Competence and Responsibilities of States: Chapter 15 - Immunity of States

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I. GENERAL NOTION OF STATE IMMUNITY

1. States, large or small, rich or poor, are equal before international law. Each one is sovereign and independent. The independence and sovereignty of States are said to be absolute, each within its own territory. As a consequence of sovereignty and equality of States, each State is presumed, in certain circumstances, to have consented to waive or to refrain from exercising its exclusive territorial jurisdiction in a legal proceeding in which another State is a party without its consent. Non-exercise of jurisdiction...
by the State of the forum is required by the acceptance of a general notion of State immunity.2/

2. An appreciable measure of relativity is inherent in the notion of State immunity. Its availability or applicability as a plea to the jurisdiction may be removed by sheer volition on the part of the State which at first may have appeared to be unwilling. Naturally, a State may itself institute proceedings before the courts of another State or otherwise submit to their jurisdiction by voluntarily participating in the proceeding, whether or not the State as such is named as a party. Thus, a State may waive its immunity at any time, during any phase or stage of the proceeding in which it may be involved or otherwise interested.

3. On the other hand, as a mark of courtesy, comity of nations, or good neighbourliness, States may accord immunities to each other to a greater extent than they are 3/...

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2/ See The Schooner Exchange v. McFaddon (1812) 7
Cranch 116, where Chief Justice Marshall stated the classic formulation of the notion of State immunity. His dictum runs in part (ibid., at pp. 136-137): "The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation, in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers." Compare also The Prins Frederik (1820), 2 Dodson's Admiralty Reports, p. 451, and Le Gouvernement espagnol c. Cassaux (1849), Dalloz, (Périodique), Recueil périodique et critique de jurisprudence, de Législation et de Doctrine, 1849-I-6, Recueil général des Lois et des Arrêts (Sirey), 1849-I-83
otherwise required under international law. The granting of additional immunities rarely gives rise to any objection, while refusal to recognize the existence and application of State immunity when required to do so by international law may result in strong protests or counter-measures being taken including reciprocal denial of like immunities. The aggrieved State may also seek redress before an international instance for judicial affirmation of its rights and for reparation for the damage suffered as the result of the internationally wrongful act violating its immunity from jurisdiction or from measures of constraint of its property.3/

II. THE IMPRECISE EXTENT OF STATE IMMUNITY

4. Contemporary rules of international law on State immunity appear to be undergoing an interesting phase of progressive development deserving the widest and keenest attention of international lawyers, practitioners, legal

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3/ See U.S.A. v. Iran (Hostages) Case, 1980, I.C.J. Reports. The case concerns a special aspect of immunity enjoyed by representatives of State ratione personae, better known as diplomatic immunity or inviolability of a diplomatic agent. It also covers inviolability of the premises of a diplomatic mission and a consular post which is reflected in the duty of protection incumbent upon the receiving State. This may be viewed as an aspect of State immunity in respect of its property or property in its use, possession or control, i.e., immunity from interference and measures of constraint by the territorial State.
advisers, judges and academicians alike. For one thing, uncertainty seems to persist with regard to the precise legal nature of the rule of State immunity owing to the relativity of consent, either by the beneficiary State to the exercise of territorial jurisdiction or by the territorial State agreeing to extend immunity beyond the extent required by international law. This lack of precision due to double relativity is further compounded by the absence of uniformity in the practice of States with the result that it is scarcely possible to state, at a given moment of continuing evolution, with the desired accuracy and certainty, the precise extent of immunity to be recognized and accorded by one State in regard to another State or its property. A State is immune in general from the jurisdiction of the courts of another State in respect of acts performed in the exercise of governmental authority or function.

5. Nevertheless, as a rule of law, the nature of State immunity must be ascertainable. It must be recognized by the international community as binding upon States in their mutual relations. In strict theory, the substance of the rule can be stated in a nutshell. The doctrine of State immunity is the result of an interplay of two fundamental principles of international law: the principle of territoriality and the principle of State personality, both being two aspects of State sovereignty.4/ Thus, State immunity is sometimes expressed in the maxim: *par in parem non habet imperium.*

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6. While the rule of State immunity may be succinctly formulated, the extent of its applicability in a given case, at a given time or place, is still far from certain. In circumstances which relate more closely and more clearly to the exercise of governmental authority of the State, immunity is upheld beyond dispute. In these clearer-cut cases of acts attributable to the State which for want of a better terminology are often referred to as "acta jure imperii", immunity is invariably recognized, granted and upheld. On the other hand, in equally clear-cut cases, where the State has acted in areas of non-governmental activities, immunity has been invariably denied with hardly any risk of complaint or counter-measures. As in these areas, widely known as acta jure gestionis or jure privatorum or commercial transactions, the State engaging in commercial or other non-governmental activities in the territory of another State may be deemed to have consented to the application of territorial law, hence to the judicial settlement of possible disputes by local jurisdiction. Yet there is a third dimension, an area of grey zones, where judicial decisions and legal opinions abound in different directions with diametrically opposite results. The latitude and multiplicity of these grey zones account for the lack of precision in the extent of internationally recognized rules of State immunity for every conceivable area of activity undertaken by States today.5/

6/...
III. THE PROBLEM OF JURISDICTION

7. As noted earlier, State immunity refers to immunity from the jurisdiction of the courts of another State. By definition, the scope of this chapter is confined to the immunity of States from the adjudicative or judicial jurisdiction of another State or at most also to the enforcement jurisdiction, at any rate, in respect of immunity of State property from measures of constraint or seizure ad fundandum jurisdictionem. It does not deal with immunity from the applicability of the substantive law of another State to which the State or its transactions may be subject. The question of extent of State jurisdiction to legislate or to prescribe law or the validity of prescriptive jurisdiction beyond its territorial confines belongs to another chapter of international law. 7/

8. Thus, whether or not and to what extent, an act of nationalization or an expropriation decree of a State is to have legal effect beyond its territory is a separate question not treated in this chapter. The extent of the validity or extraterritorial effect of prescriptive jurisdiction or legislative act of a State is determined by rules of international law under another heading. While States may legislate as they wish, the acceptance of legal consequences outside their territories rests with other members of the international community.

6/ See Section I pp. supra.

7/ See TITLE III : COMPETENCE AND RESPONSIBILITIES OF STATES, CHAPTER xiv pp. supra.
9. For the purpose of this chapter, the problem of jurisdiction is presumed to have been settled before the question of immunity may be said to have arisen. In common-law jurisdictions generally, State immunity is appropriately described as immunity from the jurisdiction. Hence, immunity presupposes the existence of the competence or jurisdiction to adjudicate the dispute brought before the court, although the decision of the court to dismiss the case on grounds of lack of personal or subject-matter jurisdiction may at times be difficult to distinguish from recognition of jurisdictional immunity, especially when several pleas to the jurisdiction have been raised concurrently. Other grounds for not examining the case include the doctrine of act of State,\(^8\) non-justiciability, forum non conveniens, etc., which may bear some resemblance to the notion of State immunity, particularly if the cause of action somehow involves an act of a foreign government. The effect is the same when the court declines jurisdiction for whatever reason. In some civil-law jurisdiction, such as France for instance, the problem of jurisdiction and that of State immunity may sometimes be inextricably interwoven to such an extent that the two questions are likewise simultaneously resolved. When the court declares itself incompetent to adjudicate a dispute brought before it, it is often unclear...

whether the declaration is grounded upon "incompétence d'attribution" or on "immunité de juridiction". Professor Niboyet has endeavoured to maintain this distinction but French jurisprudence has not been uniform in separating the two issues. Thus, there is this lingering problem of jurisdiction in certain areas where rules of private international law are overlapped by public international law.

10. It is important to clarify at this point that the problem of jurisdiction including its legal bases, or the validity and extent of prescriptive, judicial and enforcement jurisdiction of a State under internal and international law is outside the purview of State immunity, although in some measure it may come close to the consideration of immunity of States. In most cases, jurisdiction is presumed to exist in accordance with the rules of private international law of the forum State, which could be based on territorial connections, domicile, nationality, residence, forum prorogatum, forum contractus or forum connexitatis. Whether or not there may be also concurrent or conflicting jurisdiction by another State, the problem of jurisdiction is not at issue in this chapter. The problem of jurisdiction in general is considered elsewhere in this Title.\textsuperscript{10}


\textsuperscript{10/} See TITLE III : COMPETENCE AND RESPONSIBILITIES OF STATES, Chapter \textsuperscript{supra}. 
IV. THE BENEFICIARIES OF STATE IMMUNITY
RATIONE PERSONAE AND RATIONE MATERIAE

11. Apart from certain specified areas to be examined 11/ in which the extent of State immunity may be and has been curtailed in the practice of States, there appears to be a growing list of recipients or beneficiaries of State immunity. Thus, the trend in State practice is at the same time restrictive of the extent of immunity while State immunity is being accorded to ever-widening categories of entities and representatives of States. State practice has shown the possibilities of States being proceeded against in their own names. In such instances, immunity is invariably recognized once it is established that the proceedings relate to an act attributable to the State, performed in the exercise of governmental authority. As has been seen, when the beneficiary of State immunity is clearly identified as the State itself, immunity could still be denied if the action pertains to a certain specified area without any connection with the exercise of any governmental authority. State immunity has been extended even when actions were not instituted directly against the States in their own names but against the government of a sovereign State, its sovereign or other head of State, or against one of its organs, ministries, departments of government, or subsidiary organs, or indeed against State agencies or instrumentalities in respect of acts performed in the exercise of governmental authority. State immunity has been accorded also to representatives of government in their representative capacity, such as diplomatic agents, consular officers 10/...

11/ See Section VI pp. infra.
and delegates or members of special missions, permanent missions or delegations and observer delegations of States to international organizations or their organs.12/ Political subdivisions of State at the highest level, in certain circumstances, have been known to enjoy a limited extent of State immunity.

12. The rules of State immunity in regard to certain categories of State representatives have recently received codification in the form of conventions, of which the following deserve mention:— (1) The Vienna Convention on Diplomatic Relations (1961) for ambassadors and diplomatic agents;13/ (2) The Vienna Convention on Consular Relations (1963) for consuls and consular officers;14/ (3) The Convention on Special Missions (1969) for members of the delegation or special missions;15/ (4) The Vienna Convention on Representation of States in Their Relation with International Organizations of Universal Character (1975) for permanent representatives, permanent delegates and other members of...


the permanent missions or permanent delegations accredited to international organizations.\textsuperscript{16/} In addition, there are a series of international agreements of regional character extending facilities, privileges and immunities to members of the permanent missions or delegations accredited to the regional organizations such as NATO, OAS, OAU and ASEAN. A kind of inviolability is also guaranteed for internationally protected persons under the convention dealing with internationally protected persons including diplomatic agents (1973).\textsuperscript{17/} Immunity from arrest and detention is subsumed under inviolability and the duty of protection owed by the States ratifying the convention, while the internationally protected persons remain in the territory of the States accepting the obligation of protection.

13. These representatives of government enjoy State immunity even in their personal capacity, \textit{ratione personae}, at any rate throughout the duration of their missions, unless such immunity is waived by the sending States. They are again amenable to the jurisdiction of the courts of the receiving State upon the termination or cessation of their official functions. On the other hand, their immunity, \textit{ratione materiae}, in respect of acts performed as representatives of government will survive the tenure of their offices, \textsuperscript{12/...}


as it is State immunity, whether or not for convenience sake referred to as diplomatic immunity or consular privilege. A category of State organs entitled to personal immunity includes the sovereign or other heads of State. Like ambassadors, heads of State whether or not sovereigns are entitled to personal immunity, ratione personae, in their private capacity, although their status has not formed the subject for codification in any international convention. The time may have come for a serious study to be undertaken in that direction.

14. None of the conventions mentioned above deals specifically with the missions as subsidiary bodies or organs of a State situated in another State. Thus, by way of illustration, diplomatic missions, consular posts, permanent missions to the United Nations, permanent delegations to UNESCO or to the European Community, are not covered by the above conventions. Their status is left to be regulated by State practice. The International Law Commission is undertaking the task of preparing draft articles on jurisdictional immunities of States and their property, which are designed to cover State immunity in all its manifestations, including the immunity extended to these missions.

V. THE RULE OF STATE IMMUNITY AND ITS RAMIFICATIONS

15. In its work of codification and progressive developments of international law on the topic of jurisdictional immunities of States and their property, the International Law Commission has from the outset agreed to adopt an inductive method
having regard to the practice of States.\textsuperscript{18/} A survey of State practice necessarily entails a review of historical developments in the case law and governmental including treaty practice of States. The rule of State immunity has been based primarily on the judicial and governmental practice of States as evidence of international custom, further reinforced by treaties and conventions as well as national.

\textsuperscript{18/} For a comprehensive series of reports on jurisdictional immunities of States and their property, see


legislation. The topic has been one chosen for codification and a first reading of the draft articles was adopted by the International Law Commission on June 20, 1986 and circulated to States for comments.

16. The set of draft articles has been the product of an inductive approach based on State practice rather than deductions from abstract principles. In terms of theories, State immunity is sometimes believed to be absolute and other times restrictive or limited. In practice, as is clearly shown, immunity is relative from the very start, depending on the volition of the State concerned. This relativity finds expression in State practice which has never at any given moment favoured an absolute doctrine. The practice of countries like Italy, Belgium and Egypt, for instance, adopted a restrictive rule of State immunity from the very beginning. Thus, in the restrictive practice, no immunity is recognized or accorded except for acts attributable to a State in its sovereign capacity or reflecting

19/ See, e.g., the Second, Fourth and Seventh Reports referred to in Note 18 supra.


21/ See the Fourth Report, loc. cit., A/CN.4/357, paras. 56-57 Italy, paras. 58-59 Belgium, and paras 60-61 Egypt. For the practice of France, Republic of Germany, Netherlands and Austria, see ibid., paras 62-73.
a display of governmental authority of the State. In other legal systems, the initial pronouncements of the rule of State immunity were nowhere near absolute but were subject ab initio to serious qualifications. Traces of absolutism could be seen in common-law jurisdictions at intervals which reached its peak in the United Kingdom at the level of the Court of Appeal in The Porto Alexandre [1920] and in the United States of America in Berrizzi Brothers v. the S.S. Pesaro (1975). But absolute immunity even in common-law jurisdictions has been on the decline since The Cristina [1938] and the Tate letters (1952). It was given judicial burial in the Trendtex Case [1977].

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25/ The Pesaro (1921), 777 F. 473; (1925) 271 U.S. 562, Annual Digest of Public International Law cases 1925-26, No. 135.


27/ See the Fourth Report, loc.cit., para.75, declaring official policy of the State Department in favour of a restrictive theory based on the distinction between acta jure imperii and acta jure gestionis.

and 'The I Congreso del Partido' [1981]. In the United States, it was cremated in 1976 by the Foreign Sovereign Immunities Act 30/ and in the United Kingdom by the State Immunity Act 1978.31/ Legislative acts have since been adopted in various common law and other countries including Pakistan,32/ Singapore 33/ and Canada.34/

17. It should be observed, on the other hand, that several governments expressed certain preference for a more absolute rule of State immunity. The U.S.S.R. and Eastern European countries as well as some developing Asian, African and Latin American States would like to see the rule of State immunity upheld and maintained rather than eroded by large exceptions.35/ Their views cannot be ignored.

18. A possible solution lies in the adoption of a balanced

33/ State Immunity Act 1979, Singapore, ibid., p. 28.
approach based on existing State practice, starting from
the proposition that State immunity is a rule of international
law. True it is that immunity constitutes an exception
to a more basic principle of sovereignty or territoriality
of State. In stating the rule of State immunity, care should
be taken not to lose sight of the more fundamental principles
of international law.

19. The rule of State immunity can be thus formulated.

"A State enjoys immunity, in respect of itself
and its property, from the jurisdiction of the courts of
another State." 36/

This rule is subject to other qualifications and
ramifications to ascertain the precise extent of its application
or non-application in a specified area of activities.

18/...

36/ See draft article 6 of the draft articles on juris-
dictional immunities of States and their property,
which contains an additional phrase :-

"subject to the provisions of the present
articles [and the relevant rules of general
international law]."

The phrase in square brackets was inserted as an
extra-precautionary measure to preclude freezing
of subsequent development of rules of international
law. In fact, States can always agree to modify
such rules once the trend in State practice indicates
the need for such a change. Report of the Inter-
national Law Commission on the work of its 38th
session. Supp. No. 10 (A/41/10)
20. It is important to clarify by illustration the circumstances in which it can be said that immunity is enjoyed by the State. Only when a proceeding is instituted against a State before the court of another State could it be said that the question of enjoyment of immunity has arisen. The notion of "being impleaded" or "a proceeding being instituted against a State" has to be liberally construed. Thus, the proceeding is considered to have been instituted against a State, whether or not named as a party, so long as the proceeding in effect seeks to compel the State to submit to the jurisdiction or to bear the consequences of judicial determination which may affect the property, rights, interests or activities of the State. This is also true when the proceeding is instituted against one of the organs of the State, or 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 the State of its property, or of the use of property in its possession or control.37/

21. A significant qualification to the application of the rule of State immunity is the absence of consent. Thus, a State can always express consent to the exercise of jurisdiction by another State. This can be achieved (a) by international agreement; (b) in a written contract; or (c) by a declaration before the court in a specific

37/ See Article 7: Modelities for giving effect to State immunity, Yearbook of the International Law Commission 1982, Vol. II (Part Two), pp. 100-107, document A/37/10, Chapter V-B.
case *(in facie curiae)*.\(^{38/}\)

22. A State is also said to have consented to the exercise of jurisdiction by the court of another State if it has (a) itself instituted that proceeding; or (b) intervened in the proceeding or taken any step relating to the merits of the case, unless such intervention or step was designed to assert a right or interest in property at issue.\(^{39/}\)

23. A State instituting a proceeding or intervening to present a claim in a proceeding before a court of another State cannot invoke immunity from the jurisdiction in respect of any counter-claim against it arising out of the same legal relationships or facts as the principal claim or the claim presented by it. A State making a counter-claim in a proceeding instituted against it before the court of another State cannot invoke immunity from the jurisdiction of that court in respect of the counter-claim. \(^{40/}\)


\(^{39/}\) See Article 9 : Effect of participation in a proceeding before a court, *ibid.*, pp. 109-111.

VI. SPECIFIED AREAS OF ACTIVITIES WHERE
THE PRECISE EXTENT OF IMMUNITY MERITS CLOSER EXAMINATION

24. Having thus explored and identified supporting propositions that make up the ramifications for the general rule of State immunity which is nevertheless open, if not indeed subject to greater scrutiny in certain areas where its application may be more or less restricted. Our focus of attention needs to be further sharpened in view of the continuing need to balance the interests of sovereign States in the exercise of imperium or sovereign authority and the rights and interests of third parties to avail themselves of remedies obtainable in circumstances which would not in any way or manner affect the exercise of the governmental authority of that State. A just equilibrium has to be maintained to promote and protect the integrity of transnational relations, business transactions and other non-governmental activities for the benefit of all concerned without impairing sovereign dignity or authority. The following areas deserve special attention.

A. Trading or Commercial Activities

25. A large area of activities may fit under the heading of trading or commercial activities. Should such an

41/ See, e.g., the U.S. Foreign Sovereign Immunities Act 1976, Public Law 94-583, 90 Stat. 2891, Section 1605, (a)(2) and definition Section 1603 (d) : "A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."
area appear too vast to circumscribe by way of a definition, it might be useful to follow the recent trend in the legislative and treaty practice of States. These areas may be further classified and subdivided into more definite or better specified areas.

(1) **Commercial Contracts**:

26. Under this sub-heading, a State which concludes a commercial contract or transaction with a foreign natural or juridical person and by virtue of the applicable rules of private international law, differences relating to the contract fall within the jurisdiction of a court of another State, is considered to have consented to the exercise of the jurisdiction in a proceeding arising out of that commercial contract or transaction. It cannot invoke immunity from jurisdiction in that proceeding.\(^{42/}\)

27. It is not necessary to provide for the requirements under private international law which may not be uniform for every State. The territorial connection such as the place of conclusion or performance of the contract, or place of business of the State agency in the territory of the forum State, or the principle of *forum prorogatum* will suffice to justify the exercise of jurisdiction under the applicable rules of private international law.  

\(^{42/}\) See Article 11 of the Draft articles. For commentary to this article (then Article 12), see Yearbook of the International Law Commission 1983, Vol.II, (Part Two), document A/38/10, Chapter III, B. 2.
28. The term "commercial contracts" or "transactions" has been frequently used in bilateral treaties, national legislation and judicial decisions that a wider definition may be warranted, which would include not only (a) commercial contracts or transactions for the sale or purchase of goods or the supply of services, but also (b) contracts for loans or other transactions of a financial nature, including any obligation or guarantee in respect of such loans or of indemnity in respect of any such transaction, as well as other contracts or transactions, whether of a commercial, industrial, trading or professional nature, but not including contracts of employment of persons.43/

29. In order to achieve the desired balance, the commercial character of the contract or transaction is to be determined by reference primarily to the nature of the contract, but the purpose of the contract should also be taken into account if in the practice of the State party to that contract, that purpose is relevant to determining the non-commercial character of the contract.44/ Thus, to maintain the delicate balance between the interests of States and other parties to the contracts, immunity is still accorded if the other


parties are also States or State agencies or if the contract was entered into on a government-to-government basis. In the ultimate analysis, the parties to the commercial contracts may otherwise expressly agreed to maintain State immunity or to provide for methods of dispute settlement other than by judicial determination by the State of the forum.\(^{45}\)

(2) **Patents, trade marks and intellectual or industrial property**:

30. This is another area which may be covered by the notion of "commercial activity". Non-immunity is based on the exclusive authority of the territorial State to determine the right in a patent, industrial design, trade name or business name, trade mark, copy right or any other similar form of intellectual or industrial property and the power and responsibility for the administration of registration and protection of such rights by the State of the forum.\(^{46}\) Thus, non-immunity also applies to cases of alleged infringement by the State in the territory of the State of the forum of any such right belonging to a third person and legally protected in the State of the forum.\(^{47}\) The rule of non-immunity or the exception to immunity in this area is only residuary. The State concerned may reach a different agreement with the forum State.

\(^{45}\) See Draft Article 11 (2), *ibid.*

\(^{46}\) See Draft Article 15 (a), for commentary see document A/39/10, Chapter IV, B. 2.

\(^{47}\) See Draft Article 15 (b), *ibid.*
(3) Fiscal Matters

31. This is yet another specified area where non-immunity appears to prevail, granted that every State is sovereign within its borders in matters of fiscal policy and administration. A State may be liable to fiscal obligations under the law of the State of the forum, relating to such matters as duties, taxes or other similar charges. Questions relating to such matters may of course be negotiated between States and agreed upon without resorting to the available local remedies in the form of a proceeding.\(^{48/}\)

(4) Participation in Companies or other Collective Bodies

32. If a State chooses to participate in a company or other collective body, whether incorporated or unincorporated, it cannot invoke immunity in a proceeding concerning the relationship between the State and the body or other participants provided the body (a) is not purely inter-governmental, i.e., having 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. Territorial connection affords a firm basis for the State of the forum to exercise jurisdiction in these matters. This area may also be reserved for State immunity if it is so agreed between the parties to the dispute or by the constitution or other instrument establishing or regulating the body in question.\(^{49/}\)

\(^{48/}\) See Draft Article 16, originally adopted as Article 17, \textit{ibid.}\n
\(^{49/}\) See Draft Article 17, originally adopted as Article 18, \textit{ibid.}\n
(5) **State-owned or State Operated Ships Engaged in Commercial Service**

33. In the field of maritime transport, if the State operates commercial shipping service, it cannot invoke immunity from jurisdiction before a court of another State 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 purposes. The expression "proceeding relating to the operation of that ship" includes:

(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.\(^{50/}\)

34. Non-immunity 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 governmental non-commercial service.\(^{51/}\)

35. Questions relating to the government and non-commercial character of the ship or cargo may be determined by reference to 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.\(^{52/}\)


\(^{51/}\) See paragraph 2 of Draft Article 18, *ibid.*

\(^{52/}\) See paragraph 7 of Draft Article 18, *ibid.*
B. Ownership, Possession and Use of Property

36. This is an area where the *lex situs* must prevail and the *forum rei sitae* emerges as the sole authority to sit in judgement of any question relating to ownership, possession and use of property, immovable as well as movable. With regard to immovables, the exception to State immunity or the rule of non-immunity is nearly absolute, subject to contrary agreement between the States concerned. For movables, there are further detailed qualifications. Immunity is not available in connection with any right or interest arising by way of succession, gift or *bona vacantia*, or in the administration of property forming part of the estate of a deceased person or of a person of unsound mind or a bankrupt, or of property of a company in the event of its dissolution or winding-up, or of trust property or property otherwise held on a fiduciary basis. A State claiming a right or interest in the property or its use in a proceeding against a person other than the State, must provide *prima facie* evidence of its title or claim to bring into play the rule of State immunity.


54/ See Draft Article 14 (2), *ibid.*
C. Personal Injuries and Damage to Property

37. This is an area limited in scope of application. Immunity does not apply 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 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.\(^{55/}\) The physical territorial connection of the person responsible for the act or omission is the basis for the application of non-immunity where the *locus delicti commissi* is also in the State of the forum. This exception is designed to assist victims of road or other accidents and not to extend coverage of the rule of State immunity to permit insurance companies to hide behind the cloak of sovereign immunity.\(^{56/}\) The precise extent and scope of this exception is still far from clear in actual practice. Not every State admits this specified area as an exception to the rule of State immunity, particularly when it tends to encourage abuses.\(^{57/}\)

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\(^{55/}\) See Draft Article 13 (then Article 14), document A/39/10, Chapter IV, B.2.

\(^{56/}\) See commentary to Draft Article 13, *ibid.*

\(^{57/}\) In certain countries, notably the U.S.A., foreign States can be harrassed by vexatious litigations as the result of permissible non-commercial tort claims which could yield exhorbitant measure of compensation unmatched in any other legal systems.
D. Contracts of Employment

38. This is another limited area where labour law is thought to prevail. States employing locally recruited individuals for services performed or to be performed in the territory of another State cannot invoke immunity in a proceeding relating to the contract of employment. This exception is qualified by other provisos. Thus immunity still applies if the services are associated with the exercise of governmental authority, or if the proceeding relates to the recruitment, renewal of employment or reinstatement of the individual, or if the employee was neither a national or habitual resident of the State of the forum at the time when the contract of employment was concluded, or if he was a national of the employer State at the time the proceeding was instituted. The parties to the contract of employment could agree otherwise.

E. Effect of Arbitration Agreement

39. If a State enters into an agreement with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity in a proceeding relating to

(a) the validity or interpretation of the arbitration agreement;
(b) the arbitration procedure;
(c) the setting aside of the award,
unless the arbitration agreement otherwise provides.  

59/ See Draft Article 19, originally adopted as Article 20, document A/19/10, Chapter IV B.2.
The scope of this exception is thus limited to the effect of the arbitration agreement and does not extend beyond that limit. Agreement to submit to arbitration does not imply consent to the exercise of jurisdiction by the forum State generally or in areas outside the scope of the arbitration agreement as above specified. 

VII. STATE IMMUNITY IN RESPECT OF PROPERTY

40. The notion of property in respect of which a State may claim immunity from measures of constraint in connection with a proceeding before the courts of another State is not confined to property owned by the State, but covers also the use of property in its possession or control, or property in which it has a legally protected interest. Thus a State is impleaded not only when a proceeding is instituted against it, in its own name, nor against one of its organs, or agencies or instrumentalities in respect of acts performed in the exercise of governmental authority, but also if the proceeding is designed to deprive the State of the use of property owned by it or property in its possession or control. Immunity is therefore designed to protect the use of property by the State, whether or not the property actually belongs to it in accordance with its internal law, so long as the State is entitled to its use, or has its use, and the property is in its possession or control or the State has the right to use it.

See, e.g., in the matter of arbitration between Maritime International Nominees Establishment, MINE v. Republic of Guinea, the appellant (U.S.A. intervenor) F.2d., Vol. 693, p. 1094 (1982), the U.S. Court of Appeals concluded that Guinea was immune under the Foreign Sovereign Immunities Act, 1976, and that the court lacked subject-matter jurisdiction to confirm the award as the suits were between foreign plaintiffs and foreign States. The arbitration agreement was not considered to be a valid waiver of sovereign immunity.
to its immediate possession, that property is immune from measures of constraint including pre-judgement attachment, arrest and execution.\footnote{61/}

The immunity in respect of property owned, possessed or controlled by a State is not immunity of the property of a State. Property as such is an object, not a subject of right, hence, not capable of exercising any right or claiming any immunity. Immunity in respect of property therefore belongs to the State which may invoke it. The State may decide to waive its immunity by consenting to the measures of constraint contemplated. Consent to the exercise of jurisdiction in a legal proceeding involving the State cannot be held to imply consent by that State to the taking of any measure of constraint on its property, for which a separate waiver is necessary. Furthermore, consent to measures of execution is no consent to pre-judgement attachment. Consent has to be express and clearly stated in writing. It can be given in a treaty or a contract or on an ad hoc basis before the court.\footnote{62/} It must specify the property for which consent to measures of constraint is given. A general consent without specifying any property or earmarking an amount of money for payment of any debt would not be effective against certain categories of property for which express and specific waiver is necessary.\footnote{63/}

\footnote{61/} See Draft Article 21 and commentary document A/41/10, pp. 38-41.

\footnote{62/} See paragraphs 1 and 2 of Draft Article 22 and commentary \textit{ibid.}, pp. 41-42.

\footnote{63/} See paragraph 2 of the Draft Article 23, and paragraph (b) of Draft Article 21, \textit{ibid.}, pp. 38-45.
These specific categories of property for which added protection is necessary to assist developing or poorer nations include property of a military character, used or in use for defence purposes, property in the forum State including bank accounts, used or in use for purposes of the State's diplomatic missions, consular posts, special missions, permanent missions or delegations to international organizations, property of the central bank or other monetary authorities, used or in use for the purposes of the central bank or monetary authorities, and property owned by the State forming part of national archives representing cultural heritage or property forming part of an exhibition of objects of scientific and historical interest, organized in the forum State. These specific categories of property cannot be regarded as property used or in use for commercial non-governmental purposes and cannot be an object of any measure of constraint without an express and specific waiver or consent to the taking of such measures.64/

VIII. IMMUNITY FROM MEASURES OF COERCION AND PROCEDURAL IMMUNITIES

41. Apart from immunity from jurisdiction and from execution in respect of property, a State also 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.65/ A State is immune from measures of

64/ See paragraph 1 of Draft Article 23: Special Categories of Property, ibid., pp. 42-45.

65/ See Draft Article 26 and commentary, ibid., pp. 48-49.
constraint in the form of injunction or punitive sanction known in some systems as *astreinte*. A State cannot be compelled to perform a certain act or to take a measure other than payment of compensation. Enforcement measures are hardly available even at the highest level of international judicial instance, it is only natural that no municipal legal system is equipped with a mechanism to enforce judgement against another State.

43. A State is also entitled to certain privileges which may be described as procedural immunities. No State can be compelled to produce a document or disclose information for the purpose of a proceeding before a court of another State without its consent. No fine or penalty can be imposed on the State by reason of such failure or refusal to produce any document or disclose any information. Nor is a State required to provide any security, bond or deposit, to guarantee the payment of judicial costs or expenses in any proceeding to which it is a party before the court of another State.\(^{66/}\)

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IX. CONCLUSION

44. The preceding examination warrants the conclusion that there is in practice a general rule of State immunity. In certain specified areas, the general rule applies without any doubt, especially where the proceeding relates to an act of the State in the exercise of its sovereign authority (dans l'exercice de la prérérogative de la puissance publique). In certain other areas, however, the rule of State immunity clearly does not apply, particularly where the proceeding does not relate to the exercise of the sovereign authority of the State or where there has been an expression of consent or conduct implying consent of the State to the exercise of jurisdiction by a court of another State. Apart from clearer cases of immunity and of non-immunity, there appear to be unclear or unmarked areas of grey zones, where the extent of State immunity is imprecise and the practice of States divergent or at best inconsistent. It is in this ill-defined border land that greater attention has to be focused as it is in Section VI above. Codification and progressive development of the law by the International Law Commission could yield salutary results only if after further debate and deliberations the draft articles are finally accepted by States as guidance for their practice. An end may then be put to this state of uncertainty, which apart from entailing untold hardship also undermines international trade and cooperation. A body of rules in this connection is desirable to settle once and for all the many highly complex questions relating to the application of the rule of State immunity. Until then, the conclusion thus submitted seems inevitable.

Sompong SUCHARITKUL