

Document:-
A/CN.4/396 and Corr.1

**Eighth report on jurisdictional immunities of States and their property, by Mr. Sompong
Sucharitkul, Special Rapporteur**

Topic:
Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-
1986, vol. II(1)

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

[Agenda item 3]

DOCUMENT A/CN.4/396*

Eighth report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur

[Original: English]
[3 March 1986]

CONTENTS

	<i>Page</i>
<i>Note</i>	23
DRAFT ARTICLES ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY.....	23
	<i>Paragraphs</i>
Introductory note.....	1-6 23
<i>Chapter</i>	
I. A. Draft articles provisionally adopted by the Commission.....	24
PART I. INTRODUCTION	
Article 1. Scope of the present articles	24
Article 2. Use of terms	
Paragraph 1 (a) and (g)	24
Article 3. Interpretative provisions	
Paragraph 2	24
	<i>Paragraphs</i>
<i>Explanatory notes</i>	7-10 24
PART II. GENERAL PRINCIPLES	
Article 6. State immunity	25
Article 7. Modalities for giving effect to State immunity	25
Article 8. Express consent to the exercise of jurisdiction	25
Article 9. Effect of participation in a proceeding before a court	25
Article 10. Counter-claims	25
	<i>Paragraphs</i>
<i>Explanatory notes</i>	11-12 25
PART III. EXCEPTIONS TO STATE IMMUNITY	
Article 12. Commercial contracts	25
Article 13. Contracts of employment	25
Article 14. Personal injuries and damage to property	26
Article 15. Ownership, possession and use of property	26
Article 16. Patents, trade marks and intellectual or industrial property	26
Article 17. Fiscal matters	26
Article 18. Participation in companies or other collective bodies	26
Article 19. State-owned or State-operated ships engaged in commercial service	26
Article 20. Effect of an arbitration agreement	26
	<i>Paragraphs</i>
<i>Explanatory notes</i>	13-25 27
B. Draft articles pending consideration by the Drafting Committee	26-33 28
PART II. GENERAL PRINCIPLES	
Article 6. State immunity	28

* Incorporating document A/CN.4/396/Corr.1.

<i>Chapter</i>	<i>Paragraphs</i>	<i>Page</i>
<i>Explanatory notes</i>	27-30	28
Article 6. State immunity		
Alternative A		28
Alternative B		29
Alternative C		29
PART III. EXCEPTIONS TO STATE IMMUNITY		
Article 11. Application of exceptions in the present part [<i>revised text</i>]		29
	<i>Paragraphs</i>	
<i>Explanatory notes</i>	31-32	29
PART IV. STATE IMMUNITY IN RESPECT OF PROPERTY FROM ENFORCEMENT MEASURES		
Article 21. Scope of the present part		29
Article 22. State immunity from enforcement measures		29
Article 23. Effect of express consent to enforcement measures		29
Article 24. Types of property generally immune from enforcement measures		30
	<i>Paragraphs</i>	
<i>Explanatory notes</i>	33	30
C. Draft articles pending further consideration by the Commission [<i>revised and updated texts</i>]	34-42	30
PART I. INTRODUCTION		
Article 2. Use of terms		
Paragraph 1 (<i>e</i>) and paragraph 2		30
Article 3. Interpretative provisions		
Paragraph 1		30
Article 4. Jurisdictional immunities not within the scope of the present articles		30
Article 5. Non-retroactivity of the present articles		31
	<i>Paragraphs</i>	
<i>Explanatory notes</i>	35-39	31
PART V. MISCELLANEOUS PROVISIONS		
Article 25. Immunities of personal sovereigns and other heads of State		31
Article 26. Service of process and judgment in default of appearance		31
Article 27. Procedural privileges		32
Article 28. Restriction and extension of immunities and privileges		32
	<i>Paragraphs</i>	
<i>Explanatory notes</i>	40-42	32
II. ADDITIONAL PARTS	43-50	32
A. Settlement of disputes	44-48	32
PART VI. SETTLEMENT OF DISPUTES		
Article 29. Consultation and negotiation		33
Article 30. Conciliation		33
Article 31. Judicial settlement and arbitration		33
Article 32. Settlement by common consent		34
Article 33. Other provisions in force for the settlement of disputes		34
Annex		34
	<i>Paragraphs</i>	
B. Final provisions	49-50	34
PART VII. FINAL PROVISIONS		
Article 34. Signature		35
Article 35. Ratification		35
Article 36. Accession		35
Article 37. Entry into force		35
Article 38. Authentic texts		35
	<i>Paragraphs</i>	
III. CONCLUDING NOTE	51-60	35

NOTE

Multilateral conventions cited in the present report:

	<i>Source</i>
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	United Nations, <i>Treaty Series</i> , vol. 500, p. 95.
Vienna Convention on Consular Relations (Vienna, 24 April 1963)	<i>Ibid.</i> , vol. 596, p. 261.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	<i>Ibid.</i> , vol. 1155, p. 331.
Convention on Special Missions (New York, 8 December 1969)	United Nations, <i>Juridical Yearbook 1969</i> (Sales No. E.71.V.4), p. 125.
Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 14 December 1973)	United Nations, <i>Treaty Series</i> , vol. 1035, p. 167.
Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975)	United Nations, <i>Juridical Yearbook 1975</i> (Sales No. E.77.V.3), p. 87.
Vienna Convention on Succession of States in Respect of Treaties (Vienna, 23 August 1978)	United Nations, <i>Juridical Yearbook 1978</i> (Sales No. E.80.V.1), p. 106.
Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (Vienna, 7 April 1983)	A/CONF.117/14.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.

Draft articles on jurisdictional immunities of States and their property

INTRODUCTORY NOTE

1. The present report is the eighth and final report by the Special Rapporteur on jurisdictional immunities of States and their property; it comprises a set of draft articles to be considered by the International Law Commission on first reading. The draft is almost complete; it lacks only the final clauses, the preparation of which could be left to the future codification conference, and a provision on the settlement of disputes, which might take the form of an article or an optional protocol to be adopted once the body of the draft as a whole has been approved. Before considering whether any further articles need be added to the draft at the present stage to complete the first reading, it may be useful to take stock and indicate the current status of the draft articles submitted so far, with a view to their final preparation for first reading.

2. For all practical purposes, it is necessary, first, to recall the draft articles provisionally adopted by the Commission. These texts are set out in a note submitted by the Secretary-General to the General Assembly at its fortieth session, section IV of which concerns the "Draft articles on jurisdictional immunities of States and their property, as provisionally adopted by the International Law Commission".¹ These draft articles are reproduced for easy reference in section A of chapter I,

accompanied by the additional comments considered appropriate. This first group includes: for part I of the draft, article 1 and certain provisions of articles 2 and 3; for part II, articles 7 to 10; and for part III, articles 12 to 20.

3. Secondly, it would be useful to mention the draft articles which have been discussed by the Commission and are now before the Drafting Committee. These are article 6, in part II of the draft; article 11, in part III; and articles 21 to 24, in part IV. These draft articles, as revised by the Special Rapporteur, are reproduced in section B of chapter I, with explanatory notes where necessary.

4. Thirdly, part I and part V contain draft articles submitted earlier by the Special Rapporteur which may require further discussion in the Commission before being referred to the Drafting Committee. These are, for part I of the draft, certain provisions of articles 2 and 3, and articles 4 and 5; and for part V, articles 25 to 28. These draft articles are reproduced in section C of chapter I.

5. The attention of the Commission is also drawn to the possibility of adding a part VI, on the settlement of disputes, and/or a part VII, on final provisions. These questions are dealt with in chapter II of the present report.

¹ A/40/447.

6. In chapter III, the Special Rapporteur endeavours, by way of conclusion, to clarify certain doubts expressed in the Commission and in the Sixth Committee of the General Assembly, to allay certain fears and to emphasize the urgent need for a convention on the topic in the face of alarming developments, occurring more and more frequently, in the practice of some States. The principles of State immunities can be preserved only when nations can be persuaded to agree on the extent of

their application with some permissible flexibility. The absence of a general convention or any further delay in adopting one will reflect poorly upon the level of readiness or willingness of States to find a compromise solution to each of the remaining pressing problems. There is no doubt whatsoever that, if such a scenario were to ensue, the States that would suffer by far the worst consequences would be the majority, if not almost all, of the developing countries.

CHAPTER I

A. Draft articles provisionally adopted by the Commission

PART I INTRODUCTION

Article 1. Scope of the present articles

The present articles apply to the immunity of one State and its property from the jurisdiction of the courts of another State.

Article 2. Use of terms

1. For the purposes of the present articles:

(a) "court" means any organ of a State, however named, entitled to exercise judicial functions;

...

(g) "commercial contract" means:

- (i) any commercial contract or transaction for the sale or purchase of goods or the supply of services;
- (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee in respect of any such loan or of indemnity in respect of any such transaction;
- (iii) any other contract or transaction, whether of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

Article 3. Interpretative provisions

...

2. In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made primarily to the nature of the contract, but the purpose of the contract should also be taken into account if, in the practice of that State, that purpose is relevant to determining the non-commercial character of the contract.

Explanatory notes

7. The original text of *article 1*, which was adopted, with commentary, by the Commission at its thirty-second session,² was subsequently revised at the thirty-fourth session³ so as to reflect more accurately the narrower scope of the draft articles by confining it to the immunity of a State from the jurisdiction of the courts of another State. This more limited scope thus leaves aside the wider question of the immunity of a State from the exercise of sovereign power by organs of another State other than courts, for example by the executive, administrative or military authorities in fields other

than the judicial domain. This aspect may have to be re-examined after consideration of part IV of the draft.

8. *Article 2, paragraph 1 (a)*, is a corollary of the revised text of *article 1*. A definition of the term "court" was deemed necessary. In this context, any organ of a State empowered to exercise judicial functions is a court, whatever nomenclature is used.⁴ This definition may need to be reconsidered in the light of further examination of the exercise of the power to order or adopt enforcement measures by an organ of State not exercising judicial functions.

9. *Article 2, paragraph 1 (g)*, a subparagraph whose numbering may later be adjusted, was introduced as part of a package covering the exception of "commercial contracts" in *article 12* and was adopted, at the thirty-fifth session, together with the interpretative provision of *article 3, paragraph 2*.⁵ The use of the term "commercial contract" is intrinsically broadened by the enumeration of the three categories of contracts or transactions, excluding contracts of employment.

10. In *article 3*, both the "nature" test and the "purpose" test have been given appropriate status and priority in determining whether a contract is commercial or non-commercial. Primarily, reference is made to the nature of the transaction. If, according to the "nature" test, it is non-commercial, then the contract is decidedly non-commercial. But should the contract appear to be commercial in nature, its purpose should also be taken into account if, in the practice of the State in question, namely the State party to the contract, "purpose" is relevant to determining the non-commercial character of the contract. Relevance does not imply decisiveness, nor is "taking into account" necessarily determinative of the non-commercial character of the contract. The purpose should not be overlooked, but should be taken into consideration, especially in connection with efforts to relieve famine or the occurrence of an epidemic or natural disaster in developing countries. Humanitarian considerations may suffice to efface the apparent commercial nature of a transaction, so as to give greater prominence to its non-commercial character. On the other hand, if, in the practice of the State party to the contract, the purpose of the transaction is not relevant, then it should not be permitted to invoke the purpose test to override the commercial nature of the transac-

² *Yearbook* . . . 1980, vol. II (Part Two), pp. 141-142.

³ *Yearbook* . . . 1982, vol. II (Part Two), pp. 99-100, with commentary.

⁴ *Ibid.*

⁵ *Yearbook* . . . 1983, vol. II (Part Two), p. 35.

tion. The practice of the forum State is not in question in this context. The court is generally free to adopt any criterion or to follow the practice of its own executive branch in determining the non-commercial character of a contract by reference to its "purpose" in addition to the primary test of its "nature".

PART II
GENERAL PRINCIPLES

Article 6. State immunity⁶

Article 7. Modalities for giving effect to State immunity

1. A State shall give effect to State immunity [under article 6] by refraining from exercising jurisdiction in a proceeding before its courts against another State.

2. A proceeding before a court of a State shall be considered to have been instituted against another State, whether or not that other State is named as a party to that proceeding, so long as the proceeding in effect seeks to compel that other State either to submit to the jurisdiction of the court or to bear the consequences of a determination by the court which may affect the rights, interests, properties or activities of that other State.

3. In particular, a proceeding before a court of a State shall be considered to have been instituted against another State when the proceeding is instituted against one of the organs of that State, or against one of its agencies or instrumentalities in respect of an act performed in the exercise of governmental authority, or against one of the representatives of that State in respect of an act performed in his capacity as a representative, or when the proceeding is designed to deprive that other State of its property or of the use of property in its possession or control.

Article 8. Express consent to the exercise of jurisdiction

A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to any matter if it has expressly consented to the exercise of jurisdiction by that court with regard to such a matter:

- (a) by international agreement;
- (b) in a written contract; or
- (c) by a declaration before the court in a specific case.

Article 9. Effect of participation in a proceeding before a court

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has:

- (a) itself instituted that proceeding; or
- (b) intervened in that proceeding or taken any other step relating to the merits thereof.

2. Paragraph 1 (b) above does not apply to any intervention or step taken for the sole purpose of:

- (a) invoking immunity; or

⁶ The text of article 6 provisionally adopted by the Commission at its thirty-second session, with commentary, was as follows:

"Article 6. State immunity

"1. A State is immune from the jurisdiction of another State in accordance with the provisions of the present articles.

"2. Effect shall be given to State immunity in accordance with the provisions of the present articles."

(*Yearbook . . . 1980*, vol. II (Part Two), pp. 142 *et seq.*)

This article has been discussed again by the Commission and still gave rise to divergent views. The Drafting Committee has also re-examined article 6 as provisionally adopted. Although the Committee did not propose a new text, the Commission decided to reconsider the article at its future sessions. The Drafting Committee considered article 6 briefly at the thirty-seventh session, but was unable to conclude its discussion owing to lack of time.

(b) asserting a right or interest in property at issue in the proceeding.

3. Failure on the part of a State to enter an appearance in a proceeding before a court of another State shall not be considered as consent of that State to the exercise of jurisdiction by that court.

Article 10. Counter-claims

1. A State cannot invoke immunity from jurisdiction in a proceeding instituted by itself before a court of another State in respect of any counter-claim against the State arising out of the same legal relationship or facts as the principal claim.

2. A State intervening to present a claim in a proceeding before a court of another State cannot invoke immunity from the jurisdiction of that court in respect of any counter-claim against the State arising out of the same legal relationship or facts as the claim presented by the State.

3. A State making a counter-claim in a proceeding instituted against it before a court of another State cannot invoke immunity from the jurisdiction of that court in respect of the principal claim.

Explanatory notes

11. With the exception of article 6, the articles in part II of the draft as provisionally adopted by the Commission have given rise to comparatively fewer comments. It should be noted none the less that *article 7* as provisionally adopted still contains a cross-reference to article 6 in square brackets, which may be retained or deleted depending on the outcome of further consideration of article 6.

12. *Articles 7, 8 and 9* and the commentaries thereto were provisionally adopted by the Commission at its thirty-fourth session.⁷ *Article 10* was provisionally adopted, with commentary, at the thirty-fifth session.⁸

PART III
EXCEPTIONS TO STATE IMMUNITY

Article 12. Commercial contracts

1. If a State enters into a commercial contract with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial contract fall within the jurisdiction of a court of another State, the State is considered to have consented to the exercise of that jurisdiction in a proceeding arising out of that commercial contract, and accordingly cannot invoke immunity from jurisdiction in that proceeding.

2. Paragraph 1 does not apply:

(a) in the case of a commercial contract concluded between States or on a Government-to-Government basis;

(b) if the parties to the commercial contract have otherwise expressly agreed.

Article 13. Contracts of employment

1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for services performed or to be performed, in whole or in part, in the territory of that other State, if the employee has been recruited in that other State and is covered by the social security provisions which may be in force in that other State.

⁷ *Yearbook . . . 1982*, vol. II (Part Two), pp. 100 *et seq.*

⁸ *Yearbook . . . 1983*, vol. II (Part Two), pp. 22 *et seq.*

2. Paragraph 1 does not apply if:

- (a) the employee has been recruited to perform services associated with the exercise of governmental authority;
- (b) the proceeding relates to the recruitment, renewal of employment or reinstatement of an individual;
- (c) the employee was neither a national nor a habitual resident of the State of the forum at the time when the contract of employment was concluded;
- (d) the employee is a national of the employer State at the time the proceeding is instituted;
- (e) the employee and the employer State have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.

Article 14. Personal injuries and damage to property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from the jurisdiction of the courts of another State in respect of proceedings which relate to compensation for death or injury to the person or damage to or loss of tangible property if the act or omission which is alleged to be attributable to the State and which caused the death, injury or damage occurred wholly or partly in the territory of the State of the forum, and if the author of the act or omission was present in that territory at the time of the act or omission.

Article 15. Ownership, possession and use of property

1. The immunity of a State cannot be invoked to prevent a court of another State which is otherwise competent from exercising its jurisdiction in a proceeding which relates to the determination of:

- (a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum; or
- (b) any right or interest of the State in movable or immovable property arising by way of succession, gift or *bona vacantia*; or
- (c) any right or interest of the State in the administration of property forming part of the estate of a deceased person or of a person of unsound mind or of a bankrupt; or
- (d) any right or interest of the State in the administration of property of a company in the event of its dissolution or winding up; or
- (e) any right or interest of the State in the administration of trust property or property otherwise held on a fiduciary basis.

2. A court of another State shall not be prevented from exercising jurisdiction in any proceeding brought before it against a person other than a State, notwithstanding the fact that the proceeding relates to, or is designed to deprive the State of, property:

- (a) which is in the possession or control of the State; or
- (b) in which the State claims a right or interest,

if the State itself could not have invoked immunity had the proceeding been instituted against it, or if the right or interest claimed by the State is neither admitted nor supported by *prima facie* evidence.

3. The preceding paragraphs are without prejudice to the immunities of States in respect of their property from attachment and execution, or the inviolability of the premises of a diplomatic or special or other official mission or of consular premises, or the jurisdictional immunity enjoyed by a diplomatic agent in respect of private immovable property held on behalf of the sending State for the purposes of the mission.

Article 16. Patents, trade marks and intellectual or industrial property

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to:

- (a) the determination of any right of the State in a patent, industrial design, trade name or business name, trade mark, copyright or any other similar form of intellectual or industrial property, which enjoys a measure of legal protection, even if provisional, in the State of the forum; or

(b) an alleged infringement by the State in the territory of the State of the forum of a right mentioned in subparagraph (a) above which belongs to a third person and is protected in the State of the forum.

Article 17. Fiscal matters

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State in a proceeding relating to the fiscal obligations for which it may be liable under the law of the State of the forum, such as duties, taxes or other similar charges.

Article 18. Participation in companies or other collective bodies

1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from the jurisdiction of a court of another State in a proceeding relating to its participation in a company or other collective body, whether incorporated or unincorporated, being a proceeding concerning the relationship between the State and the body or the other participants therein, provided that the body:

- (a) has participants other than States or international organizations; and
- (b) is incorporated or constituted under the law of the State of the forum or is controlled from or has its principal place of business in that State.

2. Paragraph 1 does not apply if provision to the contrary has been made by an agreement in writing between the parties to the dispute or by the constitution or other instrument establishing or regulating the body in question.

Article 19. State-owned or State-operated ships engaged in commercial service

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship engaged in commercial [non-governmental] service cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the operation of that ship provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

2. Paragraph 1 does not apply to warships and naval auxiliaries nor to other ships owned or operated by a State and used or intended for use in government non-commercial service.

3. For the purposes of this article, the expression "proceeding relating to the operation of that ship" shall mean, *inter alia*, any proceeding involving the determination of:

- (a) a claim in respect of collision or other accidents of navigation;
- (b) a claim in respect of assistance, salvage and general average;
- (c) a claim in respect of repairs, supplies, or other contracts relating to the ship.

4. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the carriage of cargo on board a ship owned or operated by that State and engaged in commercial [non-governmental] service provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

5. Paragraph 4 does not apply to any cargo carried on board the ships referred to in paragraph 2, nor to any cargo belonging to a State and used or intended for use in government non-commercial service.

6. States may plead all measures of defence, prescription and limitation of liability which are available to private ships and cargoes and their owners.

7. If in any proceedings there arises a question relating to the government and non-commercial character of the ship or cargo, a certificate signed by the diplomatic representative or other competent authority of the State to which the ship or cargo belongs and communicated to the court shall serve as evidence of the character of that ship or cargo.

Article 20. Effect of an arbitration agreement

If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a

[commercial contract] [civil or commercial matter], that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

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

unless the arbitration agreement otherwise provides.

Explanatory notes

13. The texts of articles 12 and 15 and the commentaries thereto were provisionally adopted by the Commission at its thirty-fifth session.⁹ The title of part III will be re-examined after consideration of all the possible exceptions.¹⁰

14. *Article 12* was adopted together with its ancillary provisions (art. 2, para. 1 (g), and art. 3, para. 2), as indicated above (paras. 9-10). It should be recalled that the exception contained in this article originally related to the wider notion of "commercial activities", but is now confined to "commercial contracts" as defined in article 2, paragraph 1 (g), and interpreted in article 3, paragraph 2. During subsequent debate in the Sixth Committee and in the Commission, the observation was made that a clearer and more pronounced connection with the territory of the forum State may have to be stipulated in order to justify the exercise of the jurisdiction of that State in regard to the commercial contract in question, for as provisionally adopted, article 12 leaves that question to the "applicable rules of private international law". The territorial link with the State of the forum could be tightened by requiring further that the contract must have been entered into or performed, or intended to be performed, in whole or in part in the territory of the forum State, or more explicitly still, that the State party to the commercial contract must have established or maintained an office in the forum State to strengthen the territorial connection necessary to justify the exercise of jurisdiction.

15. Articles 13 and 14 and the commentaries thereto were provisionally adopted by the Commission at its thirty-sixth session, together with articles 16, 17 and 18.¹¹ Each of the exceptions contained in these five articles has been the subject of comments in the Sixth Committee. These exceptions will be examined in the light of the comments and observations made during the second reading of the draft articles.

16. With regard to *article 13*, it should be noted, at this stage, that objections have increasingly been raised concerning the redundancy of the additional requirement in paragraph 1 that the employee should be "covered by the social security provisions which may be in force in that other State". The reason is that, in many countries, especially developing countries, there are, as far as is known, no social security provisions in force.

17. The exception concerning "personal injuries and damage to property" in *article 14* has been the subject of further controversy and increased interest because of the possibilities unfolded in *Letelier v. Republic of*

Chile (1980)¹² and in the incident involving the mining of the ship *Rainbow Warrior* in New Zealand in July 1985.¹³ In addition, vexatious litigation, which is undesirable and should be discouraged, is a constant danger, especially in highly developed countries where ever-widening jurisdiction is being assumed and greater opportunity provided to institute lawsuits against an organ or representative of a foreign Government in regard to liability for accidents or non-commercial torts. Even if immunity were to be upheld by the court or successfully invoked by the State, the cost of establishing immunity might be too high for a developing country and completely out of proportion to the relative merits of the cause of action, which, as a non-starter, could entail unnecessary hardships. These are practical problems and considerations that deserve the most careful attention. A relevant question to be considered in this connection is the possibility of maintaining State immunity in respect of personal injuries and damage to property resulting from an act performed in the exercise of governmental function or authority. If the liability or responsibility of a State flows from an act which may be qualified as an act *jure imperii*, it may be questioned whether the courts of the forum State offer the best means to settle the dispute. It is arguable that the requirement of exhaustion of local remedies may oblige the forum State to exercise jurisdiction and to deny immunity, thereby avoiding any implication of denial of justice, particularly if the forum State is in fact also the *locus delicti commissi*. The question may validly be asked whether the territorial or local courts should refrain from exercising jurisdiction in the case of injuries suffered by their own nationals at the hands of a foreign Government. A balanced approach is vital to a meaningful solution to this problem. Article 14 may have struck a fair and delicate balance. The second reading will hopefully throw further light on the matter after the views and reactions of Governments have been taken fully into consideration.

18. *Article 15* has been favourably received as enunciating a clear exception to State immunity based on the predominance of the *forum rei sitae*, and as a generally accepted rule on the applicability of the *lex situs* in private international law. This rule is consistent with the principle of territorial sovereignty in public international law.

19. Articles 16, 17 and 18 have not provoked as much opposition as articles 13 and 14, since in some way each of the three exceptions relates to the main exception concerning commercial contracts in article 12, or to the property exception in article 15. Besides, these three exceptions are supported by fairly consistent State practice in the respective fields.

20. *Article 16* has given rise to reservations on the part of representatives of certain developing countries

¹² United States of America, *Federal Supplement*, vol. 488 (1980), p. 665; see also H. D. Collums, "The *Letelier* case: Foreign sovereign liability for acts of political assassination", *Virginia Journal of International Law* (Charlottesville, Va.), vol. 21 (1981), p. 251.

¹³ This incident occurred following France's opposition to the activities of the organization Greenpeace, which led to the mining of the *Rainbow Warrior* and claims being made before the New Zealand courts against the French Government and its agents.

⁹ *Yearbook* . . . 1983, vol. II (Part Two), pp. 25-34 and 36-38.

¹⁰ *Ibid.*, p. 22, footnote 68.

¹¹ *Yearbook* . . . 1984, vol. II (Part Two), pp. 63 *et seq.*

anxious to clarify and remove all possible doubts concerning their freedom of choice and sovereign authority to nationalize property within their territory, and the extent of the extraterritorial effects of a nationalization decree or a measure of expropriation, especially in the context of the transfer of technology and permanent sovereignty over natural resources. While such misgivings may, to some extent, be dispelled by the text proposed for paragraph 2 of article 11, some members of the Commission still appear reluctant to give this exception their whole-hearted endorsement.

21. The exception concerning fiscal matters in *article 17* is essentially limited in nature and scope of application. It is justified by the territorial supremacy of the State of the forum in regard to the unchallenged power to tax based on territorial source of income or importation or entry of goods into the territory.

22. The exception concerning participation in companies or other collective bodies in *article 18* is based on considerations similar to those relating to commercial contracts. These considerations are distinctly traceable to the consent of the State to participate in companies or other collective bodies formed and functioning in another State.

23. Articles 19 and 20 and the commentaries thereto were provisionally adopted by the Commission at its thirty-seventh session.¹⁴ In view of their limited scope and specialized content, the exceptions contained in these articles perhaps merit some further comments.

24. With regard to *article 19*, the exception of State-owned or State-operated ships engaged in commercial service is fairly well established in practice, as confirmed by treaties and judicial decisions.¹⁵ Conventions¹⁶ also confirm the dichotomy of two categories of ships based on the nature of their service, namely government non-commercial as opposed to commercial non-governmental service. The lingering controversy relates to the formula finally to be adopted, which need not reflect this dichotomy. While there is no objection to the expression "government non-commercial service", some members of the Commission took exception to the phrase "commercial non-governmental service", holding that "non-governmental" is superfluous and carries the misleading implication that there can be "commercial governmental" service. The question that remains to be decided at a later stage, possibly during second reading, is whether or not there is a need to emphasize this dichotomy, since immunity exists for

"government non-commercial service" in any case, while it is denied in regard to "commercial service". If further clarification is necessary, it could be made in the text of the article itself or in a separate interpretative provision. On the other hand, there may be other combinations and permutations of the two sets of opposite expressions, namely governmental and non-governmental, and commercial and non-commercial, which may have no bearing on the present study.

25. The exception set out in *article 20*, as the revised title of the article indicates, relates to the "effect of an arbitration agreement" and is, as such, confined to the direct consequences of an expression of consent to submit to arbitration differences relating to commercial contracts or to civil or commercial matters. The precise scope of the article is still undecided. It is hoped, however, that the question of scope could be settled well before the start of the second reading.

B. Draft articles pending consideration by the Drafting Committee

26. The draft articles to be considered by the Drafting Committee at the Commission's thirty-eighth session include those referred to it by the Commission at previous sessions, and those which have to be considered further by the Commission before referral to the Committee (see sect. C below).

PART II

GENERAL PRINCIPLES

*Article 6. State immunity*¹⁷

Explanatory notes

27. As already indicated, the text of article 6 was provisionally adopted by the Commission at its thirty-second session. The Commission decided, however, to reconsider the article in view of the divergent opinions expressed and the revision of article 1.

28. The text of article 6 will have to reflect a corresponding change in the revised text of article 1, so that, in paragraph 1, the words "immune from the jurisdiction" must be qualified by the phrase "of the courts". Paragraph 2 has become redundant owing to the adoption of article 7. Following consultations with members of the Drafting Committee, the Special Rapporteur proposed some alternative versions of the draft article, none of which has so far been adopted. In order to facilitate further consideration by the Drafting Committee, the Special Rapporteur wishes to recall the alternative formulas suggested, which might still serve as a basis for the Committee's current work.

Article 6. State immunity

ALTERNATIVE A

A State is immune from the jurisdiction of the courts of another State to the extent and subject to the exceptions provided in the present articles.

¹⁴ *Yearbook . . . 1985*, vol. II (Part Two), pp. 60 *et seq.*

¹⁵ See the commentary to article 19, *ibid.*, pp. 61-63; see also the Special Rapporteur's sixth report, *Yearbook . . . 1984*, vol. II (Part One), pp. 30 *et seq.*, document A/CN.4/376 and Add.1 and 2, paras. 136-230.

¹⁶ See, for example, the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (Brussels, 1926) and the 1934 Additional Protocol (League of Nations, *Treaty Series*, vol. CLXXVI, pp. 199 and 215; reproduced in United Nations, *Materials on Jurisdictional Immunities of States and their Property* (Sales No. E/F.81.V.10), pp. 173 *et seq.*); and the 1982 United Nations Convention on the Law of the Sea (*Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 193, document A/CONF.62/122, part XII, sect. 10).

¹⁷ See footnote 6 above.

ALTERNATIVE B

A State is immune from the jurisdiction of the courts of another State subject to the exceptions (and limitations) provided in the present articles.

ALTERNATIVE C

A State is immune from the jurisdiction of the courts of another State subject to the provisions of the present articles.

29. Different terms have been used to refer to the exceptions provided for in the draft articles, such as "limitations", "conditions" or "qualifications". The term "exceptions" may not be comprehensive, but appeared to be more realistic, and therefore acceptable to many. On the other hand, the phrase "to the extent . . . provided in the present articles" was equally welcome as an added epithet or qualifying measure for the amount or degree of immunity recognized and accorded. The phrase did not appear acceptable to some. On the whole, alternative C, with the shortest qualifying phrase, "subject to the provisions of the present articles", seemed more readily acceptable, although still falling short of commanding consensus. Similar wording has been suggested: "except as otherwise provided in the present articles". Alternative C-type formulas were considered unsatisfactory by one member of the Drafting Committee, but the majority of members of the Committee would be prepared to accept the formula "subject to the provisions of the present articles", with or without specific reference to "the exceptions and/or limitations provided in the present articles".

30. Since article 6 is basic to the draft, great caution and circumspection need to be exercised to achieve satisfactory results. The Drafting Committee was very close to adopting the second alternative of the draft article as a compromise formula that could respond to the needs of all States without impairing the existing rule of international law on State immunity. The inductive method originally recommended and adopted by the Commission would seem to preclude any proposition that immunity does not exist in the practice of States in any case, or that immunity exists in every case without exceptions or qualifications. The truth appears to lie somewhere in between, and article 6 must reflect the basic principle as accurately as possible. Other approaches will not lead to any generally acceptable compromise among States belonging to various regions of the world and having varying levels of national development.

PART III

EXCEPTIONS TO STATE IMMUNITY

Article 11. Application of exceptions in the present part

[Revised text]

1. The application of the exceptions provided in part III of the present articles may be subject to a condition of reciprocity or any other condition as mutually agreed between the States concerned.

2. Nothing in the present part shall prejudice the question of extraterritorial effects of measures of nationalization taken by a State in the exercise of governmental authority with regard to property, movable or immovable, industrial or intellectual, which is situated within its territory.

Explanatory notes

31. The only article in part III pending before the Drafting Committee is article 11, which is designed to preface the exceptions to State immunity set out in article 12 to 20. The revised text of paragraph 1 of this article was submitted by the Special Rapporteur following the discussion in the Commission at its thirty-fourth session.¹⁸ It was intended to emphasize the residual character of the exceptions provided for in part III. It has since become apparent that, if article 11 is to be retained in its present form, the title should be changed accordingly. As it now stands, article 11 does not seek to define the scope of part III; rather, general allowance is made for the operation of certain conditions in the application of the exceptions provided for in part III, depending on the agreement of the parties, particularly the condition of reciprocity and other conditions as may be mutually agreed. The retention of article 11 no longer depends on the final decision concerning article 6.

32. Paragraph 2 was added after the provisional adoption of draft article 16 at the thirty-sixth session;¹⁹ it was generally endorsed by the Commission and was referred to the Drafting Committee for further consideration.²⁰ The Drafting Committee is invited to consider the propriety and usefulness of such a paragraph, independently of where this provision should be contained, i.e. in article 11 or in some other article near the beginning or the end of the draft articles.

PART IV

STATE IMMUNITY IN RESPECT OF PROPERTY FROM ENFORCEMENT MEASURES

Article 21. Scope of the present part

The present part applies to the immunity of one State in respect of its property, or property in its possession or control or in which it has an interest, from judicial measures of constraint upon the use of such property, including attachment, arrest and execution, in connection with a proceeding before a court of another State.

Article 22. State immunity from enforcement measures

A State is immune without its consent in respect of its property, or property in its possession or control or in which it has an interest, from judicial measures of constraint upon the use of such property, including attachment, arrest and execution, in connection with a proceeding before a court of another State, unless the property in question is specifically in use or intended for use by the State for commercial and non-governmental purposes and, being located in the State of the forum, has been allocated to a specific payment or has been specifically earmarked for payment of judgment or any other debts.

Article 23. Effect of express consent to enforcement measures

1. Subject to article 24, a State cannot invoke immunity from judicial measures of constraint upon the use of its property, or property in its possession or control or in which it has an interest, in a proceeding before a court of another State if the property in question is located in the State of the forum and it has expressly consented to the exercise of judicial measures of constraint upon the property, which it has specifically identified for that purpose:

- (a) by international agreement; or
- (b) in a written contract; or
- (c) by a declaration before the court in a specific case.

¹⁸ *Yearbook* . . . 1982, vol. II (Part Two), p. 99, footnote 237.

¹⁹ *Yearbook* . . . 1984, vol. II (Part Two), p. 59, footnote 200.

²⁰ *Ibid.*, p. 69, para. (10) of the commentary to article 16.

2. Consent to the exercise of jurisdiction under article 8 shall not be construed as consent to the exercise of judicial measures of constraint under part IV of the present articles, for which a separate waiver is required.

Article 24. Types of property generally immune from enforcement measures

1. Unless otherwise expressly and specifically agreed by the State concerned, no judicial measure of constraint by a court of another State shall be permitted upon the use of the following property:

(a) property used or intended for use for diplomatic or consular purposes or for the purposes of special missions or representation of States in their relations with international and regional organizations protected by inviolability; or

(b) property of a military character, or used or intended for use for military purposes, or owned or managed by the military authority or defence agency of a State; or

(c) property of a central bank held by it for central banking purposes and not allocated to any specific payments; or

(d) property of a State monetary authority held by it for monetary and non-commercial purposes and not specifically earmarked for payments of judgment or any other debts; or

(e) public property forming part of national archives of a State or of its distinct national cultural heritage.

2. In no circumstances shall any property listed in paragraph 1 be regarded as property used or intended for use for commercial and non-governmental purposes.

Explanatory notes

33. The discussion on the draft articles of part IV at the thirty-seventh session²¹ will still be vivid in the minds of members of the Commission and the Drafting Committee, and therefore it is not necessary to recall it at this point. The above draft articles are the revised texts submitted by the Special Rapporteur²² in the light of the comments and observations made at that session before their referral to the Drafting Committee. They seem to require no additional restructuring in the light of the further comments and statements made in the Sixth Committee at the fortieth session of the General Assembly. The Special Rapporteur continues to have a flexible attitude as regards the number of articles to include in this part, which could vary between two and four.

C. Draft articles pending further consideration by the Commission

[Revised and updated texts]

34. The remaining articles of part I and part V of the draft have been orally presented to the Commission, and some of them have been the subject of preliminary discussion. It is expected that it will be possible to refer them to the Drafting Committee after the discussion at the thirty-eighth session, so that the consideration of the draft articles on first reading can be completed before the expiry of the term of office of the current members of the Commission. The texts of these draft articles are therefore reproduced below, accompanied by explanatory notes on their status to help bring the draft up to date in view of recent developments.

²¹ See *Yearbook* . . . 1985, vol. II (Part Two), pp. 53 *et seq.*, paras. 216-247.

²² For the texts originally submitted by the Special Rapporteur, *ibid.*, pp. 53-54, footnotes 191 to 194.

PART I
INTRODUCTION

Article 2. Use of terms

1. For the purposes of the present articles:

(a) "court" . . . [adopted]

(a) "immunity" . . . [withdrawn]

(b) "jurisdictional immunities" . . . [withdrawn]

(c) "territorial State" . . . [withdrawn]

(d) "foreign State" . . . [withdrawn]

(e) "State property" means property, rights and interests which are owned, operated or otherwise used by a State according to its internal law; [revised]

(f) "trading or commercial activity" . . . [withdrawn]

(g) "commercial contract" . . . [adopted]

(g) "jurisdiction" . . . [withdrawn]

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meaning which may be ascribed to them in the internal law of any State or by the rules of any international organization.

Article 3. Interpretative provisions

1. In the context of the present articles, unless otherwise provided:

(a) the expression "State" includes:

(i) the sovereign or head of State;

(ii) the central Government and its various organs or departments;

(iii) political subdivisions of a State in the exercise of its governmental authority; and

(iv) agencies or instrumentalities acting as organs of a State in the exercise of its governmental authority, whether or not endowed with a separate legal personality and whether or not forming part of the operational machinery of the central Government; [revised]

(b) the expression "judicial functions" includes:

(i) adjudication of litigation or dispute settlement;

(ii) determination of questions of law and of fact;

(iii) administration of justice in all its aspects;

(iv) order of interim and enforcement measures at all stages of legal proceedings; and

(v) such other administrative and executive functions as are normally exercised in connection with, in the course of, or pursuant to a legal proceeding by the judicial, administrative or police authorities of a State. [revised]

2. . . . [adopted]

Article 4. Jurisdictional immunities not within the scope of the present articles

The fact that the present articles do not apply to jurisdictional immunities accorded or extended to:

(i) diplomatic missions under the Vienna Convention on Diplomatic Relations of 1961,

(ii) consular missions under the Vienna Convention on Consular Relations of 1963,

(iii) special missions under the Convention on Special Missions of 1969,

(iv) the representation of States under the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 1975,

(v) permanent missions or delegations of States to international organizations in general,

(vi) internationally protected persons under the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 1973, [added]

shall not affect:

(a) the legal status and extent of jurisdictional immunities recognized and accorded to such missions and representation of States or

internationally protected persons under the above-mentioned conventions;

(b) the application to such missions or representation of States or international organizations, or internationally protected persons, of any of the rules set forth in the present articles to which they would also be subject under international law independently of the articles; [revised]

(c) the application of any of the rules set forth in the present articles to States and international organizations non-parties to the articles, in so far as such rules may have the legal force of customary international law independently of the articles.

Article 5. Non-retroactivity of the present articles

Without prejudice to the application of any rules set forth in the present articles to which the relations between States would be subject under international law independently of the articles, the present articles apply only to the granting or refusal of jurisdictional immunities to States and their property after the entry into force of the said articles as regards States parties thereto or States having declared themselves bound thereby. [revised]

Explanatory notes

35. The above articles of part I of the draft were submitted to the Commission at its thirty-second session.²³ Since its work on the topic was only at its initial stage, the Commission decided to postpone discussion of the substance of definitional problems, and of the drafting and interpretative problems resulting therefrom.²⁴ As has been recalled (para. 9 above), the Commission considered it useful, at its thirty-fifth session, to adopt provisionally the texts of certain provisions of articles 2 and 3²⁵ in conjunction with article 12.²⁶ During its previous sessions, the Commission has had occasion to discuss the substance of certain provisions of articles 2 to 5 at various times in connection with its consideration of the draft articles of parts III and IV. Thus very few explanatory notes are required at this late stage.

36. The number of terms to be defined has been reduced in the revised text of draft article 2. The terms "court" (para. 1 (a)) and "commercial contract" (para. 1 (g)) have been provisionally adopted. Most other terms originally proposed have been withdrawn by the Special Rapporteur, either because they no longer appeared necessary ("immunity" and "jurisdictional immunities"), or because other, more straightforward terms were adopted: thus the expressions "territorial State" and "foreign State" have been replaced by "one State" and "another State", respectively. The expression "trading or commercial activity" has been replaced by the more precise term "commercial contract", while the term "jurisdiction" is replaced by "court". The notion of "State property" has to be expanded to cover not only the relation to the State through ownership, but also the connection through operation and use, for it has become more and more apparent that the test of the nature of the use is a valid one for upholding or re-

jecting immunity in respect of property in use by the State.

37. The interpretative provisions in draft article 3, paragraph 1 (a) and (b), have been maintained and slightly revised and updated. Although there is no need to define the term "State", it may be necessary to enumerate the types of body that could be identified with or equated to the State for the purposes of immunity. Consideration of part IV of the draft, on enforcement measures, has led to the slight revision of subparagraph (b) on "judicial functions", since, for present purposes, the provision should cover provisional measures as well as enforcement measures, and indeed preventive or other measures that could be ordered by the competent authorities in connection with a legal proceeding before, during or even after the trial. Paragraph 2 of article 3 was provisionally adopted by the Commission in connection with the exception concerning commercial contracts (see para. 10 above).

38. Draft article 4 has been revised and updated by adding a reference to a new category, namely "internationally protected persons", including diplomatic agents. This provides a necessary clarification regarding the scope and effect of application of the draft articles in relation to the existing rules of international law and the obligations established by previous conventions concerning certain aspects of jurisdictional immunities of States and their property.

39. Draft article 5 on non-retroactivity merely confirms the usage of recent conventions, the intention being not to override or undo past relations, or a situation that is a *fait accompli*, or an acquired or historic right. Thus, with regard to temporal application, the point of departure is the date of entry into force of the articles, without retroactive effect, which could bring about undesirable and unnecessary complications.

PART V

MISCELLANEOUS PROVISIONS

Article 25. Immunities of personal sovereigns and other heads of State

1. A personal sovereign or head of State is immune from the criminal and civil jurisdiction of a court of another State during his office. He need not be accorded immunity from its civil and administrative jurisdiction:

(a) in a proceeding relating to private immovable property situated in the territory of the State of the forum, unless he holds it on behalf of the State for governmental purposes; or

(b) in a proceeding relating to succession to movable or immovable property in which he is involved as executor, administrator, heir or legatee as a private person; or

(c) in a proceeding relating to any professional or commercial activity outside his sovereign or governmental functions.

2. No measures of attachment or execution may be taken in respect of property of a personal sovereign or head of State if they cannot be taken without infringing the inviolability of his person or of his residence.

Article 26. Service of process and judgment in default of appearance

1. Service of process by any writ or other document instituting proceedings against a State may be effected in accordance with any special arrangement or international convention binding on the forum

²³ Yearbook . . . 1980, vol. II (Part Two), pp. 138 *et seq.*, paras. 111-121.

²⁴ *Ibid.*, p. 141, para. 122.

²⁵ See the commentaries to paragraph 1 (g) of article 2 and to paragraph 2 of article 3, Yearbook . . . 1983, vol. II (Part Two), pp. 34-36.

²⁶ See paragraph (10) of the commentary to article 12, *ibid.*, p. 26; and the commentary to paragraph 1 (a) of article 2, Yearbook . . . 1982, vol. II (Part Two), p. 100.

State and the State concerned or transmitted by registered mail requiring a signed receipt or through diplomatic channels addressed and dispatched to the head of the Ministry of Foreign Affairs of the State concerned.

2. Any State that enters an appearance in proceedings cannot thereafter object to non-compliance of the service of process with the procedure set out in paragraph 1.

3. No judgment in default of appearance shall be rendered against a State except on proof of compliance with paragraph 1 above and of the expiry of a period of time which is to be reasonably extended.

4. A copy of any judgment rendered against a State in default of appearance shall be transmitted to the State concerned through one of the channels as in the case of service of process, and any time for applying to have the judgment set aside shall begin to run after the date on which the copy of the judgment is received by the State concerned.

Article 27. Procedural privileges

1. A State is not required to comply with an order by a court of another State compelling it to perform a specific act or interdicting it to refrain from specified action.

2. No fine or penalty shall be imposed on a State by a court of another State by way of committal in respect of any failure or refusal to disclose or produce any document or other information for the purposes of proceedings to which the State is a party.

3. A State is not required to provide security for costs in any proceedings to which it is a party before a court of another State.

Article 28. Restriction and extension of immunities and privileges

A State may restrict or extend with respect to another State the immunities and privileges provided for in the present articles to the extent that appears to it to be appropriate for reasons of reciprocity, or conformity with the standard practice of that other State, or the necessity for subsequent readjustments required by treaty, convention or other international agreement applicable between them.

Explanatory notes

40. The articles constituting part V of the draft were submitted to the Commission at its thirty-seventh session, but, due to lack of time, it was not able to consider them, and confined its discussion to draft articles 19 and 20 of part III and draft articles 21 to 24 of part IV.²⁷

²⁷ *Yearbook . . . 1985*, vol. II (Part Two), pp. 52-53, para. 213.

Some members of the Commission commented on certain draft articles of part V, which is to be discussed fully at the thirty-eighth session.

41. The Special Rapporteur will have a further opportunity to clarify some of the questions raised concerning the necessity and usefulness of part V, which will virtually complete the substantive articles on the topic. Draft *article 25* appeared absolutely necessary for historical and practical reasons. One member of the Commission pointed out that centuries of State practice with regard to sovereign immunities could not be erased from the history of legal developments. Besides, the immunities of diplomatic agents and consular officers have been given separate treatment in two distinct conventions.²⁸ Yet this article is the only one proposed to deal with this other category of immunities, accorded to personal sovereigns and heads of State, which, not unlike diplomatic immunities, comprise the two dimensions *ratione materiae* and *ratione personae*, with appropriate norms based on the consistent practice of States.

42. Draft *article 26* deals with procedural practice concerning service of process and the question of judgment in default of appearance, while draft *article 27* deals with procedural privileges as necessary ramifications of jurisdictional immunities, including exemption from unenforceable orders, from certain fines or penalties, and from security for costs. Draft *article 28* is a residual provision providing a measure of latitude for readjustments of the extent and quality of treatment to be accorded to States in accordance with treaties, conventions or agreements in force between them, in conformity with the standard practice of the States concerned, having regard to considerations of reciprocity.²⁹

²⁸ 1961 Vienna Convention on Diplomatic Relations and 1963 Vienna Convention on Consular Relations.

²⁹ See the Special Rapporteur's seventh report, *Yearbook . . . 1985*, vol. II (Part One), pp. 44 *et seq.*, document A/CN.4/388, paras. 118-135.

CHAPTER II

Additional parts

43. The 28 articles submitted by the Special Rapporteur in his seven previous reports appear to have virtually completed the substantive and procedural provisions to be included in the draft articles on jurisdictional immunities of States and their property. The only two outstanding questions are those mentioned in the introductory note (para. 5 above). These relate to the possibility of including dispute-settlement provisions in the draft, and to the need for final provisions. For practical purposes, these two questions could form the subject-matter of additional articles to be incorporated ultimately in the draft as part VI (Settlement of disputes) and part VII (Final provisions).

A. Settlement of disputes

44. The possibility of including one or more dispute-settlement provisions in part VI of the draft is based on the existence of similar provisions in codification conventions prepared by the Commission, such as the 1969 Vienna Convention on the Law of Treaties (art. 66), the 1978 Vienna Convention on Succession of States in Respect of Treaties (arts. 84 and 85) and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (art. 66). On the other hand, it should be noted that not every recent conven-

tion contains provisions on dispute settlement. An interesting example is the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts. Moreover, the procedure for arbitration and conciliation established by article 66 of the 1969 Vienna Convention, like the corresponding provision of the 1986 Vienna Convention, concerns only one specific category of disputes, relating to the interpretation of what constitutes a peremptory norm of general international law (*ius cogens*).

45. For the topic under consideration, there are two possibilities. There appears to be no harm in devoting a part of the draft to the settlement of disputes, since such provisions have become increasingly fashionable in recent works of codification. This part could cover disputes concerning the application or interpretation of the articles in general, or be confined to specific aspects of the topic, such as the application of one of the recognized exceptions, whether or not on the basis of reciprocity.

46. On the other hand, the need for a dispute-settlement clause may depend on the substance of the draft articles. In the present context, State immunity is relative in the sense that consent or waiver by the State is always possible at any time. The exercise of jurisdiction by a court may be either obligatory, as in some civil-law systems, or discretionary, as is generally the case, not only on the ground of jurisdictional immunity, but on more substantive grounds such as "act of State", *forum non conveniens* or lack of personal or subject-matter jurisdiction. In the practice of States, which is not limited to the judiciary alone and is often not uninfluenced by the views and decisions of the executive or by the adoption of statutes by the legislature, once State immunity is recognized and applied by the court there can be no dispute. Indeed, the question of jurisdictional immunity may be said to have been settled primarily by the competent court of the forum State to the satisfaction of the foreign State by upholding its jurisdictional immunity. Should the court reject immunity and exercise jurisdiction in a proceeding affecting the interests of another State, there is a possibility of a secondary or consequential dispute between the forum State and the State whose immunity has been rejected. Experience has shown that, in such a situation, which is not uncommon, the State may protest against the decision of the court of another State. However, such protests have never culminated in any dispute involving questions of jurisdictional immunity in the annals of international litigation. In the case concerning *United States Diplomatic and Consular Staff in Tehran*, the ICJ did touch on an analogous issue, namely the inviolability of diplomatic premises and archives and of consular offices, as well as the personal inviolability of diplomatic agents and consular officers of the United States of America in Iran.³⁰ But even that case is not directly relevant, since the dispute did not arise out of the exercise of jurisdiction by a court giving rise to a claim of jurisdictional immunity. It concerned mainly the duty of protection by the receiving State, or the inviolability of diplomatic premises and of the staff of the embassy and consulate.

47. Apart from this case, there are no other instances of disputes between States in this field or related fields. Thus there can be a dispute only if a court decides to exercise jurisdiction in proceedings involving another State. Where jurisdiction has been exercised, only rarely have the States refused jurisdictional immunities taken any measure or step other than mere presentation of a protest.³¹ In the light of past practice, the Commission may not find it absolutely necessary to include dispute-settlement provisions in the draft articles. The Special Rapporteur would not himself propose the inclusion of such a part, having regard to the paucity of instances involving differences or disputes between States in respect of the exercise of jurisdiction by a competent court or non-application or refusal of jurisdictional immunity. However, one may wish to guard against the emergence of a new trend which could entail not only the exercise of jurisdiction in proceedings involving the interests of another State in a dispute, but also seizure, attachment or other enforcement measures by way of execution against its property.³² In order to avoid or discourage vexatious litigation, there may be a growing need to devote a part of the draft to dispute settlement, which might have the salutary effect of not encouraging courts readily to allow provisional or enforcement measures against State property, or property in use by a State or in which a State has an interest. If the Commission therefore considers it expedient that such a part should be included in the draft articles, it is submitted that the appropriate precedents may be found in recent conventions, for example in part VI of the 1978 Vienna Convention on Succession of States in Respect of Treaties. The articles of part VI of the draft may be worded accordingly.

PART VI

SETTLEMENT OF DISPUTES

Article 29. Consultation and negotiation

If a dispute regarding the interpretation or application of the present articles arises between two or more Parties to the present articles, they shall, upon the request of any of them, seek to resolve it by a process of consultation and negotiation.

Article 30. Conciliation

If the dispute is not resolved within six months of the date on which the request referred to in article 29 has been made, any party to the dispute may submit it to the conciliation procedure specified in the annex to the present articles by submitting a request to that effect

³¹ See, for example, *Société Le Gostorg et représentation commerciale de l'URSS v. Association France-Export* (1926) (Sirey, *Recueil général des lois et des arrêts*, 1930 (Paris), part 1, p. 49, and note by J. P. Niboyet, pp. 49-50; *Dalloz périodique*, 1929 (Paris), part 1, p. 75, note by R. Savatier; *Annual Digest of Public International Law Cases, 1925-1926* (London), vol. 3 (1929), p. 174, case No. 125); and *A. M. Qureshi v. USSR* (1981) (*All Pakistan Legal Decisions* (Lahore), vol. XXXIII (1981), p. 377).

³² See the judgment of the PCIJ of 15 June 1939 in the *Société commerciale de Belgique (Socobelge)* case, *P.C.I.J., Series A/B*, No. 78, p. 160.

³⁰ Judgment of 24 May 1980, *I.C.J. Reports 1980*, p. 3.

to the Secretary-General of the United Nations and informing the other party or parties to the dispute of the request.

Article 31. Judicial settlement and arbitration

Any State at the time of signature or ratification of the present articles or accession thereto or at any time thereafter may, by notification to the depositary, declare that, where a dispute has not been resolved by the application of the procedures referred to in articles 29 and 30, that dispute may be submitted for a decision to the International Court of Justice by a written application of any party to the dispute, or in the alternative to arbitration, provided that the other party to the dispute has made a like declaration.

Article 32. Settlement by common consent

Notwithstanding articles 29, 30 and 31, if a dispute regarding the interpretation or application of the present articles arises between two or more Parties to the present articles, they may by common consent agree to submit it to the International Court of Justice, or to arbitration, or to any other appropriate procedure for the settlement of disputes.

Article 33. Other provisions in force for the settlement of disputes

Nothing in articles 29 to 32 shall affect the rights or obligations of the Parties to the present articles under any provisions in force binding them with regard to the settlement of disputes.

48. A simplified version in a single provision could be included instead. Further examples are provided by optional protocols concerning the compulsory settlement of disputes, such as the Optional Protocols to the 1961 Vienna Convention on Diplomatic Relations,³³ the 1963 Vienna Convention on Consular Relations³⁴ and the 1969 Convention on Special Missions.³⁵ An annex, to be included at the end of the draft articles, could be worded as follows:

ANNEX

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a Party to the present articles shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article 30, the Secretary-General shall

bring the dispute before a conciliation commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

(a) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(b) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way.

The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the appointment of the last of them, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any Party to the present articles to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

³³ United Nations, *Treaty Series*, vol. 500, p. 241.

³⁴ *Ibid.*, vol. 596, p. 487.

³⁵ United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 139.

B. Final provisions

49. The final provisions do not call for detailed discussion, for any of the more recent codification conventions could constitute a model. For example, part VII of the 1978 Vienna Convention on Succession of States in Respect of Treaties could be followed. The text below could provide a working basis for the Commission's consideration.

PART VII FINAL PROVISIONS

Article 34. Signature

The present articles shall be open for signature by all States until . . . at . . . , and subsequently, until . . . , at United Nations Headquarters in New York.

Article 35. Ratification

The present articles are subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 36. Accession

The present articles shall remain open for accession by any State. The instruments of accession shall be

deposited with the Secretary-General of the United Nations.

Article 37. Entry into force

The present articles shall enter into force on the thirtieth day following the date of deposit of the fifteenth instrument of ratification or accession.

Article 38. Authentic texts

The original of the present articles, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

50. The same purpose may be achieved by incorporating the final provisions into a single final article containing several paragraphs covering all the points that need to be included in the final clauses. On the other hand, consideration of the question of final provisions or final clauses could be postponed until the second reading or until the plenipotentiary conference is convened. Thus the draft articles on most-favoured-nation clauses³⁶ prepared by the Commission contained no final provisions or provisions on the settlement of disputes.

³⁶ Text adopted by the Commission at its thirtieth session, *Yearbook . . . 1978*, vol. II (Part Two), pp. 16 *et seq.*

CHAPTER III

Concluding note

51. This chapter concludes the eighth and final report on jurisdictional immunities of States and their property by the Special Rapporteur for the first reading of the draft articles submitted. It does not purport to draw conclusions—whether or not they may be justified by the eight reports—from the study undertaken, which must now draw to a close. Nevertheless, the draft articles as a whole, as structured, appear to lend themselves to some suggestions or even lessons to be learned, not by the imposition of imperative norms, nor by the deduction of dogmatic principles, but more realistically by dint of an empirical and pragmatic approach ensuring an inductive appreciation of the practical problems encountered and a thorough understanding of the delicate and intricate nature of the dilemmas with which the Commission is inevitably confronted.

52. As a balanced point of departure, a general position should obtain with a reasonable measure of consensus on the part of members of the Commission, having adopted an inductive method, to the effect that State immunity is a general rule which, being essentially relative, is applicable subject to a variety of exceptions based on, or inherently traceable to, consent, either in essence or in some other admissible form. This position may be contrasted with another proposition, based on an equally fundamental principle of international law, which recognizes the territorial sovereignty of each

State. From this point of view, State immunity may be considered as an exception, albeit a universally admitted one, to the principle of jurisdiction founded on the territorial sovereignty of every independent State. Exceptions to the principle of territorial sovereignty should, as such, be restrictively construed and applied and, as a matter of evidence, might have to be established in each case. Faced with this basic dilemma, the Commission appears favourably inclined to adopt the proposition that, although immunity is an exception to the more basic rule of jurisdiction, it has nevertheless become firmly established as a general principle of law, provided that certain conditions are fulfilled. This general proposition could be justified on different grounds in view of differing legal theories, based on contradictory and varying ideologies in the vastly diverse fields of international activities in which States and individuals are currently engaged.

53. It appears to be of paramount importance that there be a clear understanding and no disagreement on the first general proposition, otherwise there would be no point in proceeding any further. The danger is not far-fetched that absence of such an understanding or persistence of disagreement on this initial proposition would plunge the international community further into a sea of turmoil. The principle of immunity has been proven to be firmly ensconced in the practice of States

since the nineteenth century, following the vivid picture painted of it for the benefit of succeeding generations by Chief Justice Marshall in *The Schooner "Exchange" v. McFaddon and others* (1812).³⁷ It is based squarely, though not exclusively, on sovereignty, but more precisely on the sovereign equality of States. The circumstances giving rise to State immunity originally were also clearly circumscribed and categorized as: (a) the exemption of the person of the sovereign from arrest and detention;³⁸ (b) the immunity which all civilized nations allow to foreign ministers (diplomatic agents);³⁹ (c) the implied cession of a portion of territorial jurisdiction when the sovereign or the State allows the troops of a foreign prince to pass through his dominion.⁴⁰ This principle was later clearly stated as follows:

The principle . . . is that, as a consequence of the absolute independence of every sovereign authority, . . . each and every [State] declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to public use . . .⁴¹

54. This principle, which is often expressed in the Latin maxim *par in parem non habet imperium* or *jurisdictionem*, was rendered in another legal system as follows:

Since the independence of States one from another is among the most widely acknowledged principles of international law; since it follows from this principle that Governments cannot, in respect of the commitments into which they enter, be subject to the jurisdiction of a foreign State; since the right of jurisdiction which every Government possesses over disputes arising out of its own orders and decrees is inherent in its sovereign authority and cannot be arrogated by another Government without risking a decline in the relations between them; . . .⁴²

55. The question has been raised whether the Commission's examination of State practice, having been confined initially to the case-law of a handful of European nations, was sufficiently exhaustive to warrant the establishment of the rule of State immunity. In response to this query, it was pointed out that the study covered all available reported decisions of every State on the topic and was not confined to any particular geographical regions or systems. The principles of State immunity were firmly established in the nineteenth century before the advent of socialism, State trading, or the emergence of new nations in Asia, Africa and the Americas.

56. However, it is significant to note that, even at the very beginning, the rule of State immunity was never expressed in absolute terms. The doctrine of "absolute immunity" has never found general acceptance. Indeed, the rule of State immunity was applied from the very

start subject to limitations, qualifications and exceptions, especially in the practice of Italy, Belgium and Egypt,⁴³ and in a very special way in France.⁴⁴

57. The adoption of an inductive approach has enabled the Special Rapporteur and the Commission to proceed on the solid basis of a general rule of State immunity, subject to exceptions in specified areas which are limited in scope and application. The Commission could have adopted a different approach, for example by considering simultaneously and on an equal footing the rule of State immunity as well as the exceptions to it, which could be regarded as the rules of non-immunity. But it did not. Thus, guided by the inductive approach, the Commission was able to formulate the draft articles as currently structured.

58. The only outstanding question appears to relate to the degree of readiness of the Commission to respond to the exigences of time. The topic was considered ripe for codification even during the time of the League of Nations, and this assessment has been reconfirmed time and again by the Commission. The time has come for the Commission to meet the challenge directly by not deferring the completion of its consideration of the draft on first reading. Eight years constitute a reasonable period of time within which to complete this part of the Commission's important task of codification of the topic. The sense of urgency is evident and the danger of retrogression presents a frightening prospect. The sooner the draft articles are finalized and adopted, the sooner greater certainty can be restored and problems resolved. The developing countries stand to benefit from the adoption of rules of international law on this topic perhaps appreciably more than others. The advanced countries with sophisticated legal systems might be prepared to wait, since any further pause in international efforts would afford greater opportunities to evolve yet more restrictive practices in the face of eroding State immunity at the expense of the vast majority of developing countries. More legislation could be expected from developed countries tending to impose yet further limitations on the existing restrictive doctrine of State immunity. In the absence of an agreed set of draft articles, further restrictions are encouraged, with further possibilities not only to exercise jurisdiction affecting foreign States, but also to adopt enforcement measures against their property or property in use by them or in which they have an interest.

59. The socialist countries of Europe and possibly other regions have overcome the obstacle of State immunity in their transnational commercial transactions by the formation of trading corporations with distinct legal personality, thus avoiding the confrontation of sovereign equality. The only remaining problem is one of educating non-socialist partners of the utter folly and futility of instituting proceedings against socialist States *eo nomine* instead of bringing actions against the trading corporations in question, or indeed the trade representatives or delegations accredited for that purpose. Developing countries, on the other hand, cannot

³⁷ W. Cranch, *Reports of Cases Argued and Adjudged in the Supreme Court of the United States*, vol. VII, 3rd ed. (New York, 1911), p. 116.

³⁸ *Ibid.*, p. 137.

³⁹ *Ibid.*, p. 138.

⁴⁰ *Ibid.*, p. 139. This applies also to national ships of war authorized to enter a port of a friendly Power (p. 143).

⁴¹ Opinion of Lord Justice Brett in *The "Parlement belge"* (1880) (United Kingdom, *The Law Reports, Probate Division*, vol. V (1880), pp. 214-215).

⁴² Judgment of the French Cour de cassation in *Gouvernement espagnol v. Casaux* (1849) (Daloz, *Recueil périodique et critique de jurisprudence*, 1849 (Paris), part 1, p. 9; Sirey, *Recueil général des lois et des arrêts*, 1849 (Paris), part 1, p. 93).

⁴³ See *Yearbook . . . 1983*, vol. II (Part Two), pp. 28-29, footnotes 97, 98 and 99 to paragraph (24) of the commentary to article 12.

⁴⁴ *Ibid.*, p. 30, footnote 103 to paragraph (25) of the commentary.

afford the luxury either of assimilating their trading enterprises completely to private companies, or of implicitly waiving immunities in general by the creation of separate legal entities for the specific purposes of international trade. The cries of developing countries should be heard in their own unorchestrated voice, undistorted by outside prompting. A compromise solution has to be found and the just and balanced measure of immunity recognized for States, especially developing nations, without sacrificing the principles of sovereignty and dignity, in order to ensure their economic survival. The problem is grave and genuine and requires immediate attention. The Commission is called upon at its thirty-eighth session to face the challenging task of reaching an agreement on the propositions of law that must clearly

be just and equitable as well as sustainable and accepted by all States of whatever size, ideology or stage of economic development. Special consideration should be given to the need to preserve the dignity, equality and sovereignty of developing countries in their struggle for survival.

60. The Special Rapporteur reiterates his implicit trust in the wisdom of the Commission and the reasonable and flexible attitude of its members, and expresses the hope that a timely conclusion of the first reading of the draft articles is not beyond reach. It is on this note of cautious optimism based on the realities of international life that this series of reports may now be brought to a close.