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Arbitration between Governments  
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ARBITRATION BETWEEN GOVERNMENTS AND INDIVIDUALS

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To develop and perfect the settlement by arbitration of differences between individuals and Governments is extremely useful; we see this clearly when we consider how imperfect the situation both of municipal and of international law still is, as regards claims on the part of individuals against Governments which arise out of a contract or the violation of any obligation.

The State increasingly inclines to extend its activities in the economical field, by becoming the owner and manager of concerns once reserved to private initiative, but such an intervention into private activities does not always imply that the State's position from a legal viewpoint has been placed, to all effects and purposes, on the same level with that of other subjects of private law. In many cases a self-evident injustice results: the State enjoys the advantages of its commercial activities, but it escapes the drawbacks bound up with these same advantages. It can exercise its rights in respect of private citizens, but it may not be prosecuted for the liabilities it has incurred towards them.

We shall not go into this aspect of the question, as it would lead us away from the subject of the present Report. It will be enough to give a brief outline of the present state of municipal and international law, concerned with the possibility of bringing a civil action against the State before its own judges and of suing a State before the courts of another State.

1°) The first question has been solved in different ways, according to the conceptions of the State and of its juridical nature, prevailing in the various law-systems. In Roman law we already find the concept of Fiscus as a juridical entity, distinct from the State in its character as the holder of sovereign power. This juridical fiction, on the strength of which Fiscus assumed a personality of its own, allowed individuals to bring certain actions against it, and

placed it, within certain limits, under the ordinary rules of private law.

This conception of the State as a juridical person, capable of being invested with rights and obligations in the field of private law, and hence qualified to appear in lawsuits as a plaintiff and as a defendant, to uphold its own rights or to answer for its own obligations, has been introduced by Roman law into the legislations of Continental States in Europe. In these countries the State may be sued in a Court of law by individuals, in respect of all acts lying outside the scope of its sovereign power: as regards acts derived from contracts, as well as responsibilities not based on contracts. Nevertheless the Court in which individuals may prosecute their claims, and the limits of their action, vary between one legislation and another. (1)

But it must be noted that even in the groups of legislations which recognize the responsibility of the State as a legal person for obligations incurred by contracts and (within certain limits) for liability in tort an insurmountable obstacle appears when judgments

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(1) - Thus, while in some countries the State, in cases of pure private law, is placed on the same level as juridical persons of private law, and legal proceedings against the State may be instituted in ordinary Courts, other legislations reserve jurisdiction for such actions also to special administrative courts. As to the boundaries limiting such actions, they concern certain cases of State responsibility for the acts of its officers and for the management of public services. Some legislations have introduced distinctions in this matter. For instance it has been laid down, in French doctrine and legislation, that the State is not liable for damages caused by its officers to private citizens, if such damages can be charged to the officers' "personal fault". The latest solution, by the Council of State, seems to admit the action of individuals against the State administration, in administrative courts, when the officers' fault reveals a "faute de service". As to damages caused by the operation of public services, present French jurisprudence does not admit an absolute responsibility on the State's part for acts caused by its agents; nevertheless it allows compensation founded on grounds of equity.

are to be executed. As a matter of fact it is a general rule that State property cannot be the object of forced executions or of conservative measures (seizure). Hence an individual has no means at his disposal to enforce judgments; his only guarantee is the State's sense of honour, its dignity, which oblige it to respect the orders of its own judges.

English law and the law of the United States of American are inspired by totally different concepts.

In England there is a rule of law that the King cannot be sued in his own courts. The remedy for actions against the State was earlier a petition of right which, according to the Petitions of Right Act, 1660, was available to enforce any contractual obligation. It was a condition precedent to the hearing of a petition by the court that it should be endorsed with the words fiat justitia by the Crown. There was no appeal against the refusal of the fiat, which was always granted unless the application was frivolous or plainly disclosed no cause of action. A judgment in favour of a suppliant on a petition of right took the form of a declaration of the rights to which the suppliant was entitled and, being always observed by the Crown, was as effective as a judgment in an ordinary action.

However, according to the Crown Proceedings Act, 1947, petitions of right have been abolished and proceedings by and against the Crown are now assimilated, as far as possible, to ordinary civil proceedings.

According to another rule that "the King can do no wrong" it was earlier impossible to sue the Crown either in respect of wrongs expressly authorised by the Crown or in respect of wrongs committed by servants of the Crown in the course of their employment. The actual wrongdoer could alone be sued. In the practise the Treasury Solicitor usually defended an action against a subordinate official and the Treasury, as a matter of grace, and paid damages if he was found liable. However, according to the Crown Proceedings Act, 1947,

henceforth the Crown as a principle is liable in tort.

The clear-cut distinction laid down by the American Constitution between the three powers - executive, legislative and judiciary - has this result, that the executive cannot be subjected to the judgment of courts emanating from the judicial power. Hence federal and State courts rule out the individuals' right to bring an action against the sovereignty of the United States and of its several States. Nevertheless, to fill this want, a special jurisdictional body has been set up, the Court of Claims, which is a legislative court exercising judicial power over all actions based on the Constitution, on Congress laws, on the ordinances of the executive's departments (pensions excepted), and on explicit or implicit contracts with the Federal Government.<sup>(1)</sup>

A further method of settling disputes between the Government and the contractor has been adopted by the executive departments on their own initiative and without the aid of any specific legislation. They have provided for insertion into Government contracts of what is known as a "disputes article", setting forth, in short, that if certain disputes arise under the contract they will be disposed of by an administrative officer of the Government's choosing.<sup>(2)</sup>

As to ex delictu actions, the State's immunity is absolute.

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(1) - The Court of Claims and the district courts have concurrent jurisdictions over contract suits against the Government when the matter of controversy does not amount to \$ 10,000. When it exceeds that figure, the Court of Claims has exclusive jurisdiction. Finally, the district courts have jurisdiction over any suit brought by the Government. As regards actions brought by foreign citizens against the United States Government, title 28, par. 261 of the Judicial Code (Mason - U.S. Code Annotated) provides that: "Aliens whose native country gives American citizens the same right to sue it as its own citizens have, may sue in the Court of Claims to the same extent as is permitted to an American citizen".

(2) - See on this subject: The disputes article in Government contracts by Leslie L. Anderson (Michigan Law Review - vol. XLIV, p. 211).

Here also the principle that the King can do no wrong applies. In this field the State does not answer for the harmful consequences of its agents' acts; the latter may be prosecuted only as individuals, for acts committed ultra vires, and not as agents of the State as well.

2°) If actions brought by individuals against the State still meet with such serious obstacles and substantial limitations when they are brought against a State whose subject the plaintiff is, the individual's position is even more difficult when he claims his rights from a foreign State. For in this case his choice lies between suing the foreign State before the latter's courts, which are foreign courts for him, or suing it before his own courts. Both courses are fraught with serious difficulties.

Although the restrictions imposed by some legal systems on action by foreigners (for instance the cautio judicatum solvi) tend to disappear, nevertheless it cannot always be presumed that judges will be quite impartially disposed towards foreigners suing the State.

The difficulties of bringing a civil action against a State before other judges than its own, is even greater.

According to an authoritative opinion of doctrine, the existence should be recognized of an international juridical norm of a customary character, providing for the reciprocal obligation, on the State's part, of granting one another immunity from jurisdiction, in respect of those acts for which each of them admits a jurisdictional course, and to which rules giving jurisdiction to the courts of that State apply (Anzilotti, "L'osenzione degli Stati stranieri della giurisdizione - Riv. di dir. int. 1910, pp. 471-550). But, always in the doctrinal field, it is still a moot point whether such a rule keeps its value as a juridical norm, or whether it has lapsed, owing

to desuetude or to international agreements to the opposite effect. (1)

Nevertheless, in England as well as in the United States, jurisprudence has remained faithful to the principle of immunity, although it may be considered to base such principle rather on a rule of international politeness than on a genuine norm of international law. (2)

This summary review may give an idea of the uncertainty still prevailing in this matter, and the difficulty of deducting a clear-cut rule, under which individuals may feel moderately certain that they are taking the right course in their litigations with foreign States.

There has been no lack of attempts and proposals, to solve the much debated question by means of agreements. A solution we might call "contractual" would be to insert, in contracts between States and foreign individuals, a clause under which the State in question should

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(1) - As provisions stipulated by States and considered irreconcilable with the recognition of the norms mentioned above, the following, among others, are quoted: some legislative measures which, by denying that some foreign properties may be seized, under conditions of reciprocity, have implicitly recognized as lawful the practice of States denying immunity to foreign States; some acts of government stating that it is possible for governments to appear before foreign courts as subjects of private law; and finally the jurisprudence of some countries explicitly declaring against the principle of immunity.

(2) - In some international acts we find now one principle stated, now the other; the Bustamante Code contemplates several hypotheses, ranging from absolute exemption to a minimum of subjection to jurisdiction in all cases; the Brussels Convention on the immunity of State ships (1926) has been interpreted as opposed to the recognition of a customary norm, and in favour of the existence of a rule of international politeness (see on this subject: Bosco, "Lo stato attuale della questione dell'esecuzione degli Stati esti dalla giurisdizione interna", Riv. di dir. internazionale, 1929, pp. 35-62).

of its own free will submit to foreign jurisdiction.<sup>(1)</sup>

The most complete solution would be to set up an international jurisdiction, to which individuals might bring their actions against foreign States. This solution however is hampered by a certain reluctance, still apparent in the doctrinal field, to recognize individuals as subjects of international law. The highest international jurisdiction, founded for the first time in 1920 and reconstructed since by the United Nations' Charter (The International Court of Justice, formerly Permanent Court of International Justice) reserves its jurisdiction only to disputes between States (art. 34). Hence that Court can not deal with actions brought by individuals, unless such actions are endorsed by the States whose subjects they are, so that the proceeding are turned into lawsuits between States. As a rule, States are disinclined to endorse the claims of their own subjects against foreign States, unless all other legal means of redress are exhausted; this leads to considerable delay in winding up such actions, for it is necessary, as a first step, to go through all the degrees of judgment before the courts of the defendant State.

Among the proposals which have been devised for an international court, in which individuals should have the right to institute legal proceedings against States, the one submitted in 1911 by prof. Wohberg deserves to be mentioned.<sup>(2)</sup>

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(1) - Such a clause has generally been considered binding, unless it is contrary to the principles of the Constitution, or of public policy, in the State itself. On the contrary, some authors maintain that this submission, to become binding, should be expressed in an international convention.

(2) - This court should have jurisdiction in the following cases:

- 1) actions brought by individuals against debtor States, and actions of creditor States against individuals;
- 2) cases of private international law;
- 3) actions brought by individuals, concerning the interpretation of general conventions;

Leaving aside the solutions which might be found by setting up a permanent international jurisdiction (this will come about in a more progressive phase of international law) let us examine the possibility of settling cases between States and individuals by arbitration. There is no doubt that, under present conditions of international law, the second solution has the best chances of developing, for the following reasons:

- 1) In the first place, arbitration being optional, States who submit to it do not derogate, in a general and permanent manner, from the principle of immunity, whenever such a principle is recognized.
- 2) The choice of arbitrators being, at least in part, reserved to the contending parties, States are enabled to elect one of their own citizens as judge; this is better than accepting the judgment of a court made up of foreign judges;
- 3) Arbitrators, in international arbitrations, are not bound, as a rule, to apply a particular national law. This also is a guarantee of impartiality, and the States which are parties to arbitration judgments cannot help finding it acceptable.

Having thus ascertained that States are better disposed to submit to arbitration in international litigation, rather than to accept the judgment of foreign judges, or of a genuine international jurisdiction, we must now inquire whether a clause providing for arbitration is generally recognized as valid in relations between States and individuals considering, in particular, cases apt to arise between States and individuals not subject to their jurisdiction.

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Continuation of the preceding note 4) appeals of individuals against the judgments of domestic courts, called in question because they are irreconcilable with some rule of international law. In the case mentioned under N. 1 the international court would act as a judge of the first degree, while in the cases contemplated under N. 2, 3 and 4 it would be a supreme court of appeal (court of cassation)

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Compromises and compromisory clauses are recognized as valid in almost all States; sometimes the recognition is limited to commercial contracts. It is more difficult to ascertain whether this recognition also extends to contracts in which a State is one of the parties, particularly when the arbitration has been entrusted to arbitrators who are not citizens of the State in question, or when arbitration must take place abroad.

Adhesion to the Geneva Protocol of September 24th 1923 does not solve the problem, because art. 1 of this Protocol recognized the validity of agreements "between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any difference that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject".<sup>(1)</sup>

Hence it seems self-evident that the compromisory clause or the compromise aimed at by the adhering States is the one stipulated between subjects of private law, and not between two States or between States and individuals.

A solution of the question must therefore be sought in the municipal law of the different States and, other elements being lacking, in the practice followed by those same States both in their international and in their internal relations.

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(1) - .... entre parties soumises respectivement à la juridiction d'Etat contractants différents, du compromis ainsi que de la clause compromissoire par laquelle les parties à un contrat s'obligent, en matière commerciale ou en toute autre matière susceptible d'être réglée par voie d'arbitrage par compromis, à soumettre en tout ou en partie les différences qui peuvent surgir dudit contrat, à un arbitrage même si ledit arbitrage doit avoir lieu dans un pays autre que celui à la juridiction duquel est soumise chacune des parties contractantes".

The validity of a convention providing for the submission to an arbitral jurisdiction of differences existing or apt to arise out of a given legal relation between the State, as a juridical person of private law, and an individual, is explicitly recognized by some legislations, albeit with some precautions and subject to certain authorizations in the interest of the State.

German law (Gesetz über die Schiedsgerichtliche Erledigung privatrechtlicher Streitigkeiten des Reichs und der Länder, October 10, 1933, I - 772) lays down that the clauses by which the Reich submits to the judgment of an arbitration court under private law, must obtain, in order to be valid, the approval of the Ministry of Finance. This provision also applies to conventions entered into by the Länder.

In Italy the legislation does not contain explicit provisions sanctioning the validity of compromisory clauses in contracts between the State and individuals; nevertheless several forms of solution by arbitration of cases arising out of such contracts exist; these solutions however conform to the type of compulsory arbitration rather than to free arbitration. This is the case of the arbitration provided for in art. 43 of the "Capitolato Generale" annexed to the Law on Public Works of March 20, 1865, which became operative by the Ministerial Decree of May 28, 1895, n. 350. Types of compromisory clauses proper are to be found, nevertheless, in the praxis of the State administration.

In Sweden, Danmark, Norway and Finland arbitration clauses as regards legal relations between States and Individuals are valid.

In England Section 23 of the Arbitration Act, 1889 (52 and 53 Vict. and 49) contemplates the possibility that an arbitration convention may be binding on the Crown, though the court is not empowered to order any proceedings to which the Crown is a party to be tried before any referee, arbitrator or officer without its

consent. (1) By the Miscellaneous Provisions Act, 1933, Section 7, it has been enacted that costs may be awarded to or against the Crown in any civil proceedings or in any arbitration to which the Crown is a party.

The jurisprudence in the United States is not clearly established as regards validity of arbitration clauses in contracts to which the State is a party. The Anes case is still cited to support the proposition that the rights and liabilities of the United States may not be submitted to the adjudication of arbitrators. (2) Moreover, it has been said that Government contracting officers are not empowered to abide by any arbitration without express statutory authority. (3)

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- (1) - This provision should be affected by the above mentioned principles introduced by the Crown Proceedings Act 1947.
  - (2) - United States v. Anes (24 Fed. Cas. 784 - C.C. Mass. 1845).
  - (3) - This opinion has been investigated in "The Yale Law Journal", January 1941, vol. 50, N. 3. In footnote n. 18 the following statements are reported: "The Pennsylvania Arbitration Act is specifically made applicable to any written contract executed by the State, any of its agencies or subdivisions, or any municipal corporations. PA. STAT. (Purdon, 1936) tit. 5, par. 176, 181; Commonwealth v. Union Paving Co., 288 Pa. 577, 136 Atl. 856 (1927). Compulsory arbitration of controversies arising from contracts of the State Highways Commission is provided by statute in North Dakota and in Minnesota. MINN. STAT. (1927) par 2554 (17); N.D. Laws 1927, c. 160 Municipal Corporations are generally stated to have an inherent power, incident to their power to contract, to submit to arbitration DILLON, MUNICIPAL CORPORATIONS (4th ed. 1890) par. 478; Shawnetown v. Baker, 85 Ill. 563 (1877); District Twp. of Walin v. Rankin, 70 Iowa 65, 29 N.W., 806 (1886); Marculas v. State Industrial Accident Comm. 117 Ore. 406, 244 Pac. 317 (1926); Iowa has carried out an arbitration provision on its specifications for highway work for 25 years, under which some 40 arbitrations have been held. The Port of New York authorities and the Department of Water Supply of the City of Detroit have occasionally resorted to arbitration. The recent contract for the construction of Lake Champlain Bridge included a clause making the findings of the bridge commission's engineer on questions of time and financial considerations reviewable by arbitration pursuant to the New York Act. White, Arbitration under Public construction contracts (1937) 1 ARBIT. J. 149.

In Soviet Russia a system of arbitration tribunals has been established to settle the various kinds of disputes which arise, either between Soviet and foreign organizations or between Soviet organizations only. Permanent tribunals of four types have been created to deal with disputes. They are: the Maritime Arbitration Commission of the All-Union Chamber of Commerce; the Foreign Trade Arbitration Commission in the aforementioned Chamber of Commerce; the State Arbitration Tribunals and, finally, the Commissariat Arbitration. They have respectively jurisdiction over: a) disputes arising out of salvage and collision in maritime trade; b) disputes between foreign firms and Soviet trade organizations; c) disputes between state institutions, enterprises and organizations, each of which is under the supervision of a different People's Commissariat; d) disputes between State enterprises under the administrative control of a single Commissariat. (1)

Another group of legislations, on the other hand, contains the explicit prohibition of submitting to arbitration cases to which the State is a party.

In France articles 1004 and 83 of the Code of Civil Procedure forbid public juridical persons to be a party to arbitration conventions. Indeed art. 83 provides that lawsuits concerning the State, State property (domainium), municipalities, public establishments, must be communicated to the Public Prosecutor, and art. 1004 forbids compromises in cases which would have to be communicated to the Public Prosecutor. The Loi de Finances of April 17, 1906 (art. 69), making an exception to the latter prohibition, provides that the State, the

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(1) - A full review of the Russian system of arbitration is offered by John N. Hazard "Soviet Commercial Arbitration" (International Arbitration Journal, April 1945, vol. 1, N. 1).

départements, and municipalities, may resort to arbitration to settle the payment of their expenditure on public works and supplies. As for the State, it is not empowered to do so, unless by virtue of a decree issued by the Cabinet Council and countersigned by the Minister concerned and by the Minister of Finance. The next provides that the rules laid down in the Code of Civil Procedure shall apply to these arbitrations. Apart from these exceptional cases, all other cases concerning the State, the départements and municipalities, come under the exclusive jurisdiction of the courts (Conseil d'Etat, 27 Janvier 1928, Sirey, I 3, 118).<sup>(1)</sup>

The same prohibition is contained in art. 1004 of the Belgian Code of Civil Procedure (Cass. 23 févr. 1889, Pas. I, 29; Trib. Bruxelles 22 mars 1900, Rev. Comm. 149; Trib. Namur, 24 déc. 1935, Jur. Liège, 1936, 140; Conseil d'Etat, 11 juillet 1884, D.P. 1886, 3, 14; Trib. I 13 avril 1929, Gaz. du Palais, 2, 68<sup>(2)</sup>; in art. 487 n. 3 of the Spanish Code of Civil Procedure (see MANRESA Y NAVARRO, Comentarios a la ley enjuiciamiento civil, tomo II, p. 472); in art. 768 n. 3 of the Code Civil Procedure of the Argentine; and in the Ley de Organización y atribuciones de los tribunales, art. 179, of Chili.

The attitude of the States towards foreign arbitration (either when the arbitrators are not the subjects of the State party to the dispute, or when the award was rendered abroad) cannot be easily determined on the basis of their legislations. Some law systems forbid foreigners to act as arbitrators, in some others it is difficult enough to secure enforcement of awards rendered in foreign countries.

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(1) - It is worth mentioning the case Republic of France v. Ingalls Shipbuilding Corp. (District Court of Alabama, Civil Action N.5 March 31, 1947). In a contract for the construction and delivery of self-propelled cargo barges to the French Government, arbitration was provided for "in the event of any dispute between the parties with respect to anything arising out of this contract" (See: The Arbitration Journal, 1947, vol. 2, N. 3).

(2) - See A. Bernard - L'arbitrage volontaire en droit privé - Bruxelles 1937.

From a Report by J.P. Chamberlain to the International Law Association, on "International Commercial Arbitration from an American viewpoint" (New York Conference, 1930), we relate the following statements: "No Court can summon before it defendants who are not within its jurisdiction or who have not property on which can be based jurisdiction, and it is too evident that neither Courts nor legislatures look with favourable eye upon a proposal to compel their citizens to obey the results of a foreign arbitration or a judicial proceeding at which they were not personally represented, even though they may have promised as part of their contract to allow the award or judgment to continue even in case of their default". And later: "If the American and foreign parties to the arbitration both appear at the proceedings abroad and submit themselves to the jurisdiction of the arbitrators, the award will be a contract, but the summary enforcement granted to awards cannot under the statute be extended to foreign awards".

Even the States, which signed the Geneva Convention of 1927 on the enforcement of foreign awards, are not bound to apply such agreement to awards others than those rendered under a compromise or a compromisory clause as provided for in the above mentioned Protocol of 1923, namely to awards in arbitration proceedings between individuals. No international engagement exists relating to acknowledgement of foreign awards when a Government is a party to the arbitration.

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Aside from the point of principle we have just examined, viz. whether a compromise or a compromissory clause may be validly stipulated for civil actions between governments and individuals, international practice, as matter of fact, supplies many instances of arbitration between individuals and States.

Since the middle of the XIX century it is possible to observe a progressive development of the practice of arbitration, as a means of settling differences between individuals and foreign governments while the action of individuals is increasingly released from control or the support of the States whose subjects they happen to be. The most typical instances are those of the Anglo-American Treaty of February 8, 1853, which set up a mixed commission to deal with differences between United States subjects and the British government, and vice versa; the arbitration of the Hamburg senate, which was closed with the judgment of February 7, 1856, in the lawsuit between Mr. Croft, a British subject, and the Portuguese government; the award of a mixed arbitration commission, on August 13, 1860, in the lawsuit between the Republic of Paraguay and the United States and Paraguay Navigation Co.; the arbitration, concluded with the award of March 19, 1864, between Melville White, a British subject, and the Government of Peru; the arbitration set up to deal with differences between the British government and that of the United States concerning the claims of the Hudson Bay and Puget Strait Companies, and in particular the award given on Sept. 10, 1869; the Italo-Columbian arbitration of 1885-1897 in the Cerutti case, and the arbitration between the French subject Aboillard and the Haiti government (1904-1905). (1)

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(1) A complete survey of all arbitrations in international relations is to be found in: CARABIBIER "Les juridictions internationales de droit privé", Editions de la Baconnière - Neuchâtel.

In all these arbitration agreements and proceedings, although Governments formally participated to uphold their subjects' rights, arbitrators gave the latter a large measure of initiative, by admitting them to state their own case either personally or through their counsel, or to give evidence; by providing directly for measures in their favour or against them in their awards; by admitting that the withdrawal of applications in the part of individual plaintiffs had the effect of interrupting proceedings.

Arbitration as a means of settling international differences between individuals and governments reached its greatest development when mixed arbitration courts were founded by virtue of the peace treaties of Versailles, St. Germain, Trianon, Neuilly and Lausanne. The instruments setting up these courts explicitly declared that access to the same was open to legal proceedings by subjects of the Allied and Associated Powers against the German government. The jurisprudence of the T.A.M. has confirmed the above principle, against the objections of the German government, and finally the regulations for procedure adopted by those courts themselves corroborated the principle, by recognizing the individuals' right to be represented by their attorneys and assisted by counsel. Judgments issued by the T.A.M. have in many cases allotted compensation for damages to the same plaintiffs. The German-Polish convention of March 15, 1922 on Upper Silesia is particularly noteworthy for setting up an arbitration court empowered to deal with special cases apt to come up between the Polish and the German governments; it provided that the court should deal with cases of compensation for damages due to the suppression or reduction of acquired rights on the State's part, "sur plainte de l'ayant-droit".

It must be remarked, however, that these mixed tribunals, although they were called "arbitral", had some of the traits of a re-institutional international jurisdiction, because arbitration tribunals do not seem to have been founded on the basis of a compromise or of a compromisory clause agreed upon between individuals and States; nor were they appointed by the contending parties: the jurisdictional power

of these tribunals was derived from peace treaties concluded between States, and the choice of two of the arbitrators was reserved to the States, while the third arbitrator was chosen by a personality designated in the peace treaties, and later by the League of Nations.

Hence mixed arbitral tribunals have been rightly defined "a mixed jurisdiction", partaking at one and the same time of arbitral and of judicial functions. And they do undoubtedly represent an international jurisdiction.

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From the above remarks some guiding principles may be deduced for the further development of arbitration solutions in lawsuits between governments and individuals, particularly where differences of an international character are concerned.

A first step towards this goal would be to recommend the introduction of the compromisory clause in international contracts between governments and individuals. An ample use of such a clause will serve to spread the practice of arbitration, thus facilitating the access of individuals to this jurisdiction, which is better qualified than ordinary courts to solve technical problems.

A particular application of the system might occur when international loans are issued. The Committee for the Study of international loan contracts appointed, on January 23, 1936, by the Council of the League of Nations to examine the means for improving contracts relating to international loans issued by Governments or other public authorities in the future and, in particular, to prepare model provisions - if necessary, with a system of arbitration - which could be inserted in such contracts, has proposed, among other things, the adoption of a type of arbitration clause, to be inserted in the instruments of loans (prospectuses, bonds, etc.). Such a clause should refer to arbitration differences arising from the interpretation and execution of loan contracts. The above-mentioned Committee

has also proposed that a special international court should be founded to deal with loans. The question has been illustrated in a memorandum submitted by the International Institute for the Unification of Private Law to the Conférence Internationale sur l'Arbitrage Commercial, during its first session in Paris, in June 1946. This question is bound up with the question of the representation of bond-holders, as it is evident that the recognition of a collective representation of bond-holders would make it easier to settle differences, either by arbitration or by friendly settlements. (1)

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(1) Among the provisions of international loan contracts for the settlement of disputes, we mention the following:

Agreement with the American Bankers Argentine 6% Redemable Gold Loan 1925. Article V, § 5. Should the bankers and/or the paying agents have any doubts in some particular case as to their rights or obligations under the present agreement, any question or difficulty of this kind shall be settled by reference to an arbitrator appointed jointly by the Ambassador of the Argentine Republic in the United States of America and the bankers; the decisions of this Arbitrator shall be final and without appeal. 7 1/2% Stabilisation Loan 1928 of the Kingdom of Bulgaria. General Bond, Clause 19.

"Whenever any question arises as to the interpretation of the present text, such question shall be submitted to the Council of the League of Nations, and the decision taken by it or by such person or persons as the Council may appoint to settle the question, shall be binding on all the parties concerned. When it is necessary to apply the present clause, the decisions will be taken by a majority vote".

A similar clause is inserted in the general obligation of the Loan of the Free City of Dantzig, at 6 1/2%, 1927.

5% 1932 and 1937 Bonds, of the Czechoslovak Republic Guaranteed by the French Government. Contract concluded with French Bankers Article 22: "any dispute which may arise as to the interpretation or the execution of the present provisions shall be subject to the jurisdiction of the Permanent Court of International Justice at The Hague, acting in execution of art. 14 of the League of Nations Covenant. The Czechoslovak State undertakes to lay such disputes before the Permanent Court of International Justice, whose jurisdiction it accepts".

This first solution, however, does not exhaust the question for, as we have seen, many legislations do not consider compromises or compromisory clauses valid in cases where the State is one of the parties, and other legislations, although they recognize their validity, render it subordinate to strict formalities and restrictions. Hence it is suggested that, beside applying arbitration to the contracts States make from time to time with individuals, the arbitration clause should also be introduced in trade agreements between States, for all differences derived from the application of those same agreements.

But the effect of such a clause should not be understood as limited only to differences between the two contracting States; it should also apply to differences between subjects of said States or between one or more subjects of a State on one side, and the other State on the other, when the difference concerns the interpretation or the execution of a treaty.

Arbitral jurisdiction, in order to preserve its character, should be optional between individuals; they should be free to submit their differences to ordinary jurisdiction.

The last phase in perfecting the practice of arbitration would be the conclusion of a plurilateral convention, by which each contracting State should undertake to recognize the validity of arbitration clauses also for the solution of determined classes of differences, derived from relations of private law with citizens of the other contracting States. In other words, this would amount to extending the scope of the Geneva Protocol 1923, by applying the Protocol also to differences between individuals and governments<sup>(1)</sup>.

Having thus outlined the different phases in the development of arbitration, let us see how arbitration proceedings may be organized in relation to each phase.

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(1) Such agreements would not be complete unless accompanied by an integrative agreement for the execution abroad of arbitration awards, like the Geneva Integrative Agreement of 1927.

In the first phase - compromisory clause inserted into each contract between States and individuals - the greatest freedom should be left to the contracting parties, both as to the choice of arbitrators and as to the rules of procedure. As a great variety of transactions may result from these agreements, special technical knowledge will be required of arbitrators; it is impossible to suggest a type of arbitration panel of an invariable character. Sometimes the right should be reserved to each of the contracting parties, of designating an arbitrator, provided that these same arbitrators, or some impartial organ shall elect the additional arbitrator or umpire. Sometimes the task of choosing arbitrators may be made over to a particularly well-qualified national or international organization, such as arbitration associations, international or national chambers of commerce, importers' or exporters' associations, &c.-Finally, the award of an arbitration court of tested national or international authority may be sought. The procedure might be established case by case in the same agreement empowering arbitrators to act, or reference might be made to the procedure followed in arbitrations by the International Chamber of commerce or by other national arbitration associations.

In the second phase - arbitration clauses in bilateral agreements between States - it will be possible to adopt a largely uniform policy.

A type of arbitral jurisdiction which has been recognized as particularly well adapted to this class of agreements, is the one offered by the mixed arbitral tribunals referred to above. It is well known that such courts were made up of arbitrators chosen by the States which had signed the treaty, and of a chairman chosen among personalities designated in the same treaty, later by the League of Nations Council, or else chosen by the parties themselves (as in the Lausanne Convention of July 24, 1923). Moreover agents of the governments had a part in the proceedings before these courts; their functions were those of advisers on behalf of their Governments

and they had the right of watching over the entire proceedings; for instance they were empowered to approve renuncements and transactions between the parties.

To stress the technical character of arbitration judgments, whose objects may be differences of various types, the parties might perhaps be given the right to designate, in each case, their own arbitrators, according to the matter in hand, selecting him out of a special list of experts, instead of giving the arbitration court a permanent character, which would bring it closer a judicial institution proper.

Finally, in case it were possible to reach a multilateral international agreement, recognizing compromises and compromisory clauses as valid also in the case of differences over contracts between States on one side and individuals not under their jurisdiction on the other, the strictness of the provision might be tempered, particularly for States whose legislation does not recognize the validity of arbitration conventions in respect of public administrations. This might be done by laying down that arbitration proceedings must be instituted before a body enjoying a special international authority.

It seems to us that such a body might be, subject to the necessary adaptations, the Permanent Court of Arbitration founded on the basis of the two Hague Conventions of 1899 (art. 41) and 1907 (art. 41). The fundamental principle of this Court was to prepare a panel of personalities "competent in questions of international law and enjoying high moral consideration"; out of this list the States might select qualified arbitrators. In the 1907 draft, which was never carried out, it was suggested to give this court a truly permanent character by delegating three judges, taken among its members, to decide on cases of summary procedure and to conduct inquiries.

It would now be a question, on one hand, of applying the above-mentioned draft, making procedure easier and quicker through the institution of an arbitration court in permanent session - reserving to the parties the right of choosing other judges out of

the panel of court members - and on the other hand of allowing access to the court also to individuals, so that they might prosecute governments to whose jurisdiction they are not subject, whenever cases are based on compromise or on a compromisory clause. Nevertheless, to avoid burdening the court with an excessive and indiscriminate amount of lawsuits, its jurisdiction might be confined to cases whose financial value should be above a given amount.

Of course the new task entrusted to the Permanent Arbitration Court would require it to be formed in a different manner, since the panel of arbitrators should contain not only personalities particularly competent in the field of "international law", but also experts on "private law" according to the different law-systems. For if - considering the court's present jurisdiction, meant to solve questions between States - the rules applicable are mainly those of public international law, and less frequently those of private international law, should its jurisdiction be extended also to disputes between individuals and States, the necessity would arise of applying the rules of a given municipal law. Therefore it is necessary that arbitrators should be acquainted with these rules.

Thus perfected and completed, the Permanent Arbitration Court might perform an extremely important task, by instituting - along with the permanent jurisdiction of the Court of International Justice, which is the States' court - another jurisdiction, of an arbitral character, for international cases between individuals and States.

A substantial progress would hence be made in the administration of justice.

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Summing up the preceding remarks, it seems to us that the following conclusions may be drawn:

- 1) The settlement by arbitration of differences between individuals and States to whose jurisdiction the former are not subject seems the best means of overcoming the serious obstacle of State immunity.

2) A settlement by arbitration is not always possible, as some juridical systems do not recognize the validity of arbitration agreements, in cases where the State's interests are at stake.

3) To develop and perfect gradually the system of settling cases by arbitration, it is suggested that the following initiatives be encouraged:

a) to spread the use of the compromisory clause in commercial contracts between the State and individuals not subject to its jurisdiction, in all cases where such a clause is permitted;

b) to insert the arbitration clause into treaties of commerce between States, giving also to individuals under the jurisdiction of the contracting States the right to have recourse to arbitration for the settlement of differences arising out of the interpretation and execution of such treaties, both when litigation takes place between subjects of the two States, and when it arises between an individual and the other State;

c) to uphold the conclusion of a plurilateral international agreement, which should recognize the validity of arbitration conventions for settling cases between States and individuals not subject to their jurisdiction.

4) As to the organization of arbitration proceedings, it is suggested:

a) in the case of a compromisory clause inserted into the various treaties, the contracting parties should enjoy the greatest freedom in forming the arbitral tribunal;

b) in the case of arbitration clauses inserted into bilateral treaties, the system of mixed arbitration tribunals set up by the peace treaties of Versailles a.s.c., should be followed, with the adaptations that seem fitting;

c) in the case of a plurilateral international agreement, laying down the validity of arbitration conventions between States and individuals not under their jurisdiction, it should be provided that jurisdiction belongs to the Permanent Arbitration Court, whose chart should be modified and adapted in a suitable manner.