of an *ad hoc* committee to study the record and to make recommendations thereon.

Almost all concerned seem agreed that some steps should be taken to render the International Court more effective. It has, throughout its existence of some 50 years (combined with that of the Permanent Court of International Justice), rendered decisions in something less than two cases per year, none of which has of itself averted armed conflict.

Most of the suggestions made in the foregoing summary of the record support the position of the American Bar Association, and the plan worked out over a period of years by the present author.[31] They deserve careful and deliberate consideration to improve the stature and the effectiveness of the Court.

However, it must regretfully be concluded that little or no progress has been made toward meeting the recommendations of the American Bar Association in its 1965 resolution, mentioned at the outset of this article. The truculence of the Soviet Union throughout the discussions demonstrates the certain veto of such amendments of the Statute of the Court as would be required to carry out the beneficent purposes of the Association's resolution. On the other hand, it may nevertheless be that the very fact that there have been such discussion and correspondence as are outlined above does indicate some progress after all.

EBERHARD P. DEUTSCH
of the New Orleans Bar

[31] *Supra*, note 29.

PUBLIC DEBT AND SOVEREIGN IMMUNITY: SOME CONSIDERATIONS PERTINENT TO S.566

S.566, a bill introduced in Congress last January on the subject of "Jurisdictional Immunities of Foreign States,"[1] would import significant changes in the law of this country regarding the immunity, both from suit and execution, of foreign states. The purpose of the bill is essentially twofold. First, the bill would put an end to the practice regarding "suggestions of immunity" by the Department of State, which has led to confusion and judicial "abdication,"[2] and would refer the decision of issues of sovereign immunity exclusively to the courts. Second, the bill would give to the courts certain statutory guidelines which should be of assistance to them in the determination of such issues and the elaboration of a coherent body of rules on the subject.

[1] 119 CONG. REC. (daily ed.) S. 1298 (1973); 12 ILM 118 (1973). By way of background material *see also*, American Society of International Law, [1969] PROC., 176; Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United States Law*, 44 N.Y.U.L. REV. 901 (1969) and the "Section by Section Analysis" of the bill, Cong. Rec., Feb. 6, 1973 at S. 2118 (hereinafter referred to as "Analysis").

[2] *See e.g.*, among an abundant literature on the subject, Boynton, *International Law—Sovereign Immunity—The Last Straw in Judicial Abdication*, 46 TULANE L. REV. 841 (1972).

Statutory enactments in matters of sovereign immunity are rather scarce and the few statutes in point usually relate to immunity from execution rather than immunity from suit. Examples are found in Italy and Greece, where it is provided that no execution can be levied upon the property of foreign sovereigns without the authorization of the proper authorities.[3] Except for such statutes, issues of sovereign immunity are in most countries referred for decision to the courts, whose pronouncements, however, are not necessarily consistent from country to country or in one and the same country at the same or different times. This is particularly, but by no means exclusively, the case in regard to issues arising in respect of the public debt of foreign states, political subdivisions of such states, and other foreign public agencies or bodies.

There is no consensus as to whether the foreign borrowings made by such entities should be regarded as acts *jure gestionis* or acts *jure imperii*,[4] or on the question whether immunity, to the extent that it exists, should be granted only to the central government of a foreign state or be extended also to its political subdivisions, or to certain agencies.[5]

In order to deal with this situation, lenders have recourse to various contractual devices, the most common of which is to stipulate in the loan documents that the borrower submits to the jurisdiction of a designated forum and waives any rights to sovereign immunity from suit and, possibly also, from execution. However, in this respect also, there is no general agreement as to the effect of such waivers of immunity. These are usually held binding and enforceable in Continental countries in regard to immunity from suit, although not necessarily in regard to immunity from execution.[6] In other countries, such as the United States and the United Kingdom, contractual waivers of immunity from suit have been held revocable and immunity from execution remains in any case the general rule.[7]

Under the circumstances the situation of creditors of foreign sovereigns may be difficult indeed. The most carefully drawn waiver of immunity[8]

[3] Italy, Decree-Law of Aug. 30, 1925 and Law of July 15, 1926, Art. I, as translated in SERENI, THE ITALIAN CONCEPTION OF INTERNATIONAL LAW 239 (1943); Greece, Law 15/1938, *see* Cass, Greece, Case No. 460/1962, 16 REV. HELLÉNIQUE DE DROIT INTERNATIONAL 355 (1963). *See generally*, DELAUME, LEGAL ASPECTS OF INTERNATIONAL LENDING AND ECONOMIC DEVELOPMENT FINANCING 204–06 (1967).

[4] DELAUME, preceding note, 156–57. [5] *Id.* 157–59.

[6] *Id.* 159, 204. *See also* text and note 32 *infra*.

[7] *Id.* 160, 205. *Cf.* Isbrandtsen Tankers v. President of India, 446 F.2d 1198 (2d Cir. 1971). *See also*, "Analysis" (note 1 *supra*), at S. 1301–02.

[8] In this country, some lenders have gone so far as to add to waivers of immunity a stipulation to the effect that the loan should be considered as "a private and commercial act" rather than a "governmental or public act," thereby attempting to get to the root, or one of the roots, of the problem. *See* DELAUME, note 3 *supra*, 171.

Whether such a stipulation, assuming that it would have been sufficient to overcome a plea of immunity from suit, would have had the same effect in regard to execution against the assets of the borrower is doubtful. *See* Dexter and Carpenter v. Kunglig Jarnvagsstyrelsen, 43 F.2d 705 (2d Cir. 1930); Weilamann v. Chase Manhattan Bank, 192 N.Y.S. 2d 469, 21 Misc. 2d 1086 (Sup. Ct. 1959).

is no guarantee against judicial fiat or, at the other extreme, suggestions of immunity made for political rather than legal considerations.

S.566 should, in this respect, bring some solace to American lenders. Certain of the proposed rules, however, appear somewhat over conservative and it may be appropriate to consider them in the context of both American lending practice and the rules and contractual practices obtaining in other leading financial markets, possibly competing with those in the United States.

I

THE STATUTORY RULES OF S.566

A. *Immunity from Suit.*

Section 1606 of Title 28 of the United States Code, as proposed in S.566, would make a fundamental distinction between the public debt of the central government of a foreign state and that of its political subdivisions or of an agency of such state or subdivision.

Political subdivisions and agencies would enjoy no immunity at all in regard to their own borrowings in the United States. This principle is clearly stated in §1606(a)(2),[9] which would make the American rule consistent with that of other countries, such as France.[10] Since in respect of the public debt of such entities S.566 refuses to characterize borrowing as a commercial act (falling within the scope of §1605) or as something else,[11] the rationale for this provision must be that immunity, to the extent that it exists, must be limited to the public debt of the central government, a characterization in accord with that of other countries.[12]

As to the public debt of a central government, S.566 acknowledges the principle of absolute immunity from suit in the absence of an "explicit" waiver of immunity on the part of the borrower.[13] According to the Section by Section Analysis which accompanies S.566, this solution:

> . . . should be maintained by the United States, in its role as one of the principal capital markets of the World. Many national governments are unwilling to issue their securities in a foreign country which subjects them to actions based on such securities . . .[14]

[9](a) A foreign state shall be immune from the jurisdiction of the courts of the United States and of the States in any case relating to its public debt, except if:

. . . . .

(2) the case whether or not falling within the scope of Section 1605 (applicable among other things to commercial acts carried out by foreign sovereigns), relates to the public debt of a political subdivision of a foreign state, or of an agency or instrumentality of such a state or subdivision . . .

[10] DELAUME, note 3 *supra*, 157–60. *See also*, Cour d'appel, Paris (1er Ch.) Nov. 5, 1969, Gouvernement du Land de Hesse v. Neger, 59 REV. CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 703 (1970).

[11] *See* note 9 *supra*.

[12] DELAUME, note 3 *supra*, 157–60. *See also*, the European Convention on State Immunity of May 16, 1972, 11 ILM 470 (1972), Arts. 27 and 28.

[13] §1606(a)(1).

[14] *See supra* note 1, at S.2118–20.

This statement finds support in the practice generally prevailing in the United States, with some notable exceptions,[15] in respect of bonds publicly issued in the market. It contrasts, however, with the practice of American lenders regarding loans made directly by them to foreign sovereigns. The loan documents relating to such transactions usually provide for express waivers of immunity.[16] By placing both types of transactions under the same heading of "public debt,"[17] S.566, therefore, seems to formulate a rule of general application which, in a substantial measure, does not accord with American contractual lending practice.

Nor would the rule be consistent with that of other leading financial markets, such as those in Switzerland. For several decades, the Swiss courts have consistently held that borrowings made in that country by foreign sovereigns should be considered as acts *jure gestionis* subjecting the borrower to the jurisdiction of the Swiss courts, which is always provided for in the loan documents, irrespective of whether those consist of a direct loan contract or bonds publicly issued in the market.[18] Yet, this restrictive approach to sovereign immunity, which is not limited to immunity from suit and applies also to immunity from execution,[19] does not seem to have affected in the least the attractiveness of the Swiss capital market, the financial conditions of which are such as to make foreign sovereigns willing to abide by the strict rules of the Swiss law.[20] Substantially the same observation can be made in respect of loans contracted or bonds issued in other domestic Continental markets or the Euro-bond market. Though cases in these countries are too few to reveal the same consistent pattern as that which prevails in Switzerland,[21] current con-

[15] DELAUME, note 3 *supra*, 174 and note 66.

[16] *Id.* 170–72.

[17] "Analysis" (note 1 *supra*), at S.2120, according to which:

> While there is no clear definition of "public debt," the concept seems to embrace not only direct bank loans but also governmental bonds and securities sold to the general public through bond markets and stock exchanges.

[18] This solution is subject to the additional requirement that the transaction must be connected with Switzerland, *e.g.*, either because the loan contract was made, or the bonds were issued, or payment is to be made in that country. *See e.g.*, Tribunal fédéral, March 18, 1930, République Hellénique v. Walder, R.O. 56.I.237; Tribunal fédéral, June 6, 1956, Royaume de Grèce v. Banque Julius Bär et Cie, R.O. 82.1.75, 23 INT. L. REPORTS, 195 (1956); Tribunal fédéral, March 13, 1918, K.K. Oesterreichisches Finanzministerium v. Dreyfus, R.O. 44.1.49; Tribunal fédéral, Oct. 7, 1938, Etat Yougoslave v. S.A. Sogerfin, 61 LA SEMAINE JUDICIAIRE 327 (1939). *Cf.* Tribunal fédéral, Feb. 10, 1960, République Arabe Unie v. Dame X. . . . , R.O. 86.1.23; 88 J. DE DROIT INTERNATIONAL 458 (1961); 55 AJIL 167 (1961).

[19] *See* text and notes 31 and 42 *infra*.

[20] DELAUME, note 3 *supra*, 174. *See also* text and note 42 *infra*.

[21] In France, it has recently been held that the guarantee by a foreign (Turkish) government of bonds issued by a municipality (the City of Constantinople) should be characterized as an act *jure gestionis* and that the guarantor could not plead sovereign immunity. *See* Court of Appeal of Rouen February 10, 1965, Société Bauer, Marchal et Cie v. Ministre des Finances de Turquie, 92 J. DE DROIT INTERNATIONAL 655 (1965); 54 REV. CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 565 (1965). *See also* in the same case, Court of Cassation Dec. 19, 1961, Juris-Classeur Périodique, LA SEMAINE JURIDIQUE, II, 12 489 (1962); summarized in 56 AJIL 1112 (1962).

tractual lending practice shows that foreign sovereign borrowers are not reluctant to waive sovereign immunity in order to have access to the market.[22]

The basic issue is thus squarely raised. Should a foreign government, by not being asked or by refusing to waive its immunity at the time of contracting, be allowed to intimate that it might with impunity renege upon its contractual commitments simply because the transaction falls within the concept of "public debt"? Or should the borrower be bound initially and irrevocably by the terms of the loan contract or the bonds, as it would in the case of a "commercial" operation, freely negotiated under the conditions, whether "commercial," "financial" or other, prevailing at the time of contracting? The answer to such questions cannot, and should not, be in doubt. The time has passed when a state's public debt was regarded as not binding in law, but in honor only. Securities laws and regulations,[23] statutes providing for the grouping and defense of the interests of bondholders,[24] or the settlement of disputes between holders of foreign bonds and foreign public borrowers[25] have been enacted in various countries in the last few decades. They all bear testimony to the fact that foreign sovereigns are, in respect of foreign borrowings, increasingly subject to definite requirements of a legal nature. Under the circumstances, the distinction attempted by the drafters of S.566 between the "public debt" of central governments and that of other foreign public entities (which are both subject to essentially the same securities laws and other regulations) appears to constitute a somewhat gratuitous acknowlegmment of a concept of state contract which has outlived the doubtful usefulness that it may have had in years long past.

A reconsideration of outmoded notions is in order and has already found its expression in the provisions of the European Convention on State Immunity of May 16, 1972.[26] This Convention differs in approach from S.566 which maintains the principle of sovereign immunity, subject only to making various and significant inroads into it. This approach may bring the advantage of showing the significant changes brought about by the bill. The Convention starts from the premise that in a number of situations, which are enumerated in the Convention a contracting state should have no immunity from suit. It is only in cases other than those listed in the Convention that a contracting state may still be entitled to plead sovereign immunity as a defense.[27] In other words, under the Convention, sovereign immunity, rather than being the principle, has become a purely residual concept. This approach has a direct impact upon the solutions adopted in the Convention in connection with state contracts.

[22] *See* text and notes 39 to 43 *infra*.
[23] To which express reference is made in S.566, §1606(b).
[24] DELAUME, note 3 *supra*, 52–70.
[25] *Ibid.*, 185–87.
[26] 11 ILM 470 (1972).
[27] Arts. 3 to 14. Art. 15.

Pursuant to Article 4(1) of the Convention:

> . . . A Contracting State cannot claim immunity from the jurisdiction of another Contracting State, if the proceedings relate to an obligation of the State, which, by virtue of a contract, falls to be discharged in the territory of the state of the forum."

The generality of this provision and the absence of any qualification, such as is made by the Convention in regard to certain employment contracts,[28] makes it applicable to loans contracted by contracting states. In effect, such operations, whether they consist of direct loan agreements or bonds publicly issued in the market, always include an "obligation" (even if only payment) to be "discharged" in the market of issue or that in which the funds are raised. The worn-out mantle of immunity has, therefore, been shed by the drafters of the Convention and replaced by the basic principle of sanctity of contracts. The Convention, of course, reflects Continental views on the subject. The question, however, is whether those views ought to be taken into account in the drafting of an American statute of major importance intended not only to clarify the law of this country but to ensure also that the American markets remain competitive with those outside the United States. Or, to put the question in another way, is the basic issue of competitiveness a matter of juridical leniency toward foreign sovereigns or is it one of a purely financial nature, depending upon the conditions in which money can be obtained in the American or the non-American markets?

B. *Immunity from Execution.*

Insofar as public entities other than a central government are concerned, the provisions of S.566 and of the European Convention are consistent, since they both provide that such entities are not entitled to immunity from suit or to immunity from execution.[29]

In regard to the immunity of central governments, the European Convention adheres to traditional notions. It provides that:

> No measures of execution or preventive measures against the property of a Contracting State may be taken in the territory of another Contracting State except where and to the extent that the State has expressly consented thereto in writing in any particular case.[30]

This provision is more conservative than the law of Belgium or Switzerland, since it is held in these countries that whenever there is no immunity from suit, there should be, even in the absence of an express waiver of immunity, no immunity from execution.[31] It is more consistent with the

[28] Art. 5.

[29] European Convention, Arts. 27 and 28. S.566, §1610.

[30] Art. 23.

[31] Trib. Civ. Brussels April 30, 1951, Socobelge et Etat Belge v. Etat Hellénique, J. des Tribunaux 298 (1951); 79 J. de Droit International 244 (1952); 18 Int.

law of France, which in its latest formulation maintains immunity from execution even if there is no immunity from suit.[32]

While this last solution would be in accord with existing American case law,[33] it would be inconsistent with the solutions provided for by S.566 in regard to the commercial activity of foreign states. In this last respect, §1610(a)(2) of S.566 provides that the assets in the United States of a foreign state "to the extent that they are used for a particular commercial activity" shall not be immune from attachement or measures of execution if, *inter alia*, the foreign state has waived its immunity "either explicitly or by implication." This provision, however, is clearly limited to waivers of immunity incidental to the commercial activity of foreign states. Since under §1606 of S.566 "public debt," insofar as a foreign state is concerned, is *not* a "commercial" transaction, it would follow that §1610(a)(2) cannot receive application in regard to contractual waivers of immunity found in loan documents.

Such an interpretation could have dire consequences. In the absence of any provision similar to §1610(a)(2) in respect of "public debt," the implication would be that, notwithstanding a waiver of immunity from execution in loan documents, the waiver would remain revocable. There would thus be a flagrant opposition between the treatment of waivers of immunity in respect of commercial transactions, which under S.566 are irrevocable, and of waivers of immunity from execution relating to the borrowings of foreign states, which, for lack of express reference thereto in S.566, would continue to be governed by American case law. The situation becomes even more curious when it is observed that waivers of immunity from suit are under §1606(a)(1) irrevocable in regard to the public debt of states in exactly the same manner as waivers concerning the commercial transactions of such states (§1605(1)). Whether these discrepancies are the result of an oversight or of a deliberate choice is not known, but it may be suggested that the matter deserves some reconsideration.[34]

L. REPORTS 3 (1951); Tribunal fédéral, February 10, 1960, République Arabe Unie v. Dame X. . . . , R.O. 86.I.23; 88 J. DE DROIT INTERNATIONAL 458 (1961); 55 AJIL 167 (1961). In Royaume de Grèce v. Banque Julius Bär et Cie, Tribunal fédéral, June 16, 1956, R.O. 82.I.75, the action was dismissed but only on the ground that the loan transaction (bonds payable outside Switzerland) did not have a sufficient connection with the Swiss territory to enable the Swiss courts to exercise jurisdiction and validate the attachment in Switzerland of funds deposited in that country by the Greek Government.

[32] Cass. Nov. 2, 1971, Clerget v. Banque Commerciale pour l'Europe du Nord, 61 REV. CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 310 (1972); 99 J. DE DROIT INTERNATIONAL 267 (1972).

[33] Dexter and Carpenter *cited* note 8 *supra*.

[34] In the same connection, it should be noted that whereas under §1606(a)(1) a waiver of immunity from suit in connection with the public debt of foreign states must be "explicit," a waiver of immunity from execution under §1610(a)(1) may, in respect of commercial acts, be made "explicitly or by implication." A choice between the two alternatives would appear useful for the sake of consistency.

II.

CONTRACTUAL LENDING PRACTICE AND SOVEREIGN IMMUNITY

A. *Immunity from Suit.*

The frequency of choice of forum clauses and corresponding waivers of immunity in transnational loan documents is proportionate to the expected effectiveness of such stipulations in the relevant forum. Thus, whereas such stipulations are not normally found in England, where waivers of immunity are revocable, they are a permanent feature of loan contracts made, or bonds issued, in Switzerland, where waivers of immunity are irrevocable.[35]

As mentioned above, waivers of immunity are commonly found in loan contracts concerning loans made directly by American financial institutions to foreign sovereigns, but are much less frequent in the case of bonds issued in the American market by foreign states.[36] Whether this difference is attributable to reasons of prestige and national pride on the part of the borrowers or to other reasons, including possibly traditional patterns of doing business, is an interesting matter for speculation. Of more practical significance, however, is the fact that in recent years bonds issued by foreign governments or by certain international organizations such as the High Authority of the European Coal and Steel Community have included express waivers of immunity, subjecting the borrower to the jurisdiction of American courts.[37]

In addition to these national trends, the stipulations in use in the Euro-bond market also deserve attention. Bonds issued by foreign sovereigns in the Euro-bond market commonly provide for waivers of immunity from suit and the submission of loan disputes to the jurisdiction of a specifically agreed forum or of alternative fora in the country of issue and in that of the borrower. In this respect, some provisions are more explicit than others, depending presumably on the particular preference of the managing underwriters or their counsel for a specific formula.[38] Thus, certain stipulations may contain no more than an express choice of forum,[39] whereas

[35] DELAUME, note 3 *supra*, 169–70; 174. [36] *See* text and notes 15 and 16 *supra*.

[37] DELAUME, note 3 *supra*, 174, n. 66, and 175–77.

[38] DELAUME, *Choice of Law and Forum Clauses in Euro-Bonds*, 11 COL. J. TRANS. L. 240, at 248 and 252–54 (1972).

[39] *See e.g.*, the prospectus of the U.S. $15 million 8 3/4 per cent guaranteed Bonds due 1986 of Pekema Oy, unconditionally guaranteed by the Republic of Finland:

> The guarantee is governed by English law. The Republic has agreed to accept the jurisdiction of the English Courts.

See also, the Republic of South Africa, DM 100 million 7 per cent Bonds of 1972:

> The forum for all actions arising from matters which have been provided for in these Conditions [of issue] shall be Frankfurt am Main. In this respect, the Republic of South Africa submits to the jurisdiction of the German courts. The bondholders, however, may waive such forum and pursue their claims before courts within the Republic of South Africa where German law shall likewise be applied to those Conditions.

A similar provision is found in the Mexico, DM 100 million 7 1/4 per cent Bonds of 1973.

other provisions may include an express waiver of immunity,[40] particularly but not exclusively when such a waiver is supplemented by a waiver of immunity from execution.

B. *Immunity from Execution.*

Waivers of immunity from execution are, of course, implicit in bonds issued in such countries as Switzerland in view of the established position of the Swiss courts that, where there is no immunity from suit, there should be no immnunity from execution.[41] This consideration explains why express waivers are not always found in bonds issued in Switzerland and such bonds may simply provide for the submission of loan disputes to a Swiss forum.[42]

Express waivers of immunity, however, have appeared (it is believed for the first time in 1970) in Euro-bonds governed by German law and providing for the jurisdiction of the German courts, such as the DM 100 million 8½ per cent Bonds 1970/1985 issued by the Republic of Ireland, which provide that:

> The place of jurisdiction in respect of all matters covered in these Terms and Conditions is Düsseldorf. The bondholders and Commerzbank Aktiengesellschaft, however, are also entitled to pursue their

[40] *See e.g.*, the Republic of South Africa 1970–1982 External Loan of 20 million European Units of Account, which, after providing for the application of the law of the Grand Duchy of Luxembourg, stipulates that:

> The bondholders shall be free to enforce their rights against the Republic in the courts of the Grand Duchy of Luxembourg and/or of the Republic of South Africa. The Republic has expressly waived sovereign immunity with respect to any action or proceeding brought in the courts of the Grand Duchy of Luxembourg or in the courts of the Republic of South Africa in connection with the Bonds. For the purpose of any action or proceeding brought in the Grand Duchy of Luxembourg, the Republic has elected domicile at the principal office of the Fiscal Agent for all acts, formalities or procedures in connection with the present loan and has irrevocably submitted to the jurisdiction of the courts of the Grand Duchy of Luxembourg.

Similar provisions are found in the Kingdom of Denmark 1972–1987 External Loan of French Francs 100 million and the Commonwealth of Australia 8 per cent 1971–1986 Loan of European Units of Account 15 million.

[41] *See* text and note 31 *supra*.

[42] Until recently, Swiss lenders were generally satisfied with making provision for the jurisdiction of the Swiss courts over loan disputes. *See* DELAUME, note 3, *supra*, 174.

Reference to possible measures of execution in Switzerland now sometimes appears in the loan documents. A typical example is the Argentine Republic 7 1/2 per cent S. Frs. 50 million Loan of 1970:

> Any disputes between the bondholders, on the one hand, and the Argentine Republic, on the other hand, arising out of the bonds or coupons of this issue shall be governed by Swiss law and shall be decided by the ordinary courts of the Canton of Zurich, subject to appeal to the Federal Tribunal, at Lausanne. *To that end and for the purpose of any procedure of execution in Switzerland,* the Argentine Republic elects legal and special domicile in the Argentine Consulate in Zurich . . .
>
> Bondholders shall have also the right to bring their claims and to institute legal proceedings before the courts in the Argentine Republic having jurisdiction, Swiss law remaining applicable to the terms and conditions of the Bonds (as translated, italics supplied).

> claims before Irish courts and before courts in any other country in which there are situate [sic] assets belonging to Ireland in which case the laws of the Federal Republic of Germany shall likewise be applicable in accordance with §14(1). The German courts shall have jurisdiction over the annulment of lost or destroyed Bonds. Ireland will not plead immunity or lack of jurisdiction before any court in which claims can be pursued against Ireland under this provision, or before any authority competent for the enforcement of judicial decrees and judgments. Ireland hereby expressly submits to the jurisdiction of such courts or authorities.[48]

Since then, other waivers have been stipulated in various Euro-bond issues, some of which, interestingly enough, are made subject to the law of the State of New York, such as the Argentine Republic $US 50 million Floating Rate Notes 1977, according to which:

> Neither the Republic nor its property has any right of immunity from legal proceedings; and to the extent that the Republic or any of its property has or hereafter may acquire any such right of immunity, it hereby irrevocably waives such right of immunity in respect of its obligations under this Note or the coupons appertaining hereto.

Through the medium of Euro-bonds, therefore, provisions similar to those used in direct loan contracts, including those between American lenders and foreign borrowers, have found their way into publicly issued bonds. The cycle is thus completed and consistency of solutions, regardless of the medium in use or of the private or public nature of the transaction, is achieved through substantially the same contractual devices.

Conclusion

In view of these contractual trends, of the willingness of foreign sovereigns to subscribe to them, and of the courts of various countries to enforce such stipulations, the question arises whether the particular provisions of S.566 are not unnecessarily restrictive. The S.566 treatment of disputes concerning the public debt of foreign states is in sharp contrast with the solutions proposed by S.566 in regard to the commercial acts of foreign states.

[48] *Cf.*, the following provisions in the prospectus relating to the DM 100 million 7 1/2 per cent Bearer Bonds of 1971/1986, issued by New Zealand:

> 14 (1) The Bonds, coupons and the talon both as to form and content, and the rights and duties of the Bondholders [and] New Zealand . . . shall in all respects be governed by the laws of the Federal Republic of Germany; the manner of granting and foreclosure of any security shall be subject to the law of the country where such security is situate [sic].
>
> . . . . . .
>
> (4) Should claims concerning matters which have been covered in these Terms and Conditions be pursued against New Zealand, New Zealand waives the right to claim extraterritoriality or immunity from jurisdiction before any court in which claims can be pursued against New Zealand under this provision and before any agency competent for the enforcement of the law but hereby submits to their jurisdiction. The place of jurisdiction for all such actions shall be Frankfurt/Main. The Bondholders and Commerzbank Aktiengesellschaft, however, are entitled to pursue their claims before courts in New Zealand and courts in any other country in which there are situate [sic] assets belonging to New Zealand and where the laws of the Federal Republic of Germany shall likewise be applied in accordance with §14(1). The German courts shall have jurisdiction over the annulment of lost or destroyed Bonds. . .

Is the difference between the two categories of transactions really justified? It is believed that it is not and that current contractual practice shows that it should not be. To use a tautology, contracts are contracts and the subject matter of the agreement should be immaterial in determining the binding character of contractual commitments. If it is objected that sovereignty may be a more relevant consideration in the case of foreign borrowings than in that of commercial transactions, let us observe only that this argument, to a large extent, is a fallacy based on dubious historical premises of earlier vintage. To drive home the point, let it be noted that waivers of sovereign immuity have now made their appearance in a number of concession agreements between states and foreign concessionaries.[44] These agreements, by their texture and content, certainly have greater repercussions on the sovereign prerogatives of the host state that those which could conceivably flow from such a simple relationship as that which exists between a lender and its foreign borrower. Yet, the fact remains that the governments of various countries are willing, in order to attract foreign capital, to surrender sovereign prerogatives which, according to S.566, should still be upheld as a matter of principle. Has the time not come when, as a matter of good faith and good law, provision should be made for the binding character of state promises, regardless of whether those originate with the central government or some other public entity of a foreign state, or concern one or the other sectors of public activity bringing the state in contact with foreign private contractual partners? The question is of paramount importance since S.566, or rather its outcome, is likely

[44] Such waivers of immunity are usually found in stipulations providing for the arbitral settlement of disputes between the host state and the concessionaire. *See e.g.*, the Convention Regulating the Petroleum Activity of Chevron Oil Company of Madagascar in the territory of the Malagasy Republic (OFF. GAZ. Oct. 7, 1972, at 2262), Art. 35, para. 16(3):

> The award is final and irrevocable. The parties waive as of now, formally and without any reservation, any right to attack the award or object to its execution by any means and any remedy before any court. In particular, the State waives its right to invoke its privilege of jurisdictional immunity with regard to the enforcement of the award. (as translated).

Cf., the Establishment Convention of June 30, 1971, between the Islamic Republic of Mauritania and AGIP Research and Exploitation (Mauritania) S.A. (annexed to Law No. 71.199 of July 20, 1971, OFF. GAZ. August 25, 1971, at 606), Art. 17.6 and 7.

> . . . The arbitral award shall be final and irrevocable. The parties expressly and without any reservation waive any right to attack the award or object to its enforcement by any means or any remedy before any count.
>
> In the event that arbitration proceedings would result in an arbitral award obligating the Islamic Republic of Mauritania to pay to the Company a sum of money, the Company will be entitled to offset such sum with amounts owed by it to the Islamic Republic of Mauritania, for any reason whatever, including obligations of a fiscal nature (as translated).

See also The Diminco Agreement (1970), Ratification Act, 1970 ratifying an agreement between the Government of Sierra Leone and Sierra Leone Selection Trust Limited (Supp. to the Sierra Leone 101 GAZETTE, No. 89, dated Dec. 17, 1970, Schedule E, para. 2):

> The State and DIMINCO hereby expressly waive the right to avail themselves of any privilege or immunity of jurisdiction in respect of any arbitration pursuant to this Agreement or the execution or enforcement of any award or judgment as a result thereof.

to be viewed the world over as a precedent setting example. It would be a pity if this example were to perpetuate notions which no longer correspond to the needs of the time.[45]

G. R. DELAUME *

[45] The "Analysis" (*see* note 1 *supra*) states that:

> The existing case law, both United States and foreign, could be drawn upon in aid of the interpretation and application of the provisions of this Act. As the law develops in other jurisdictions, that law may similarly be relied upon to elucidate the provisions of this Act.

This reference to interpretation of statutory provisions in the light of judicial or statutory developments outside the United States is a tribute to comparative law analysis. To be complete, however, the tribute should include comparative evaluation of contractual trends which, in practice, are often more revealing of the evolution of current legal thinking than the pronouncements of the judiciary or those of the legislature.

* Senior Counsel, International Bank for Reconstruction and Development. The views expressed in this note are those of the author and do not necessarily represent the views of the Bank.