the British courts have moved away from the absolute immunity

---

82 Materials, p.13.

and towards restrictive immunity. In its reply, the Government of Trinidad and Tobago highlights the possibility of such a development in its jurisdiction.[83] As we shall see later, the pronouncements of the Indian courts also point a move towards the same direction.

In the field of shipping, almost all countries of this group adhere to the restrictive immunity role.[84]

Keeping the above facts in mind, the special rapporteur to the International Law Commission on the topic of State Immunity pointed out:

> It is easy to say in the absence of state practice in a given country or without any reference thereto, that the laws developed in the practice of so wide a region as Asia, Africa and Latin America points to a direction or in the opposite of that of the prevailing practice in Western Europe. Nothing can be farther from truth.(85)

Indeed, there is no such practice which could be said to be common among countries of Asia, Africa and Latin America. There are, as we saw in the preceding paragraphs,

---

83 Ibid, p.611.

84 Sixth Report, UN Doc. A/CN.4/376, Add 1, p.57.

85 Fifth Report of the Special Rapporteur, UN Doc. CN.4/363, p.11.

a few countries who adhere to the absolute theory of immunity. There are a few others who have already put into practice the restrictive immunity theory. In the practice of a few other countries a trend towards restrictive immunity is discernible. The executive and judicial branches of the governments in these countries seem to be aware of the developments that are taking place in other countries.

E. INDIAN STATE PRACTICE

India is a leading Third World country that has displayed keen interest in international affairs since her independence in 1947. The Government of India has all along raised its voice for establishing fairness in international relations. It would be of interest to examine the Indian State Practice in this area of international intercourse in greater detail.

National Legislation

Unlike in a few other Third World countries such as Pakistan and Singapore, there exists no special enactment in India to govern immunities of foreign states. Section 86 and 87 of the Code of Civil Procedure, 1908, are the only two pieces of legislation found in India relevant to this topic.

Section 86(1) lays down that "No foreign state may be sued in any court otherwise competent to try suit except with the consent of the central government certified in writing by a Secretary to that Government". The Section also provide for an exception to the above rule : "Provided that a person may as a tenant of immovable property sue without such consent aforesaid foreign state whom he holds or claims to hold the property".

Section 86(2) deals with the question of consent which the central government is authorised to give -- It lays down that the government shall not give the consent "unless it appears" to the government that the foreign state (a) "has instituted a suit in the court against the person desiring to sue it" or, (b) "by (itself) or another trades within the local limits of the jurisdiction of the court", or (c) "is in possession of immovable property situated within those limits and is to be sued in reference to such property or for money charged thereon, or, (d) "has expressly or impliedly waived the privilege accorded to it by this section". The central government has also been directed by this Subsection to mention the court, in case it gives consent to any person to sue a foreign state, in which the foreign state is to be sued.

Section 86(6) requires the government to give the person making the request for its consent "a reasonable opportunity of being heard" before refusing to accede to his request in whole or in part.

While Section 87-A of the Code defines a foreign state as "any state outside India which has been recognised by the central government", Section 86(3) of the Code provides that "no decree shall be executed against the property of any such state without the consent of the central government certified in writing by a Secretary of that government".

These are the legislative provisions available in India on the question of immunity of foreign state.

It does not take much thinking to realise that these provisions do not provide a clear picture of the status of foreign states before the Indian courts: they leave many questions unanswered. For example, it is not clear from these provisions whether the doctrine of immunity of the foreign sovereign state, which is available under international law, is available in India. Similarly, nothing has been said as to whether the Section 86(1) is confined to suit against foreign states by name or would still apply when an organ or instrumentality of a foreign state is sought to be sued. Again, while

the law provides for the cases in which the government shall deny the consent, it remains silent as to the cases in which the government shall be bound to give its consent.

Judicial Decisions

Sections 86 and 87, however, have come up for construction before the Supreme Court and a couple of High Courts of the country in a few cases and the pronouncements of these courts in those cases throw some light on the true implications of the two sections. It would be worthwhile to enumerate a few important decisions here.

The case of Mirza Ali V. United Arab Republic is an important one in which the Supreme Court of India examined the implications of Section 86(1) of the Code. It was held by the Supreme Court that the Sub-section (1) of Section 86 provided that states could be sued within the municipal courts of India with the consent of the central government of India and upon such consent being granted as required by Section (1), it would not be open to a foreign state to rely on the doctrine of international law because courts in India would be bound by statutory provisions, such as those contained in the Code of Civil Procedure.[86]

---

86 Mirza Ali Akbar Khasani V. The United Arab Republics A.I.R. 1966, S.C.230.

The context in which the Supreme Court expressed this opinion is as follows:

The United Arab Republic (through the Ministry of Economy, Supplies and Import) and Mirza Ali entered into a contract whereby the latter agreed to supply tea to the former. One of the conditions of the contract was that UAR should not place any further orders in India for the purchase of tea from anyone else during the subsistence of the contract. Contrary to this condition, the UAR placed orders with a third party for the supply of tea upon which Mirza Ali instituted a suit against UAR for recovery of an amount as damages for breach of contract in the original side of the Calcutta High Court.[87] The UAR claimed immunity from the judicial process on two grounds: (1) Under Section 86 and 87 of the CPC and (2) alternatively, "under the general Principles of Private International Law as laid down by certain English decisions" which, according to the appellants, "should be treated as a part of the municipal law of our country".[88]

---

87 AIR, 1962 Cal. 3.87.

88 It is important here to note that Section 86(1), before it was amended in 1976, read as follows: "No ruler of a foreign state may be sued in any court otherwise competent to try suit except with the consen of the Central Government certified in writing by a Secretary to that Government". Now it reads: "No foreign state may be sued in any court otherwise competent to try suit except with the central government certified in writing by a Secretary to the Government."

On the first point, the trial court held against the UAR. The position taken by the court was that Sec.86(1) was only a personal privilege of a 'Ruler' of a foreign state and hence, only monarchical states could claim immunity under Sec.86(1) of C.P.C. but not the republican states. On the question of the plea raised by the respondent under international law, the trial judge held that the plea of immunity raised by the respondents could not be sustained as the contract which formed the subject matter of the suit was of a commercial nature and under international law states did not enjoy immunity in respect of such transactions.[89]

The matter thereafter, went up before the Division Bench of the Calcutta High Court under letters of Patent of Appeal. There, after referring to the argument, both the learned judges who constituted the Division Bench upheld the finding of the trial court that the section 86(1) did not create any bar against the suit in question. They, however, did not concur with the decision of the trial judge that foreign state did not enjoy immunity under international law in respect of their commercial activities.

---

89 Ibid, p.393, para 014.

Extensively referring to the decisions of the British Court, they ruled that the immunity of states was absolute.[90] They found it "difficult" to accept the contention of the complainant that in view of the enormous increase in the trading activities of modern states in "recent years" the "law in our country" should be brought into line with the "law prevailing in continental countries in preference to the views expressed by the English courts". Because, the judges thought that "so far as our court is concerned, it has adopted the rule of English law as the rule of private international law applicable to our country".[91]

Mirza Ali then took up his cause to the Supreme Court. After examining the relevant provisions, the Supreme Court held that Section 86(1) applied to the suit and as such it was not maintainable in the absence of consent of the Central Government. The effect of reading Sections 84, 86 and 87 together was that the suit would be in the name of the state, whether it was a suit filed by a foreign state under Section 84 or was a suit against the ruler of the foreign state under s.86, held the court.[92]

---

90 As we have seen elsewhere, the British Courts adhered to the doctrine of absolute immunity until recent years.

91 Ibid, para 17.

92 AIR 1966, S.C. 230.

Having taken this position, the court found it no more necessary to go into what it characterised as "the interesting question about the immunity of sovereign state under international law". However, the Supreme Court utilised the opportunity for clarifying the doubts about the effects of Section (1) of the Code. Speaking of the effects of the Section, the Court said:

> The effects of the provisions of Section 86(1) appear to be that it makes a statutory provisions covering a field which would otherwise be covered by the doctrine of immunity under international law. It is not disputed that every sovereign state is competent to make its own laws in relation to the rights and liabilities of foreign states to be sued within its own municipal courts. Just as an independent sovereign state may statutorily provide for its own rights and liabilities to sue and be sued in its municipal courts, so it can provide for the rights and liabilities of foreign states to sue and to be sued in its municipal courts. This being so, it would be legitimate to hold that the effect of Section 86(1) is to modify to a certain extent the doctrine of immunity recognised by international law, because municipal courts in India would be bound by the statutory provisions, such as those contained in CPC. In substance, Section 86(1) is not merely procedural; it is in a sense a counterpart of Section 84. whereas Section 84 confers a right on a foreign state to sue, Section 86(1) in substance imposes a liability on foreign states to be sued though this liability is circumscribed and safeguarded by the limitation prescribed by it. That is the effect of Section 86(1)". (93)

---

93 Ibid, para 30.

This decision of the Supreme Court came up for consideration before the Division Bench of the Bombay High Court in the case of German Democratic Republic V. Dynamic Industrial Undertaking Ltd.[94] There, one of the contentions urged before the Bombay High Court on behalf of the respondents, in appeal, was that the doctrine of immunity of foreign states, which is available under international law, was not available in India in view of the provisions of the Section 86 and 87-A of the CPC. The Bombay High Court considered in that context, the position of international law.

Setting out the observations of the Supreme Court (made in Mirza Ali V. UAR), the Bombay High Court held that the expression, used by the Supreme Court was 'modified' and it signified that the doctrine of immunity applied in India but only with the modification as made by Section 86. The High Court was of the view that the Supreme Court did not mean or imply Section 86 wholly supplanted the relevant doctrine of international law. The expression 'modified' showed that the principle of international law would be applicable in India but that in its application Section 86 created an exception. In

---

94 AIR, 1972, Bom. 27.

international law, the High Court further said, the immunity was absolute subject only to the exception recognised in international law and one of such exceptions being when the foreign state waived the privilege of immunity. Section 86, according to the Bombay High Court, created another exception, the exception being where the requisite consent was given by the Government of India, as provided under Sec.86. But theprovisions of Section 86 would to that extent operate as another exceptions and to that extent 'modify' the principles of international law, and subject to this exception, according to Bombay High Court, the relevant principles of international law would be still applicable in India.

The recent decision of the Calcutta High Court in the case of New Central Jute Mills Co.Ltd. V. VEB Devtfracht Seereedenei (1983) is of considerable interest. Examining the scope of Section 86(1) in the case, the Calcutta High Court laid down that "...whereas consent is required to institute suits against foreign states, it does not appear that such restriction applies also to the organs of the foreign state or against a body or organ which is even the part of the foreign state".[95] The facts of the case,

---

95 AIR 1983, Cal.225, at p.226.

in brief, are as follows:-

The New Central Jute Mills Co.Ltd. purchased different spare parts and accessories for its ammonia plant from Newman & Esser, in the Federal Republic of Germany. The goods were entrusted to the carrier VEB Deutfracht Seenedenei Rostock (also called DSRLINES) to carry them from Hamburg port in West Germany to Calcutta. The goods got damaged in transit, became defective and certain repairs were necessitated. The Jute Mills filed a suit before the trial judge for damages against the carrier under the Bill of Landing. On initiation of the suit by the Jute Mills, the DSR LINES filed an application before the trial judge stating that the DSR LINES was a company incorporated under the laws of German Democratic Republic which was recognised by the Government of India and that it "was the department and/or agent and/or instrumentality" of German Democratic Republics.

The trial judge upheld the arguments of the defendant and granted the latter immunity.[96] The appellate court, the Calcutta High Court, however, disagreed with the trial court in interpreting the scope of Section 86

---

96 Ibid., p.228.

of CPC. It overruled the decision of the trial court saying that, "it is quite apparent on a plain reading of the expression (in Sec.86) whereas consent is required to institute suits against foreign states, it does not appear that such restriction applies also to the organs of foreign state or against a body or an organ which is even the part of the foreign state".[97] The court then went on to examine the question whether the DSR LINES was entitled to jurisdictional immunity under international law independent of Sec.86 of CPC. The consideration of this arose out of the fact that the DSR LINES put forward the argument that even if the jurisdictional immunity was not available to it under Sec. 86(1), it was nontheless entitled to such an immunity under international law. Ultimately, however, the court did not take any position on the availability of immunities to foreign state instrumentalities under international law. Instead, it left the question to be "decided in the suit as a Preliminary issue" as "this is an issue which is taken in the written statement by the defendants (DSR LINES)".[98] The court, however, took judicial cognisance

---

97 Ibid., p.225.

98 Ibid., p.236, para 26.

of the contention of the advocate for the appellant that 'our international law' should be brought in harmony with the trend of international law. Speaking for himself, Mr.Justice Mukarjii said that foreign states did not enjoy immunity in respect of their commercial activity.[99] However, the court found it prudent not to pronounce a final verdict in view of the fact that "it is yet to be established as a definite proposition of law in India as to whether the present accepted trend of international law is that the foreign state does not enjoy immunity in respect of commercial transactions".[100] In the light of the important issues involved, the High Court gave a certificate of fitness for appeal to the Supreme Court.

The Supreme Court has so far not had any opportunity to examine the "interesting question about the immunity of sovereign states under international law".[101] The provision of prior consent of the central government as contained in paragraph (1) of the Sec. 86 has always come in its way. If in this case, the Supreme Court agreed with the finding

---

99 Ibid, para 27.

100 Ibid.

101 See Ibid, para 27.

of the Calcutta High Court that Section 86(1) did not apply to the defendant, the DSR LINES, then it would have to take a decision on that important question.

Without venturing any guess as to the final outcome in the above case, it would be pertinent to explain here a judgement of the Supreme Court delivered recently. The case in question is Harbhajan Singh Dhalla V. Union of India (1986).[102] In the case, the petitioner, Mr.Dhalla, had undertaken general maintenance work at the Embassy of Algeria in India and the residence of the then Ambassador of Algeria in New Delhi in the year 1976.

According to the petitioner, after the completion of the work assigned to him, he submitted a bill for Rs.29,000 to the concerned embassy which was not settled in toto by the latter. The petitioner then requested the Central Government in writing for the latter's consent to sue the state of Algeria under section 86 of the Code of Civil Procedure for the realisation of the outstanding amount with interest. But the Government of India turned down his request saying that "the permission to sue the state of Algeria cannot be given on political grounds".

---

102 JT 1986, SC 765.

Upon this, the petitioner moved the Supreme Court challenging the order of the Central Government. In its affidavit filed in the Supreme Court, the respondent, the Union of India, said that no prima facie case had been made out and therefore, it was decided not to grant any permission to the petitioner.

After hearing the parties, the Supreme Court set aside the order of the Central Government and ordered the latter to reconsider the application of the plaintiff. Clarifying the nature of the power entrusted to the Central government by Section 86(1), the court said:-

> It is true that these provisions both of sections 86 and 87 are intended to save the foreign state from harrassment which would be caused by the institution of a suit but except in cases where the claims appear to be frivilous patently, the Central Govern ment should normally accord consent or give sanctions against foreign states unless there are cogent political and other reasons. Normally, however, it is not the function of the Central government to attempt to adjudicate upon the merits or the case intended to be made by litigants in their proposed suits. It is the function of the Courts or competent jurisdiction and the central government cannot under section 86 of the Code usurp that function. The power given to the central government must be exercised in accordance with the principle of natural justice and in consonance with the principle that reasons must appear from the order we may note that in the counter-affidavit we don't find any such cogent reasons or due considerations.(103)

---

103 Ibid, p.772, para 22.

In deciding the case, the Supreme Court devoted much time to study the recent changes in the doctrine and practice of sovereign immunity in various countries of the world and further laid down that "in the days of international trade and commerce, international opening or embassies, in granting sanctions, the growth of national law in this aspect has to be borne in mind. The interpretation of the provisions of the code of Civil Procedure must be in consonance with the basic principles of Indian constitution".[104]

Executive Policy and Practice

As We saw in the preceding paragraphs, in India it has been provided by law that no suit can be instituted against foreign states without the written consent of the Central Government. While the law provides for the cases in which the central government can deny the consent, it does not say anything as to when the central government shall be bound to give it. There is also no provision of appeal from the order of the central government in either granting or refusing to grant the sanction. The executive branch of the government is thus left with wide powers in matters relating to immunity of foreign state.

---

104 Ibid, p.773, para 23.

The Government of India on its part has, however, given no authoritative guidance on its determination of matters under section 86 of the Code (discussed above).[105] In fact, till date, the Government has issued no official statement on the Indian State Practice in relation to this topic.[106] Efforts to procure any official statement or reaction on this subject have proved abortive.[107]

The only documented official statement that exists is the "Memorandum on State Immunity" submitted by the Government of India in the first session of the Afro Asian Legal Consultative Committee held in New Delhi in 1957.[108] In the memorandum, the Government had pointed out that the principle of absolute immunity no longer accorded with the doctrine and practice of international law. After

---

105 Afro-Asian Legal Consultative Committee; Immunity of Foreign States, AALCC/n64 ,p.46

106 S.K.Agrawala, "A Note on Indian State Practice with respect to the Immunity of Indian Property located within the Jurisdiction of Foreign States", NYBIL vol.10, 1979, p.125.

107 The Government of India did not respond to the questionnaire sent by the UN Secretariat to member states in order to elicit latter's opinion regarding their state practice and other questions related to the topic of state immunity. See, Materials on Jurisdictional Immunity on States and their Property, UN Doc. ST/LEG/SER.B/20.

108 Report of the Asian African Legal Consultative Committe Second Session, and issued by the Secretariat of the Committee, New Delhi, pp.44-48.

reviewing the practice of a number of countries in the memorandum, the government had suggested automatic waiver of immunity when a state took upon itself the role of a trader. This memorandum was supplemented by the statement of the Indian delegate before the Committee on Restriction of Immunity of states in respect of Commercial Transactions entered into by states or State Trading Corporations.[109] In the statement, it was said that the claims arising out of transactions carried out by the governments in foreign countries for the purchase of equipment for public services or utilities within the country should not be outside the jurisdiction of the local courts. In addition, it was stated that it would make no difference if the transactions were entered into the name of state trading organisation rather than in the name of the Government. It was further stated that no immunity would be available in respect of State Trading Corporations, their bonds, assets and claims arising out of transactions entered into by them in their own name when such organisation had personalities of their own under the municipal law and were empowered to function at their own risks, though under the supervision of the government.

---

109 M.K.Nawaz, "The Problems of Jurisdictional Immunity of Foreign States with particular reference to Indian State Practice", IJIL, vol.2, 1962, p.185.

This view of sovereign immunity of the Government of India has, however, not been reflected in its actual conduct. As we saw earlier in this section, the Central Government did not give consent to one of its citizens to sue a foreign state namely, Algeria, to enforce the terms and conditions of contract or commercial nature. Before the courts in foreign countries as well, the Government of India has invoked the doctrine of immunity in absolute term.[110]

In High Commissioner for India et al V. Ghosh (1963) the Government of India did resist a counter-claim based on slander on the ground of sovereign immunity in an action instituted by itself for recovery of debt or for claims for breach of contract.[111] In the case, the plaintiffs, the High Commissioner for India in the UK, the Union of India and the Government of West Bengal, were suing Dr. Satya Ranjan Ghosh, before the English courts for the return of money lent or, alternatively, damages for breach of contract. The defendant contested the liability in respect of the loans, and counter-claimed for damages for slander against two plaintiffs and some others. The High Commissioner for India and the Union of

110 Agrawala, n.106, p.128.

111 Ibid., pp.126-27.

India resisted the counter-claim on the grounds, inter alia, that the High Commissioner was immune from suit and legal process under the Diplomatic Immunities (Commonwealth and Republic of Ireland) Act, 1952 and that the Union of India was a sovereign state.

The plea was upheld and the counter-claim set aside.

In another case, Isbrandteen Tankers inc. V. President of India (1971), the Government of India pleaded sovereign immunity before the American courts with respect to an activity of commercial nature, and even in the face of a clause in the relevant contract which clearly amounted to a waiver of immunity.[112]

In the case, the plaintiff, a ship owner, entered into a charter party with the defendant, the Government of India, for the purpose of transporting grain to India. The charter party contained a clause saying that "any and all differences and disputes arising under this charter party are to be determined by the US courts for the Southern District of New York, but this does not preclude a party from pursuing any in rem proceeding in another jurisdictions, or from submission by mutual agreement of

---

112 Ibid., p.128.

any differences or disputes to arbitration".[113] However, inspite of this clause, the Government of India pleaded sovereign immunity when the plaintiff sued for damages for losses allegedly caused by unreasonable delays in the process of unloading the plaintiff's ship at the port of Calcutta.

Looking at these policies and practices of the Government of India, one gets the impression that the Government has not given any serious thought to the problem of immunity. The fact that the government failed to respond to the enquiries of the International Law Commission lends credence to that impression.

Opinion of Jurists

It is surprising to learn that the problem of state immunity, which has engaged the attention of statesmen, academics and law-makers alike and has stimulated a vast amount of literature abroad, has not attracted as much attention of jurists in India as it should have. This author came across only a couple of articles by Indian authors in the course of the collection of materials for the present study. However, in these articles, pleas have

---

113 Ibid.

been made for the adoption of restrictive immunity. In an editorial comment in the Indian Journal of International Law, the editor, Mr. K.Narayana Rao, after surveying the trend towards restrictive immunity in a growing number of countries has come to the conclusion that "there is no reason why India should not fall in line with these developments, at least in exempting trading and commercial activities from the purview of the foreign state immunities".[114] In the same journal two decades and a half back, another jurist had expressed views favouring the restrictive immunity principle.[115]

---

114 K.Narayana Rao, "Jurisdictional Immunities of Foreign States in India : Some Aspects", IJIL vol.23 (1983), p.579.

115 Nawaz, n.109.

Chapter III

WANTED : AN INTERNATIONAL LEGAL REGIME

Chapter - III

WANTED : AN INTERNATIONAL LEGAL REGIME

A. NEED FOR THE LEGAL REGIME

In the preceding chapter we saw that there exists much diversity and uncertainty in the practice of states regarding state immunity. Till date, there has not been any comprehensive international convention to guide state practice in this regard; the entire corpus of law on the subject is still largely the creation of national authorities who do not interpret customary international law on the subject uniformly. What is worse is that states not only take different stands on the question, they also at times deviate from their own stand. Some times even the views of different departments within the same government have not necessarily been harmonious.

This situation is bound to give rise to frequent irritants and some times even major disputes in international relations.[1] Until recently immunity disputes involved

---

1 See, some countries have already expressed concern about the implementation of the American Foreign Sovereign immunity Act. AALCC, Jurisdictional Immunity of States, Vol.XXVI/13, p.1.

mostly state owned merchant vessels or funds deposited in foreign states. The current expansion of state activities and increasing involvement of states in commercial transactions, especially foreign trade, raise the issue in greater variety and types of transactions, leading to a corresponding increase in inter-state and state-non-state entity disputes. The worst affected area of international intercourse, obviously, would be international trade and development.

At a time when the volume of world trade is sought to be increased and demands for greater cooperation amongst states are made day in and day out, they (states) would do well to avoid such consequences. The time has come for them to harmonise the rule regarding immunity on a global basis. The problem deserves international attention and can not be left to the judicial decisions of municipal courts or to national legislations. The codification and progressive development of international law by international institutions will alone be likely to provide an adequate and satisfactory answer to the most questions involved.

A legal regime based on a multilateral convention would go a long way in reconciling the various conflicts of interests in the exercise of the right of states to claim immunity from the jurisdiction of foreign states and

of the corresponding duty to grant similar immunity to other states. It would provide a stable basis for intercourse among states, particularly in the field of commercial activities. The question of immunity in relation to some areas of international intercourse have already been subjected to international conventions and it is certain they have enabled the international community to avoid several undesirable incidents.[2] A document covering the immunities of states in respect of all their activities would definitely be a major contribution to the codification and progressive developments of international law and the strengthening of international legal order. The need for codification of the law on this topic was underlined by the 1948 survey of the Secretary General of the United Nations in the following words :-

> There would appear little doubt that the question - in all its aspect of jurisdictional immunity of foreign states is capable and in need of codification. It is a question which figures more than any other aspect of international law in the administration of justice before municipal courts. The increase in economic activities of states in the foreign sphere and assumption by states in many countries of the responsibility for the management of the principal industries and of transport have added to

---

2 For example, conventions on diplomatic immunities and those on international navigation.

> the urgency of a comprehensive regulation of the subject.(3)

On the feasibility of codification of the topics, the survey said:

> It is doubtful whether consideration of any national interest of decisive importance stand in the way of codified statement of law commanding the agreement of a vast majority of nations on this matter. This applies not only to question of details on such matters as counter claims, set-offs and various forms of waiver - but also in regard to what is perhaps central issue in this connection, namely, immunity with regard to state transactions and activities of similar character as well as with regard to such transactions and activities of bodies possessing a personality separate from that of the state, but in fact, acting as an agency of the States. The indication of a change of attitude in the highest tribunals of countries such as UK and USA shows that the obtaining divergencies are not grounded in such fundamental conceptions of national jurisprudence as to preclude a statement of the law commanding general agreement.(4)

As far back as 1928, a committee of experts appointed by the League of Nations had opined that some aspects of this topic were ripe for codification and should be considered by an international conference convened

---

3 Survey of International Law, UN Doc.A/CN.4/1/Rev.1, Para 52.

4 Ibid, para 53.

for that purpose. In reply to the questionnaire sent out by the Committee, twenty-one Governments had expressed themselves in favour of codification of this subject; only three states answered in the negative.[5]

The need for progressive development and codification of law on this topic has also been highlighted by jurists and publicists, notable among them being Sir H. Lauterpacht[6], Philip Jessup,[7] S.Sucharitkul[8] and M.K. Nawaz.[9]

Taking the above facts into account, it is hardly surprising to learn that international lawyers, publicists, legislators and administrators alike have taken keen interest in the search for some practical working solution to the problem. Efforts have been made by various inter-governmental bodies from time to time to progressively develop and codify whole or in part, the law on the subject

---

5 Ibid, para 50.

6 See Lauterpacht, Collected Papers, vol.1, pp.445-530.

7 See IJIL, vol.26 (1932) Supplement, p.451.

8 S.Sucharitkul, "Immunities of Foreign State Before National Authorities", Hague Recueil 149, 1976.

9 M.K.Nawaz, "The Problem of Jurisdictional Immunities of Foreign States with particular reference to Indian State Practice", IJIL, vol.2 (1962), p.174.

or, less ambitiously, to regulate particular aspects of the problem. Some of these efforts have resulted in the adoption of multilateral conventions. Contributions in this regard have also been made at non-governmental level, by several professional and academic circles of international repute. They have passed resolutions proposing codification and progressive development of the topic and have also prepared and presented draft articles for the considerations of the concerned Governments.

It is proposed to give a brief account of these efforts in the following section.

B. HISTORICAL SKETCH OF THE EFFORTS TOWARDS CODIFICATION

1. Governmental Efforts

One of the earliest and most successful governmental efforts at codification of law on the subject relates to the immunities of state-owned vessels. It resulted in the adoption of a convention known as The International Convention for the Unification of Certain Rules Relating to the State-Owned Vessels (Brussels, 1926) and its additional Protocol of 1934 which is significant as living testimony of treaty endorsement of the rule of state immunity as applied to

state-owned or state operated vessels employed exclusively in governmental and non-commercial service.[10] It is true that this convention never had universal application.[11] Nevertheless, it is indisputable that the convention has set the most encouraging example for various other codification conventions. The 1958 Geneva Conventions on the Law of the Sea and 1982 United Nations Conference on the Law of the Sea have incorporated the provisions of this convention.

Another important effort in this category was made by the Asian African Legal Consultative Committee in the late fifties. In its first session held in New Delhi in 1957, the Committee considered the problem of immunity of states in respect of their commercial transactions. In its third session in 1960, it produced a report which contained various new recommendations restricting the immunities or States in respect of commercial transactions entered into by them and their agencies.[12] The Committee compiling the report consisted of the representatives of

---

10 League of Nations, Treaty Series, vol.CLXXVI, pp. 199 and 214.

11 By 1980, only twenty countries had notified the convention Six Report of the Special Repporteur, Add.1, p.57.

12 M.M.Whiteman, Digest of International Law, vol.6, pp.572-74.

Burma, Ceylone, India, Indonesia, Iraq, Japan, Pakistan, Syria and UAR.[13] However, it did not lead to any multilateral treaty unlike the effort mentioned above.

While the two preceding efforts addressed to only certain aspects in the problem of state immunity, the one initiated by the European Council in 1967 dealt with the problem in all its aspects. The effort culminated in the entry into force of the European Convention of State Immunity, 1972.[14] The Convention represents a compromise between the doctrine to absolute and restrictive immunity. It was drafted by the Committee of Experts on State Immunity for the European Community on Legal Cooperation and was later approved by the Council of Minister of the Council of Europe, 1972. So far it has been ratified by Austria, Belgium, Portugal, and the U.K., the Netherlands is contemplating ratification.[15]

This effort by the European Council led to similar efforts by other regional fora. The inter-American Judicial

---

13 Ibid.

14 See Sucharitkal, n.8.

15 The Fourth Report of the Special Rapporteur to the Thirty-sixth Session of the Commission, UN Doc. A/CN.4/376. P. 38

Committee adopted a draft convention on the topic at Rio de Janeiro in 1983.[16] The draft convention may be cited as an example of regional effort in pursuit or restrictive trend. It incorporates the restrictive theory of immunity.

The Central American States and the Carribbean states have also been considering similar projects.[17]

II. Contribution by Non-Governmental Bodies

As far back as 1932, Havard Research had prepared a draft convention on the topic known as Havard Draft Convention on Competence of Courts in regard to Foreign States 1932, with Philip Jessup and Francis Deak as rapporteurs.[18] The draft constituted the first comprehensive attempts at codification of this branch of law in most of its aspects, both substantive as well as procedural, including the position of foreign states as plaintiffs. It contained, among other things, a detailed discussion against the background of an instructive documentation of the methods of assenting immunity and of the question of enforcement of judgements. It clearly sided with the restrictive immunity

---

16 See OEA/SER.G.CP/Doc/352/83 or March 1983.

17 See Materials, pp.74-75.

18 AJIL, vol.26 (1932) Supplement p.451.

doctrine. Articles 11, 12 and 13 of the draft contained provisions relating to the amenability of states and state agencies to local jurisdiction.[19] It provided for enforcement of judgement against foreign states' immovable property not used for diplomatic or consular purposes. Needless to say, this draft convention served as an encouragement and guidance for the later codification efforts. When in 1952 the US embraced the doctrine of restrictive immunity, the draft furnished some guidelines for the new practice.

Long before the emergence of the Havard Draft, the Institut de Droit International at one of its sessions held in Hamburg in 1891, had passed a resolution calling for limiting the application of state immunity in certain cases. On 30th April, 1954, the Institut adopted a new resolution on the immunity of foreign states from jurisdiction and execution confirming immunity in regard to acts of sovereignty but upholding jurisdiction in relation to an act which under the lex fori is not an act of sovereign authority.[20]

Another professional body, the International Law Association, has been engaged with the search for a solution

---

19 Ibid, p.533.

20 Annvaire 45 (1954), pp.293-294.

for the problem of state immunity since the early decades of this century. It has discussed the problem in several of its sessions and has produced a couple of drafts on the subject.[21] The latest draft articles for a convention on state immunity was prepared by a Committee on State Immunity of the Association and adopted by it in its sixtieth conference held at Montreal in 1982.[22] The doctrine of restricted immunity finds expression in the draft.

Yet another non-governmental institution engaged in this field is the International Bar Association. At its meeting at Cologne in 1958, the International Bar Association proposed a draft resolution incorporating a restrictive doctrine of state immunity. A resolution was adopted at its meeting in Salzburg in July, 1960, spelling out the circumstances in which immunity might be limited. The resolution resembled closely the corresponding provisions of the Havard Draft Convention, while its Paragraph I clearly endorsed the restrictive principle of the Brussels Convention of 1926.[23]

---

21 See the Report of it's thirty-six, fourtyfifth and Sixtieth Conferences.

22 International Law Association, Report of the Sixtieth session held at Montreal (1982) (London, ILA, 1983), pp.6-10.

23 ILC Report, 35th session (1982), p.74.

III. Codification Effort and the ILC

The most ambitious effort to provide an international codification of the law on the subject, however, is made by the International Law Commission. Although the Commission commenced its work on the topic towards the end of the last decade, its involvement with the topic goes back to the first session of the Commission which was held in 1948.[24]

In 1948 the Secretary General of the UN prepared for the first session of the Commission a memorandum entitled "Survey of International Law in relation to the work of codification of the International Law Commission". Included in that survey was a separate section on "Jurisdiction over foreign states" in which it was stated that the subject covered the entire field of judicial immunity of states, of their public vessels, of their sovereign and armed forces. At its first session in 1949, the Commission (ILC) drew-up a provisional list of fourteen topics selected for codification, including the one entitled "Jurisdictional Immunity of State and their Property". But the matter was forgotten until 1971 when the Secretary General, in a working paper prepared by him, drew the attention of the commission to the topic again. In 1973, the Commission discussed the

---

24 ILC Report (1978).

agenda for it's long term programme of work on the basis of the 1971 report of the Secretary General. Among the topic repeatedly mentioned in the discussion was that of immunities of states. At last, it was recommended by the Commission in its twenty-ninth session, that the topic should be given active consideration. At its thirty-second session the General Assembly considered the recommendation of the Commission and adopted on 19th December 1977 a resolution (No.32/151) inviting the ILC to commence work on the topic at an appropriate time. In response to the above invitation, the Commission established a working group to consider the question of immunity during its thirtieth session. The working group submitted a report to the Commission containing an examination of some aspects of the work to be done. The Commission on the basis of the recommendation to the working group decided to include the topic on its current programmer work, that is in thirtieth session in 1978, and appointed Mr.S.Sucharikul, as special rapporteur for the topic.

After long discussions and deliberations spanning over nine sessions, during which the special rapporteur produced eight reports containing various suggestions for the considerations of the Commission from time to time, the Commission at its 1972nd meeting on 20 June 1986 adopted

on first reading a set of draft articles on the topic entitled "Draft Articles on Jurisdictional Immunities of States and their Property".[25]

It is pertinent to mention that although the Commission produced its first comprehensive draft on the topic in 1986, certain other draft articles prepared by the Commission on similar topics had touched upon certain aspects of this problem. In its draft articles of 1956 on the Law of the Sea, the Commission had referred to the immunities of State owned ships and warships. Similarly, the immunities of State properties used in connection with the diplomatic missions were provided for in its draft on diplomatic intercourse, while those of the properties used in connection with consular posts were dealt with in the 1961 draft an consular relations. The 1967 draft articles on special missions also contained provisions on the immunity of state property used in those missions, as did the 1971 draft articles, on the representations of state in their relations with international organisations. International conventions have been concluded on the basis of these draft articles.[26] It remains to be seen when the recent draft articles on State immunity enters the catalogue of multilateral conventions.

---

25 ILC Report (1986), p.8. For the text of the draft articles see Appendix.

26 See the 1st Chapter, [illegible]

Chapter IV

THE DRAFT ARTICLES : A CRITIQUE

Chapter - IV

THE DRAFT ARTICLES : A CRITIQUE

The International Law Commission has not yet finalised the draft articles on state immunity; they have been adopted provisionally on the first reading. Before submitting the draft articles to the General Assembly, the Commission intends to bring about improvement in the provisions of the draft articles in the second reading. For that purpose, the Commission has solicited the comments and observations of the member-governments which the latter are expected to submit before 1 January 1988. Meanwhile, the General Assembly has urged the Governments to give full attention to the request of the Commission in its resolution (41/81) adopted in December 1986.[1]

This chapter examines the suitability of the draft articles for a future Convention on state immunity.

A. DRAFT ARTICLES : THE CONTENT

The draft consists of twentyeight articles divided into five parts, each part dealing with one aspect of the problem. Part one entitled, "Introduction", sets out the

---

1 ILC Report 1986, p.8.

scope of application of the draft articles and gives the definitions of various terms used in the draft; part second, as its title, "General Principles" indicates, defines the scope of the immunity of sovereign state and explains how states should give effect to this immunity. The third part, the most important one, enumerates the types of proceedings in respect of which states shall not be immune from the jurisdiction of foreign countries. The immunity of state-property from measures of constraint, which form part and parcel of the composite whole of the doctrine of state immunity, has been dealt with separately in part four. The provisions contained in the last part of the draft are, however, not least in importance. They have a significant bearing on the implications of the provisions of first four parts.

The draft articles give a comprehensive treatment to the problem of state immunity. They deal not only with the most important aspect of the problem, namely, the scope and extent of immunity, but also provide for other questions related thereto, such as, voluntary submissions by states to be sued, service of process, default of judgements and others. The draft articles, however, do not address to the immunity from the over-all sovereign powers of states they only deal with the immunity from the

jurisdiction of "any organisation of a state, however named, entitled to exercise judicial functions".[2] Also, the provisions of the draft articles are not to affect the immunities and privileges of diplomatic missions, consular post', "Special missions and other few similar institutions, as those have been governed by special international legal regimes concluded by states sometime back.

The draft articles recognise the doctrine of state immunity but subject it to some exceptions. In other words, they incorporate the restrictive theory of state immunity. The categories of exceptions contemplated in the draft articles relate to "commercial contracts", 'tontract of employment", "Personal injuries and damage of property", "ownership, possession and use of property", "patents, trade marks, intellectual or industrial property", "participation in companies or other collective bodies", "State-owned or state operated ships engaged in commercial service", "effect of an arbitration agreement", and lastly, "cases of nationalisations".

State are debarred from claiming immunity on foreign courts in proceedings involving the above mentioned matters.

---

2 See Art. 1 and 2 of the draft.

These exceptions to state immunity are, however, not provided in absolute terms. That means, they have been subjected to various qualifying clauses. Most of the exceptions, as enumerated in the articles 11 to 20, are preceded by the qualifying clause "unless otherwise agreed between the states concerned". It means that, if the states concerned decide otherwise, they shall still enjoy immunity in the situation enumerated in those exceptions. Some of the exceptions are subjected to more than one qualifying clauses, the operation of some of which are not dependant on the desire of the concerned states. For example, the Article 11 lays down that states cannot invoke immunity from the jurisdiction of foreign courts in respect of proceedings related to commercial contracts. This rule rather the exception to the rule of state immunity, has been subjected to two qualifications, one of which says that the above exception would not apply "in the case of a commercial contract concluded between state or on a Government-to-Government basis". The exception provided in the article 12 is subjected to as many as five qualifying clauses, the application of any one of which would render the exception inoperative.

The draft articles restrict the immunity of states from measures of constraint as well. According to articles

21 and 22, a state cannot invoke immunity from measures of constraint in respect of three types of property. They are:

a) Property "specially in use or intended for use by the state for commercial (non-governmental) purposes and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding has directed";

b) Property that has been allocated or earmarked by the state for the satisfaction of the claim which is the object of that proceedings";

c) Property in respect of which it has expressly consented to the taking of such measures, either in a written contract or by a declaration before, the court in a specific case.

However, while subjecting states to measures of constraint, the draft articles arm them with certain safeguards. One such safeguard is provided in the article 23 which specifies a certain categories of state properties and holds that they are not to be considered as used or intended for use for commercial purposes and are not to be subject to measures of constraints in connection with

proceedings before the court of a foreign country save with the consent of the country concerned. The properties mentioned in this category are, among others, the property including any bank account, used or intended for use for the purposes of diplomatic, consular and other such missions; the property of the central bank or other such monetary authority; the property forming a part of cultural heritage; and others. The inclusion of this safeguard is significant in view of an alarming trend in certain jurisdiction to attach to and freeze foreign state property, especially assets of the central bank, and the bank accounts of the Embassies and other such properties which are vital to the functioning of the government of a state.

A noteworthy feature of the draft articles is that while restricting the immunity of states, they seek to do it in a manner consistent with the horizontal nature of the present day international society and the dignity of states. While formulating the rules of procedure, it seems, the difference that exist between a sovereign state and non-state entities has been taken into consideration by the Commission. The former has been provided with some procedural immunities and privileges befitting its status. They are-

a) A state enjoys immunity in connection with proceedings before a court of another state from

any measures of coercion requiring it to perform or to refrain from performing a specific act on the pain of suffering a monetary penalty;[3]

b) Any failure or refusal by a state to produce any other information or documents or disclose any other information for the purposes of a proceeding before a court of another state shall entail no consequences other than 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;[4]

c) A state is not required to provide any security, bond or deposit, however described, to guarantee the payment of judicial costs or expenses in any proceedings to which it is a party before a court of another state.[5]

The provisions of the paragraph (b) are as of great significance considering the fact that sometimes states, for reasons of security and/or their domestic laws, are prevented from submitting certain documents carrying

---

3 Art.26.

4 Art.27(1).

5 Art.27(2).

certain information to the court of another states and even to those of their own.

In the draft articles adequate attention has been paid to procedural matters like service of process, default judgements, voluntary submissions by a state to being sued in another states, the scope of counter-claim etc., in no uncertain terms. For the consent of a state to be recognised it has to be expressly made "in a written contract" or "by a declaration before the court in a specific case". Again, it is provided that consent to the exercise of jurisdiction ... by a court shall not be held to imply consent to taking measures of constraint under part IV of the draft articles, for which a separate consent shall be necessary.[6]

The draft article do not permit the courts to act upon implied consent of states as has been the practice with the courts of civil law jurisdictions. To avoid any confusion detailed description has been given of the various ways in which service of process are to be effected.[7]

---

6 Art.22.

7 See Art.24.

and of the procedure to be followed while rendering default judgements.[8] The immunity of states from counter-claims has been put in the black and white. Thus a state, according to article 10, cannot invoke immunity :-

a) In respect of any counter-claim arising out of the same legal relationship or facts as the principal claim, when the proceeding has been instituted by the state itself;

b) In respect of any counter-claim arising out of the same legal relationship or facts as the principal claim, when the state has intervened in a proceeding to present a claim before the court; and

c) In respect of the principal claim, when the state is making a counter-claim in a proceeding.[9]

B. DRAFT ARTICLES : A CRITIQUE

The most commendable thing about the draft articles is that they incorporate the theory of restrictive immunity.

---

8 See Art.25.

9 See Art.10.

Apart from establishing justice and rule of law in an important area of international relations (the relation between state and non-state entities),[10] an international legal regime based on the principle of restrictive immunity would also have a favourable effect on international trade and development by facilitating the adjudication of disputes relating to those fields. It is not for nothing that several countries, including many socialist ones, have signed treaties agreeing to waive immunity in respect of their commercial activities.[11]

They are well aware of the fact that without there being any restriction on their right to immunity, their ability to find private entities willing to have commercial dealings with them would be compromised and their opportunity of foreign trade reduced. One can hardly disagree with K.Philip Knierem when he says that "participation by state entities in international commercial interaction is

---

10 The history of the relation between state and non-state entities is replete with instances of unredressed grievances of the former against the latter.

11 For such treaties see Materials on Jurisdictional Immunity of States, p.130; also see the second chapter.

sufficiently widespread that it is impossible to exclude them from the ambit of obligation enforcement without precluding a viable international economic regime".[12] It is worthwhile to quote here the memorandum of the Ministry of External Affairs of the Government of India submitted in the first session of the Afro-Asian Legal Consultative Committee held in New Delhi in 1957. Arguing for the acceptance of the restrictive theory, the memorandum said:

> The activities that are undertaken by modern states cannot be regarded as state activity in the sense that it was understood and it would indeed be stretching the point too far if the principle of immunity was applied to all such activities undertaken by a state today. If the sovereign state choses to trade, it should be in no better position than an individual or company engaged in foreign trade. To allow immunity in such cases would unduly result in a better position than trading individual or company for which preferential treatment there is no warranty in international law.(13)

Some countries are of the opinion that the functional theory of immunity which states that a state when engages

---

12 K.Philip Knierem, "State Immunity from Judicial Enforcement : The Impact of European Convention of State Immunity", Colombia Journal of Transnational Law, vol. ,1973, p.130.

13 Quoted in M.K.Nawaz, "The Problems of Jurisdictional Immunity of Foreign States with particular reference to Indian State Practice", IJIL, vol.2, 1962. p.186.

itself in commercial activity in foreign territories can be sued and its property subjected to enforcement measures as in the case of individuals, is violative of the sovereignty and disunity of states and hence, unacceptable to them.[14]

Such a stand on the part of these countries, however, is erroneous. To require a state to answer claims based upon transactions of non-governmental nature cannot be said to involve a challenge or enquiry into the acts of sovereignty.[15] It cannot be termed as a threat to the dignity of states either. As Lord Denning has rightly said,

> It is more in keeping with the dignity of a foreign state to submit himself to the rule of international law than to claim to be above it, and his independence is better ensured by accepting the decision of a court or acknowledged impartiality than by arbitrarily rejecting their jurisdiction.(16)

---

14 See the answers of the socialist countries to the questionnaire sent by the Secretary General, Materials on Jurisdictional Immunity of States. Even though many socialist countries have signed bilateral treaties subjecting their state instrumentalities engaged in commercial activities abroad to local jurisdiction, they still refrain from expressing any formal acceptance of the restrictive theory of immunity.

15 Hersch Lauterpacht, "The Problems of Jurisdictional Immunity of States", British YBIL, vol.28, 1951, pp.250-72.

16 In Rahimtolah V. Nizam of Hyderabad. Quoted in ibid.,

The provision of the part third of the draft articles thus cannot be said to be violative of the sovereignty and dignity of states.

The exceptions engrafted by the draft articles on state immunity are reasonable and balanced. If implemented, they would definitely promote accountability of states for their activities in foreign countries -- an outcome, which, apart from serving as a boost to the dignity of the former, will also be beneficial for both international trade and world peace. The subjection of state to the economic and trade law of the foreign countries as provided under articles 11, 15, 16, 17, & 18 would allow each state to pursue its domestic policies for industrial and economic growth within its own territory and require respect for the policies of another state when engaging in such conduct therein. Such an arrangement would contribute to certainty and fairness in international trade which is a *sine qua non* for its growth. The exception provided in Article 13, which require states to submit to the jurisdiction of foreign courts in relation to their acts or omissions which caused death or injury to persons or damage to property, is designed to avoid hardships incurred by individuals who would otherwise have no relief. The overwhelming

interest of the dignity of states alone, if not the interest of the individuals, provides enough justification for the acceptance of this exception. As for the exception regarding "ownership, possession or use of property", there can be no second opinion. The concept of ownership and other property rights and interest can only exist within the framework of legal system of the states and such a concept is bound to be inherently absorbed within the notion of territorial sovereignty of the state itself.

The draft articles have been designed to receive the support of all states. While formulating the articles, the commission seems to have kept in mind the need to approach the topic from international perspective. While ensuring that private individuals and non-state entities do not suffer in their dealings with foreign states, care has also been taken to see to it that the socialist and developing countries, where governments play a direct role in the development process, are not put to disadvantage on account of their different economic system. Concern for the interests of these countries has found expression in several articles of the draft viz. 3, 11, 20 and 23 among others. The provisions of Article 11 is important.

It holds that state cannot invoke immunity in respect of their commercial contract concluded in foreign states but that this rule will not apply in the case of contracts concluded between states or on a government to government basis. This provision will allow the developing countries to carry on undisturbed with the scores of contracts which they conclude each year with foreign states and on Government-to-Government basis for such important purposes as transfer of food-aid, technology and the like. Similarly, a persistent demand of the socialist countries is met by article 3 which holds that in determining the commercial nature of the contract the purpose of the contract should also be taken into account if in the practice of that state the purpose is relevant to determining the non-commercial character of the contract.

The provision of the Article 23, which prohibits the attachment and execution of a few categories of properties of states without their prior consent, must have come as a relief to the developing countries as, in recent years, a practice has been growing among the litigants in developed countries to seek relief through the attachment

and execution of the properties mentioned in that article.[17] So is true of the provisions in the Article 20 as well.

Another feature of the draft articles which adds to their acceptability is the provision of the Article 28 which allows the states, by agreement, to extend to each other treatment different from what is required by the provisions of the articles. In case a few states do not fell like submitting to foreign courts in respect of a particular area of their activity, they can do so by an agreement among themselves. Different but concurrent regimes are possible within the limits of the provisions of the draft articles.

Finally, it must be said in favour of the draft articles that they are arranged and organised in such a pattern as to present a vivid and easily perceptible picture of the whole structure of the treatment of state immunity. The whole draft, it can be said without hesitation, represent a concrete achievement in the progressive development of international law and its codification.

---

17 The properties mentioned in Article are: bank accounts used for the purpose of embassies, the assets in central bank and other such monetary authority situated abroad, and etc. See Art.21.

While conceding the above facts in respect of the draft articles, it needs to be mentioned that there is room for improvement in a few provisions of the draft and also the need for a few additional provisions.

Firstly, the method envisaged in the draft articles to solve the age-old problem of distinguishing commercial contracts from non-commercial ones is not satisfactory. Paragraph 2 of the article 3 states:-

> In determining whether a contract for the sale or purchase of goods or the supply for services is commercial, reference should be made primarily to the nature of the contract, but the purpose of the contract should also be taken into consideration if in the practice of that state purpose is relevant to determining the non-commercial character of the contract.

If the socialist countries, given their familiar stand on the matter, try to invoke immunity in respect of all their activities by applying the purpose test, then the whole purpose of restricting the state immunity in the draft article will be defeated.[18] Hence it must be made clear in the articles that the purpose test should not be

---

18 For the stand of the socialist countries on the nature of state activity see Chapter 11 page.

overworked, but should be taken into consideration only in connection with activities geared to such purposes as relief operations in times of natural disaster or during the outbreak of epidemic diseases, or famine.

Another problem which deserves consideration is that, following the adoption of restrictive theory of immunity by states, there will definitely be an increase in litigation against states. There is also ever present the danger of vexatious litigations, especially in developed countries. Even if in such cases immunity were to be upheld by the court successfully invoked by a state, the cost of establishing immunity may be too high for a developing country and out of proportion with the relative merits of cause of action, which could entail unnecessary hardship.[19] Hence, appropriate provisions have to be made in the draft-articles to avoid such consequences. As has been said at the outset in this chapter, certain provisions of the draft articles have been in square-brackets following

---

19 In one case the government of a developing country had to spend as much as US $ 200,000 in legal cost for establishing it's immunity before the court of first instance alone. See AALCC, Jurisdictional Immunities of States, Doc.XXVI/13, P. 26

difference among the members of the commission on these provisions. These brackets have to be removed on the second reading and before the draft articles are presented in the General Assembly. But the task does not seem to be easy considering the fact that the presence or absence of the bracketed provision will make, at least in some cases, much difference to the implications of the concerned articles.[20]

However, there should be no cause for worry. Much will depend upon the attitude of governments. The Law Commission has solicited their comments and observation on the articles. Their constructive indulgence in the matter can work wonder. They must rise to the occasion.

---

20 See the bracketed provisions, especially, in the Articles 6 and 22.

Chapter V

SUMMARY AND CONCLUSIONS

Chapter - V

SUMMARY AND CONCLUSIONS

The doctrine of state immunity is an important rule of international law affecting the rights and duties of states as well as the interests of indiviauals and non-state entities. It governs the legal status of states and their properties when they are engaged in activities in foreign territory. Therefore, for the smooth conduct of international relations, especially between individuals and non-state entities on the one hand and foreign states and their agencies on the other, it is necessary that the rule of immunity is uniformly interpreted and applied by all the states. However, in reality it is not so. While there exists a large measure of disagreement among state on the general principle of immunity, the divergencies and uncertainties in its application are conspicuous not only between various states but also in the internal jurisprudence of states.

Aware of the consequences of the existing situation and conscious of the need for harmonising the practice of states in this regard, international lawyers, legislators, administrators and the like have shown keen interest in developing an international convention on the subject. They have also taken some practical steps in this direction. Of

late, the International Law Commission has also displayed keen interest in the progressive development and codification of this topic. After long discussions and deliberations spanning over several sessions, the Commission has provisionally adopted a set of draft articles on the subject.

Based on the doctrine of restricted immunity, the draft articles give a comprehensive treatment to the problem of state immunity. They deal not only with the most important aspect of the problem, namely, the scope and extent of immunity, but also provide for other questions related thereto, such as service of process, default judgement, voluntary submissions, etc. The exceptions engrafted on state immunity in the articles are balanced and reasonable.

The consideration of the draft articles in the sixth Committee of the General Assembly has, however, been controversial.[1] While many of the representatives who have spoken on the topic have commented on the draft articles in a fashion that is constructive and encouraging, a few

---

1 See Topical Summary of the debates in General Assembly, 35th to 40th session.

other members have expressed reservations to the work of the Commission and have questioned the validity of the part third of the draft articles (which deals with exception to state immunity) provisionally adopted by the Commission. [2] It has been pointed out by the latter that the theory of restrictive immunity, as reflected in part third of the draft articles, is not based on universal state practice and therefore, cannot serve as the basis for formulating a general norm of international law on the subject.[3] They also disagree with the assumption of the Commission that a state can act in capacities other than governmental. A state can not have two different personalities, they argue.[4]

The criticisms of the work of the Commission, however, seems to be unjustified. It is true that allthe exceptions engrafted on state immunity on the draft articles are not based on universal state practice. But the Law Commission cannot be faulted on that count. It should not be overlooked that the subject of state immunity is not only in need of

---

2 Topical Summary, 37th session UN Doc.A/CN.4L.352, paras 157-85.

3 Ibid, para 160.

4 See the memorandum submitted by the Russian member of the Commission. UN Doc.A/CN.4/ 371.

codification but also requires progressive development. In formulating a set of draft articles, therefore, the Commission has not only to codify existing state practice but also to find out new provisions suitable to the present condition. Thus, the question that needs to be asked is whether the draft articles are reasonable or not and not whether they are based on universal state practice.

As it is, the draft articles present a breakthrough and offer a possible way out of the present mess. The second reading of the draft could result in still better provisions. Therefore, the Member-Governments must respond to the Commission's request in a constructive manner. Instead of viewing the work of the Commission as offering an opportunity for furthering their ideological interest, they must consider the issue on merits and forward their comments and observations which the Commission is so eagerly waiting for. while doing so, they must keep it in mind that to be ruled by law is not an act of slavery but of salvation, that the dignity of a state, as of an individual, lies in passing the test of law and not in by-passing it with the help of some technical device.

A P P E N D I X

JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

Text of the Draft Articles provisionally adopted by the International Law Commission on first reading

ANNEX

JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

Text of the draft articles provisionally adopted by the International Law Commission on first reading

PART I

INTRODUCTION

Article 1

Scope of the present articles

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

Article 2

Use of terms

1. For the purposes of the present articles:

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

(b) "commercial contract" means:

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

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

(iii) Any other contract or transaction, whether of a commercial, industrial,

trading or professional nature, but not including a contract of employment of persons.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or in the internal law of any State.

Article 3

Interpretative provisions

1. The expression "State" as used in the present articles is to be understood as comprehending;

(a) the State and its various organs of governments;

(b) political sub-divisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State;

(c) agencies or instrumentalities of the State, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State;

(d) representatives of the State acting in that State acting in that capacity.

2. In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made primarily to the

nature of the contract, but the purpose of the contract should also be taken into account if in the practice of that State that purpose is relevant to determining the non-commercial character of the contract.

Article 4

Privileges and immunities not affected by the present articles

1. The present articles are without prejudice to the privileges and immunities enjoyed by a State 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 the privileges and immunities accorded under international law to heads of State ratione personae.

Article 5

Non-retroactivity of the present articles

Without prejudice to the application of any rules set forth in the present articles to which jurisdictional immunities of States and their property are subject under international law independently of the present articles,

the articles 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 said articles for the States concerned.

PART II

GENERAL PRINCIPLES

Article 6

State immunity

A State enjoys immunity, in respect of itslef and its property, from the jurisdiction of the courts of another State subject to the provisions of the present articles (and the relevant rules of general international law).

Article 7

Modalities for giving effect to State immunity

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

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

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

Article 8

Express consent to exercise of jurisdiction

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

(a) by international agreement;

(b) in a wirtten contract; or

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

Article 9

Effect of participation in a proceeding before a court

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

(a) itself instituted that proceeding; or

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

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

(a) invoking immunity, or

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

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

Article 10

Counter-claims

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

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

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

PART III

(LIMITATIONS ON) (EXCEPTIONS TO) STATE IMMUNITY

Article 11

Commercial contracts

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

2. Paragraph 1 does not apply,

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

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

Article 12

Contracts of employment

1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for

services performed or to be performed, in whole or in part, in the territory of that other State, if the employee has been recruited in that other State and is covered by the social security provisions which may be in force in that other State.

2. Paragraph 1 does not apply if:

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

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

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

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

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

Article 13

Personal injuries and damage to property

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to compensation for death or injury to the person or damage to or loss of tangible property if the act or omission which is alleged to be attributable to the State and which caused the death, injury or damage occurred in whole or in part in the territory of the State of the forum, and if the author of the act or omission was present in that territory at the time of the act or omission.

Article 14

Ownership, possession and use of property

1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked to prevent a court of another State which is otherwise competent from exercising its jurisdiction in a proceeding which relates to the determination of:

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

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

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

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

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

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

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

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

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

Article 15

Patents, trade marks and intellectual or indsutrial property

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

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

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

Article 16

Fiscal matters

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

Article 17

Participation in companies or other collective bodies

1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to its participation in a company or other collective body, whether incorporated or unincorporated, being a proceeding concerning the

relationship between the State and the body or the other participants therein, provided that the body:

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

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

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

Article 18

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

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

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

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

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

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

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

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

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

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

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

Article 19

Effect of an arbitration agreement

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

(a) the validity or interpretation of the arbitration agreement,

(b) the arbitration procedure,

(c) the setting aside of the award,

unless the arbitration agreement otherwise provides.

Article 20

Cases of nationalization

The provisions of the present articles shall not prejudge any question that may arise in regard to extraterritorial effects of measures of nationalization taken by a State with regard to property, movable or immovable, industrial or intellectual.

PART IV

STATE IMMUNITY IN RESPECT OF PROPERTY FROM MEASURES OF CONSTRAINT

Article 21

State Immunity from measures of constraint

A State enjoys immunity, in connection with a proceeding before a court of another State, from measures of constraint, including any measures of attachment, arrest and execution, on the use of its property or property in its possession or control (, or property in which it has a legally protected interest,) unless the property:

(a) is specifically in use or intended for use by the State for commercial (non-governmental) purposes and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed, or

(b) has been allocated or earmarked by the State for the satisfaction of the claim which is the object of that proceeding.

Article 22

Consent to measures of constraint

1. A State cannot invoke immunity, in connection with a proceeding before a court of another State, from measures of constraint on the use of its property or property in its possession or control (, or property in which it has a legally protected interest,) if and

to the extent that it has expressly consented to the taking of such measures in respect of that property, as indicated:

(a) by international agreement,

(b) in a written contract, or

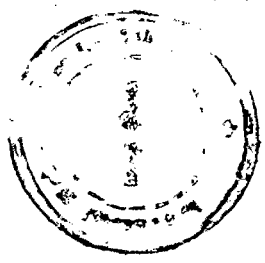
(c) by a declaration before the court in a specific case.

2. Consent to the exercise of jurisdiction under article 8 shall not be held to imply consent to the taking of measures of constraint under Part IV of the present articles, for which a separate consent shall be necessary.

Article 23

Specific categories of property

1. The following categories of property of a State shall not be considered as property specifically in use or intended for use by the State for commercial (non-governmental) purposes under paragraph (a) of article 21:



(a) property, including any bank account, which is in the territory of another State and is used or intended for use for the purposes 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 for military purposes;

(c) property of the central bank or other monetary authority of the State which is in the territory of another State;

(d) property forming part of the cultural heritage of the State or part of its archives which is in the territory of another State and not placed or intended to be placed on sale;

(e) property forming part of an exhibition of objects of scientific or historical interest which is in the territory of another State and not placed or intended to be placed on sale.

2. A category of property, or part thereof, listed in paragraph 1 shall not be subject to measures of constraint in connection with a proceeding before a court of another State, unless the State in question has allocated or earmarked that property within the meaning of paragraph (b) of article 21, or has specifically consented to the taking of measures of constraint in respect of that category of its property, or part thereof, under article 22.

PART V

MISCELLANEOUS PROVISIONS

Article 24

Service of process

1. Service of process by any writ or other document instituting a proceeding against a State shall be effected:

(a) in accordance with any special arrangement for service between the claimant and the State concerned; or

(b) failing such arrangement, in accordance with any applicable international convention binding on the State of the forum and the State concerned; or

(c) failing such arrangement or convention, by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned; or

(d) failing the foregoing, and if permitted by the law of the State of the forum and the law of the State concerned:=

(i) by transmission by registered mail addressed to the head of the Ministry of Foreign Affairs of the State concerned requiring a signed receipt; or

(ii) by any other means.

2. Service of process by the means referred to in paragraphs 1 (c) and (d) (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 25

Default judgement

1. No default judgement shall be rendered against a State except on proof of compliance with paragraphs 1 and 3 of article 24 and the expiry of a period of time of not less than three months from the date on which the service of the writ or other document instituting a proceeding has been effected or deemed to have been effected in accordance with paragraphs 1 and 2 of article 24.

2. A copy of any default judgement 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 paragraph 1 of article 24 and any time-limit for applying to have a default judgement set aside, which shall be not less than three months from the date on which the copy of the judgement is received or is deemed to have been received by the State concerned, shall begin to run from that date.

Article 26

Immunity from measures of coercion

A State enjoys immunity, in connection with a proceeding before a court of another State, from any measure of coercion requiring it to perform or to refrain from performing a specific act on pain of suffering a monetary penalty.

Article 27

Procedural immunities

1. Any failure or refusal by a State to produce any document or disclose any other information for the purposes of a proceeding before a court of another State 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 is not 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 party before a court of another State.

Article 28

Non-discrimination

1. The provisions of the present articles shall be applied on a non-discriminatory basis as between the States parties thereto.

2. However, discrimination shall not be regarded as taking place:

(a) where the State of the forum applies any of the provisions of the present articles restrictively because of a restrictive application of that provision by the other State concerned;

(b) where by agreement States extend to each other treatment different from that which is required by the provisions of the present articles.

BIBLIOGRAPHY

SELECT BIBLIOGRAPHY

PRIMARY SOURCES

United Nations Documents

Materials on Jurisdictional Immunities of States and Their Property. Doc.ST/LEG/SER.13/20.

Report of the International Law Commission 1978 to 1986.

Yearbook of the International Law Commission, vol.II, Part two, Doc.A/CN.4/SER.A/1978-84.

Asian African Legal Consultative Committee Documents

Jurisdictional Immunities of States, Doc.No.AA/CC/XXVI/13.

Final Report of the Committee on Immunity of States in respect of Commercial and other Transaction of a Private Character, Third Session, 1960.

Government Documents

India, Memorandum on State Immunity, Ministry of External Affairs, Government of India.

SECONDARY SOURCES

Books

Brownlie, I., Principles of Public International Law (London : Oxford University Press, 1979).

Jenks, C.Wicfred, International Immunities (London: Steven & Sons Ltd., 1961).

Friedman, Henkin and Lissitzyn, ed., Transnational Law in a Changing Society : Essays in Honour of Philip Jessup (New York : Columbia Univ. Press, 1972).

Oppenheim, L., International Law : A Treatise, Lauterpacht ed., (London : Longman, 1972).

Sucharitkul, S., State Immunity and Trading Activities (London, 1959).

Articles

Adebe, A.O., "The Doctrine of Sovereign Immunity Under Commercial Law : An Observation on Recent Trends", Indian Journal of International Law, vol.17, 1977, pp. 245-60

Boguslavasky, M.M., "Foreign State Immunity : Soviet Doctrine and Practice", Netherlands YBIL (The Hague), vol.10, 1979, pp.167-77.

Bouchez, C.J., "The Nature and Scope of State Immunity from Jurisdiction and Execution", Netherlands YBIL, vol.10, 1979, p.3.

Bouchman, S., "The Question of Iran's Immunity : Jurisdiction over a Foreign Sovereign", Brooklyn Journal of International Law (Brooklyn,), vol.41, 19 ,pp.47-53

Brittenhaim, A.David, "Foreign Sovereign Immunity : A Conflict of Approach", Columbia Law Review, (NY,USA), vol.83, Nos.5-6, 1983, pp.1440-1512.

Crawford, J.R., "A Foreign Sovereign Immunity Act for Australia?", Australia YBIL (Canberra), vol.8, 1983, pp.71-108.

Dalevme, "Economic Development and Sovereign Immunity", American Journal of International Law, vol.19, 1985, pp.319-346.

Dalavme, "Public Debt and Sovereign Immunity : The Foreign Sovereign Immunity Act, 1976", American Journal of International Law, vol.71, 1977, pp.409-13.

Enderlein, Fritz, "The Immunity of State Property from Foreign Jurisdiction : Doctrine and Practice of German Democratic Republic", Netherlands YBIL, vol.10, 1979, pp.111-124.

Feidman, Mark, "Foreign Sovereign Immunity Act in the US Counts 1976-86", Vender beilt Journal of Transnational Law (Nashville, Tennessee), vol.19, No.1, Winter 1986, pp.1-18.

Friedman, W., "Changing Social Arrangements in State Trading States and their Effect on International Law", Law and Contemporary Problems (Durham, N.C.,USA), vol.24, 1959, pp.350.

Gracia, M.K., "The Doctrine of Sovereign Immunity of Foreign States and its Recent Modification", Virginia Law Review (Virginia, USA), vol.42, 1956, pp.

Hervey, J.G., "The Immunity of Foreign States when Engaged in Commercial Enterprise : A Proposed Solution", Michigan Law Review (Michigan, USA), vol.27, 1929, p.751.

Higgins, R., "Certain Unresolved Aspect of the Law on Sovereign Immunity", Netherlands Int.Law Review vol.29, 1982, pp.

Hirobe, K., "Immunity of State Property : Japanese Practice Netherland YBIL, vol.10, 1979, pp.233-244.

Johnson, D.H.N., "The Puzzel of Sovereign Immunity", Australian YBIL, vol.6, 1978, pp.1-51.

Kale, George A., and Vega, A.Makis, "Immunity and Jurisdiction : Toward a Uniform Body of Law in Action against Foreign States", Columbia Journal of Transnational Law (N.Y) vol.18, 1979, pp.211-59.

Kindered, H.M., "Foreign Governments Before Courts", Canbera Bar Review, vol.63, 1980, pp.624-31.

Lauterpacht, H., "The Problem of Jurisdictional Immunity of Foreign States", British YBIL (London),vol.28, 1951, pp.250-72.

Mann, F.F., "State Immunity Act, 1978", British YBIL, vol.57, 1980, pp.

Markensins, B.S., "The Changing Law of State Immunity", Cambridge Law Journal (UK), vol.36, 1979, pp.211-16.

Morris, Virginia, "Sovereign Immunity : The Exception for Intellectual Property", Venderbeilt Journal of Int. Law, vol.19, Winter 1986, pp.83-116.

Nawaz, M.K., "The Problem of Jurisdictional Immunity of Foreign States with particular reference to Indian State Practice", Indian Journal of International Law vol.2, 1962, pp.164-99.

Neilsen, N.K., "Lack of Uniformity in the Law and Practice of States with regard to Merchant Vessels", American Journal of Int.Law, vol.13, 1919, pp.1-21.

Rajah, Sorna, "Problems with the Doctrine of Restrictive Immunity", International and Comparative Law Quarterly, (London), vol.18, 1982, pp.661-85.

Riesenfield, S.A., "Sovereign Immunity in Perspective", Venderbeilt Journal of Transnational Law, vol.19, No.1, Winter 1986, pp.1-18.

Sinclair, "The Law of Sovereign Immunity : Recent Developments", 167, Recueil Des Cours (The Hague), 1980, pp.117-256.

Sester, V.S., "The Immunity of the State and Government Economic Activities", Law and Contemporary Problems vol.24, 1959, pp.291.

Steven, M.S., "Sovereign Immunity : End of Absolutism", Indian Journal of International Law, vol.16, 1976, pp.267-75.

Sucharitkul S., "Immunities of Foreign State Before National Authorities", 149, Recueil Des Cours, 1976, p.117.

Van Panhirgs, "In the Borderland Between the Act of State Doctrine and the Question of Jurisdictional Immunity", International and Comparative Law Quarterly, vol.13, 1964, pp.1193-1213.