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The Application of the New York Convention of 1958 to Disputes Between States and Between State Entities and Private Individuals: The Problem of Sovereign Immunity

For a number of years an important international instrument has been in operation in the field of international commercial arbitration. This mechanism of dispute settlement is the New York Convention of 1958.[1] The importance of this Treaty is demonstrated by the fact that important trading nations such as the United States, the Soviet Union, almost all the West European countries, all the East European nations, and many Asian and African countries are ~~not~~ parties to it.[2]

The New York Treaty represents a considerable improvement on previous international treaties such as the Protocol on arbitration clauses, signed at Geneva on 24 September 1923,[3] and the Convention for the execution of foreign arbitral awards, concluded at Geneva on 26 September 1927.[4]

In the present paper an attempt will be made to survey an important topic which so far has been dealt with inadequately in the literature, i.e., whether the

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[1]Convention on the Recognition and Enforcement of Foreign Arbitral Awards—330 U.N.T.S. p. 3—The Convention was prepared and opened for signature on 10 June 1958 by the United Nations Conference on International Commercial Arbitration, convened in accordance with resolution 604 (XXI) of the Economic and Social Council of the United Nations adopted on 3 May 1956. It came into force on 6 June 1959.

[2]At the time this paper was prepared, the following states were parties to the Convention: Austria, Botswana, Bulgaria, Byelorussian SSR, Central African Republic, Ceylon, Czechoslovakia, Ecuador, Egypt, Federal Republic of Germany, Finland, France, Ghana, Greece, Hungary, India, Israel, Italy, Japan, Khmer Republic, Madagascar, Mexico, Morocco, Netherlands, Niger, Nigeria, Norway, Philippines, Poland, Romania, Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Ukrainian SSR, Union of Soviet Socialist Republics, United Republic of Tanzania, United States of America.

[3]For the text of the Protocol see U.N. Register of Texts of Conventions and other instruments concerning international trade law, Vol. 2, 1973, pp. 8-12.

[4]*Ibid.*, at pp. 13-17.

New York Convention can be applied to disputes between states and private individuals, with the related problem of the sovereign immunity of states.

Article 1 paragraph 1 of the New York Convention lays down that the Convention shall apply to arbitral awards arising out of differences between persons, whether physical or legal.[5] The problem here is to ascertain whether states can also be included in the category of legal persons. If an affirmative answer is given to this question, it remains to be seen whether this is so both in the case in which a state acts as a private individual *(jure gestionis)* and the case in which it acts as a public body *(jure imperii)*.

The wording of the text of the Convention does not give any direct hint from which it would be possible to infer that states are also capable of being parties to an arbitral agreement and subject of an arbitral award. The only indirect inference which can be drawn favouring the inclusion of states in the category of legal persons envisaged by the Convention is based on the consideration that the New York Conference certainly did not seem to exclude from the domain of its application the Eastern European countries, the international trade of which is carried on by state enterprises. This is supported by the fact that the text of the Convention[6] explicitly recognizes arbitral awards made by permanent arbitral bodies in order to meet the demands of the Eastern European countries, where international arbitration is handled by permanent arbitral bodies attached to the international chambers of commerce.[7]

Likewise worthy of consideration is the course of discussion manifested in the "travaux préparatoires" of the Convention. While in the International Chamber of Commerce draft no mention was made of legal or physical persons,[8] the *Ad Hoc* Committee draft refers to the objects of the Convention as "physical or legal" and in its report[9] discusses the problem of states. The representative of Belgium proposed that Article 1 of the Convention should expressly indicate that public enterprises and public utilities acting in the domain of private law would be considered legal for the purposes of Article 1. The Committee decided that the amendment requested was superfluous and that if necessary a reference to its report would be sufficient. This clearly evidences that the Committee intended to include states in the category of legal persons. There is, however, the restriction that, for the purposes of the Convention, states are taken into consideration only when they act in the domain

[5]The French text of the Convention speaks of "personnes physiques ou morales."

[6]Article 1 paragraph 2 which states: "The term 'arbitral awards' shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted."

[7]*See* U.N. Doc. A/CN.9/64 dated 1 March 1972, Report by Ian Nestor p. 28.

[8]I.C.C. Brochure 174, Art. 1.

[9]U.N. Doc. E/2704 p. 7, paragraph 24.

of private law, i.e., when they act *jure gestionis* and not *jure imperii.*[10] Another passage of the *Ad Hoc* Committee report validates this point. In paragraph 17 of the report[11] it is stated that the Draft Convention did not deal with arbitration between states, but with the recognition and enforcement in one country of arbitral awards made in another country. "Arbitration between states" as used here by the Committee appears clearly related to relationships carried on by the states as public bodies, i.e. acting *jure imperii.* During the course of the Conference the Italian representative, Mr. Matteucci, raised some doubts about the use of the words "arising out of disputes . . . between legal persons" since this terminology could provide for a justification for invoking the New York Convention in controversies between states pending before the Hague Permanent Court of Arbitration. The President replied that the *Ad Hoc* Committee did not intend to embrace such an interpretation when it prepared the Draft Convention.[12] The trend followed during the "travaux préparatoires" seems to be followed in many states, e.g., in the United States where arbitral awards concerning public bodies acting in the field of private law (*jure gestionis*) have been enforced.[13] This has taken place especially in maritime questions.[14] In the well-known case of *Victory Transport v. Com-*

[10]*See* P. Contini, *International Commercial Arbitration. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* in (1959) 8 A. J. COMP. L. 294; and P. Sanders, *The New York Convention*, U.I.A. INT. COM. ARB. Vol. II, p. 299. Sanders asserts (at p. 299) that the New York Convention may be applicable to states acting *jure imperii* only when a specific statement concerning the applicability of the Convention is made in the arbitral agreement. In this context see also: F. E. Klein in Revue Suisse, *op. cit.* at pp. 249-250. Klein adds also that the wording of Article V paragraph 1(a) gives to the Contracting State an escape route through which it can claim the nullity of an arbitral agreement on the basis of its incapacity to be a party to the agreement. Article V paragraph 1(a) states: "1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) the parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it . . . . " That a state can claim its incapacity to comply with an arbitral award rendered against it has happened in reality (even though not yet related to the New York Convention). *See, for example,* the Myrtoan Steamship Case in which the Court of Appeals of Paris in its decision of April 10, 1957, found appropriate the plea of the French Government invoking the nullity of the arbitral agreement due to its incapacity. (1957), II Juris-classeur Périodique, 10078.

[11]U.N. Doc. *supra,* p. 5.

[12]U.N. Doc. E/Conf. 26/SR.16 p. 5.

[13]The determination of a state activity as *jure imperii* or *jure gestionis* was considered by the German Bundesverfassungs-gericht in 1963 (*See* judgement as reported by I. M. Sinclair in *The European Convention on State Immunity* in (1973), 22 INT. COMP. L. Q. at 263-264.) The German Bundesverfassungsgericht found itself competent to determine that the contract concluded by the Iranian Ambassador in Bonn for the repair of the Embassy's heating plant was not connected with an activity carried out *jure imperii* by the Iranian Government but rather with an act *jure gestionis.* It is, however, added that "domestic law may not treat such acts as acts *jure gestionis* which, according to the view of the great majority of States, belong to the sphere of public power in its narrower and proper sense." The German Court concluded by asserting that in the present case its jurisdiction did not infringe upon the diplomatic privileges or immunities enjoyed by the Iranian Government.

[14]*See* M. Domke, *The Enforcement of Maritime Arbitration Agreements with Foreign Governments* (1971), 2 J. OF MAR. L. COM. 617-624.

isaria General de Abastecimientos y Transportes the United States Supreme Court[15] denied *a certiorari* to review a decision of the Court of Appeals[16] for the Second Circuit affirming a District Court decision by which the Comisaria General, an agency owned by the Spanish Government, was compelled to comply with an arbitral clause referring a dispute between the parties to arbitration. The defence of sovereign immunity pleaded by the Spanish Government was rejected on the grounds that, in the case concerned, the Spanish Government acted *jure gestionis* and not *jure imperii.*[17] The former United States attitude towards the problem of limiting the impact of sovereign immunity had its inception, of course, when "the Tate letter" was issued in 1952 by the Legal Adviser of the State Department.[18] It accepted the view of a restrictive theory of sovereign immunity (as opposed to the theory of absolute immunity), according to which no immunity is allowed whenever a state is engaged in private acts, i.e., commercial activities. Difficulties have arisen when an attempt is made to determine which classes of foreign state activities can be included within the categories of activities envisaged by the Tate letter. Where a case involving a claim to sovereign immunity has arisen in the United States, the State Department was commonly requested by the defendant government to issue an executive certificate suggesting to the court that immunity be granted. The decision to issue or withhold the suggestion of immunity was made by the Department administratively on the basis of the general policy set out in the Tate letter. In *Victory Transport* the court had not been provided with such an executive certificate and had to reach its own decision. But the procedures whereby the Courts deferred to suggestions of immunity by the Department of State were abolished by the Foreign Sovereign Immunities Act of 1976[19] whose principal purpose was to transfer the determination of sovereign immunity from the executive to the judicial branch. The legislation defines the circumstances under which persons can maintain suits against foreign states in courts of the United States, codifies the restrictive principle of sovereign immunity and specifies the conditions under which a foreign state is entitled to immunity.

The elusive nature of the problem which had previously beset American

[15]381 U.S. 934 (1965) 362.

[16]336 F. 2d 354 (2d cir. 1964).

[17]Other cases decided on the same footing by New York courts involved the governments of Greece, United Arab Republic and Vietnam. *See* Domke *op. cit.* at 618. *See also* the case Ocean Transport Company Inc. (a Louisiana corporation) v. the Government of the Republic of the Ivory Coast referred to in Proceedings and Committee Reports of the American Branch of the International Law Association (1971), 7 at 106.

[18]26 Department of State Bulletin 784 (1952). On the Tate letter see: Bishop, *New United States Policy Limiting Sovereign Immunity* in (1953) 47 A.J.I.L. 93; Cardozo, *Sovereign Immunity: The Plaintiff Deserves a Day in Court* (1954). 67 HARV. L. REV. 608.

[19]Public Law 94-583, 90 Stat. 2891, 28 U.S. Code § 1330 *et seq.*

judges was underscored by the Court of Appeals in *Victory Transport*[20] when it stated:

> . . . the Tate letter offers no guide-lines or criteria for differentiating between a sovereign's private and public acts. Nor have the courts or commentators suggested any satisfactory test. . . . The conceptual difficulties involved in formulating a satisfactory method of differentiating between acts *jure imperii* and acts *jure gestionis* have led many commentators to declare that the distinction is unworkable. . . . we are disposed to deny a claim of sovereign immunity that has not been "recognized and allowed" by the State Department unless it is plain that the activity in question falls within one of the categories of strictly political or public acts about which sovereigns have traditionally been quite sensitive. Such acts are generally limited to the following categories:
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> (1) internal administrative acts, such as expulsion of an alien,
> (2) legislative acts, such as nationalization,
> (3) acts concerning the armed forces,
> (4) acts concerning diplomatic activity,
> (5) public loans.

In previous American practice, therefore, the determination as to whether the act of a foreign state is of a private or public nature was also a matter for the courts to deal with in the absence of an executive suggestion.[21] Still, a clear and definite distinction between a private and a public foreign activity has not existed and this state of affairs gives rise to a non-uniform application of the "restrictive theory".[22] An element which restricts the pleading of state immunity is provided where a state has consented to arbitration. This was one of the factors which persuaded the Court of Appeals to deny the defence of sovereign immunity to the Spanish Government in *Victory Transport.*[23] It was a determining reason for denying immunity from jurisdiction to the Government of Yugoslavia in *République socialiste fédérale de Yougoslavie v. Sté. européenne d'études et d'entreprises* by the Tribunal de Grande Instance de Paris.[24] The Government of Yugoslavia had instituted a proceeding for the annulment of an *exequatur* of a foreign arbitral award[25] condemning Yugoslavia to the payment of 6,164,928,521 F. due for the supply of equipment and work

[20] *See* (1965), 59 A.J.I.L. 388-390.

[21] *See* footnote 19.

[22] In Weilamann and McCloskey v. Chase Manhattan Bank (192 N.Y.S.2d 469, Supreme Court, Westchester County, Spec. Term, Oct. 1, 1959), the New York Supreme Court dismissed action in favour of Mrs. Weilamann who owned Soviet State bonds in default. The action was aimed at attaching the bank accounts of the State Bank and the Bank for Foreign Trade of the U.S.S.R. maintained in the Chase Manhattan Bank. Her complaint was dismissed according to the advice of the State Department on the grounds that the Soviet Union accounts could not be subject to attachment because of state immunity. It does not seem in this case that the doctrine enacted by the Tate letter was jeopardized. In fact, even though the U.S.S.R. bonds were issued to pay for equipment purchased by the U.S.S.R. from a British company (and was therefore a commercial transaction, covered by "the restrictive theory" set out in the Tate letter), the immunity awarded by the New York Supreme Court consisted of jurisdictional immunity only with respect to the levying of execution against Soviet bank accounts which were unconnected with the commercial transaction.

[23] (1965), 59 A.J.I.L. 390.

[24] (1971), 98 CLUNET 131-134.

[25] Award given in Lausanne the 2nd July, 1966, by the arbitrators Ripert and Pauchaud.

undertaken for the railway Veles-Prilep by la Société européenne d'études et d'entreprises.[26] The Tribunal de Grande Instance de Paris stated:

> en souscrivant une clause compromissoire, l'Etat Yougoslave a accepté par la même de renoncer à la dite immunité de jurisdiction.[27]

The most irritating problem in the past for litigants and counsel, however, arose whenever an arbitral award affecting a foreign state received an *exequatur.* When the enforcement of a judgment implied seizure of foreign state property located in the state where the *exequatur* was given, to speak of "enforcing" became an empty phrase. As is well known, the tendency of many countries such as the United States and Great Britain has been to grant immunity from execution to foreign states. In *Weilamann v. Chase Manhattan Bank*[28] the legal adviser of the State Department, as Domke noted,[29] made the following familiar statement on behalf of the United States:

> The Department has always recognized the distinction between "immunity from jurisdiction" and "immunity from execution." The Department has maintained the view that under international law property of a foreign sovereign is immune from execution even to satisfy a judgment obtained in an action against a foreign sovereign where there is no immunity for suit.[30]

Here again, the Foreign Sovereign Immunities Act of 1976 has sought to provide a measure of relief. The Act modifies the former rule of absolute immunity from execution on property of a foreign state by partially lowering the barrier so as to make this immunity conform more closely to the jurisdictional immunity.

On the other hand, in France a recent decision seems to follow the line formerly taken in the United States. In *Yougoslavie v. Sté européenne*[31] the Tribunal de Grande Instance de Paris implicitly recognized the immunity from execution of the Government of Yugoslavia when it affirmed that the *exequatur* of the arbitral award rendered in Lausanne

> ne porte aucune atteinte à l'immunité d'exécution dont jouit l'Etat Yougoslave.[32]

The prevailing French approach to the problem of state immunity consists of a restrictive immunity concept (i.e., immunity restricted to governmental

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[26]Execution pursuant to the arbitral award had not been effected when annulment was sought.

[27]CLUNET, *supra* at 132. Decision of July 6, 1970.

[28]Weilamann v. Chase Manhattan Bank cited at footnote 22. *See also* J. C. Castel, *Immunity of a Foreign State from Execution: French Practice* in (1952) 46 A.J.I.L. 520.

[29](1971), 2 J. OF MAR. L. COM. 619.

[30]*See* the recent decision in Isbrandtsen Tankers v. President of India of July 27, 1971. In that case the Court of Appeals for the 2nd Circuit affirmed an order and judgment of the U.S. District Court for the Southern District of New York dismissing an action for damages initiated by Isbrandtsen Tankers against the Government of India. The plaintiff had alleged a delay by the Indian authorities in discharging a cargo of grain from the plaintiff's vessels. The reason given by the District Court for dismissing the action was based on state immunity at the suggestion of the Department of State, 446 F.2d 1198 (1971); (1971), 10 INT. LEG. MAT. 1046.

[31]Cited at footnote 99.

[32]*As cited,* at p. 133.

transactions *jure imperii)* as far as initial jurisdiction is concerned and of an absolute immunity with respect to execution.[33]

Belgian and Dutch courts recently have followed a different approach. In the N.I.O.C. (National Iranian Oil Company) case, the Hague Court of Appeal reversed a decision of the District Court[34] which had refused to enforce an arbitral award against the Iranian Government on the ground of immunity.[35] The appellate court stated that the District Court had erred in declining jurisdiction. The activity of the National Iranian Oil Company was in fact not *jure imperii* but *jure gestionis* and therefore the District Court was bound to take cognizance of the applicant's claims. The opinion added:

> A judicial award is, by its nature, enforceable; and if immunity constitutes no bar to jurisdiction, it can in principle neither constitute a bar to enforcement[36] . . .

This reasoning appears to be quite appropriate. In fact, what would be the significance of a judicial proceeding against a foreign state if a possible judgment of the Court against the state cannot be enforced unless the state itself gives its consent? On the other hand, it can be argued that enforcement of a judgment against a foreign state against its will might imply deterioration of diplomatic relations between this state and the state in which the judgement was rendered. Here legal arguments come to an end and one enters the field of politics.

In *Socobelge v. Etat Hellénique*[37] the Tribunal Civil of Brussels, 5th Court, in its decision of April 30, 1951 denied the plea of immunity from execution raised by the Greek Government by reason of equality of states and international courtesy. On August 27, 1925, the Greek Government and la Société Commerciale de Belgique (Socobelge) had signed a contract for the construction of railway lines and supply of materials by the Belgian company in the territory of Greece. Socobelge would have been paid with bonds issued by the Greek Government. The latter, however, did not honour its obligations after 1 July 1932, and consequently the dispute was referred to arbitration under the

[33]This view is supported by other French decisions. *See* note by P. Kahn on the case of République socialiste fédérale de Yougoslavie in (1971) CLUNET 136. *See also* the decision of the Court of Extended Jurisdiction of Paris (Nov. 11, 1972) on the Chilean Copper Corporation's plea of sovereign immunity in third party attachment proceedings. It is interesting to note also the decision of Jan. 22, 1973, by the Superior Court of Hamburg (Federal Republic Germany) denying third party attachment of copper sold by the Chilean Copper Corporation ((1973) INT. LEG. MAT., March, 251). J. C. Castel argues that seizure of foreign state property is allowed in France provided that "the original cause of action against the foreign government arose from a non-governmental activity" (*op. cit.*, note 67, at p. 521).

[34]Judgement of the District Court at the Hague dated April 15, 1965—(1966), 5 INT. LEG. MAT. 477-79.

[35](1970), 9 INT. LEG. MAT. 152 and ff.—judgement of Nov. 28, 1968. The dispute arose concerning an agreement between the National Iranian Oil Company and a Canadian corporation (Sapphire Petroleum) domiciled in Toronto with regard to exploration and possible production of oil in a certain area of Iran.

[36]As cited *supra* at 161.

[37]*See* (1952) 79 CLUNET 245.

terms of the contract. Two arbitral awards were rendered against the Greek Government which was condemed to the payment of $6,771,668. Since the Greek Government was not able to comply with the decisions of the Arbitration Commission, the Belgian Government (on behalf of Socobelge) instituted a proceeding before the Permanent Court of International Justice at the Hague, which decided that the two awards rendered against the Government of Greece were final and binding.[38] The plea of Greece was based on the ground that the sums due to Socobelge had to be considered not so much as involving a commercial transaction but rather as pertaining to a part of its public debt, and therefore were entitled to the same moratorium awarded to it. The decision of the Permanent Court of International Justice did not lead to any material result regarding the sums due to the Belgian corporation, with the exception of $111,384 recovered in another proceeding[39] by the latter by attaching a sum held by another Belgian company for the account of Greece. This attachment is, however, of great importance as it represents a distraint levied upon a debt owned by a foreign state, disregarding the immunity from execution to which the latter might have been entitled. Moreover, the Civil Tribunal of Brussels, (5th Court), in its decision of 1951, endorsed the attempt of Socobelge to attach very large sums received by the Greek Government under the Marshall Plan and partially deposited in Belgian banks for the purchase of additional railway materials needed by Greece. The Greek Government had pleaded immunity from execution on the basis of equality of states and international courtesy. Further, it asked the Court to disregard the arbitral awards and the decision of the Permanent Court of International Justice as not constituting a good title for attachments of its funds. Under Belgian law, it continued, an attachment is allowed only in the case of "an authentic and private claim" (Art. 557 of the Code of Civil Procedure).[40] The Belgian tribunal found groundless the pleas of the Greek Government and held that property of a foreign state was not entitled to immunity from execution. The doctrine of equality of states could not be applied in this case since defendant could not claim the immunity enjoyed in Belgian courts by the Belgian Government. The latter derives immunity from reasons of Belgian internal "ordre public," i.e., the general interest of the Belgian community. The attachment of property owned by the Belgian Government in its own territory would cause harm to Belgian citizens and therefore must be avoided. The same procedure could not be applied to a foreign country which had just concluded business in Belgium and which was subject to the application of Belgian laws. Granting immunity from execution to a foreign country doing business in Belgium would ultimately affect local economic independence. To the objec-

[38] Judgement of June 15, 1939. P.C.I.J., Series A/B, No. 78.
[39] *Supra*, note 37.
[40] CLUNET *supra* at 263.

tion that it was appropriate under the principles of international law to grant immunity from execution to foreign state property, as this would affect the mutual independence of states, the Belgian Court responded that

> in positive law, the sovereignty of a foreign state stops at its frontiers, subject to certain exceptions imposed by the free exercise of its diplomatic representation abroad.[41]

The independence of a state, concluded the Court, would not therefore be affected by attachment of the property belonging to it in the territory of another country.

With regard to the argument of international courtesy raised by the Greek Government, the Belgian tribunal, after having concluded that (a) the arbitral procedure had not endangered the good relations between the two governments, since recourse to arbitration had been agreed upon by both the Greek Government and the Belgian company, and (b) the exercised jurisdiction by the Belgian Courts freely accepted by the Greek Government would not negatively influence the relationship between the two countries, stated that international courtesy could not be unilateral but must be based on the principle of reciprocity. Accordingly, the Greek Government, having accepted the jurisdiction of the Belgian Courts, could not expect that in Belgian territory execution should be granted pursuant to decisions made in its favour, while judgements pronounced against it should not be executed because of state immunity.

Quite recently the Court of Appeal at the Hague and the Supreme Court of the Netherlands have applied the New York Convention of 1958 to a dispute between a state and a foreign corporation. In *Sté. européenne v. Yugoslavia*, Sté. Européenne[42] appealed against a decree of the District Court at Rotterdam which denied recognition and enforcement of the arbitral award rendered in Lausanne[43] on the ground of Yugoslavia's sovereign immunity. The Court of Appeal at the Hague annulled the decree of the Rotterdam District Court on 8 September 1972, on these grounds:

> The Convention which, pursuant to its Article 1, paragraph (1), applies to arbitral awards arising out of differences between persons, whether physical or legal, has not excluded from among such persons states or other so-called public law entities; furthermore, the legislative history of the Convention leads to the conclusion that the legal persons referred to in its Article 1, paragraph (1), include such public law entities if they perform private acts; but apart from the question whether Yugoslavia is entitled to immunity from jurisdiction and execution in the present case on the basis of these considerations, Yugoslavia cannot successfully plead immunity from jurisdiction or execution for the following reasons.
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> For, a state can plead immunity from the jurisdiction of another state only in respect of purely governmental acts *(acta jure imperii)* and not in respect of other acts often grouped together under the term *acta jure gestionis.*

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[41] *Ibid.* at 259.

[42] (1975) 2 INT. LEG. MAT. 72. *See* for this case also pp. 61 and 63.

[43] *See* note 25, *supra.*

> The conclusion of a private agreement for the construction of a railroad by SEEE against payment and delivery of materials is not a purely governmental act if a state performs that act.

This rationale was confirmed by the Supreme Court of the Netherlands on 26 October 1973.[44] As stated in the decision

> it is possible to observe in international treaty practice, doctrine and local case law a tendency to limit the cases in which a state can invoke immunity before a foreign court; this development has notably been caused in part by the fact that the governments of many countries have increased their activities in a sector of social relations which is governed by private law, and, in connection therewith, have entered into transactions with private individuals on a basis of equality;
> in such cases, it appears to be reasonable to grant to the party dealing with the state the same measure of protection under the law as when such party would have dealt with a private individual;
> on the ground of these considerations, it must be assumed that the immunity from jurisdiction to which a foreign state is entitled under current international law does not extend to cases in which a state has acted in a manner as meant above;
> The request for permission of enforcement of the award in question could only then be considered to conflict with the immunity from execution to which a foreign state is entitled under international law if it had to be decided that international law opposes every execution of foreign state assets situated in the territory of another state; however, such rule of international law does not exist; consequently, the ground cannot lead to cassation, whatever may be the meaning of the Court of Appeal's reasoning of this point;

Without any doubt the last two cases examined are milestones on the long path leading to a more effective protection of private individuals in their commercial transactions with foreign states. The decisions of the Belgian and Dutch Courts, and especially the reasons given for them, have opened a new chapter in Belgian and Dutch jurisprudence which, for the first time, have put aside the doctrine of absolute immunity of foreign states from execution as well as from jurisdiction. It is to be hoped that the trend will also be followed by other nations, thus creating an atmosphere of more confidence in commercial transactions between states and private enterprises. This is particularly esssential because states have become more and more involved in the field of what were private commercial activities, by means of governmental agencies or institutions largely controlled by national governments, such as in the case of E.N.I. (Ente Nazionale Idrocarburi) which is the Italian National Oil Agency, or the I.R.I. (Istituto per la ricostruzione industriale), which is the Italian Government Agency for Industrial Reconstruction established after the Second World War.

Paralleling this private trend on the domestic scene, the intervention of national governments in the field of international trade has likewise become accelerated. Classic examples of this trend are those of the Soviet Union and other communist countries, in which international commercial transactions

[44] INT. LEG. MAT. *supra* at p. 75.

are carried on by governmental agencies. Additionally, one can take into consideration the case of the developing countries, which generally prefer to entertain direct relationship with foreign enterprises for the utilization of their natural resources and for the achievement of a rapid industrialization. Their governments have called for foreign investment, installation of industries, and the supply of technical equipment, and have at the same time awarded oil and mineral concessions to the industrialized countries. It has long ceased to be possible to ignore the numerous and ever-increasing commercial transactions between states and foreign enterprises. The New York Convention of 1958[45] could be appraised as a new means in the hands of private businessmen for facilitating these relations. As previously discussed, the text and the "travaux préparatoires" of the Treaty lead to the conclusion that a state which has agreed to submit to arbitration a dispute having the nature of private law should comply with the resulting arbitral award. Thus it can no longer plead immunity whenever it has acted *jure gestionis,* i.e., in doing business with a foreign corporation.

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[45]More specific than the New York Treaty about the rights of legal persons to be a party to an arbitral agreement is the European Convention on International Commercial Arbitration done in Geneva, April 21, 1961, which specifically allows public legal persons to enter into valid arbitration agreements. (Article 2, paragraph 1 of the Convention.)

This Convention entered into force on 7 January 1964, with the exception of paragraphs 3 to 7 of Article IV which entered into force on 18 October 1965. For the text of the Convention with the annex and the agreement relating to its application, see U.N. Register *supra* at pp. 32-45. The Convention was established mainly to facilitate foreign trade between the Western and the Eastern European countries.

A strong approach to the protection of private individuals against state immunity is given as well by two recent conventions: the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, and the European Convention on State Immunity. The former, done in Washington on 18 March 1965 and entered into force on 14 October 1966, has given birth to an international centre whose objective consists of providing facilities for conciliation and arbitration of investment controversies between a contracting state and nationals of other contracting states. The text of this Convention was drafted by the International Bank for Reconstruction and Development and appears in the U.N. Register cited at pp. 46-64.

The novelty introduced by this treaty is the power conferred upon an individual to address a petition directly to an international organization such as the International Centre for Settlement of Investment Disputes without the consent and co-operation of his own parent state. *See* Arts. 28 paragraph (1) and 36 paragraph (1). Also under the European Economic Community Treaty an individual has a similar right. He can address directly the European Court of Justice without the consent of his parent state.

The European Convention on State Immunity done at Basle on 16 May 1972 also set up a certain number of rules protecting a private individual against the plea of state immunity. This treaty was drafted by the Committee of Experts on State Immunity for the European Committee on Legal Co-operation and subsequently approved by the Council of Ministers of the Council of Europe. For the text of the Convention and Additional Protocol see (1972), 66 A.J.I.L. 923. The Explanatory Report (Cmnd 5081) also merits perusal.

The prime importance of this treaty lies in the fact that it purports to create rules valid not only for the matters related to immunity from jurisdiction but also for matters concerning immunity from execution.