COMMERCIAL ACTIVITIES OF STATES
AND IMMUNITIES IN RELATION THERETO

Introductory

There is one branch of the law of state immunity with which a diplomat ought to be familiar. This arises in connection with the trading and commercial activities undertaken by states. There are two aspects from which a diplomat is concerned with this subject. In the first place, he may be called upon to negotiate and enter into contracts on behalf of his government with regard to transactions of a commercial nature involving certain purchases. He may also be required to take up matters concerning the activities of state trading organisations of his government and claims made against such organisations in the state of his residence. In the second place, he may have occasion to advise a national of his home state with regard to his rights in transactions between him and the government of the receiving state or a state agency.

Nature and purposes of commercial contracts by or on behalf of governments. It is to be observed that states today do not confine their activities to what had been regarded as the traditional functions of a state in the nineteenth and the early part of the present century. Some of the states not only own and control all means of production and distribution inside the state, but they also handle all import and export trade through government departments or state agencies. The increasing participation by governments in trade and commerce ever since the first World War has brought them directly into contact with merchants and trading organisations in other countries. Even the governments, which do not enter into trading activities as such, are sometimes obliged to import supplies for their defence forces as well as foodstuff for maintenance of rationing systems or essential supplies; and countries with a programme of industrial expansion often have to import
machinery from abroad. This is particularly so in the case of newly independent countries where development plans necessitate industrial expansion in the public sector by the government itself or through state agencies. States are also known to operate news agencies and international transport, such as steamships and air services. All these activities necessarily lead to contractual relations involving rights and obligations between a government and foreign parties, whether it be a foreign government, an individual or a corporation.

When a contract is entered into by one government with another even with regard to matters of a commercial nature, the rights and obligations created under such a contract stand practically on the same footing and are enforceable in the same manner as any other engagement on a government to government level. But the problem would appear to be different when a government or a state agency enters into contractual relations with a private person or a corporation in another country. Disputes may arise out of such commercial engagements on a variety of matters, such as non-delivery of goods within the stipulated time, disputes as to the quality or short supply as well as non-payment of price, or refusal to take delivery of goods as would normally arise between private parties in a trading contract.

The commercial engagements of governments are entered into through different agencies depending upon the nature of the transaction and the internal constitutional set up in each state. In cases where the government is making purchases of supplies for its defence forces, or foodstuffs for maintenance of essential supplies within the country, or machinery for use in the factories for defence production, the purchase would generally be made through a government department. In such cases, the contract would in all probability be negotiated and signed by a specially authorised official of the government or an official of its diplomatic mission. Purchases of these character and contracts in relation thereto may be said to be directly connected with the governmental functions of a state in the true sense of the term.

The other category of commercial transactions which the governments sometimes enter into may be termed as purely trading transactions. These include transactions for sale abroad of commodities produced in government owned factories or contracts for sale of raw materials or import of consumer goods. Russia and other East European countries, where the entire trade is in the hands of the government, undertake such activities very often, and they maintain special representatives of the department of state trading in various capitals.