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Preliminary report on jurisdictional immunities of States and their property, by Mr. Motoo Ogiso, Special Rapporteur

Topic:

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Preliminary report on jurisdictional immunities of States and their property by Mr. Motoo Ogiso, Special Rapporteur

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NOTE

References to multilateral conventions and national legislation mentioned in the present report are given in the note in document A/CN.4/410 and Add.1-5 (see p.45 above).

Introduction

1. The topic "Jurisdictional immunities of States and their property" was included in the Commission's current programme of work by the decision of the Commission at its thirtieth session, in 1978, on the recommendation of the Working Group which it had established to commence work on the topic and in response to General Assembly resolution 32/151 of 19 December 1977.[1]

2. At its thirty-first session, in 1979, the Commission had before it the preliminary report[2] of the Special Rapporteur, Mr. Sompong Sucharitkul. The Commission decided at the same session that a questionnaire should be circulated to States Members of the United Nations to obtain further information and the views of Governments. The materials received in response to the questionnaire

[1] See *Yearbook . . . 1978*, vol. II (Part Two), pp. 152 *et seq.*, paras. 179-190.

[2] *Yearbook . . . 1979*, vol. II (Part One), p. 227, document A/CN.4/323.

were submitted to the Commission at its thirty-third session, in 1981.[3]

3. From its thirty-second session (1980) to its thirty-eighth session (1986), the Commission received seven further reports from the Special Rapporteur,[4] which contained draft articles arranged in five parts, as follows: part I (Introduction); part II (General principles); part III (Exceptions to State immunity); part IV (State immunity in respect of property from attachment and execution); and part V (Miscellaneous provisions).

4. After long deliberations over eight years, at its 1972nd meeting, on 20 June 1986, the Commission adopted on first reading an entire set of draft articles on the topic,[5] which was transmitted, in accordance with articles 16 and 21 of the Commission's statute, through the Secretary-General to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 1988.

5. The present preliminary report is an effort to analyse the comments and observations of 23 Member States and Switzerland, which had been submitted by 24 March 1988,[6] and to recommend, duly taking into account those observations, some amendments which would enable a feasible consensus to be reached on the draft articles in relation to which, because of practical and doctrinal difficulties, Governments have taken widely differing positions.

6. In drafting the present report, the Special Rapporteur also took duly into consideration not only the written comments and observations referred to above but also the various opinions expressed in the Sixth Committee of the General Assembly[7] and in the Commission.

[3] These materials, as well as others compiled by the Secretariat, are published in the volume of the United Nations Legislative Series entitled *Materials on Jurisdictional Immunities of States and their Property* (United Nations publication, Sales No. E/F.81.V.10), hereinafter referred to as *Materials on Jurisdictional Immunities* . . . .

[4] The seven further reports of the previous Special Rapporteur are reproduced as follows:

Second report: *Yearbook . . . 1980*, vol. II (Part One), p. 199, document A/CN.4/331 and Add. 1;

Third report: *Yearbook . . . 1981*, vol. II (Part One), p. 125, document A/CN.4/340 and Add.1;

Fourth report: *Yearbook . . . 1982*, vol. II (Part One), p. 199, document A/CN.4/357;

Fifth report: *Yearbook . . . 1983*, vol. II (Part One), p. 25, document A/CN.4/363 and Add.1;

Sixth report: *Yearbook . . . 1984*, vol. II (Part One), p. 5, document A/CN.4/376 and Add.1 and 2;

Seventh report: *Yearbook . . . 1985*, vol. II (Part One), p. 21, document A/CN.4/388;

Eighth report: *Yearbook . . . 1986*, vol. II (Part One), p. 21, document A/CN.4/396.

[5] See *Yearbook . . . 1986*, vol. II (Part Two), pp. 8 *et seq.* The draft articles are also reproduced in document A/CN.4/410 and Add.1-5 (see p. 45 above).

[6] These comments and observations, as well as those subsequently received from the Governments of five other Member States, are reproduced in document A/CN.4/410 and Add.1-5 (see p. 45 above).

The comments submitted jointly by Denmark, Finland, Iceland, Norway and Sweden appear under "Nordic countries".

In the original mimeographed version of the present report, the comments and observations of Governments on each article were reproduced after the Special Rapporteur's analysis of that article; here, those quotations have been replaced by cross-references to the relevant pages and paragraphs of document A/CN.4/410 and Add.1-5.

[7] See the topical summaries, prepared by the Secretariat, of the discussions in the Sixth Committee on the reports of the Commission, from the thirty-sixth to forty-second sessions of the General Assembly: A/CN.4/L.339 (thirty-sixth session); A/CN.4/L.352 (thirty-seventh session); A/CN.4/L.369 (thirty-eighth session); A/CN.4/L.382 (thirty-ninth session); A/CN.4/L.398 (fortieth session); A/CN.4/L.410 (forty-first session); A/CN.4/L.420 (forty-second session).

I. Comments of a general nature

(*a*) Summary of the comments of Governments

7. Twenty Governments presented comments and observations of a general nature on the draft articles under consideration. These included the Governments of the following Member States:

Australia	(see above, p. 51, paras. 1-6)
Belgium	(see above, p. 57, paras. 1-3)
Bulgaria	(see above, p. 59, paras. 1-7)
Byelorussian SSR	(see above, p. 60, paras. 1-3)
Canada	(see above, p. 61, paras. 1-3)
China	(see above, p. 63, paras. 1-3)
German Democratic Republic	(see above, p. 67, paras. 1-8)
Germany, Federal Republic of	(see above, p. 70, para. 1)
Nordic countries	(see above, p. 77, para. 1)
Spain	(see above, p. 79, paras. 1-4)
Thailand	(see above, p. 81, paras. 1-3)
USSR	(see above, p. 82, paras. 1-8)
United Kingdom	(see above, p. 84, paras. 1-4)
Venezuela	(see above, p. 90, paras. 1-2)
Yugoslavia	(see above, p. 91, paras. 1-2)

and the Government of one non-member State:

Switzerland	(see above, p. 92, paras. 1-16)

8. Many countries, such as Belgium, Brazil, the Nordic countries, Spain, the United Kingdom and Yugoslavia, express general support for the overall framework of the draft articles. On the other hand, several other countries, such as Bulgaria, the Byelorussian SSR, China and the USSR, are critical of the draft articles and regard the present formulation as unsatisfactory, especially the provisions contained in parts III and IV. The latter countries are of the view that the number and extent of exceptions to State immunity should be kept at the lowest level.

9. It is apparent that there are fundamental differences of views in the theoretical approach to this subject between those countries which favour the so-called restrictive theory of State immunity and those which favour the so-called absolute theory.

10. Belgium, the Federal Republic of Germany, Switzerland and the United Kingdom note that there is a tendency in recent international law to limit the immunity of a State from the jurisdiction of the courts of another State. They feel therefore that recent international and national practice should be reflected in the draft articles and that an effort should be made to achieve the closest possible approximation to the 1972 European Convention on State Immunity.

11. On the other hand, countries such as Bulgaria, China, the German Democratic Republic, the USSR and Venezuela are basically of the view that the goal of the future convention is to reaffirm and strengthen the concept of the jurisdictional immunity of States, with clearly stated exceptions. From their viewpoint, replacing this principle by the concept of so-called functional immunity considerably weakens the effectiveness of the principle and the number of exceptions should be kept to a minimum.

12. The Byelorussian SSR and the USSR also point out that the draft articles should reflect the concept of segregated property. According to their comments, the State enterprise has State property—placed in its possession for its use and disposal—which is segregated from general State property, and the State is not liable in connection with the obligations of the enterprise, and vice versa.

(*b*) Recommendations of the Special Rapporteur

13. Although there is a clear theoretical gap between the two groups of States, it seems that the present framework of the draft articles may offer a possible basis for a compromise between the two different positions. Several countries commented that the future convention should take into account the legitimate interests of all States and that achieving that goal required compromise and concession on the part of both groups.

14. With regard to the points on segregated property made by the USSR and the Byelorussian SSR, the Special Rapporteur notes article 11 of the Constitution of the Union of Soviet Socialist Republics,[8] which reads:

Article 11

State property, i.e. the common property of the Soviet people, is the principal form of socialist property.

The land, its minerals, waters, and forests are the exclusive property of the State. The State owns the basic means of production in industry, construction, and agriculture; means of transport and communication; the banks; the property of State-run trade organizations and public utilities, and other State-run undertakings; most urban housing; and other property necessary for State purposes.

15. However, in the light of the comments made by the USSR and the Byelorussian SSR, the Special Rapporteur understands that, with regard to differences relating to commercial contracts, a State enterprise is subject to the jurisdiction of a court of a forum State as far as segregated property placed in its possession is concerned. With that understanding, he is proposing an article 11 *bis* (see para. 122 below).

[8] Adopted at the Seventh (Special) Session of the Supreme Soviet of the USSR on 7 October 1977. English translation published by Novosti, Moscow, 1977.

II. Specific comments on individual articles

A. PART I. INTRODUCTION

ARTICLE 1

16. The text adopted reads as follows:

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.

(*a*) Summary of the comments of Governments

17. Comments on article 1 were submitted by the Government of only one Member State:

Mexico (see above, p. 74, para. 1)

18. Mexico states that the article seems acceptable and suggests that the general principle of immunity from jurisdiction of sovereign States should be set forth at the outset of the envisaged convention.

(*b*) Recommendations of the Special Rapporteur

19. The Special Rapporteur prefers to keep the original approach, namely to leave the enunciation of the general principle in article 6 and to define in article 1 the scope of the draft articles as a whole.

ARTICLE 2

20. The text adopted reads as follows:

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;

(b) "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.

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 meanings which may be given to them in other international instruments or in the internal law of any State.

(*a*) Summary of the comments of Governments

21. Comments on article 2 were submitted by the Governments of the following Member States:

Bulgaria	(see above, p. 59, para. 6)
Byelorussian SSR	(see above, p. 60, paras. 4-5)
German Democratic Republic	(see above, p. 67, paras. 9, 10 and 13)
Mexico	(see above, p. 74, paras. 2-5)
Thailand	(see above, p. 81, para. 4)
Venezuela	(see above, p. 90, para. 3)

and by the Government of one non-member State:

Switzerland	(see above, p. 92, paras. 17-19)

22. Venezuela points out that since draft articles 2 and 3 contain definitions relating to the terms "court", "commercial contract" and "State", it seems appropriate to combine the two articles. The German Democratic Republic also makes a comment on the same point.

Paragraph 1 (a)

23. The German Democratic Republic suggests that the term "court" should include a precise explanation of the term "judicial functions" since legal systems differ. Mexico suggests that the juridical nature of proceedings be clearly established and that a definition of the concept of "judicial proceedings" be included.

Paragraph 1 (b)

24. Mexico also points out that services offered by the State with lower fees than the true cost of the goods and services should not be considered as commercial contracts.

25. The German Democratic Republic points out that, as paragraph 1 (*b*) of article 2 and paragraph 2 of article 3 (determination of the commercial character of a contract) deal with the same subject, they should be combined.

Paragraph 1 (b) *(i) and (iii)*

26. Thailand is not satisfied with the definition of "commercial contract" because the present wording is circular and unhelpful; it therefore suggests that the word "commercial" in subparagraphs (i) and (iii) be deleted.

(*b*) Recommendations of the Special Rapporteur

27. With regard to the definition of a "court", the Special Rapporteur feels that the present formulation is sufficient but would be ready to study the matter further in the Drafting Committee.

28. The rearrangement of articles 2 and 3 seems to be necessary.

(*c*) Proposed new text

29. The Special Rapporteur proposes the following new text of article 2:

"*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;

"(*b*) 'State' means:

(i) the State and its various organs of government;

(ii) political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State;

(iii) agencies or instrumentalities of the State, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State;

(iv) representatives of the State acting in that capacity;

"(*c*) '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.

"2. The provisions of paragraph 1 (*a*), (*b*) and (*c*) regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or in the internal law of any State.

"3. 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 if an international agreement between the States concerned or a written contract between the parties stipulates that the contract is for the public governmental purpose, that purpose should be taken into account in determining the non-commercial character of the contract."

30. As regards paragraph 3 of the text proposed above, see the recommendation of the Special Rapporteur concerning article 3 (para. 39 below).

ARTICLE 3

31. The text adopted reads as follows:

Article 3. Interpretative provisions

1. The expression "State" as used in the present articles is to be understood as comprehending:

(*a*) the State and its various organs of government;

(*b*) political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State;

(*c*) agencies or instrumentalities of the State, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State;

(*d*) representatives of the State acting in that capacity.

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.

(*a*) Summary of the comments of Governments

32. Comments on article 3 were submitted by the Governments of the following Member States:

Australia	(see above, p. 51, paras. 7-10)
Brazil	(see above, p. 58, para. 1)
Byelorussian SSR	(see above, p. 60, paras. 6-8)
Cameroon	(see above, p. 61, para. 1)
Canada	(see above, p. 61, para. 1 *in fine*)
German Democratic Republic	(see above, p. 67, paras. 11-12)
Germany, Federal Republic of	(see above, p. 70, paras. 2-4)
Mexico	(see above, p. 74, paras. 6-9)
Nordic countries	(see above, p. 77, para. 2)
Qatar	(see above, p. 78, paras. 1-7)
Spain	(see above, p. 79, para. 5)
United Kingdom	(see above, p. 84, paras. 6-10)
Yugoslavia	(see above, p. 91, paras. 3-4)

and by the Government of one non-member State:

Switzerland	(see above, p. 92, paras. 19-21)

Paragraph 1

33. The Federal Republic of Germany points out that neither draft article 3 nor any of the other articles contains any special provisions for federal States. In connection with paragraph 1 (*c*), it also observes that agencies or instrumentalities may invoke immunity only when acting in the exercise of sovereign authority. The United Kingdom expresses a similar view.

34. The German Democratic Republic states that paragraph 1 does not make it sufficiently clear that State-owned, self-supporting legal entities do not represent the State and are not entitled to immunity.

35. Australia and the Byelorussian SSR suggest incorporating paragraph 1 into article 2, which contains definitions. Australia points out that the definition of the term "State" does not make clear the position of agencies or instrumentalities of a political division. It also suggests that there is confusion stemming from the use of the word "State" and that the terms "a State" and "another State" should be replaced by the expressions "forum State" and "foreign State", which are clearer. The Byelorussian SSR proposes the following new wording of paragraph 1:

> "The expression 'State' means the State and its various organs and representatives which are entitled to perform acts in the exercise of the sovereign authority of the State."

Paragraph 2

36. Most Governments are of the view that in determining whether a contract is commercial reference should be made only to the nature of the contract and not to its purpose. The countries holding this view include Canada, Mexico, the five Nordic countries, Qatar, Spain and the United Kingdom.

37. On the other hand, Yugoslavia supports the present formulation of the draft article and expresses the view that both "nature" and "purpose" criteria should be used at the same time and given the same importance.

38. Brazil interprets paragraph 2 as giving courts clear guidance on the matter.

(*b*) Recommendations of the Special Rapporteur

39. With regard to paragraph 2, in the light of the fact that many countries support the nature criterion in determining whether a contract is commercial or not and criticize the purpose criterion, which in their view is less objective and more one-sided, the Special Rapporteur has no objection to deleting the purpose criterion. At the same time, it should be recalled that several Governments, both in their written comments and in their oral observations in the Sixth Committee, have supported the inclusion of the purpose criterion. Taking these facts into consideration, the Special Rapporteur suggests the text of the new paragraph 3 of article 2 (see para. 30 above).

Article 4

40. The text adopted reads as follows:

Article 4. Privileges and immunities not affected by the present articles

1. The present articles are without prejudice to the privileges and immunities enjoyed by a State in relation to the exercise of the functions of:

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

(b) persons connected with them.

2. The present articles are likewise without prejudice to the privileges and immunities accorded under international law to heads of State *ratione personae*.

(*a*) Summary of the comments of Governments

41. Comments on article 4 were submitted by the Governments of the following Member States:

Australia	(see above, p. 51, para. 11)
Germany, Federal Republic of	(see above, p. 70, para. 5)
Mexico	(see above, p. 74, paras. 10-11)
Spain	(see above, p. 79, paras. 6-7)
United Kingdom	(see above, p. 84, paras. 11-12)

and by the Government of one non-member State:

Switzerland	(see above, p. 92, para. 22)

42. There is general support for the present article 4. The following suggestions have been made by some countries.

Paragraph 1

43. The United Kingdom is of the view that a specific reference to the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations may be called for because those two instruments are now so widely accepted.

44. Australia suggests a drafting change, namely to insert the phrase "under international law" after the word "State" in the introductory clause of paragraph 1, in order to make the meaning and intention clearer and to bring the text into line with paragraph 2.

45. Spain points out that, although the jurisdictional immunity of diplomatic missions, consular posts etc. is commonly recognized, the 1961 Vienna Convention on Diplomatic Relations and the other relevant conventions do not expressly and directly provide for the jurisdictional immunity of diplomatic missions, and that therefore the present paragraph has not satisfactorily resolved the question.

Paragraph 2

46. Regarding the persons covered under paragraph 2, the Federal Republic of Germany suggests the introduction of a clause generally clarifying the fact that types of immunity other than jurisdictional immunity of States remain unaffected. Spain is of the view that not only the privileges of heads of State but also those recognized for heads of Government, ministers for foreign affairs and persons of high rank should be included. The United Kingdom similarly feels that certain persons connected with a head of State, e.g. members of his family forming part of his household and his personal servants, should be included.

47. The United Kingdom also suggests the addition of a new paragraph which would provide that the present articles are without prejudice to the question of the privileges and immunities enjoyed by the armed forces of one State while present in another State with the latter's consent.

(*b*) Recommendations of the Special Rapporteur

48. With regard to paragraph 1, the Australian suggestion to add the words "under international law" is acceptable. As to the suggestion of the United Kingdom to refer to the Vienna Conventions of 1961 and 1963, the Special Rapporteur prefers to keep the draft as it stands, since paragraph 1 (*a*) also refers to "special missions", and "missions to international organizations".

49. Regarding the comments by Spain and the United Kingdom on paragraph 2, privileges and immunities of members of the family of heads of State, ministers for foreign affairs and persons of high rank are accorded rather on the basis of international comity than of established international law. Therefore it may not be necessary to change paragraph 2. Likewise, the privileges and immunities of the armed forces of a State while present in another State are determined by agreement between the States concerned rather than by customary international law, and it may not be relevant to refer to such privileges and immunities in paragraph 2.

(*c*) Proposed new text

50. The Special Rapporteur proposes that paragraph 1 of article 4 be amended to read:

"Article 4. Privileges and immunities not affected by the present articles

"1. The present articles are without prejudice to the privileges and immunities enjoyed by a State under international law in relation to the exercise of the functions of:

". . ."

ARTICLE 5

51. The text adopted reads as follows:

Article 5. Non-retroactivity of the present articles

Without prejudice to the application of any rules set forth in the present articles to which jurisdictional immunities of States and their property are subject under international law independently of the present articles, the articles shall not apply to any question of jurisdictional immunities of States or their property arising in a proceeding instituted against a State before a court of another State prior to the entry into force of the said articles for the States concerned.

(*a*) Summary of the comments of Governments

52. Comments on article 5 were submitted by the Governments of the following Member States:

Australia	(see above, p. 51, paras. 12-13)
Mexico	(see above, p. 74, para. 12)
United Kingdom	(see above, p. 84, para. 13)

53. Australia does not consider that there is much value in imposing any restriction on the operation of the articles because nothing stops the plaintiff in a proceeding from recommencing his action once the convention enters into force for the States concerned. It suggests an alternative: to include an additional "optional clause" allowing the articles to operate with regard to any cause of action arising within, say, the six years preceding the date upon which the convention enters into force between the States concerned.

54. Mexico is also of the view that it might be advantageous to provide for the retroactive application of certain articles setting forth current principles of international law.

55. The United Kingdom considers that it is premature to comment on the article at this stage.

(*b*) Recommendations of the Special Rapporteur

56. The Special Rapporteur suggests that, at the present stage, no change be made in article 5.

B. PART II. GENERAL PRINCIPLES

ARTICLE 6

57. The text adopted reads as follows:

Article 6. State immunity

A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present articles [and the relevant rules of general international law].

(a) Summary of the comments of Governments

58. Comments on article 6 were submitted by the Governments of the following Member States:

Australia	(see above, p. 51, paras. 14-15)
Brazil	(see above, p. 58, para. 2)
Bulgaria	(see above, p. 59, para. 9)
Byelorussian SSR	(see above, p. 60, para. 9)
Cameroon	(see above, p. 61, para. 2)
German Democratic Republic	(see above, p. 67, paras. 14-15)
Germany, Federal Republic of	(see above, p. 70, para. 6)
Mexico	(see above, p. 74, para. 13)
Nordic countries	(see above, p. 77, para. 3)
Spain	(see above, p. 79, para. 8)
Thailand	(see above, p. 81, para. 5)
USSR	(see above, p. 82, para. 9)
United Kingdom	(see above, p. 84, para. 14)
Venezuela	(see above, p. 90, para. 4)
Yugoslavia	(see above, p. 91, para. 5)

and by the Government of one non-member State:

Switzerland	(see above, p. 92, para. 23)

59. There is a clear split of views on whether to retain the bracketed phrase "and the relevant rules of general international law" or to delete it.

60. The Governments of the following ten countries support the retention of the bracketed wording: Cameroon, Germany, Federal Republic of, Mexico, Nordic countries, Switzerland and United Kingdom.

61. On the other hand, the Governments of the following nine countries favour the deletion of the phrase: Australia, Brazil, Bulgaria, Byelorussian SSR, German Democratic Republic, Spain, Thailand, Venezuela and Yugoslavia.

62. The Governments supporting retention of the bracketed phrase base themselves in particular on the reasoning that State practice is in a state of development and that it would be wrong to give the impression that codification is intended to impede further development by laying down certain rules.

63. The Governments favouring deletion of the phrase advance the argument that the basic principle of State immunity is absolute, that to seek exceptions from immunity outside the framework of the draft articles is illogical and that the bracketed formulation would only serve to encourage unilateral restrictions of the immunity of a State and leave room for different interpretations.

64. Australia proposes the following wording, if there is a strong desire to retain the words between square brackets:

> "and the evolving rules of general international law relating to such immunity."

or:

> "and the practices of States giving rise to rules of international law, whether general or particular, relating to such immunity."

65. Spain furthermore suggests that the preamble to the future convention include the following paragraph:

> "*Affirming* that the rules of general international law continue to govern questions not expressly regulated in this Convention".

(b) Recommendations of the Special Rapporteur

66. Because of the diverse views on this article dealing with State immunity, which is the core concept of the future convention, some sort of compromise is required. The basic concept that a State enjoys immunity from the jurisdiction of the courts of another State with certain limitations/exceptions is unobjectionable. Although this basic concept may be in harmony with the evolving customary international law independently of the provisions of the draft articles, we shall endeavour to determine the proper limitation/exception to this principle. In this sense the phrase "subject to the provisions of the present articles", which precedes the bracketed wording, seems to be generally acceptable.

67. The Governments which oppose the wording "and the relevant rules of general international law" insist that limitations/exceptions to the principle of State immunity cannot be envisaged if the phrase "the relevant rules of general international law" is interpreted unilaterally. This fear is understandable and the Special Rapporteur proposes to allay it by deleting the bracketed phrase. At the same time, due regard should be paid to the arguments put forward by those countries which emphasize the recent development of international and national practices and refer to the 1972 European Convention. In this connection, one option could lie in the suggestion made by Spain to deal with the matter in the preamble to the future convention. The deletion of the bracketed phrase should be viewed in conjunction with the possible addition of article 28 (see para. 273 below), which is essentially the application of the principle of reciprocity. If article 28 is accepted, it could to some extent help to keep a balance between the two different points of view.

ARTICLE 7

68. The text adopted reads as follows:

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 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 property, rights, interests 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 political subdivisions or agencies or instrumentalities in respect of an act performed in the exercise of sovereign 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.

(*a*) Summary of the comments of Governments

69. Comments on article 7 were submitted by the Governments of the following Member States:

Australia	(see above, p. 51, paras. 16-19)
Byelorussian SSR	(see above, p. 60, para. 10)
German Democratic Republic	(see above, p. 67, para. 16)
Germany, Federal Republic of	(see above, p. 70, para. 7)
Mexico	(see above, p. 74, paras. 14-15)
United Kingdom	(see above, p. 84, para. 15)
Venezuela	(see above, p. 90, para. 5)

and by the Government of one non-member State:

Switzerland	(see above, p. 92, para. 24)

70. The Byelorussian SSR points out that the content of article 7 does not correspond to its title and recommends that either the title of article 7 be made more precise or the article be combined with article 6. The German Democratic Republic observes that such terms as "interests . . . of . . . [a] State" and "property in its . . . control" are not suitable and would tend to complicate the application of the future convention. It therefore suggests that such terms not be used.

71. The Federal Republic of Germany raises the following two points: (i) article 7 should be supplemented by clear rules on the burden of presentation and the obligation of the court to examine its jurisdiction; and (ii) it should be made clear that State immunity is to be respected by the courts *ex officio*, i.e. that no default judgment may be rendered against States.

Paragraph 1

72. Australia proposes that the paragraph be redrafted in the form "A forum State shall give effect . . .", as article 6 bestows the privilege of immunity on the foreign State.

Paragraph 2

73. Australia points out that paragraph 2 is too wide and that a narrower formulation would be preferable. Furthermore, it suggests that the beginning of paragraphs 2 and 3 be redrafted in the following way: "A/The forum State shall be considered to have exercised jurisdiction against another/a foreign State . . .".

Paragraph 3

74. Australia, Mexico, Switzerland, Venezuela and the United Kingdom made similar comments on paragraph 3. All express the view that it is not necessary to repeat the definition which is already provided in article 3.

75. Mexico suggests that provision must also be made for cases in which the purpose of the proceeding is to prevent or restrict the free exercise of functions or rights by a State or an agency or subdivision thereof.

(*b*) Recommendations of the Special Rapporteur

76. There seems to be a need to examine in the Drafting Committee the use of such terms as "interests" in paragraph 2 and "control" in paragraph 3, taking into account in particular the views of Governments of common-law countries. Also, paragraph 3 can be simplified.

77. It should be noted that Australia observed that there is confusion stemming from the use of the word "State", and that the terms "a State" and "another State" should be replaced by "a forum State" and "a foreign State". This comment, in the view of the Special Rapporteur, is acceptable.

78. As to the comment of the Federal Republic of Germany regarding default judgment, see paragraph 4 of the proposed new text of article 9 (para. 100 below).

(*c*) Proposed new text

79. The Special Rapporteur proposes the following new text of article 7:

"Article 7. Modalities for giving effect to State immunity

"1. A forum State shall give effect to State immunity under article 6 by refraining from exercising jurisdiction in a forum State against a foreign State.

"2. A proceeding in a forum State shall be considered to have been instituted against a foreign State, whether or not the foreign State is named as party to that proceeding, so long as the proceeding in effect seeks to compel the foreign 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 the foreign State.

"3. In particular, a proceeding in a forum State shall be considered to have been instituted against a foreign State when the proceeding is instituted against

any organ of a State referred to in subparagraphs (*a*) to (*d*) of article 3, paragraph 1, or when the proceeding is designed to deprive that foreign State of its property or of the use of property in its possession or control."

ARTICLE 8

80. The text adopted reads as follows:

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.

(*a*) Summary of the comments of Governments

81. Comments on article 8 were submitted by the Governments of the following Member States:

Australia	(see above, p. 51, paras. 20-21)
Mexico	(see above, p. 74, para. 16)
Thailand	(see above, p. 81, paras. 6-7)
United Kingdom	(see above, p. 84, para. 16)
Venezuela	(see above, p. 90, para. 6)

and by the Government of one non-member State:

Switzerland	(see above, p. 92, para. 25)

82. Thailand proposes that the words "in force" be added at the end of subparagraph (*a*) for the sake of clarity.

83. On subparagraph (*b*), Switzerland takes a firm position against the view, expressed by some Member States in the Sixth Committee, that provision should be made for the possibility of a fundamental change in the circumstances existing at the time when the contract was signed.

84. Conversely, Venezuela wishes to introduce a proviso which would grant immunity to a State which had consented to the exercise of jurisdiction by a foreign court in those cases where there had been a fundamental change in the circumstances prevailing at the time of signature of the contract in question.

85. As to subparagraph (*c*), several Governments have proposed amendments. Australia suggests that the subparagraph be redrafted along the lines of subparagraph (*c*) of article 2 of the 1972 European Convention, so as to enable a State to submit to a foreign court's jurisdiction in a less restrictive way, by introducing the principle *forum prorogatum*. Thailand's proposal is to replace the subparagraph by the words "by a written declaration submitted to the court in a specific case". The United Kingdom, while proposing no alternative phrases, expresses doubts as to whether the requirement in subparagraph (*c*), i.e. that consent should be given *in facie curiae*, might not be too restrictive.

86. Thailand proposes further, for the sake of clarity, that a proviso be added at the end of the article, as follows:

"However, a provision in any agreement or contract that it is to be governed by the law of another State is not to be deemed *per se* to be submission to the jurisdiction of the court of that State."

87. Australia wishes to make it clear that submission to foreign jurisdiction would involve submission to the exercise of jurisdiction by appellate courts in any subsequent stage of the proceeding up to and including the decision of the court of final instance, retrial and review. For that purpose it proposes, rather than amending article 8, introducing a qualification in article 2, paragraph 1, along the lines indicated.

88. Mexico proposes that it be made clear that, as a general rule, no public official is empowered to waive State immunity, and that any waiver of State immunity would therefore have to be made by the highest authorities of the State.

(*b*) Recommendations of the Special Rapporteur

89. With respect to subparagraph (*b*), it is not advisable to allow a State which has once consented in a written contract to submit to a foreign court's jurisdiction to claim State immunity owing to fundamental changes in the circumstances. Such an approach might lead to abuse and destabilization of international economic legal relations.

90. Concerning subparagraph (*c*), the Special Rapporteur favours a more flexible approach as regards the way in which a State may submit to a foreign court's jurisdiction. One way is to replace the subparagraph by the words "by a written declaration submitted to the court after a dispute between the parties has arisen".

91. Regarding the questions whether an agreement concerning the applicable law of one State should not be interpreted as submission to the jurisdiction of that State and whether consent to the exercise of jurisdiction by a foreign court implies submission to the jurisdiction of appellate courts, the Special Rapporteur intends to indicate in the commentary for the sake of clarity that the answers must be in the negative for the first question and in the affirmative for the second but does not consider it necessary to include an express stipulation to that effect in article 8.

92. As to the comment by Mexico that the waiver of State immunity must be made by the highest authority, it concerns primarily a question of internal procedure. The Special Rapporteur wishes to draw attention to article 46 of the 1969 Vienna Convention on the Law of Treaties, which stipulates:

Article 46. Provisions of internal law regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

(*c*) Proposed new text

93. The Special Rapporteur proposes that subparagraph (*c*) of article 8 be amended to read:

"Article 8. Express consent to the exercise of jurisdiction

"**. . .**

"(c) by a written declaration submitted to the court after a dispute between the parties has arisen."

ARTICLE 9

94. The text adopted reads as follows:

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

(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.

(a) Summary of the comments of Governments

95. Comments on article 9 were submitted by the Governments of the following Member States:

Mexico (see above, p. 74, paras. 17-18)

United Kingdom (see above, p. 84, para. 17)

96. The United Kingdom and Mexico propose that paragraph 1 be qualified by providing for the case in which the State in question took a step relating to the merits of a proceeding before it had knowledge of facts on which a claim to immunity might be based.

97. Mexico considers it preferable to make it clear that the appearance of representatives of a State before a foreign tribunal to give evidence as witnesses or to perform consular duties should not be deemed to constitute assent to the exercise by the court of jurisdiction over the State represented.

(b) Recommendations of the Special Rapporteur

98. With regard to the above-mentioned proposal by Mexico and the United Kingdom, the addition of a second sentence based on article 3, paragraph 1, of the 1972 European Convention, as suggested by the United Kingdom, seems appropriate.

99. With regard to the other Mexican proposal, the concept of "appearance . . . in performance of the duty of affording protection" seems to widen unduly the scope of immunity. Therefore it is suggested that a new paragraph 3 be added to article 9 as recommended below, with the present paragraph 3 becoming paragraph 4.

(c) Proposed new text

100. The Special Rapporteur proposes the following new text of article 9:

"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. However, if the State satisfies the court that it could not have acquired knowledge of facts on which a claim to immunity can be based until after it took such a step, it can claim immunity based on these facts provided it does so at the earliest possible moment.

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

"(a) invoking immunity; or

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

"3. The appearance of a representative of a State before a court of another State as a witness does not affect the immunity of that State in the proceeding before that court.

"4. 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

101. The text adopted reads as follows:

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.

(a) Summary of the comments of Governments

102. Comments on article 10 were submitted by the Governments of two Member States:

Australia (see above, p. 51, para. 22)

Thailand (see above, p. 81, para. 8)

103. Thailand suggests that a proviso be added to the effect that a foreign State cannot invoke immunity from jurisdiction only to the extent that the claim or counter-claim against it does not seek relief exceeding in amount or differing in kind from that sought by that State itself. A provision to the same effect is to be found in the United States Foreign Sovereign Immunities Act of 1976 (sect. 1607 (c)).

104. Australia recommends that the article be condensed and rewritten.

(b) Recommendations of the Special Rapporteur

105. The Special Rapporteur proposes that the suggestion of Thailand be incorporated as a new paragraph 4.

106. With regard to the suggestion of Australia, it could be referred to the Drafting Committee for consideration.

(c) Proposed new text

107. The Special Rapporteur proposes that a new paragraph 4 be added to article 10, to read:

"Article 10. Counter-claims

". . .

"4. A State cannot invoke immunity from jurisdiction only to the extent that the claim or counter-claim against it does not seek relief exceeding in amount or differing in kind from that sought by that State itself."

C. PART III. [LIMITATIONS ON] [EXCEPTIONS TO] STATE IMMUNITY

(a) Summary of the comments of Governments

108. Comments on part III of the draft articles were submitted by the Governments of the following Member States:

Brazil	(see above, p. 58, para. 3)
Byelorussian SSR	(see above, p. 60, para. 11)
Cameroon	(see above, p. 61, para. 4)
German Democratic Republic	(see above, p. 67, para. 17)
Nordic countries	(see above, p. 77, para. 4)
Spain	(see above, p. 79, para. 9)
Thailand	(see above, p. 81, para. 9)
USSR	(see above, p. 82, paras. 10-11)
United Kingdom	(see above, p. 84, para. 18)
Venezuela	(see above, p. 90, para. 7)
Yugoslavia	(see above, p. 91, para. 6)

109. The Governments fall into two groups, each of which supports one of the two alternatives presented between brackets, reflecting differences in doctrinal positions. The United Kingdom and six other Governments express a preference for "limitations". The United Kingdom in particular takes the position that, in the areas dealt with in this part, international law does not recognize that the State has jurisdictional immunity. On the other hand, Brazil and five other countries favour "exceptions". Brazil, among others, takes this position because the Brazilian courts consider the doctrine of State immunity as absolute.

(b) Recommendations of the Special Rapporteur

110. It seems to the Special Rapporteur that, although the issue of the title of part III has been quite a controversial one, the importance given to it during the first reading has been disproportionate. The members of the Commission may have feared that the choice of a specific title would give a doctrinal orientation to the further discussion of other aspects. A choice could be more easily made either way after all the issues pertaining to the rest of the draft have been settled, without prejudice to the doctrinal position of each Government.

ARTICLE 11

111. The text adopted reads as follows:

Article 11. 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.

(a) Summary of the comments of Governments

112. Comments on article 11 were submitted by the Governments of the following Member States:

Australia	(see above, p. 51, paras. 23-25)
Brazil	(see above, p. 58, para. 4)
German Democratic Republic	(see above, p. 67, para. 18)
Germany, Federal Republic of	(see above, p. 70, paras. 8-10)
Nordic countries	(see above, p. 77, para. 5)
United Kingdom	(see above, p. 84, para. 19)

and by the Government of one non-member State:

Switzerland	(see above, p. 92, para. 26)

113. The five Nordic countries and the German Democratic Republic favour the inclusion of a rule pertaining to the jurisdictional link between the commercial contract and the State of the forum, whereas the United Kingdom considers the reference to the applicable rules of private international law as effective and sufficient to determine whether differences relating to a commercial contract fall within the jurisdiction of a court of another State.

114. Australia, the Federal Republic of Germany and the United Kingdom indicate that they have difficulty with the phrase "is considered to have consented" in paragraph 1.

115. Australia proposes that paragraph 2 (*a*) be deleted, as its content is self-evident.

(*b*) Recommendations of the Special Rapporteur

116. With regard to the point raised in paragraph 113 above, the Special Rapporteur is of the view that the reference to the applicable rules of private international law is, as indicated in the United Kingdom's comments, effective and sufficient. If, for example, State A concludes a commercial contract with a national of State B, with reference to the law of State C, and if differences relating to the contract are brought before the court of State B, it is the rules of private international law which are part of the law of the forum that will determine whether the differences fall within the jurisdiction of the court of the State of the forum. And these rules often require some form of territorial connection. Further elaboration of the rules, which would seek unification of rules of private international law, is not within the scope of the draft articles; nor is it necessary to invent a special rule on jurisdictional link for the purpose of the draft convention. Indeed this would be no easy task. Relevant municipal or international legal instruments give different solutions to the issue. The relevant United States legislation (Foreign Sovereign Immunities Act of 1976) stipulates in section 1605 (*a*) (2):

Section 1605. General exceptions to the jurisdictional immunity of a foreign state

(*a*) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case:

. . .

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

117. The United Kingdom State Immunity Act provides as follows in its article 3:

Exceptions from immunity

. . .

3. (1) A State is not immune as respects proceedings relating to:

(*a*) a commercial transaction entered into by the State; or

(*b*) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom.

118. And article 4, paragraph 1, of the 1972 European Convention reads as follows:

1. Subject to the provisions of Article 5, a Contracting State cannot claim immunity from the jurisdiction of the courts of another Contracting State if the proceedings relate to an obligation of the State which, by virtue of a contract, falls to be discharged in the territory of the State of the forum.

119. It is open to serious doubt whether the draft convention inevitably and absolutely needs a jurisdictional criterion which comprehensively unifies domestic rules of private international law. It is suggested therefore that the present wording be retained, leaving the question to the domain of private international law.

120. As for the words "is considered to have consented to", the Special Rapporteur considers the present wording unnecessarily complicated, introducing a theory of consent based on a fiction, and suggests that those words be replaced by the words "cannot invoke", as proposed by Australia and the Federal Republic of Germany.

(*c*) Proposed new text

121. The Special Rapporteur proposes that paragraph 1 of article 11 be amended to read:

"Article 11. 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 cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial contract.

". . ."

ARTICLE 11 *bis*

Proposed text

122. In accordance with his recommendations in connection with the general comments of the Byelorussian SSR and the USSR (see paras. 14-15 above), the Special Rapporteur proposes the following new article 11 *bis*:

"Article 11* bis. *Segregated State property

"If a State enterprise enters into a commercial contract on behalf of a State 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 former State cannot invoke immunity from jurisdiction in a proceeding arising out of that commercial contract unless the State enterprise, being a party to the contract on behalf of the State, with a right to possess and dispose of segregated State property, is subject to the same rules of liability relating to a commercial contract as a natural or juridical person."

ARTICLE 12

123. The text adopted reads as follows:

Article 12. 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.

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.

(*a*) Summary of the comments of Governments

124. Comments on article 12 were submitted by the Governments of the following Member States:

Australia	(see above, p. 51, paras. 26-30)
Belgium	(see above, p. 57, paras. 4-5)
Brazil	(see above, p. 58, para. 5)
German Democratic Republic	(see above, p. 67, para. 19)
Germany, Federal Republic of	(see above, p. 70, paras. 11-14)
Qatar	(see above, p. 78, para. 8)
Thailand	(see above, p. 81, para. 10)
United Kingdom	(see above, p. 84, para. 20)

and by the Government of one non-member State:

Switzerland	(see above, p. 92, paras. 27-28)

125. The most drastic proposal comes from the German Democratic Republic, which suggests that the entire article be deleted from the draft in order to reduce the number of exceptions to State immunity. In this connection, note should be taken of the reference in the fifth report of the previous Special Rapporteur to the scarcity of judicial cases in this area.[9]

126. Australia and the United Kingdom express the view that the two conditions for non-immunity in paragraph 1 of article 12—relating to (i) the place where the service is to be performed, and (ii) the place where the employee is to be recruited—must not be cumulative.

127. Criticism focuses on the criterion of "social security" for non-immunity in paragraph 1 of the article. Several Governments (Australia, Belgium, Qatar and Thailand) indicate that some States might not have a social security system. Furthermore, some Governments (Australia, Belgium, Qatar, Switzerland, Thailand and the United Kingdom) doubt whether there is any persuasive justification for adding the criterion of "social security coverage" as a cumulative condition for non-immunity of a foreign State.

128. Strong fear is expressed by Belgium, the Federal Republic of Germany and the United Kingdom concerning paragraph 2 (*a*). In their view, the notion of "governmental authority" is so vague as to lead to an extremely wide interpretation which might substantially negate the exception to State immunity in case of differences relating to the contracts of employment dealt with in paragraph 1.

129. The Federal Republic of Germany questions both subparagraphs (*a*) and (*b*) of paragraph 2 on the same ground. The United Kingdom wishes to specify that paragraph 2 (*b*) does not prevent the court from finding an obligation to pay compensation or damages.

130. Other interesting suggestions are made by several Governments, including the introduction of the theory of dominant nationality into paragraph 2 (*c*) and (*d*) to provide for cases of dual nationality (Australia) and the addition of a new paragraph patterned on article 7 of the 1972 European Convention (United Kingdom).

(*b*) Recommendations of the Special Rapporteur

131. In view of the comments submitted, the criterion of "social security" seems neither an effective reference nor a necessary limitation on the exception to State immunity, and it is recommended that it be deleted.

132. The Special Rapporteur shares the fear that paragraph 2 (*a*) and (*b*) as presently worded could give rise to unduly wide interpretations, which could lead to confusion in the implementation of the future convention. It is worth noting that the 1972 European Convention contains no similar provisions. It is therefore suggested that the two subparagraphs be deleted from article 12.

(*c*) Proposed new text

133. The Special Rapporteur proposes the following new text of article 12:

"Article 12. 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.

"2. Paragraph 1 does not apply if:

"(*a*) 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;

"(*b*) the employee is a national of the employer State at the time the proceeding is instituted;

"(*c*) 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."

[9] *Yearbook . . . 1983*, vol. II (Part One), p. 34, document A/CN.4/363 and Add.1, para. 39.

ARTICLE 13

134. The text adopted reads as follows:

Article 13. Personal injuries and damage to 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 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 in whole or in part 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.

(*a*) Summary of the comments of Governments

135. Comments on article 13 were submitted by the Governments of the following Member States:

Australia	(see above, p. 51, paras. 31-32)
Brazil	(see above, p. 58, para. 5)
Bulgaria	(see above, p. 59, para. 10)
Byelorussian SSR	(see above, p. 60, para. 12)
German Democratic Republic	(see above, p. 67, paras. 20-21)
Germany, Federal Republic of	(see above, p. 70, paras. 15-17)
Mexico	(see above, p. 74, paras. 19-20)
Spain	(see above, p. 79, para. 10)
Thailand	(see above, p. 81, para. 11)
USSR	(see above, p. 82, paras. 12-13)

136. Several Governments view article 13 as unacceptable. The Byelorussian SSR and the USSR present two arguments: (i) the personal injuries and damage to property take place as a result of an act or omission on the part of an individual or legal entity, and the regulation of the legal relations arising in connection with compensation for damage is outside the scope of the draft articles; (ii) as to the question of State responsibility, the illegality of the behaviour is determined by the rules of international law, with the help of international proceedings, and cannot be established by national courts. The German Democratic Republic endorses the proposal to delete article 13 on the grounds that it would result in giving less immunity to States than to their diplomats, who are protected under article 31 of the 1961 Vienna Convention on Diplomatic Relations, and that due account should be taken of the small number of immunity disputes in the field owing to insurance coverage or to the settlement of pertinent problems through diplomatic channels.

137. Other Governments (Australia, Federal Republic of Germany, Thailand), on the other hand, are in favour of extending the scope of application of the draft article to transboundary injury or damage and propose that the last part of the article—"and if the author of the act or omission was present in that territory at the time of the act or omission"—be dropped.

138. Spain wishes to have it specified that article 13 would not affect the international liability of States.

139. Mexico makes the point that, when activities of a State can be related only indirectly or remotely to death, injury or damage, a causal relationship cannot be established between the activities and the results. This seems rather self-evident, but Mexico offers an example:

> Injury and damage caused in the reasonable defence or preventive protection of internationally protected persons . . . should not render either a State or its officials subject to the jurisdiction of the courts of the State of the forum.

(*b*) Recommendations of the Special Rapporteur

140. The Special Rapporteur is of the opinion that, when the responsibility for death, injury or damage caused in the territory of the State by an official of a foreign State performing his duties is attributable to that foreign State in accordance with the municipal law of the forum State, the courts of the forum State should be permitted to exercise jurisdiction over the foreign State, on the grounds that no State should be under an obligation to acquiesce in any wrongful acts under its internal law committed on its territory by a foreign official acting in the exercise of his function and that relief for death, injury or damage caused by a foreign official performing his duties should be brought not only through international proceedings according to the applicable rules of international law, but also by the tribunal of the State in the territory of which the death, injury or damage occurred.

141. As regards the proposals submitted by Australia, the Federal Republic of Germany and Thailand relating to the transboundary injury or damage, the Special Rapporteur doubts whether the criterion of the presence of the author of the act or omission in the territory of the State of the forum at the time of the deed can legitimately be viewed as a necessary criterion for exclusion of State immunity, and he therefore proposes that it be eliminated from the draft article.

142. The suggestion by Spain seems worthy of incorporation in the draft article.

(*c*) Proposed new text

143. The Special Rapporteur proposes the following new text of article 13:

"Article 13. Personal injuries and damage to property

"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 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 in whole or in part in the territory of the State of the forum.

"2. Paragraph 1 does not affect any rules concerning State responsibility under international law."

ARTICLE 14

144. The text adopted reads as follows:

Article 14. Ownership, possession and use of property

1. Unless otherwise agreed between the States concerned, 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.

(*a*) Summary of the comments of Governments

145. Comments on article 14 were submitted by the Governments of the following Member States:

Australia	(see above, p. 51, paras. 33-34)
Belgium	(see above, p. 57, para. 6)
Brazil	(see above, p. 58, para. 6)
Bulgaria	(see above, p. 59, para. 11)
German Democratic Republic	(see above, p. 67, para. 22)
Mexico	(see above, p. 74, paras. 21-24)
Thailand	(see above, p. 81, para. 12)
USSR	(see above, p. 82, para. 14)
United Kingdom	(see above, p. 84, paras. 21-22)

146. Some Governments express the view that article 14 is too broadly formulated to be adopted as it is (Bulgaria, USSR).

147. With regard to paragraphs 1 (*a*) to (*e*), various comments have been submitted. The USSR fears that these provisions could open the door to foreign jurisdiction even in the absence of any link between the property or company concerned and the State of the forum. The German Democratic Republic proposes the deletion from subparagraph (*b*) of the words "movable or immovable" to encompass protected privileges which may form part of such property, and also the elimination of subparagraph (*e*). Mexico considers subparagraphs (*b*), (*c*) and (*d*) unnecessary, inasmuch as a State which has an interest in the property concerned will appear voluntarily before the court in order to assert its rights, thus submitting to the jurisdiction of a foreign court.

148. Thailand wishes to have it specified that, during the proceedings mentioned in paragraph 1, a foreign State is not to be subject to eviction.

149. As regards paragraph 2, Belgium proposes that it be deleted because of the vagueness of its content. Brazil is of the view that the paragraph should be understood as not contradicting paragraph 3 of article 7 *in fine*.

150. Mexico asserts that if a State has a right in the property in question it must be impleaded and granted the prerogatives due to it under the articles, so as not to deny the State any possibility of defence. Mexico also holds, in relation to paragraph 2 (*b*), that the burden of proof should rest with the party arguing that State immunity cannot be applied in the case concerned.

151. As regards drafting, the United Kingdom questions the appropriateness of the words "the immunity of a State cannot be invoked to prevent a court of another State. . . from exercising its jurisdiction in a proceeding" and of the words "the determination of" in the introductory clause of paragraph 1.

(*b*) Recommendations of the Special Rapporteur

152. Subparagraphs (*c*), (*d*) and (*e*) mainly concern the legal practice in common-law countries. But in the opinion of the Special Rapporteur it is doubtful whether it reflects universal practice. There is a "grey area", to say the least.

153. If the Commission wishes to let the common-law countries' practice prevail, the Special Rapporteur proposes that subparagraphs (*c*), (*d*) and (*e*) be amended to better reflect actual practice[10] (see the text proposed, para. 156 below).

154. The Commission could take the opposite view on the ground that, as indicated by the USSR, subparagraphs (*b*), (*c*), (*d*) and (*e*) could open the door to foreign jurisdiction even in the absence of any link between the property and the forum State (in this connection, it should be noted that the Foreign Sovereign Immunities Act of 1976 of the United States contains no provisions similar to those of subparagraphs (*c*) to (*e*). In such a case, the Special Rapporteur would propose that subparagraphs (*b*) to (*e*) be deleted, for it is only in relation to subparagraph (*a*), which concerns immovable property, that there is a sufficient jurisdictional link.

155. The drafting aspects should be referred to the Drafting Committee.

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[10] See the comments of Sir Ian Sinclair at the thirty-fifth session of the Commission (*Yearbook . . . 1983*, vol. I, pp. 79-80, 1767th meeting, paras. 35-38).

(c) Proposed new text

156. The Special Rapporteur proposes that paragraph 1 of article 14 be amended to read:

"Article 14. Ownership, possession and use of property

"1. Unless otherwise agreed between the States concerned, 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:

"(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) the administration of a trust, the winding up of companies, bankruptcy proceedings or any other form of administration of property situated in the State of the forum, notwithstanding that a foreign State might have or assert an interest in part of the property.]

". . ."

ARTICLE 15

157. The text adopted reads as follows:

Article 15. 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.

(a) Summary of the comments of Governments

158. Comments on article 15 were submitted by the Governments of the following Member States:

Brazil	(see above, p. 58, para. 7)
Mexico	(see above, p. 74, para. 25)
Thailand	(see above, p. 81, para. 13)
United Kingdom	(see above, p. 84, paras. 23-24)

159. The United Kingdom, while expressing satisfaction with the draft article, comments on three points: (i) subparagraph (*a*) should include a reference to plant breeders' rights; (ii) the word "similar" in subparagraph (*a*) should be deleted, for it might cause confusion as to whether rights in computer-generated works could be included in "other similar form of intellectual or industrial property"; and (iii) the words "the determination of" in subparagraph (*a*) should be replaced by some other words, so that the possibility of unjustifiable restriction on the scope of this provision could be eliminated.

160. Mexico expresses the view that the exception to immunity provided for in article 15 should apply only to the use of intellectual, industrial or commercial rights in the State of the forum and not to the determination of ownership of such rights, since they might have been validly obtained under the laws of the defendant State and be publicly used solely within its territory.

(b) Recommendations of the Special Rapporteur

161. As regards the United Kingdom's proposal to refer to plant breeders' rights, in view of the fact that various new categories are emerging in the area of intellectual property and that it may be difficult to enumerate all types of intellectual property exhaustively, the Special Rapporteur prefers to explain in the commentary that new categories of intellectual property such as plant breeders' rights are, as far as this article is concerned, encompassed by the phrase "any other similar form of intellectual or industrial property".

162. With respect to the United Kingdom's proposal that the word "similar" be dropped from subparagraph (*a*), the Special Rapporteur prefers to retain the word and to state in the commentary that new rights of intellectual property such as rights in computer-generated works should be identified as rights enjoying a legal protection under national or international legislation by responsible international authorities, in order to be deemed included under the phrase "any other similar form of intellectual or industrial property".

ARTICLE 16

163. The text adopted reads as follows:

Article 16. Fiscal matters

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 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.

(a) Summary of the comments of Governments

164. Comments on article 16 were submitted by the Governments of the following Member States:

Spain	(see above, p. 79, para. 11)
Thailand	(see above, p. 81, para. 14)
United Kingdom	(see above, p. 84, para. 25)

and by the Government of one non-member State:

Switzerland	(see above, p. 92, para. 29)

165. The United Kingdom considers it difficult to find any very clear rules or principles in the field of taxation of foreign sovereigns, and it therefore proposes that a provision along the lines of article 29 (*c*) of the 1972 European Convention, which stipulates its non-application to cus-

toms duties, taxes or penalties, should be substituted for article 16.

166. Spain proposes that the words "or under the international agreements in force between the two States" be added after the words "for which it may be liable under the law of the State of the forum", in view of the fact that quite often the fiscal obligations of a State in another State are governed by international agreements.

167. Thailand proposes the insertion of the phrase "and without prejudice to the established rules of international diplomatic law" after the phrase "Unless otherwise agreed between the States concerned".

168. Switzerland points out that it would seem advisable to place article 16 after article 18.

(*b*) Recommendations of the Special Rapporteur

169. The Special Rapporteur is of the view that article 16 should be kept as it is, since under the principle of territorial sovereignty a State has the power to tax any person, including a foreign State, on the understanding, to be inserted in the commentary, that article 4 already makes it clear that the privileges and immunities of diplomatic or consular State property under international law shall not be prejudiced.

170. As to the comment of Spain, the Special Rapporteur considers that the point is covered by the words "Unless otherwise agreed between the States concerned".

Article 17

171. The text adopted reads as follows:

Article 17. Participation in companies or other collective bodies

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 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.

(a) Summary of the comments of Governments

172. Comments on article 17 were submitted by the following Member States:

Germany, Federal Republic of	(see above, p. 70, para. 18)
Mexico	(see above, p. 74, para. 26)
Thailand	(see above, p. 81, para. 15)

173. With regard to paragraph 1 (*b*), the Federal Republic of Germany expresses the view that the "principal place of business" should be given precedence among the three alternative criteria.

174. Thailand points out that, in order to have international organizations/bodies created by international agreements/treaties unequivocally excluded from the scope of this draft article, it is preferable either to add a new paragraph excluding the application of paragraphs 1 and 2 to such organizations or to substitute the words "membership" and "members" for "participation" and "participants" in paragraph 1.

175. Mexico requests clarification as to the relation between subparagraphs (*a*) and (*b*) of paragraph 1.

(*b*) Recommendations of the Special Rapporteur

176. With respect to the comments of the Federal Republic of Germany, neither the 1972 European Convention (art. 6) nor the United Kingdom *State Immunity Act 1978* (art. 8) gives precedence to the "principal place of business".

177. Substitution of the words "membership" and "members" for "participation" and "participants" does not seem to be necessary.

Article 18

178. The text adopted reads as follows:

Article 18. 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 proceeding 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.

(*a*) Summary of the comments of Governments

179. Comments on article 18 were submitted by the Governments of the following Member States:

Australia	(see above, p. 51, paras. 35-36)
Belgium	(see above, p. 57, para. 7)
Brazil	(see above, p. 58, para. 8)
Byelorussian SSR	(see above, p. 60, para. 13)
Germany, Federal Republic of	(see above, p. 70, paras. 19-24)
Mexico	(see above, p. 74, paras. 27-28)
Nordic countries	(see above, p. 77, para. 6)
Spain	(see above, p. 79, para. 12)
Thailand	(see above, p. 81, para. 16)
USSR	(see above, p. 82, para. 15)
United Kingdom	(see above, p. 84, paras. 26-31)
Yugoslavia	(see above, p. 91, para. 7)

and by the Government of one non-member State:

Switzerland	(see above, p. 92, para. 30)

180. With regard to paragraphs 1 and 4, the United Kingdom expresses the view that the term "non-governmental" in square brackets should be deleted on the ground that the introduction of this adjective in addition to the adjective "commercial" might impose additional restriction on the scope of the provisions and thereby unwarrantably broaden the circumstances in which States can claim immunity in respect of their commercial activities. The Federal Republic of Germany and the five Nordic countries expressed a similar view in this regard.

181. The United Kingdom further proposes the deletion of the word "exclusively" in those two paragraphs for the same reason.

182. On the other hand, Thailand is of the view that the term "non-governmental" should be retained, while Yugoslavia points out that the possibility of a ship being used for commercial but also governmental purposes should also be taken into account.

183. With regard to paragraph 2, Australia suggests that it should more clearly stipulate that warships and other government ships operated for non-commercial purposes are to enjoy total immunity from the jurisdiction of any State other than the flag State.

184. As regards paragraph 3, which stipulates the definition of "proceeding relating to the operation of that ship", the United Kingdom suggests that the more extensive definition of "maritime claim" should be retained, as, for instance, that given in article 1 (1) of the International Convention relating to the Arrest of Seagoing Ships, signed at Brussels on 10 May 1952.[11]

185. With regard to paragraph 7, the United Kingdom points out that any certificate provided in accordance with this paragraph would not be conclusive, while Belgium proposes that this paragraph be deleted in order to avoid having the commercial character of ships depend on the assessment of the State.

186. In this regard, Mexico indicates that a simple statement by the competent authorities must always be regarded as reliable evidence that an activity pertains to a State.

187. The USSR considers that article 18 creates a number of complex problems for many States and that the introduction into the draft articles of the concept of separate State property could considerably facilitate the solution of these problems. The Byelorussian SSR expresses a similar view in this regard.

188. Brazil observes that the exception to State immunity relating to State-owned or State-operated ships engaged in commercial service is to be found in the generally accepted practice of States.

189. Spain suggests that in the Spanish text the words *oficial* and *únicamente* should be used instead of *gubernamental* and *exclusivamente* respectively (in English, "only" instead of "exclusively"), in line with the terminology of article 96 of the 1982 United Nations Convention on the Law of the Sea.

190. Switzerland suggests that consideration be given to the appropriateness of introducing an analogous provision for aircraft.

(*b*) Recommendations of the Special Rapporteur

191. The Special Rapporteur also feels that the insertion of the term "non-governmental" makes the meaning of paragraph 1 ambiguous and could become an unnecessary source of controversy. Therefore, considering the written comments expressed by a number of Governments, he wishes to propose the deletion of the term "non-governmental" from paragraphs 1 and 4.

Article 19

192. The text adopted reads as follows:

Article 19. 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.

[11] United Nations, *Treaty Series*, vol. 439, p. 193.

(a) Summary of the comments of Governments

193. Comments on article 19 were submitted by the Governments of the following Member States:

Australia	(see above, p. 51, para. 37)
Brazil	(see above, p. 58, para. 8)
Bulgaria	(see above, p. 59, para. 12)
Cameroon	(see above, p. 61, para. 5)
Mexico	(see above, p. 74, para. 29)
Nordic countries	(see above, p. 77, para. 7)
Qatar	(see above, p. 78, para. 9)
Thailand	(see above, p. 81, para. 17)
United Kingdom	(see above, p. 84, para. 32)
Yugoslavia	(see above, p. 91, para. 8)

194. The United Kingdom proposes that both limitative phrases in square brackets be omitted so as not to limit the scope of non-immunity in arbitration. To the same end, Australia and the five Nordic countries express the view that, of the two expressions, "civil or commercial matter" should be retained.

195. Bulgaria considers the article unacceptable on the ground that an arbitration agreement between a State and a natural or juridical person should not mean the automatic waiver of immunity from jurisdiction even in the cases specified. Yugoslavia and Thailand express the view that the term "commercial contract" should be kept, as the meanings of the words "civil" and "matter" are too broad and, consequently, would severely jeopardize the general jurisdictional immunity of States.

196. Cameroon likewise points out that the State party to an arbitration agreement should retain the right to invoke its immunity before the court of a State which is not involved or designated in the agreement unless expressly stipulated by the latter.

197. Qatar suggests that in subparagraph (*c*) the words "the recognition and enforcement or" should be added before the words "the setting aside of the award".

198. Australia points out that the position with respect to enforcement of arbitral awards might raise different and very difficult problems which should be dealt with explicitly.

199. Mexico indicates that, in case of the setting aside of the arbitration, a court which had had jurisdiction by virtue of that agreement should first verify its jurisdiction over the defendant State in the light of other legal prescriptions.

(b) Recommendations of the Special Rapporteur

200. With regard to the expressions "commercial contract" and "civil or commercial matter" presently in square brackets as alternatives, the Special Rapporteur considers, as do a number of countries, that the latter expression is preferable, in view of the increased importance of arbitration as a means of settlement of conflicts arising from commercial and civil matters between a State and a natural or juridical person, and on the ground that there seems to be no reason to limit the forum State's supervisory jurisdiction to a "commercial contract".

201. As to the suggestion of Qatar to add the words "the recognition and enforcement or" in subparagraph (*c*), the point seems to be covered by the words "validity" in subparagraph (*a*) and "arbitration procedure" in subparagraph (*b*) respectively.

202. As to the comment of Mexico, a court of the State of the forum exercises supervisory jurisdiction under its internal law, including its private international law, and this point can be explained in the commentary.

Article 20

203. The text adopted reads as follows:

Article 20. Cases of nationalization

The provisions of the present articles shall not prejudice any question that may arise in regard to extraterritorial effects of measures of nationalization taken by a State with regard to property, movable or immovable, industrial or intellectual.

(a) Summary of the comments of Governments

204. Comments on article 20 were submitted by the Governments of the following Member States:

Australia	(see above, p. 51, para. 38)
German Democratic Republic	(see above, p. 67, para. 23)
Germany, Federal Republic of	(see above, p. 70, para. 25)
Mexico	(see above, p. 74, para. 30)
Thailand	(see above, p. 81, para. 18)
USSR	(see above, p. 82, para. 16)

205. Australia observes that the meaning and precise significance of article 20 are far from clear.

206. The German Democratic Republic expresses the view that measures of nationalization, as sovereign acts, are not subject to the jurisdiction of another State and that article 20, which allows the conclusion that nationalization measures are an exception to the principle of immunity, should be deleted. The USSR and Mexico hold a similar view.

207. Thailand suggests that the article should be placed in part I, as it is not to provide for a limitation or exception to State immunity. Australia expresses the same view.

(b) Recommendations of the Special Rapporteur

208. Extraterritorial effects of measures of nationalization are an area on which the Commission has not been specifically requested to express a legal opinion at present. During the first reading some discussion took place on this problem, but the Commission agreed to retain a general reservation clause such as article 20. The Special Rapporteur prefers to retain article 20 without change.

D. PART IV. STATE IMMUNITY IN RESPECT OF PROPERTY FROM MEASURES OF CONSTRAINT

ARTICLE 21

209. The text adopted reads as follows:

Article 21. State immunity from measures of constraint

A State enjoys immunity, in connection with a proceeding before a court of another State, from measures of constraint, including any measures of attachment, arrest and execution, on the use of its property or property in its possession or control [, or property in which it has a legally protected interest,] unless the property:

(*a*) is specifically in use or intended for use by the State for commercial [non-governmental] purposes and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed; or

(*b*) has been allocated or earmarked by the State for the satisfaction of the claim which is the object of that proceeding.

(*a*) Summary of the comments of Governments

210. Comments on part IV in general or on article 21 were submitted by the Governments of the following Member States:

Australia	(see above, p. 51, para. 39)
Belgium	(see above, p. 57, para. 8)
Bulgaria	(see above, p. 59, para. 13)
Byelorussian SSR	(see above, p. 60, paras. 14-15)
Canada	(see above, p. 61, para. 2)
German Democratic Republic	(see above, p. 67, paras. 24-25)
Germany, Federal Republic of	(see above, p. 70, paras. 26-28)
Mexico	(see above, p. 74, para. 31)
Nordic countries	(see above, p. 77, paras. 8-11)
Qatar	(see above, p. 78, paras. 10-11)
Thailand	(see above, p. 81, paras. 19-20)
USSR	(see above, p. 82, para. 17)
United Kingdom	(see above, p. 84, para. 33)
Venezuela	(see above, p. 90, para. 8)
Yugoslavia	(see above, p. 91, para. 9)

and by the Government of one non-member State:

Switzerland	(see above, p. 92, para. 31)

211. The United Kingdom considers that the phrase "or property in which it has a legally protected interest" in square brackets in the introductory clause is vague in itself and uncertain in its effect, so that it might permit a broadening of the present scope of State immunity from execution. The Federal Republic of Germany, Belgium and the five Nordic countries express a similar view. Yugoslavia is also of the opinion that the expression "its property or property in its possession or control" should be kept. Thailand and Venezuela, on the other hand, propose that the words "or property in which it has a legally protected interest" be retained.

212. With regard to subparagraph (*a*), the United Kingdom and Australia consider that the term "non-governmental" in square brackets should be omitted for the reasons given in relation to article 18 (see para. 180 above).

213. With regard to the phrase "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed" in subparagraph (*a*), the United Kingdom expresses the view that its inclusion might impose an unnecessary limitation upon the cases in which property may legitimately be subject to measures of constraint. Australia, Canada, the five Nordic countries, Qatar and Switzerland share this view.

214. With regard to subparagraph (*b*), the Nordic countries consider that the right to execute should not be limited to property that "has been allocated or earmarked by the State for the satisfaction of the claim".

215. Mexico proposes a different formulation of article 21 that is similar in concept to the present text but does not contain the concept expressed in its subparagraph (*b*), since no court may require a State to post bond or designate property with a view to the execution of a judgment.

216. The German Democratic Republic expresses the view that only the principle of the immunity of a foreign State from measures of constraint, laid down in the first part of article 21, should be incorporated, while subparagraphs (*a*) and (*b*) should be deleted. The Byelorussian SSR points out that a more precise formulation is needed for the article. The USSR indicates, in a similar manner, that subparagraph (*a*) significantly limits the principle of the inadmissibility of measures of constraint against a State.

(*b*) Recommendations of the Special Rapporteur

217. With regard to the phrase "or property in which it has a legally protected interest" in square brackets, the Special Rapporteur agrees with the view of a number of Governments that it should be deleted owing to the uncertainty of its meaning.

218. As regards the term "non-governmental" in square brackets in subparagraph (*a*), the Special Rapporteur considers that it should be deleted for the same reasons as those given in relation to article 18 (see para. 191 above).

219. As to the phrase "and has a connection with the object of the claim" in subparagraph (*a*), the Special Rapporteur feels that in view of the preceding phrase, namely "specifically in use or intended for use by the State for commercial purposes", further limitation does not seem to be necessary. Therefore, the words "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed" should be deleted.

220. With regard to the proposal of the German Democratic Republic to delete subparagraphs (*a*) and (*b*), in view of the comments of Australia, Belgium, Canada, the Federal Republic of Germany, the five Nordic countries, Qatar, the United Kingdom and Switzerland, the Special Rapporteur considers it to be unacceptable, as it might

lead to the total inadmissibility of measures of constraint against a State. The Special Rapporteur is of the view that the restrictions on immunity formulated in subparagraphs (*a*) and (*b*) are necessary in order to prevent a broadening of the scope of immunity related to measures of constraint.

ARTICLE 22

221. The text adopted reads as follows:

Article 22. Consent to measures of constraint

1. A State cannot invoke immunity, in connection with a proceeding before a court of another State, from measures of constraint on the use of its property or property in its possession or control [, or property in which it has a legally protected interest,] if and to the extent that it has expressly consented to the taking of such measures in respect of that property, as indicated:

(*a*) by international agreement;

(*b*) in a written contract; or

(*c*) by a declaration before the court in a specific case.

2. Consent to the exercise of jurisdiction under article 8 shall not be held to imply consent to the taking of measures of constraint under part IV of the present articles, for which separate consent shall be necessary.

(*a*) Summary of the comments of Governments

222. Comments on article 22 were submitted by the Governments of the following Member States:

Australia	(see above, p. 51, paras. 40-41)
Brazil	(see above, p. 58, para. 9)
Canada	(see above, p. 61, para. 2)
Mexico	(see above, p. 74, para. 32)
Thailand	(see above, p. 81, paras. 21-22)
United Kingdom	(see above, p. 84, para. 34)

223. The United Kingdom has some doubts, as in the case of article 8 (see para. 85 above), about the requirement that consent other than by an international agreement or in a written contract must be given *in facie curiae*. Australia considers that, as for article 8, it would be preferable to adopt the less restrictive formula used in article 2 (*c*) of the 1972 European Convention. Canada shares these views.

224. Thailand suggests, as it did in the case of article 21, that the phrase "or property in which it has a legally protected interest" in square brackets in paragraph 1 be retained and that the amendments which it proposed in relation to article 8 (see paras. 82 and 85 above) be made also to paragraph 1 (*a*) and (*c*) of article 22.

225. Mexico points out that any waiver in regard to measures of execution is valid only if made in respect of proceedings in which the State does not enjoy immunity; that property in respect of which execution is agreed to must be in the territory of the State of the forum and be related directly to the activities which gave rise to the suit; and that consent to execution may be given only by the competent organ of the State.

(*b*) Recommendations of the Special Rapporteur

226. With regard to the phrase "or property in which it has a legally protected interest" in square brackets in paragraph 1, the Special Rapporteur considers that it should be deleted as in article 21 (see para. 217 above).

ARTICLE 23

227. The text adopted reads as follows:

Article 23. Specific categories of property

1. The following categories of property of a State shall not be considered as property specifically in use or intended for use by the State for commercial [non-governmental] purposes under subparagraph (*a*) of article 21:

(*a*) property, including any bank account, which is in the territory of another State and is used or intended for use for the purposes of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences;

(*b*) property of a military character or used or intended for use for military purposes;

(*c*) property of the central bank or other monetary authority of the State which is in the territory of another State;

(*d*) property forming part of the cultural heritage of the State or part of its archives which is in the territory of another State and not placed or intended to be placed on sale;

(*e*) property forming part of an exhibition of objects of scientific or historical interest which is in the territory of another State and not placed or intended to be placed on sale.

2. A category of property, or part thereof, listed in paragraph 1 shall not be subject to measures of constraint in connection with a proceeding before a court of another State, unless the State in question has allocated or earmarked that property within the meaning of subparagraph (*b*) of article 21, or has specifically consented to the taking of measures of constraint in respect of that category of its property, or part thereof, under article 22.

(*a*) Summary of the comments of Governments

228. Comments on article 23 were submitted by the Governments of the following Member States:

Australia	(see above, p. 51, para. 42)
Brazil	(see above, p. 58, para. 9)
Bulgaria	(see above, p. 59, para. 13)
German Democratic Republic	(see above, p. 67, para. 26)
Germany, Federal Republic of	(see above, p. 70, paras. 29-32)
Mexico	(see above, p. 74, para. 33)
Nordic countries	(see above, p. 77, para. 12)
Qatar	(see above, p. 78, para. 12)
Thailand	(see above, p. 81, para. 23)
United Kingdom	(see above, p. 84, para. 35)
Venezuela	(see above, p. 90, para. 9)

and by the Government of one non-member State:

Switzerland	(see above, p. 92, para. 32)

229. The Federal Republic of Germany considers that the bracketed addition "non-governmental" in paragraph 1 should be deleted, while Thailand holds the view that it should be retained without square brackets.

230. With regard to paragraph 1 (*a*), the United Kingdom considers that it may be desirable to make it clear that the phrase "for the purposes of the diplomatic mission" refers to the purposes of the mission's purely diplomatic functions. Australia, the Federal Republic of Germany and Switzerland support this view.

231. Venezuela is of the opinion that paragraph 1 (*a*) should be retained in its present wording, with its link to the introductory clause of article 23, on the understanding that such property should not be considered as property used or intended for use specifically by the State for commercial purposes.

232. With regard to paragraph 1 (*b*), the United Kingdom points out that there may be room for misinterpretation of the phrase "of a military character".

233. With regard to paragraph 1 (*c*), the Federal Republic of Germany considers that there is no clear justification for a complete immunity of central bank property and that it should be made clear that immunity may only be claimed by such property of central banks or other authorities of foreign States as serves monetary purposes. Australia, the five Nordic countries and Qatar submit similar comments in this regard.

234. With regard to paragraph 2, the German Democratic Republic considers that, as presently worded, it annuls the special precautionary measure to protect certain categories of property against any measures of constraint and should therefore be eliminated.

235. Mexico is of the opinion that certain property, such as the cultural heritage of a State, the property of the central bank or the property of a diplomatic or consular representative, may not be subject to measures of constraint even if consent to execution is given.

236. Brazil points out that it is not strictly necessary to list the specific categories of property in use for commercial purposes in view of the very nature of the property mentioned.

237. Bulgaria indicates that, in view of the right of States to determine in each specific case the purposes for which their property is used, the exceptions to property used for commercial (non-governmental) purposes should not be interpreted as exhaustive.

(*b*) Recommendations of the Special Rapporteur

238. With regard to the term "non-governmental" in square brackets in paragraph 1, the Special Rapporteur considers that it should be deleted, as in articles 18 and 21 (see paras. 191 and 218 above).

239. With regard to paragraph 1 (*c*), the Special Rapporteur considers that the words "and serves monetary purposes" should be added in order not to permit immunity for the entire central bank property.

(*c*) Proposed new text

240. In view of the comments of Governments, in particular those of the German Democratic Republic, the Special Rapporteur proposes that paragraph 2 of article 23 be amended to read:

"Article 23. Specific categories of property

". . .

"2. Notwithstanding the provisions of article 22, a category of property, or part thereof, listed in paragraph 1 shall not be subject to measures of constraint in connection with a proceeding before a court of another State unless the State in question has allocated or earmarked that property within the meaning of subparagraph (*b*) of article 21."

E. PART V. MISCELLANEOUS PROVISIONS

ARTICLE 24

241. The text adopted reads as follows:

Article 24. Service of process

1. Service of process by any writ or other document instituting a proceeding against a State shall be effected:

(*a*) in accordance with any special arrangement for service between the claimant and the State concerned; or

(*b*) failing such arrangement, in accordance with any applicable international convention binding on the State of the forum and the State concerned; or

(*c*) failing such arrangement or convention, by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned; or

(*d*) failing the foregoing, and if permitted by the law of the State of the forum and the law of the State concerned:

(i) by transmission by registered mail addressed to the head of the Ministry of Foreign Affairs of the State concerned requiring a signed receipt; or

(ii) by any other means.

2. Service of process by the means referred to in paragraph 1 (*c*) and (*d*) (i) is deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs.

3. These documents shall be accompanied, if necessary, by a translation into the official language, or one of the official languages, of the State concerned.

4. Any State that enters an appearance on the merits in a proceeding instituted against it may not thereafter assert that service of process did not comply with the provisions of paragraphs 1 and 3.

(*a*) Summary of the comments of Governments

242. Comments on article 24 were submitted by the Governments of the following Member States:

Canada	(see above, p. 61, para. 3)
German Democratic Republic	(see above, p. 67, para. 28)
Mexico	(see above, p. 74, para. 34)
Nordic countries	(see above, p. 77, para. 13)

243. The five Nordic countries point out that draft article 24 seems to be overly ambitious since the special arrangements for service of process between the claimant and the State concerned provided for in paragraph 1 (*a*) cannot be taken into account in many national legal systems.

244. Canada considers that the service of process provided for in paragraph 2 should be deemed to have been effected by the "transmission" of the documents to the Ministry of Foreign Affairs, rather than by their "receipt".

245. The German Democratic Republic expresses the view that service of process or other document should be effected, as a matter of principle, by transmission through diplomatic channels.

246. Mexico states that it is imperative that service of process should always be effected in a regular manner so that the matter can be dealt with through appropriate channels and the State is not left undefended.

(*b*) Recommendations of the Special Rapporteur

247. In view of the comments of the Nordic countries and of the German Democratic Republic, it would not be proper to refer to a special arrangement between the claimant and the State, since such practice does not seem to be accepted in many legal systems. Therefore, it would be more appropriate to refer to an international agreement between the States concerned and, failing that, to transmission through diplomatic channels.

(*c*) Proposed new text

248. The Special Rapporteur proposes that paragraphs 1 and 2 of article 24 be amended to read:

"Article 24. Service of process

"1. Service of process by writ or other document instituting a proceeding against a State shall be effected:

"(*a*) in accordance with any applicable international convention binding on the State of the forum and the State concerned; or

"(*b*) failing such convention, by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned; or

"(*c*) failing the foregoing, and if permitted by the law of the State of the forum and the law of the State concerned:

(i) by transmission by registered mail addressed to the head of the Ministry of Foreign Affairs of the State concerned requiring a signed receipt; or

(ii) by any other means.

"2. Service of process referred to in paragraph 1 (*b*) is deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs.

". . ."

ARTICLE 25

249. The text adopted reads as follows:

Article 25. Default judgment

1. No default judgment shall be rendered against a State except on proof of compliance with paragraphs 1 and 3 of article 24 and the expiry of a period of time of not less than three months from the date on which the service of the writ or other document instituting a proceeding has been effected or is deemed to have been effected in accordance with paragraphs 1 and 2 of article 24.

2. A copy of any default judgment rendered against a State, accompanied if necessary by a translation into the official language or one of the official languages of the State concerned, shall be transmitted to it through one of the means specified in paragraph 1 of article 24 and any time-limit for applying to have a default judgment set aside, which shall be not less than three months from the date on which the copy of the judgment is received or is deemed to have been received by the State concerned, shall begin to run from that date.

(*a*) Summary of the comments of Governments

250. Comments on article 25 were submitted by the Governments of the following Member States:

German Democratic Republic	(see above, p. 67, para. 29)
Germany, Federal Republic of	(see above, p. 70, para. 33)
Spain	(see above, p. 79, para. 13)
Venezuela	(see above, p. 90, para. 10)

251. The Federal Republic of Germany suggests the addition in paragraph 1 of the words "if the court has jurisdiction" since there is a danger that a default judgment will be rendered merely by virtue of due service of process in accordance with article 24.

252. The German Democratic Republic expresses the view that the implication in article 25 that a State may be deemed to have received certain documents should be eliminated in the redrafting process.

253. Spain drew attention to a correction to be made in the Spanish text. Venezuela observed that paragraph 2 needed clarifying.

(*b*) Recommendations of the Special Rapporteur

254. The concern expressed by the Federal Republic of Germany and the German Democratic Republic with regard to the possibility of a default judgment being rendered against the defendant State merely by virtue of due service of process may be covered in practice if article 24 is revised as recommended and service of process is thereby effected either in accordance with an international agreement or through diplomatic channels.

ARTICLE 26

255. The text adopted reads as follows:

Article 26. Immunity from measures of coercion

A State enjoys immunity, in connection with a proceeding before a court of another State, from any measure of coercion

requiring it to perform or to refrain from performing a specific act on pain of suffering a monetary penalty.

(*a*) Summary of the comments of Governments

256. Comments on article 26 were submitted by the Governments of the following Member States:

Germany, Federal Republic of	(see above, p. 70, para. 34)
Mexico	(see above, p. 74, para. 35)
United Kingdom	(see above, p. 84, para. 36)

257. The Federal Republic of Germany and Mexico doubt whether the restriction of immunity to monetary measures of coercion is appropriate.

258. The United Kingdom, while endorsing the objective of article 26, proposes that it be reformulated in order to make it clear that the immunity which it confers means that a domestic court should not make orders against the Government of another State.

(*b*) Recommendations of the Special Rapporteur

259. It goes without saying that, where a State enjoys immunity in a proceeding before a court of another State, the court has an obligation to respect that immunity and accordingly not to issue an order of monetary coercion. In the present provision, the expression "State enjoys immunity . . . from any measure of coercion" is interpreted to include the obligation not only not to take the actual measure but also not to issue such an order.

ARTICLE 27

260. The text adopted reads as follows:

Article 27. Procedural immunities

1. Any failure or refusal by a State to produce any document or disclose any other information for the purposes of a proceeding before a court of another State shall entail no consequences other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal.

2. A State is not required to provide any security, bond or deposit, however described, to guarantee the payment of judicial costs or expenses in any proceeding to which it is a party before a court of another State.

(*a*) Summary of the comments of Governments

261. Comments on article 27 were submitted by the Governments of the following Member States:

Germany, Federal Republic of	(see above, p. 70, para. 35)
Mexico	(see above, p. 74, paras. 36-37)
United Kingdom	(see above, p. 84, para. 37)

262. The Federal Republic of Germany and the United Kingdom express the view that there is no justification for the non-requirement of security in cases where the State is acting as plaintiff.

263. Mexico points out that a State should not be required to offer surety or bond against execution of a sentence on the premise of being granted access to a higher court.

264. Mexico also deems it necessary to acknowledge the right of each State to invoke immunity through its own diplomatic or consular representatives or other designated officials.

(*b*) Recommendations of the Special Rapporteur

265. In view of the comments of the United Kingdom and the Federal Republic of Germany, paragraph 2 should be amended so as to apply only to a defendant State.

(*c*) Proposed new text

266. The Special Rapporteur proposes that paragraph 2 of article 27 be amended to read:

"Article 27. Procedural immunities

". . .

"2. A State which is a defendant in a proceeding before a court of another State is not required to provide any security, bond or deposit, however described, to guarantee the payment of judicial costs or expenses in any proceeding to which it is a party before a court of another State."

ARTICLE 28

267. The text adopted reads as follows:

Article 28. Non-discrimination

1. The provisions of the present articles shall be applied on a non-discriminatory basis as between the States Parties thereto.

2. However, discrimination shall not be regarded as taking place:

(*a*) where the State of the forum applies any of the provisions of the present articles restrictively because of a restrictive application of that provision by the other State concerned;

(*b*) where by agreement States extend to each other treatment different from that which is required by the provisions of the present articles.

(*a*) Summary of the comments of Governments

268. Comments on article 28 were submitted by the Governments of the following Member States:

Australia	(see above, p. 51, paras. 43-44)
German Democratic Republic	(see above, p. 67, para. 30)
Mexico	(see above, p. 74, para. 38)
United Kingdom	(see above, p. 84, para. 38)

269. The United Kingdom, while pointing out the necessity of including article 28 in order to preserve the requisite flexibility to accommodate further developments in State practice, suggests that reconsideration be given to its formulation, which is not entirely apt to give effect to the intention underlying it.

270. Australia points out that, as article 28 is concerned essentially with the question of reciprocity, there seems to be no rational basis for limiting such reciprocity to "agreement" in paragraph 2 (*b*).

271. The German Democratic Republic proposes the deletion of article 28 lest it be invoked to justify unilateral restrictions of immunity that are incompatible with the articles.

272. Mexico suggests the inclusion in paragraph 2 of a subparagraph dealing with situations where the State of the forum extends greater immunity than is granted under the articles.

(*b*) Recommendations of the Special Rapporteur

273. In order to maintain flexibility and to balance two opposing theoretical viewpoints, the Special Rapporteur proposes retaining the article as adopted (see para. 67 above).

III. Additional provisions

PART VI. SETTLEMENT OF DISPUTES

274. The previous Special Rapporteur presented, in his eighth report, proposals regarding dispute-settlement provisions,[12] which were to be considered by the Commission in finalizing the draft articles.[13] Though the Commission did not discuss whether those provisions should be incorporated in the draft, they are reproduced below for reference purposes. Should the Commission so desire, the Special Rapporteur would be willing to present his views on the subject.

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 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.

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

[12] *Yearbook . . . 1986*, vol. II (Part One), pp. 32 *et seq.*, document A/CN.4/396, paras. 43-48.

[13] *Yearbook . . . 1986*, vol. II (Part Two), p. 8, para. 16.

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.