

THE NEW YORK ARBITRATION CONVENTION  
AND  
STATE IMMUNITY

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1. INTRODUCTION

If you have arbitrated against a State, it is likely that you have encountered one or more of the following defences:

- (1) Under its national law, the State does not have capacity to agree to arbitration or requires the approval of some government agency which is lacking;
- (2) Under its national law, the subject matter of the arbitration may not be submitted to arbitration; or
- (3) Under international public law, the State is entitled to immunity from jurisdiction.

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You will also have experienced that international arbitrators almost invariably reject these defences. The progress made in this area is largely due to sophisticated theories developed by imminent scholars, including restrictive immunity, the distinction between *acta de jure gestionis* and *imperii*, the reliance on *pact sunt servanda* and the creation *ordre public réellement international*.

If the award was in your favour, it is also likely that you obtained a leave for enforcement under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958.

So far, so good. But then comes the disillusion. You attempt to execute the award on which the leave for enforcement was given. The State now invokes its ultimate defence: the immunity from execution. For you logic breaks down because the Court that was so brave in adhering to the theory of restrictive immunity from jurisdiction tells you now that this theory does not extend to execution and that at this stage immunity is absolute. After all your efforts and success, you are left perplexed with an award that is worth no more than the paper on which its is typed.

True, not all cases end up like this. First, there are some countries that are prepared to act logically and to extend the restrictive theory of immunity from jurisdiction to immunity from execution - but there are not many of them. Second, in some cases the mere existence of an award against a State offers sufficient ground to reach a settlement - of course, almost always less than the amount awarded. Regrettably, these cases are the exception and the anomaly of absolute immunity from execution is the rule.

The foregoing matters are examined in this contribution in relation to, in particular, court decisions involving the New York Convention.<sup>2</sup> The reason for this is two-fold. First, nowadays, most cases concerning the recognition of the arbitration agreement and the enforcement of the foreign

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<sup>2</sup> For an excellent survey of arbitral awards involving States, see Stephen M. Schwebel, "*Denial of Justice by Governmental Negation of Arbitration*", in *INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS* (Cambridge 1987), pp. 61-143. He concludes that a refusal of a State to arbitrate pursuant to an arbitration clause in a contract between the State and an alien constitutes a denial of justice under international law.

arbitral award are dealt with on the basis of the Convention. Second, as will be shown below, the Convention has contributed to the development of, *inter alia*, the waiver of immunity from jurisdiction.<sup>3</sup>

## 2. CONVENTION'S APPLICABILITY TO STATES

It is generally accepted that the New York Convention applies to arbitration agreements and arbitral awards to which a State is a party, if a transaction concerning commercial activities in their widest sense is involved.

The text of the Convention does not state this general principle in so many words. However, the expression in article I(1) "differences between persons, whether physical or legal" was inserted in the Convention on the understanding that an arbitration agreement and an arbitral award to which a State is a party are not excluded from the ambit of the Convention.

The initial 1953 Draft of the Convention prepared by the International Chamber of Commerce did not contain the above expression. It appeared for the first time in the ECOSOC Draft Convention of 1955. In the accompanying report, it was explained by the Committee that:

"The representative of Belgium had proposed that the article should expressly provide that public enterprises and public utilities should be deemed to be legal persons for the purposes of that article if their activities were governed by private law. The Committee was of the opinion that such a provision would be superfluous and that a reference in the present report would suffice."<sup>4</sup>

At the Conference, the Italian delegate had, according to the Summary Record:

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<sup>3</sup> The subject matter of "Acts of State" in relation to international arbitration can also be viewed with respect to matters that a State declares as not capable of settlement by arbitration, the issue of so-called "arbitrability". See, generally, the Commentaries on Cases under the New York Convention by the author of this contribution appearing in the Yearbook Commercial Arbitration at ¶¶ 223 and 519.

<sup>4</sup> UN DOC E/2704 and Corr. 1, para. 24.

"... some doubts about the part of the article that referred to legal persons. He wondered whether the words 'arising out of disputes ... between ... legal persons' might not furnish grounds for invoking the Convention in a dispute between States submitted to the Permanent Court of Arbitration at The Hague."<sup>5</sup>

The President replied that he "thought that the Ad Hoc Committee had no such intention when it had prepared the Draft Convention (E/2704 and Corr. 1)."<sup>6</sup>

The foregoing statements taken from the *travaux préparatoires* signify that the drafters of the Convention did not envisage the Convention's applicability to arbitration between two States but, on the other hand, did not exclude the Convention's applicability to arbitration between a State and a private party. What they presumably had in mind with respect to applicability in the latter case was the distinction between States acting *jure gestionis* and not *jure imperii*.

The authors have unanimously confirmed the foregoing.<sup>7</sup> This is also the practice of the courts. For example, the Court of Appeal at The Hague has explicitly confirmed that article I(1) of the Convention does not make any exception for States or other legal persons of public law; the Court held, on the contrary, that it follows from the preparatory works of the Convention that States are also included under the term "differences between persons, whether physical or legal" at least when they act *jure*

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<sup>5</sup> UN DOC E/Conf. 26/SR 16, p. 5.

<sup>6</sup> *Id.*

<sup>7</sup> P. Sanders, "The New York Convention", in *International Commercial Arbitration*, Vol. II (The Hague 1960) p. 293 at p. 299; P. Contini, "International Commercial Arbitration - The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards", 8 *American Journal of Comparative Law* (1959) p. 283 at p. 294; G. Haight, *Report on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Commission on International Commercial Arbitration of the International Chamber of Commerce, ICC Document no. 420/90 of 19 September 1958, p. 4. The interpretation was expressly confirmed by Hof [Court of Appeal], The Hague, 8 September 1972, *SEEE v. Yugoslavia*, I Yearbook Commercial Arbitration (1976) pp. 195 - 198 (Netherlands no. 2A). See also L. Cappelli-Perciballi, "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", 12 *The International Lawyer* (1978) pp. 197-207.

*estionis*.<sup>8</sup> In fact, many cases under the New York Convention involve a State or public body as a party. In these cases, the Convention's applicability as such has never even been questioned.<sup>9</sup>

It is unclear whether the New York Convention would also apply to arbitration agreements and arbitral awards rendered between two States or their agencies. Although, as mentioned above, the Convention's drafters did not contemplate such cases, there does not seem to be policy or other reasons against the view that the Convention applies to arbitrations between two States or State bodies where the transaction is commercial in nature *lato sensu*.

### 3. CAPACITY TO ARBITRATE

One of the classic defences of a State that is named as defendant in an arbitration is that under its law it cannot agree to arbitration. A variation of this theme is that the national law allows the State to agree to arbitration only after authorization has been obtained from a competent government body and that such authorization is lacking in the present case. A review of the more than 50 National Reports published in *The International Handbook on Commercial Arbitration* reveals a wide variety of such cases.

The Convention does not contain a specific provision regarding the capacity of a State to agree to arbitration. However, the question can be considered to be encompassed in the broad wording of article V(1)(a) of the

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<sup>8</sup> See Hof [Court of Appeal], The Hague, 8 September 1972, *SEEE v. Yugoslavia*, *Revue de l'arbitrage* 1974 p. 313; *Netherlands Yearbook of International Law* (1973) p. 390; summarized in I Yearbook Commercial Arbitration (1976) pp. 195-198 (Netherlands no. 2A). The case itself was one of many in the continuing story of *SEEE v. Yugoslavia*. The Hague Court of Appeal held the view that the conclusion of a contract for the construction of a railway with delivery of material is not an act *jure imperii* even if the railway was constructed for military or strategic purposes, which intention was not expressed in the contract or in any other manner brought to the attention of *SEEE*.

<sup>9</sup> States are not only defendants but also claimants in cases falling under the Convention. See, e.g., United States Court of Appeals, Fifth Circuit, 19 July 1976, *Imperial Ethiopian Government v. Baruch Foster Corporation (USA)*, II Yearbook Commercial Arbitration (1977) p. 252 (United States no. 10); United States Court of Appeals, Ninth Circuit, 23 October 1989, *Gould, Inc. et al. (USA) v. Ministry of Defense of Iran*, XV Yearbook Commercial Arbitration (1989) pp. 605-611 (United States no. 100).

Convention, which, as part of the general grounds for refusal of enforcement of an award relating to the invalidity of the arbitration agreement, provides:

"(a) The parties . . . were, under the law applicable to them, under some incapacity."

A review of the cases under the Convention shows that article V(1)(a) is not relied upon explicitly by the courts in relation to a defence of a State for its agencies that it lacked capacity to agree to arbitration.

One of the few examples is offered by the Administrative Tribunal of Damascus of 31 March 1988.<sup>10</sup> The case concerned a contract for the construction of a military hospital in Syria between the French company Fougerolle and the Syrian Ministry of Defence. A dispute ensued and, according to the arbitration clause in the contract, ICC arbitration took place in Geneva. Two awards resulted thereafter. Both were in favour of Fougerolle. When it came to enforcement in Syria, enforcement was refused. The Administrative Tribunal held:

"In the present case, the two awards for which enforcement is sought were rendered without the preliminary advice on the referral of the dispute to arbitration, which must be given by the competent Committee of the Council of State. Consequently, Article 44 of the Law no. 55 of 1959 of the Council of State has been violated. This norm is mandatory and pertains to public policy. The consequence of this violation is that [the two ICC awards] are non-existent. . . ."<sup>11</sup>

However, cases like the Syrian one mentioned above are becoming increasingly rare. Rather, national laws and courts distinguish between domestic and international transactions. Under this distinction, the national prohibition for the State to agree to arbitration does not apply in interna-

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<sup>10</sup> Administrative Tribunal, Damascus, 31 March 1988, *Fougerolle SA (France) v. Ministry of Defense of the Syrian Arab Republic*, XV Yearbook Commercial Arbitration (1990) pp. 515-517 (Syria no. 1).

<sup>11</sup> Article 44 of the Law No. 55 of 1955 of the Council of State reads: "No Ministry or State organization may conclude, accept or authorize a contract, a compromise or an arbitration or execute an arbitral award of more than Syrian £ 45,000 without the prior advice of the competent Committee."

tional transactions. An example of such legislation is France, where a new statute, promulgated in 1986, provides that the State and other public entities may submit to arbitration disputes with foreign companies. This statute confirms positions previously adopted in leading cases decided by the French *Cour de Cassation*.<sup>12</sup>

As far as the New York Convention is concerned, the Court of First Instance of Tunis offers a good example of this trend. The case concerned the Tunisian public enterprise Société Tunisienne d'Electricité et de Gaz (STEG) which had concluded a contract with the French company Entrepouse for the construction of a pipeline for transportation of gas in Tunisia. The contract provided for ICC arbitration in Geneva. Notwithstanding the arbitration clause, STEG commenced an action before the Tunisian courts, asserting that under Tunisian law the State and public entities are prohibited from resorting to arbitration. This argument was rejected by the Court of First Instance in Tunis. With reference to French case law, the Court held the arbitration clause valid, reasoning that it related to an international transaction and that the foreign law applicable to the contract recognized the validity of the arbitration clause. The Court deemed the requirement of recognition under foreign law to have been met because Tunisia had adhered to the New York Convention. This case therefore serves as an example of how the New York Convention has been instrumental in this area.

The European Convention on International Commercial Arbitration of 1961 is clearer than the New York Convention as it provides in article II:

"(1) In the cases referred to in article I, paragraph 1, of this Convention, legal persons considered by the law which is applicable to them as 'legal persons of public law' have the right to conclude valid arbitration agreements.

"(2) On signing, ratifying or acceding to this Convention any State shall be entitled to declare that it limits the above faculty to such conditions as may be stated in its declaration."

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<sup>12</sup> See, G.R. Delaume, *Law and Practice of Transnational Contracts* (New York 1988) p. 357.

The scope of the European Convention in this respect is succinctly stated to be as follows:

"Article II(1) validates both arbitral clauses and submission agreements entered into by 'legal persons of public law' with a view to placing them on the same footing as legal persons of private law. Article II(1) supersedes, in that respect, the law governing their status which is referred to as 'the law applicable to them'. The expression 'legal persons of public law' should be interpreted in a broad way as to comprise not only public corporations but also States and any public agencies. The scope of article II(1) is restricted to the international situations laid down in article I(1). Accordingly, legal persons of public law that do not have the capacity to arbitrate and that are within the jurisdiction of the same State cannot make use of article II(1) to submit to arbitration abroad, even if the legal relation between them is of a commercial nature."<sup>13</sup>

To my knowledge, the Swiss Private International Law Act of 1987 is the only national legislation that addresses the capacity of States to agree to arbitration. Article 177(2) thereof provides:

"If a party to the arbitration agreement is a state, or an enterprise held or an organisation controlled by it, it cannot rely on its own law in order to contest its capacity to be a party to an arbitration or the arbitrability of the dispute covered by the arbitration agreement."<sup>14</sup>

Finally, the reverse situation may also occur: a private party invokes the defence of a lack of the State's capacity to arbitrate. An example is the proceedings in the United States for the enforcement of an ICC award rendered in Geneva in a dispute between Shaheen Natural Resources Company, Inc. (US) and Sonatrach (Algeria). Enforcement was sought by

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<sup>13</sup> D. Hascher, *European Convention on International Commercial Arbitration*, XX Yearbook Commercial Arbitration (1995) p. 1006 at 1016. An example of the application of article II of the European Convention is the arbitral award of 18 November 1983, in the ad hoc arbitration *Benteler (FR Germany) v. Belgian State*, X Yearbook Commercial Arbitration (1985) pp. 37-38.

<sup>14</sup> See P. Lalive, J.-F. Poudret and C. Reymond, *Le droit de l'arbitrage interne et international en Suisse* (Lausanne 1989) pp. 309-312. These provisions were necessary in view of the horror case of *Société des Grandes Travaux de Marseille v. Bangladesh*, Tribunal Fédéral [Supreme Court], 5 May 1976, ATF 102 I a 574, reported in V Yearbook Commercial Arbitration (1980) p. 217.



Sonatrach against Shaheen who had lost the arbitration. One of the defences for resisting enforcement was Shaheen's contention that under Algerian law Sonatrach, as a State-owned company, was not entitled to enter into an arbitration agreement. The District Court (whose decision was confirmed by the Court of Appeals *per curiam*) rejected this argument, reasoning:

"Shaheen, in its final argument against the enforcement of the award, is grasping for straws. . . . Shaheen has misinterpreted the documents submitted on Algerian law to serve its own purpose. It is apparent from the affidavits submitted by Ali Bencheneb and Mohand Issad, professors of Algerian law, that the restriction on agreements to arbitrate applies only to domestic disputes. This dispute arises out of an international contract, and as such is clearly arbitrable and would be governed by the ICC Rules and the Convention."<sup>15</sup>

#### 4. ARBITRABILITY OF THE SUBJECT MATTER

Another classic defence of a State that is named as defendant in an arbitration is that the dispute is not arbitrable under its national law.

As a matter of principle, the defence based on the lack of capacity to arbitrate (discussed in Chapter 3) is different from the defence of non-arbitrability of the subject matter. One is called subjective arbitrability (capacity to arbitrate), the other objective arbitrability (arbitrability of the subject matter). However, in international practice, arbitrators frequently do not distinguish between these two categories since they lead to the same result, i.e., the invalidity of the arbitration agreement and the tribunal's lack of jurisdiction.<sup>16</sup>

Thus, it is also questioned in theory whether a distinction should be made at all between subjective arbitrability and objective arbitrability.<sup>17</sup>

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<sup>15</sup> US District Court, Southern District of New York, 15 November 1983, *Shaheen Natural Resources Company, Inc. (USA) v. Sonatrach (Algeria)*, X Yearbook Commercial Arbitration (1985) p. 540 at p. 546 (United States no. 58).

<sup>16</sup> K.P. Berger, *International Economic Arbitration* (1993) pp. 183-184.

<sup>17</sup> K.H. Böckstiegel, *Public Policy and Arbitrability*, P. Sanders, Ed., ICCA Congress Series no. 3 (Deventer 1987), pp. 177 at 181-183.

It is submitted that the distinction is useful since subjective arbitrability may have to be analyzed under a law that is different from the law governing objective arbitrability. Subjective arbitrability is virtually always governed by personal law, i.e., the national law of the State (as corrected by principles of international public law). On the other hand, various laws can be candidates for the law governing objective arbitrability, including the law of the place of arbitration, the law applicable to the substance, and the national law of the State party.

The Swiss Private International Law Act addresses both the subjective arbitrability and the objective arbitrability in the same article. In article 177(2) quoted at page 8, it is provided that, if a party to the arbitration agreement is a State or an enterprise or organization controlled by it, it cannot rely "on its own law in order to contest its capacity to be a party to an arbitration or the arbitrability of the dispute covered by the arbitration agreement."

Insofar as the New York Convention is concerned, the arbitrability of the subject matter has been raised in only two reported cases. The first case concerned an arbitral award rendered in Geneva, awarding Liamco US\$ 80 million in damages against Libya following Libya's nationalizations in 1973 and 1974.<sup>18</sup> Liamco sought enforcement in various countries. The US District Court for the District of Columbia refused enforcement with specific reference to article V(2)(a) of the Convention, which provides that enforcement of an award may be refused if the subject matter of the difference is not capable of settlement by arbitration. The Court reasoned that had the question been brought before the Court initially, the Court could not have ordered the parties to submit to arbitration because in so doing it would have been compelled to rule on the validity of the Libyan nationalization law in respect of which the US Act of State doctrine counsels judicial abstention from passing on its effectiveness. The District Court's decision was rendered on 18 January 1980. On 20 March 1981, the parties

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<sup>18</sup> US District Court, District of Columbia, 18 January 1980, *Libyan American Oil Company (USA) v. Libya*, VI Yearbook Commercial Arbitration (1981) pp. 248-250 (United States no. 33). The Act of State doctrine is expressed by the US Supreme Court in *Underhill v. Hernandez*, 168 US 250 (1897): "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."

reached a settlement. Nevertheless, by an order of 6 May 1981, the Court of Appeals for the District of Columbia vacated the decision of the District Court. Unfortunately, the Court of Appeals order was *per curiam* and therefore does not set forth the reasons.<sup>19</sup>

The second case is a decision by the US District Court for the Southern District of New York.<sup>20</sup> It concerned a US warship that stranded off the Netherlands coast in 1974. The Dutch salvage company Wijsmuller and the captain of the warship signed a Lloyds Open Form Salvage Agreement (LOF) which provided for submission of the salvager's claim for salvage compensation to arbitration to be held in London in accordance with English law, before an arbitrator appointed by the Committee of Lloyds. The US District Court denied the motion to compel arbitration, holding that the Public Vessels Act permitted recovery against the US Government only by suit in the appropriate Federal District Court. The Court noted that arbitration in London before an arbitrator appointed by the Committee of Lloyds or any other body is entirely inconsistent with the statutory scheme. The Court also considered the arbitration clause null and void within the meaning of article II(3) of the New York Convention because of the sovereign immunity principles. The Court further considered that relations arising out of activities of warships have never been regarded as "commercial".

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<sup>19</sup> US Court of Appeals, 6 May 1981, *Libyan American Oil Company (USA) v. Libya*, VII Yearbook Commercial Arbitration (1982) p. 382 (United States no. 38).

<sup>20</sup> US District Court, Southern District of New York, 21 December 1976, *BV Bureau Wijsmuller (Netherlands) v. United States of America*, III Yearbook Commercial Arbitration (1978) pp. 290-291 (United States no. 15).

## 5. IMMUNITY FROM JURISDICTION

The most popular defence of a State or a State agency is that it enjoys immunity from jurisdiction, also called immunity from suit. Whereas the previous two defences derive from the State's domestic law, the defence of immunity from suit is based on public international law.

In the context of international arbitration, it is nowadays virtually unanimously held that a State cannot invoke immunity from jurisdiction. This applies at all three levels, *viz.*: before the arbitral tribunal, before the court at the time of recognition of the arbitration agreement, and before the court at the time of enforcement of the arbitral award.

A survey of relevant case law reveals that the New York Convention supports the denial of immunity from jurisdiction.<sup>21</sup> The underlying theories are the distinction between *acta jure gestionis* and *acta jure imperii*, and waiver.

The Court of Appeal of Athens held in a case between the Greek Ministry of Trade and a foreign ship owner-charterer that the provisions of article II of the New York Convention are also controlling with respect to the Greek State.<sup>22</sup> The Court further held that the formalities provided for in the Greek Code of Civil Procedure pertaining to the conditions required for the Greek State to conclude arbitration agreements are concerned with domestic public policy only, and that they cannot be an obstacle for the State to conclude an arbitration agreement having an international character calling for arbitration abroad (*i.e.*, London).

The High Court of Gujarat (India) rejected the Union of India's contention that the arbitration clause in a charter party obliging the State to submit to foreign arbitration would be tantamount to denial of sovereign status and that such an agreement was valid and binding between citizens of

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<sup>21</sup> For a survey of arbitral awards, see n. 1 *supra*.

<sup>22</sup> Court of Appeal, Athens, Decision no. 3894 of 1976, *The Government of Greece v. Foreign Shipowner*, XIV Yearbook Commercial Arbitration (1989) pp. 634-636 (Greece no. 7).

different States only.<sup>23</sup> In particular, the High Court rejected the Union of India's reliance on the general reciprocity clause contained in article XIV of the New York Convention.

In a case before the Court of Appeal in Casablanca (Morocco), the Court stated in relevant part:

"Doctrine and jurisprudence consistently recognize the validity of an arbitration agreement concluded by a State or State agency where the contract for which the arbitration agreement is concluded is an international contract and is governed by private law."<sup>24</sup>

In Continental Europe, the question whether a State or its agency enjoys immunity from jurisdiction is determined on the basis of the nature of the activity involved. If the activities concern governmental matters (*acta jure imperii*), immunity can be invoked. On the other hand, if the activities are commercial in nature (*acta jure gestionis*), no immunity from jurisdiction can be invoked. An example is offered by the French and Dutch court decisions involving attempts to enforce the award between SEEE and Yugoslavia. The courts held that the contract for the construction of a railway (from Veles to Prilep in the former Yugoslavia) was intended to meet the needs of personal transport, which is in itself a private activity, and that, consequently, Yugoslavia was not allowed to invoke sovereign immunity.<sup>25</sup>

The situation in the United States merits special mention. The Foreign Sovereign Immunities Act of 1976 (FSIA) gives US District Courts

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<sup>23</sup> High Court, Gujarat, 4 May 1982, *Union of India et al. v. Lief Hoegh & Co. et al. (Norway)*, IX Yearbook Commercial Arbitration (1984) pp. 405-411 (India no. 8 (sub 3)).

<sup>24</sup> Court of Appeal, Casablanca, 21 June 1983, *Office National du Thé et du Sucre (Morocco) v. Philippines Sugar Company Ltd.*, to be published in XXI Yearbook Commercial Arbitration (1996) (Morocco no. 1 (sub 7)).

<sup>25</sup> Court of Appeal, Rouen, 13 November 1984, *SEEE v. Yugoslavia*, XI Yearbook Commercial Arbitration (1986) pp. 491-499 (France no. 8); Supreme Court, 26 October 1973, *SEEE v. Yugoslavia*, I Yearbook Commercial Arbitration (1976) pp. 195-198 (Netherlands no. 2B). See also Tribunal de Première Instance, Geneva, 13 March 1986, *Maritime International Nominees Establishment (MINE) (Liechtenstein) v. the Republic of Guinea*, XII Yearbook Commercial Arbitration (1987) pp. 514-522 (Switzerland no. 15).

original jurisdiction against a foreign State as to "any claim for relief *in personam* with respect to which the foreign state is not entitled to immunity under sections 1605-1607". The FSIA is structured to the effect that a State can invoke immunity from jurisdiction unless one of the exceptions listed in the FSIA is present. Section 1605(a)(i) specifies that there is no immunity in any case:

"in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver."

The legislative history of this section reads in relevant part:

"With respect to implicit waivers, the courts have found such waivers in cases where a foreign State has agreed to arbitration in another country or where a foreign State has agreed that the law of a particular country should govern a contract."<sup>26</sup>

In one of the early cases, the US District Court for the District of Columbia considered that this legislative history is to the effect that an agreement to arbitrate in another country constitutes an explicit waiver.<sup>27</sup> In that case, Nigeria had agreed to ICC arbitration in accordance with Swiss law. The court considered this a waiver of sovereign immunity under the FSIA.

Thereafter, a controversy arose in the United States as to whether the reference to arbitration "in another country" in the legislative history meant any other country or the United States only. The restrictive interpretation

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<sup>26</sup> Congressional Committee Report on Jurisdiction of United States Courts in Suit against Foreign States of 9 September 1976 (H. Rep. no. 94-1487, reproduced in XV *International Legal Materials* (1976) pp. 1398-1416.

<sup>27</sup> US District Court, District of Columbia, 25 September 1977, *Ipitrade International SA (France) v. Federal Republic of Nigeria*, IV Yearbook Commercial Arbitration (1979) pp. 337-338 (United States no. 24).

was suggested in *Verlinden B.V. v. Central Bank of Nigeria*.<sup>28</sup> This view was adopted in a number of subsequent decisions.<sup>29</sup>

In order to counter the restrictive interpretation, the theory was developed that adherence by a State to a treaty on arbitration constituted a waiver of immunity. One of the first courts to do so was the District Court for the Southern District of New York in *Liberian Eastern Timber Corp (LETCO) v. The Republic of Liberia*.<sup>30</sup> Liberia moved to vacate an *ex parte* judgment handed down by a US court which enforced an arbitral award rendered against it under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington 1965. Liberia claimed that the court did not have jurisdiction under the FSIA and that Liberia had not waived its sovereign immunity by entering into an agreement to arbitrate under the Washington Convention. The Court ruled that, notwithstanding the fact that Liberia was a foreign State and the party seeking enforcement was a French entity, Liberia had impliedly waived its immunity to jurisdiction in the United States by signing the Washington Convention.<sup>31</sup>

The rationale of the LETCO decision was followed by the District Court for the District of Columbia in a case in which a Canadian party sought to enforce an arbitral award rendered against the Republic of Trinidad and Tobago under the New York Convention. The District Court rejected the Republic's invocation of sovereign immunity. The Court considered:

"To accept Respondent's contention that it did not waive its sovereign immunity by agreeing to arbitrate this dispute under the terms of the Convention would defeat the fair purpose of the Convention which is to provide for the enforcement of foreign arbitral awards. [articles I and III of the Convention]

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<sup>28</sup> 488 F.Supp. 1284 (SDNY 1980) aff'd 647 F.2d 320 (2d Cir 1981), rev'd on other grounds 461 US 480; 103 S.Ct. 1962; 76 L.Ed.2d 81 (1983).

<sup>29</sup> See, Delaume, n. 12 *supra*, pp. 372-375.

<sup>30</sup> 650 F.Supp. 73 (SDNY 1986). See also n. 30, *infra*.

<sup>31</sup> However, actual execution was refused by the US courts in this case on the ground of immunity from execution, see p. 23 *infra*.

Accordingly, as in *Liberian Eastern Timber Corp.*, this Court rules that the Respondent must have contemplated the participation of the United States courts for enforcement of arbitration awards under the Convention notwithstanding that the Respondent is a foreign state and the Petitioners are foreign corporations."<sup>32</sup>

The controversy was subsequently resolved in 1988 by an amendment to the FSIA. Section 1605(a) of the FSIA now removes the immunity of foreign States from the jurisdiction of the US courts in cases:

"(6) in which the action is brought, either to enforce an agreement made by the foreign State with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is authorized to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or Sect. 1607 [on counterclaims], or (D) paragraph (1) of this subsection [on waiver] applies."<sup>33</sup>

The amended FSIA was discussed by the US Court of Appeals for the 2nd Circuit in *Cargill International S.A. et al. vs. Novorossiysk Shipping Company et al.*<sup>34</sup> The case concerned a charter party providing for arbitration in London, involving on the one hand Cargill and on the other Novorossiysk, an entity wholly owned by the former Soviet Union. Following a dispute, Cargill applied to the US District Court for the Southern District of New York, seeking to compel Novorossiysk to arbitrate

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<sup>32</sup> US District Court, District of Columbia, 30 October 1989, *M.B.L. International Contractors, Inc. (Canada) et al. v. Republic of Trinidad and Tobago*, XVI Yearbook Commercial Arbitration (1991) pp. 630-634 (United States no. 106).

<sup>33</sup> See H.M. Holtzmann, *United States*, in the International Handbook on Commercial Arbitration, p. 9.

<sup>34</sup> United States Court of Appeals, Second Circuit, 19 April 1993, *Cargill International SA et al. v. Novorossiysk Shipping Company et al.*, XIX Yearbook Commercial Arbitration (1994) pp. 835-842 (United States no. 157).



in London. The District Court determined that it did not have subject matter jurisdiction as none of the statutory exceptions available under the FSIA applied to Novorossiysk. On appeal, the US Court of Appeals reversed. Cargill invoked two exceptions to sovereign immunity under the FSIA. First, Cargill contended that Novorossiysk had waived its immunity by agreeing to arbitrate its dispute. The Court of Appeals rejected Cargill's waiver argument "absent strong evidence of the sovereign's intent". The Court noted that the courts in the United States have interpreted the waiver provision narrowly: "[M]ost courts have refused to find an implicit waiver of immunity . . . from a contract clause providing for arbitration in a country other than the United States". Cargill's second exception concerns the above quoted article 1605(a)(6). Here, the Court of Appeals accepted Cargill's argument. It reasoned in relevant part:

"Thus, the Convention should be broadly interpreted to effectuate the goals of the legislation. Moreover, when the Convention is read together with the FSIA's arbitration exception, which gives jurisdiction if an arbitration agreement 'is or *may be* governed' by a treaty, 28 U.S.C. Sect. 1605(a)(6)(B) (emphasis added), it evinces a strong legislative intent to provide enforcement for such agreements. We agree with [Cargill] that the Convention is exactly the sort of treaty Congress intended to include in the arbitration exception. If the alleged arbitration agreement exists, it satisfies the requirements for subject matter jurisdiction under the Convention and FSIA."<sup>35</sup> (emphasis added)

Traditionally, in particular in Continental Europe, a distinction is made between acts carried out by a State as if it were a private party (*acta jure gestionis*) and acts carried out as a State (*acta jure imperii*). This distinction gives rise to a number of questions, such as under which law it

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<sup>35</sup> It is interesting to note that barely a month earlier, the US Court of Appeals had held that "[W]hen a country becomes a signatory to the Convention, by the very provisions of the Convention, the signatory State must have contemplated enforcement actions in other signatory States" and that this fact constituted a waiver of immunity under the exception, of Section 1605(a)(1); US Court of Appeals, Second Circuit, 16 March 1993, *Seetransport (Germany) v. Navimpex et al. (Romania)*, XIX Yearbook Commercial Arbitration (1994) pp. 812-820 (United States no. 154). See also United States Court of Appeals, Second Circuit, 8 July 1994, *Seetransport (Germany) v. Navimpex et al. (Romania)*, XX Yearbook Commercial Arbitration (1995) pp. 988-993 (United States no. 187 sub 1). See also US District Court, District of Columbia, 22 March 1995, *Creighton Ltd. v. The State of Qatar*, to be published in XXI Yearbook Commercial Arbitration (1996) (United States no. 197 sub 3) concerning an arbitral award rendered in Paris.

must be determined whether a specific act falls under one or the other category, whether the nature or purpose of the specific act determines the applicable category, and in case the nature criterion is used, whether it can be done without looking at the purpose of the act.<sup>36</sup>

However, the making of the distinction is no longer required for determining whether a State enjoys immunity from jurisdiction, in those cases where a State has agreed to arbitration. As is observed in the preliminary award in ICC case no. 2321 of 1974: "[T]his distinction is of no relevance once the parties have agreed upon arbitration".<sup>37</sup> This appears indeed to herald the current trend.

However, the Draft Articles on Jurisdictional Immunities of States and Their Property of 1991, prepared by the International Law Commission (ILC), does not follow this more modern and logical trend.<sup>38</sup> Part III, headed "Proceedings in Which State Immunity Cannot be Invoked", provides in article 10, headed "Commercial transactions":

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

This article reflects the classic distinction between *acta jure gestionis* and *acta jure imperii*. The article is concerned with proceedings before courts of another State. The effect of the arbitration agreement is dealt with separately in article 17, the last article of Part III:

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<sup>36</sup> See, generally, International Law Association, International Committee on State Immunity, "First Report on Development in the Field of State Immunity Since 1982", in Report of the Sixty-fourth Conference (Queensland, Australia), Sydney 1991, pp. 393-406.

<sup>37</sup> ICC case no. 2321, 1974, I Yearbook Commercial Arbitration (1976) p. 133 at p. 135. See also, G. Bernini and A.J. van den Berg, *The enforcement of arbitral awards against a state: the problem of immunity from execution*, in J. Lew, Ed. Contemporary problems in international arbitration (1986) p. 359 at 363.

<sup>38</sup> ILC Report of the Forty-third Session, 1991, UN Gen.Ass. for the 6th Session, supp. no. 10 (UN DOC A/46/405) reprinted in *XXX International Legal Materials* pp. 1565-1574.

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

- (a) the validity or interpretation of the arbitration agreement;
- (b) the arbitration procedure; or
- (c) the setting aside of the award;

unless the arbitration agreement otherwise provides."

One readily sees that the limitation to "differences relating to a commercial transaction" is unnecessary in the case of an arbitration agreement. To put it differently, if the difference is considered not commercial, is the arbitration agreement, entered into by the State, simply not binding on that State?

It should also be pointed out that the list of possible court proceedings set forth in article 17 seems to be incomplete. An example is the appointment of an arbitrator by a court in case a party fails to do so. More important, the recognition and enforcement of the award are not provided for, which will be addressed below.<sup>39</sup>

## 6. IMMUNITY FROM EXECUTION

At the outset, it should be noted that it is generally accepted that immunity from jurisdiction is not limited to the arbitration proper. Immunity is also deemed to have been waived in respect of court proceedings relating to the arbitration agreement, setting aside of the arbitral award, and the leave for enforcement of the award.

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<sup>39</sup> See also European Convention on the State's Immunity of 1972 (ratified by Austria, Belgium, Germany, Luxembourg, the Netherlands, Switzerland, and the United Kingdom). This Convention deals only with immunity from jurisdiction. Article 12(1) provides that a State may not claim immunity from jurisdiction of a court of another State in respect of proceedings relating to (a) the validity or interpretation of the arbitration agreement; (b) the arbitration procedure; or (c) setting aside of the award, unless the arbitration agreement otherwise provides. Although the Convention is a hobbyhorse of scholars, it has seldom been mentioned in court decisions.

Thus, it is generally accepted that a State against which enforcement of a foreign arbitral award is sought under the New York Convention is not entitled to invoke immunity in relation to the enforcement proceedings. These proceedings belong to the realm of waiver of immunity of jurisdiction discussed above. The question of immunity from execution comes into play only at the stage that actual execution is sought on the basis of a leave for enforcement.

As mentioned in the Introduction, it is here where logic breaks down. If there is no immunity from jurisdiction in the case of arbitration, consistency requires that there would be no immunity from execution either. However, even if a State is deemed to have waived its immunity from jurisdiction by agreeing to arbitration, the immunity from execution is considered absolute by legislation and courts in many States. Thus, the obtaining of a leave for enforcement by a private party on an arbitral award under the New York Convention may be a pyrrhic victory only.

The inconsistency stems from an overtaking of legal and common sense reasoning by political and economic considerations. It is said that enforcement of execution is felt to be a "more intensive interference with the rights of the State".<sup>40</sup>

In those few States where no absolute immunity from execution is accepted but which have applied a doctrine of restrictive immunity from execution, different tests are either cumulatively or alternatively used for determining whether immunity from execution can be invoked, i.e., the nature-of-funds test (use for sovereign or commercial purposes), and the nature-of-activity test (sovereign or commercial activity).<sup>41</sup> Also, certain States require that there be a connection between the legal relationship on which the award is based and the territory of that State where execution is sought.<sup>42</sup>

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<sup>40</sup> K.H. Böckstiegel, *Arbitration and a State Enterprise* (Deventer 1984), p. 15.

<sup>41</sup> See, generally, Report, n. 36, *supra*, pp. 406-412.

<sup>42</sup> E.g., Switzerland, where a so-called *Binnenbeziehung* is required). See, generally, Bernini and Van den Berg, *supra* note 37.

The following legislation and court decisions may exemplify the virtually insurmountable obstacles in this area. The 1988 amendment of the FSIA was to the effect that, while the general rule of immunity from attachment and execution was maintained, the exception was that a private party can now execute the arbitral award against property of the foreign state "used for a commercial activity in the United States".<sup>43</sup> However, as will be seen later, this is a rather difficult test to meet in practice.

In the United Kingdom, the State Immunity Act 1978 allows execution against property of the State in use or intended for use for commercial purposes.<sup>44</sup> However, the English courts have held that the statement of the ambassador of a foreign state that its bank account with a bank in England was not held for commercial purposes should be accepted as sufficient evidence of this fact.<sup>45</sup>

In France three conditions must be fulfilled for immunity from execution to be denied: (i) the State's activity must be commercial; (ii) the funds must have a commercial nature; and (iii) the funds must be used for the activity upon which the claim is based.<sup>46</sup>

Greece may also be mentioned. According to the Supreme Court, it makes a difference whether the State in question is the Greek State or a foreign State: enforcement of an award against the Greek State is simply not possible; enforcement against a foreign State is possible if it involves *acta jure gestionis* and the Minister of Justice has approved enforcement.<sup>47</sup>

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<sup>43</sup> 28 USC §§ 1609 and 1610(a)(6). Prior to the amendment, execution was limited to property "used for the same commercial activity on which the claim was based".

<sup>44</sup> Section 13(4).

<sup>45</sup> Court of Appeal, 24 October 1983, *Alcom Ltd. v. Republic of Colombia* [1984] AC 580. This follows from section 13(5) of the State Immunity Act 1978 according to which the commercial or public use is to be decided by a certificate of the head of the State's diplomatic mission.

<sup>46</sup> *Cour de Cassation*, 14 March 1984, *Eurodif*, *Revue de l'arbitrage* (1985) p. 69. See Bernini and Van den Berg, *supra* note 37, at pp. 369-371.

<sup>47</sup> A. Foustoucos, Greece, *The International Handbook on Commercial Arbitration*, Chapter II, sub 2(2).

In the same manner that the New York Convention is silent on immunity from jurisdiction, it likewise does not deal with immunity from execution. Therefore, the matter is to be resolved on the basis of the law of the forum.

In contrast, immunity from execution is specifically addressed in the Washington Convention of 1965. Article 54 of the Convention provides with respect to immunity of jurisdiction:

"(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

"(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

"(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought."

Yet, article 55 takes back what was given by article 54:

"Nothing in article 54 shall be construed as derogating from the law in force in any Contracting state relating to immunity of that State or of any foreign State from execution."<sup>48</sup>

The Report of the Executive Directors of the World Bank which was submitted together with the draft of the Washington Convention gives the following comment on the above quoted article 55:

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<sup>48</sup> An attempt to exclude immunity from execution failed and article 55 was inserted at the request of a number of developing countries. See, G. Delaume, *Transnational Contracts* (Dobbs Ferry 1990) Chapter XV, § 15-82.

"The doctrine of sovereign immunity may prevent the forced execution in a State of judgments obtained against foreign States or against the State in which execution is sought. Article 54 requires Contracting States to equate an award rendered pursuant to the Convention with a final judgment of its own courts. It does not require them to go beyond that and to undertake forced execution of awards rendered pursuant to the Convention in cases in which final judgments could not be executed."

ICSID believes that a waiver of immunity from execution can be agreed to by the parties. For that purpose, it recommends a specific provision.<sup>49</sup> It will be rare, if ever, that a State party agrees to waive its immunity from execution.

Immunity from execution under the Washington Convention was considered in the United States in the aforementioned case *Letco v. Liberia*.<sup>50</sup> The successful claimant Letco obtained a leave for enforcement in the United States "[W]ith the same force and effect as if it were a final judgment of this Court".<sup>51</sup> However, two attempts to levy on the attachments, both unsuccessful, were made. The first was an attachment of tonnage fees, registration fees and other taxes due to Liberia. Here, the District Court for the Southern District of New York agreed with Liberia that these were sovereign and not commercial assets and therefore not covered by the FSIA exception from immunity of execution of assets used for commercial activities. The second seizure concerned several Liberian embassy accounts. The District Court for the District of Columbia quashed the attachment, holding that the embassy accounts were immune from attachment, both because they enjoyed diplomatic immunity under the 1961 Vienna Convention on Diplomatic Relations and because no exception of the FSIA applies to deprive the bank accounts, which in the Court's opinion

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<sup>49</sup> "The Host State hereby waives any right of sovereign immunity as to it and its property in respect of the enforcement and execution of any award rendered by an arbitral tribunal constituted pursuant to this Agreement", ICSID Model Clauses, ICSID/5/Rev. 2.

<sup>50</sup> For a discussion of this case with references, see A. Broches, *Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 - Explanatory Notes and Survey of its Application*, XVIII Yearbook Commercial Arbitration (1993) p. 627 at 704-705.

<sup>51</sup> See n. 30, *supra*.

were essentially of a public or governmental nature, of their grant of sovereign immunity.<sup>52</sup>

To conclude this section on immunity from execution, the aforementioned Draft Articles on Jurisdictional Immunities of States and their Property of 1991, prepared by the International Law Commission (ILC), may be mentioned. Article 17 concerning the effect of an arbitration agreement, contained in Part III entitled "Proceedings in which State Immunity Cannot be Invoked", was quoted at page 18 above. When dealing with article 17 (then numbered article 19), the Special Rapporteur had suggested an additional sub-paragraph (d), reading "the recognition of the award". This would mean that a State could not invoke immunity from jurisdiction before a court of another State in proceedings relating to the recognition of the award. This proposal, however, was abandoned since it was observed that recognition could be interpreted as a first step towards execution.<sup>53</sup> This is even worse than what has been generally accepted by the courts as mentioned above: recognition and enforcement orders are generally considered not to pertain to execution for the purposes of immunity.

The activities of the International Committee on State Immunity of the International Law Association (ILA) may also be mentioned. The Committee reconsidered at the end of the 1980's the 1982 Montreal Draft Convention on State Immunity in the light of new State practice, the work of the ILC and the Institut de droit international in particular. This resulted in the adoption by the ILA at the Buenos Aires Conference in 1994 of revised Draft Articles for the Convention on State Immunity. Article VII of the Draft provides that a foreign State's property in the forum State shall be immune from attachment, arrest and execution, except as provided in article VIII. Article VIII sets forth a number of exceptions, the most notable of which is: "The property is in use for the purpose of commercial activity or was in use for the commercial activity upon which the claim is based". It also provides in article VIII-C for an exception to the exception, i.e., that attachment or execution is not permitted if the property is used for

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<sup>52</sup> 659 F.Supp. 606 (DDC 1987).

<sup>53</sup> ILC Report of Thirty-Third session, 1991, UN DOC. A/46/10.



diplomatic or consular purposes, is used or intended for use for military purposes or the property is that of a State central bank held by it for central banking purposes, or a State monetary authority held by it for monetary purposes.<sup>54</sup>

It is submitted that the ILA Draft is preferable to the conservative ILC Draft. However, the ILA Draft does not fundamentally tackle the problem of immunity from execution. A simple solution would be to make no distinction between immunity from jurisdiction and immunity from execution and to provide as the sole exception that no execution can be levied against certain classes of property such as those set forth in article VIII-C of the ILA Draft.

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<sup>54</sup> See International Law Association, Report of the Sixty-Sixth Conference (Buenos Aires 1994) pp. 21-28. The Draft Convention provides for pre-award attachment "in exceptional circumstances" if a party presents a *prima facie* case that the assets within the forum state may be removed, dissipated or otherwise dealt with by the foreign state before rendition of the award and "there is a reasonable probability that such action will frustrate execution of any such judgment."

## 7. CONCLUSIONS

In the foregoing discussion, the three classic tactics of States in their attempts to dishonour an arbitration agreement were reviewed in relation to the New York Convention. They are, however, generally not successful.<sup>55</sup> On the other hand, one ultimately is confronted with the obstacle of the absolute immunity from execution (or with a restrictive immunity from execution which operates as being absolute in practice), that will frequently decided be in a State's favour.

It is surprising that most attention in literature is paid to immunity from jurisdiction and the theories purporting to reduce the number of cases in which it can be invoked. Obviously, these theories constitute significant progress. However, these efforts are ineffective if execution proves impossible. It is submitted, therefore, that attention should be shifted to immunity from execution, or better, that the distinction between immunity from jurisdiction and execution should no longer be made.

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<sup>55</sup> A sub-issue is the question of the identification of the State party, including the question whether a State-controlled corporation can be identified with the State. See, generally, Berger, n. 16 *supra*, pp. 180-183 and 188.