

JUSTITIA ET PACE
INSTITUT DE DROIT INTERNATIONAL

Session of Basel - 1991

**Contemporary Problems Concerning the Immunity of States in
Relation to Questions of Jurisdiction and Enforcement**

(Fourteenth Commission, Rapporteur : Mr Ian Brownlie)

(The English text is authoritative. The French text is a translation.)

The Institute of International Law,

Whereas significant trends have appeared both in the practice of States and in doctrine and jurisprudence since the Resolution on the immunities of foreign States adopted at the Aix-en-Provence Session of the Institute in 1954 ;

Whereas it is helpful to propose formulations pertinent to the application within the various national legal systems of the rules relating to the jurisdictional immunity of States with a view to limiting the immunity, while maintaining the protection of essential States interests ;

Adopts the following Resolution :

Article I
Scope of the Resolution

The present Resolution is concerned exclusively with the competence of the relevant organs of the State of the forum in respect of the acts or omissions of a State which is a party to proceedings in the courts of the forum State or in other organs of that State with powers of a quasi-judicial character.

Article 2
Criteria Indicating the Competence of
Courts or Other Relevant Organs of the Forum State
in Relation to Jurisdictional Immunity

1. In determining the question of the competence of the relevant organs of the forum State, each case is to be separately characterised in the light of the relevant facts and the relevant criteria, both of competence and incompetence ; no presumption is to be applied concerning the priority of either group of criteria.

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

a) The organs of the forum State are competent in respect of proceedings relating to a commercial transaction to which a foreign State (or its agent) is a party.

b) The organs of the forum State are competent in respect of proceedings concerning legal disputes arising from relationships of a private law character to which a foreign State (or its agent) is a party ; the class of relationships referred to includes (but is not confined to) the following legal categories : commercial contracts ; contracts for the supply of services ; loans and financing arrangements ; guarantees or indemnities in respect of financial obligations ; ownership, possession and use of property ; the protection of industrial and intellectual property ; the legal incidents attaching to incorporated bodies, unincorporated bodies and associations, and partnerships ; actions *in rem* against ships and cargoes ; and bills of exchange.

c) The organs of the forum State are competent in respect of proceedings concerning contracts of employment and contracts for professional services to which a foreign State (or its agent) is a party.

d) The organs of the forum State are competent in respect of proceedings concerning legal disputes arising from relationships which are not classified in the forum as having a "private law character" but which nevertheless are based upon elements of good faith and reliance (legal security) within the context of the local law.

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

f) The organs of the forum State are competent in respect of proceedings relating to any interests of a foreign State in movable or immovable property, being a right or interest arising by way of succession, gift or *bona vacantia* ; or a right or interest in the administration of property forming part of the estate of a deceased person or a person of unsound mind or a bankrupt ; or a right or interest in the administration of property of a company in the event of its dissolution or winding up ; or a right or interest in the administration of trust property or property otherwise held on a fiduciary basis.

g) The organs of the forum State are competent in so far as it has a supervisory jurisdiction in respect of an agreement to arbitrate between a foreign State and a natural or juridical person.

h) The organs of the forum State are competent in respect of transactions in relation to which the reasonable inference is that the parties did not intend that the settlement of disputes would be on the basis of a diplomatic claim.

i) The organs of the forum State are competent in respect of proceedings relating to fiscal liabilities, income tax, customs duties, stamp duty, registration fees, and similar impositions provided that such liabilities are the normal concomitant or commercial and other legal relationships in the context of the local legal system.

3. In the absence of agreement to the contrary, the following criteria are indicative of the incompetence of the organs of the forum State to determine the substance of the claim, in a case where the jurisdictional immunity of a foreign State party is in issue :

a) The relation between the subject-matter of the dispute and the validity of the transactions of the defendant State in terms of public international law.

b) The relation between the subject-matter of the dispute and the validity of the internal administrative and legislative acts of the defendant State in terms of public international law.

c) The organs of the forum State should not assume competence in respect of issues the Resolution of which has been allocated to another remedial context.

d) The organs of the forum State should not assume competence to inquire into the content or implementation of the foreign defence and security policies of the defendant State.

e) The organs of the forum State should not assume competence in respect of the validity, meaning and implementation of an intergovernmental agreement or decision creating agencies, institutions or funds subject to the rules of public international law.

Article 3

State Agencies and Political Subdivisions

1. The general criteria of competence and incompetence set forth above are applicable to the activities of the agencies and political subdivisions of foreign States whatever their formal designation or constitutional status in the State concerned.

2. The fact that an agency or political subdivision of a foreign State possesses a separate legal personality as a consequence of incorporation or otherwise under the law of the foreign State does not in itself preclude immunity in respect of its activities.

3. The fact that an entity has the status of a constituent unit of a federal State, or a comparable status of special autonomy, under the law of the foreign State does not preclude immunity in respect of its activities.

Article 4
Measures of Constraint

1. The property of a foreign State is not subject to any process or order of the courts or other organs of the forum State for the satisfaction or enforcement of a judgment or order, or for the purpose of prejudgment measures in preparation for execution (hereafter referred to as measures of constraint), except as provided for by this Article and by Article 5.

2. The following categories of property of a State in particular are immune from measures of constraint :

- a) property used or set aside for use by the State's diplomatic or consular missions, its special missions or its missions to international organizations ;
- b) property in use or set aside for use by the armed forces of the State for military purposes ;
- c) property of the central bank or monetary authority of the State in use or set aside for use for the purposes of the central bank or monetary authority ;
- d) property identified as part of the cultural heritage of the State, or of its archives, and not placed or intended to be placed on sale.

3. Subject to paragraph (2) above, the following property of a State is not immune from measures of constraint :

- a) property allocated or earmarked by the State for the satisfaction of the claim in question ;
- b) where the property referred to in sub-paragraph (a) has been exhausted or is shown to be clearly inadequate to satisfy the claim, other property of the State within the territory of the forum State which is in use or intended for use for commercial purposes.

4. This Article applies to property of or in the possession of State agencies and political subdivisions of a State, whatever their formal designation or constitutional status ; but this is without prejudice to the due identification of :

- a) the legal entity liable in respect of the claim, and

b) the property which belongs to that entity and which may accordingly be liable in accordance with paragraph (3) to measures of prejudgment attachment and seizure in execution to satisfy its liabilities.

5. The courts and other organs of the forum State shall give appropriate effect to the principle of proportionality as between the remedy sought and the consequences of enforcement measures.

Article 5
Consent or Waiver

1. A foreign State may not invoke immunity from jurisdiction or from measures of constraint if it has expressly consented to the exercise of the relevant type of jurisdiction by the relevant court or other organs of the forum State :

a) by international agreement ;

b) in a written contract ;

c) by a declaration relating to the specific case ;

d) by a voluntary submission to jurisdiction in the form of the institution of proceedings in the relevant organs of the forum State, or of intervention in proceedings for the purpose of pursuing issues related to the merits of those proceedings, or of a comparable step in the proceedings.

2. Consent to the exercise of jurisdiction does not imply consent to measures of constraint, for which separate and explicit consent is required.

Article 6
The Principle of Good Faith

The principle of good faith is to be given appropriate weight in applying the present Resolution.

Article 7
Saving Clauses

1. The present Resolution is not intended to indicate either directly or indirectly the validity or otherwise of doctrines affecting the competence of municipal courts which form part of one or more systems of municipal law and of which the act of State doctrine is an example.

2. The present Resolution is not intended to regulate the general question of the recognition, as a matter of private international law, of the validity of foreign governmental acts.

3. A foreign State which asserts its jurisdictional immunity in respect of a claim before a relevant organ of the forum State is not thereby precluded from arguing that the organ lacks competence to determine the subject-matter of the claim for reasons other than jurisdictional immunity.

4. The present Resolution is without prejudice to the privileges and immunities accorded to a State under international law in relation to the exercise of the functions of :

a) its diplomatic missions, consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences ; and

b) persons connected with them.

5. The present Resolution is without prejudice to the personal privileges and immunities accorded to Heads of States under international law.

*

(2 September 1991)