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

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

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NOTE

Instruments relating to jurisdictional immunities of States and their property cited in the present report

Multilateral conventions

	Source
International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (Brussels, 10 April 1926)—hereinafter referred to as the "1926 Brussels Convention"	League of Nations, *Treaty Series*, vol. CLXXVI, p. 199.
and	
Additional Protocol (Brussels, 24 May 1934)	*Ibid.*, p. 214.
European Convention on State Immunity and Additional Protocol (Basel, 16 May 1972)—hereinafter referred to as the "1972 European Convention"	Council of Europe, European Treaty Series, No. 74 (Strasbourg, 1972).

*Incorporating documents A/CN.4/422/Corr.1 and A/CN.4/422/Add.1/Corr.1.

National legislation

The texts listed below, with the exception of the Australian Act, are reproduced in a volume of the United Nations Legislative Series: *Materials on Jurisdictional Immunities of States and Their Property* (Sales No. E/F.81.V.10), part I.

	Source
AUSTRALIA	
Foreign States Immunities Act 1985	Australia, *Acts of the Parliament of the Commonwealth of Australia passed during the year 1985* (Canberra, 1986), vol. 2, p. 2696.
CANADA	
State Immunity Act, 1982	*The Canada Gazette, Part III* (Ottawa), vol. 6, No. 15, 22 June 1982.
PAKISTAN	
State Immunity Ordinance, 1981	*The Gazette of Pakistan* (Islamabad), 11 March 1981.
SINGAPORE	
State Immunity Act, 1979	United Nations, *Materials on Jurisdictional Immunities . . .*, pp. 28 *et seq.*
SOUTH AFRICA	
Foreign States Immunities Act, 1981	Republic of South Africa, *Government Gazette* (Cape Town), vol. 196, No. 7849, 28 October 1981.
UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND	
State Immunity Act 1978	United Kingdom, *The Public General Acts, 1978*, part 1, chap. 33, p. 715.
UNITED STATES OF AMERICA	
Foreign Sovereign Immunities Act of 1976	*United States Code, 1982 Edition*, vol. 12, title 28, chap. 97.

Introduction

1. This second report of the Special Rapporteur deals, as did the previous one, with the entire set of draft articles on jurisdictional immunities of States and their property adopted on first reading by the International Law Commission at its thirty-eighth session, in 1986,[1] after long consideration. In his preliminary report,[2] submitted to the Commission at its fortieth session, in 1988, the Special Rapporteur analysed the comments submitted in response to the Commission's request by the Governments of 24 States[3] and proposed certain amendments to the draft articles in the light of those comments. The present report is additional to the preliminary report, and the two reports should be read together for the purpose of the second reading of the draft articles.[4]

[1] For the text, see *Yearbook . . . 1986*, vol. II (Part Two), pp. 8 *et seq.*

[2] *Yearbook . . . 1988*, vol. II (Part One), p. 96, document A/CN.4/415.

[3] These comments, which were received before 24 March 1988, together with those submitted after that date by the Governments of five other States, are reproduced in *Yearbook . . . 1988*, vol. II (Part One), p. 45, document A/CN.4/410 and Add.1-5.

[4] The following reports of the previous Special Rapporteur may also be mentioned in this connection: second report: *Yearbook . . . 1980*, vol. II (Part One), p. 199, document A/CN.4/331 and Add.1; 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.

I. General comments

2. A closer examination of the comments of Governments shows a clear split of views on the present status of the rule of State immunity in international law.[5] In the light of the two main points of view, the Special Rapporteur will discuss the rule of State immunity in this report and will propose an appropriate approach towards a possible codification of the topic. As a matter of fact, the previous Special Rapporteur, Mr. Sucharitkul, examined

[5] See document A/CN.4/415 (footnote 2 above), paras. 8-10.

State practice concerning the rule of State immunity in detail in his second report and concluded that, in the general practice of States as evidence of customary law, there was no doubt that the principle of State immunity had been firmly established as a norm of customary international law.[6] At that early stage, this conclusion was confirmed as a justification for the Commission to commence work on the topic, and since then the Commission has been making efforts to clarify the extent of the application of the principle of State immunity to the various activities of foreign States.

3. Though the draft articles, which were provisionally adopted in 1986 on first reading, must be tested by reference to accepted principles of international law and emerging State practice, the Commission has already identified the basic concept of the draft—namely, that a State enjoys immunity from the jurisdiction of the court of another State with certain limitations/exceptions.[7] In his preliminary report, the Special Rapporteur tried not to reopen discussion on the theoretical basis of the rule of State immunity. That was why he did not deal in detail with judicial practice and domestic legislation or with international agreements However, after the presentation of the preliminary report, towards the end of the fortieth session, some members of the Commission expressed their preference for hearing about the recent development of the general practice of State immunity in more detail. Although the former Special Rapporteur had already dealt with that in some of his reports in an excellent manner, this is an entirely legitimate request, in particular on the part of those members who have joined the Commission relatively recently. The Special Rapporteur is pleased to respond to it by including in the present report a summary of the recent development of general State practice, without examining in detail the theoretical basis of the rule of State immunity. However, it would be pertinent to stress that what is needed at this stage of second reading is to endeavour to elaborate a new multilateral agreement that would make it possible to reconcile conflicting sovereign interests arising out of the application or non-application of State immunity, rather than mere confirmation of the more fundamental principle of sovereignty in this specific area.

4. One point of view that appeared in the comments of Governments is that a State is absolutely immune from the jurisdiction of a foreign court in practically all circumstances, unless it has expressly consented to submit to such jurisdiction. According to this position, absolute immunity is a norm of general international law and, consequently, States which do not abide by it violate international law. Several States, such as Bulgaria, China, the German Democratic Republic, the Soviet Union and Venezuela, have apparently supported this doctrine,[8] which rests in part on the fact that for some time in the past it was the rule predominantly applied by the courts of several States. However, the doctrine of absolute immunity has gradually given way to a doctrine of restricted immunity, and therefore it now appears that there is no existing rule of customary international law which automatically requires a State to grant jurisdictional immunity to other States in general terms.[9] This process, in which domestic courts have adopted a restrictive view of immunity, will be examined briefly below.

5. The doctrine of absolute immunity appears to have been entrenched in the judicial practice of the nineteenth century. The following selective State practice can be suggested. In France, the Cour de cassation, in the *Gouvernement espagnol* v. *Casaux* case (1849),[10] affirmed the doctrine of absolute immunity in respect of private law acts, by applying the general principle that a Government might not be subjected to the jurisdiction of a foreign State with respect to commitments which it might have entered into.[11] At the beginning of this century, the German courts also began to embrace the doctrine of absolute immunity. For example, in the *Hellfeld* v. *den Fiskus des russischen Reiches* case (1910),[12] the Prussian Court for Conflicts of Jurisdiction took the view that the distinction between the State as exercising its sovereignty and the State as appearing in its private law personality had not been generally recognized in international law. Again, in the *Polish Loans* case (1921)[13] the same court supported the rule of absolute immunity by holding that, according to international law, a foreign State, both in its public capacity and in transactions of a private law nature, was not subject to the jurisdiction of the courts of another country, except in cases of voluntary submission and in matters involving immovable property.[14] In the United Kingdom, the lower courts generally followed the absolute doctrine after 1880, at least with respect to arrest or attachment of foreign State-owned vessels,[15] though in *The "Cristina"* (1938)[16] some Lords in the highest court reserved their view as to whether the doctrine was applicable in international law.[17] In addition to this selective case law, it has often been said that the courts of many countries, including the United States of America, Australia, India and South Africa, adhered to the absolute immunity doctrine in the past.[18]

6. On the other hand, even at that early stage, especially in the 1920s and the 1930s, the courts of Belgium[19]

[6] Document A/CN.4/331 and Add.1 (footnote 4 above), para. 90.

[7] See document A/CN.4/415 (footnote 2 above), paras. 66 and 110.

[8] *Ibid.*, para. 11.

[9] But for the view held by some States that the principle of jurisdictional immunity of States is universally recognized in international law, see document A/CN.4/410 and Add.1-5 (footnote 3 above), comments of, for example, Bulgaria (para. 3) and China (para. 1).

[10] Dalloz, *Recueil périodique et critique de jurisprudence, 1849* (Paris), part I, p. 9; Sirey, *Recueil général des lois et des arrêts, 1849* (Paris), part I, p. 93.

[11] See S. Sucharitkul, "Immunities of foreign States before national authorities", *Collected Courses of The Hague Academy of International Law, 1976-I* (Leyden, Sijthoff, 1977), vol. 149, pp. 140-141.

[12] *Zeitschrift für internationales Recht* (Leipzig), vol. XX (1910), p. 416; *The American Journal of International Law*, vol. 5 (1911), p. 490.

[13] *Annual Digest of Public International Law Cases, 1919-1922* (London, 1932), p. 116, case No. 78.

[14] See I. Sinclair, "The law of sovereign immunity. Recent developments", *Collected Courses . . ., 1980-II* (Alphen aan den Rijn, Sijthoff & Noordhoff, 1981), vol. 167, pp. 130-131.

[15] *Ibid.*, pp. 121-127.

[16] United Kingdom, *The Law Reports, House of Lords, Judicial Committee of the Privy Council, 1938*, p. 485.

[17] See Sucharitkul, *loc. cit.* (footnote 11 above), p. 162.

[18] See I. Brownlie, *Principles of Public International Law*, 3rd ed. (Oxford, Clarendon Press, 1979), pp. 328-329, footnote 5.

[19] See Sucharitkul, *loc. cit.*, pp. 132-135.

and Italy[20] developed and applied the so-called restrictive theory, which denied immunity to foreign States in proceedings arising out of acts done in a non-sovereign capacity (acts *jure gestionis*). As early as 1879, a Belgian court denied immunity in proceedings arising out of a contract for the sale of guano, observing that there can no longer be any question of sovereignty when a foreign Government "takes actions and enters into contracts which, always and everywhere, have been considered to be commercial contracts, subject to the jurisdiction of commercial courts".[21] One scholar, after an extensive survey of State practice, published in 1933, concluded, with regard to the restricted immunity doctrine based on the distinction between acts *jure imperii* and acts *jure gestionis*, that the idea that this distinction was "peculiar to Belgium and Italy must be enlarged to include Switzerland, Egypt, Romania, France, Austria and Greece".[22] Since then, the distinction between acts *jure imperii* and acts *jure gestionis* has been developed and applied in a number of important civil law countries in Western Europe.[23]

7. As the practice of State trading has spread rapidly, particularly since 1945, the number of States rejecting the absolute theory has continued to grow up to this day. In the United States, the Supreme Court in the *Berizzi Brothers Co.* v. *SS "Pesaro"* case (1926)[24] upheld the immunity of a vessel owned and operated by the Italian Government and engaged in the carriage of passengers and cargo to the United States.[25] But in subsequent cases the Court took the position that the granting of State immunity was a matter of national policy as determined by the executive branch of the Government, and thereafter, in 1952, the Department of State announced that it espoused the restrictive theory in the so-called "Tate letter".[26] The present position in the United States is governed by the provisions of the *Foreign Sovereign Immunities Act of 1976*, which reflects the restricted immunity doctrine. The United Kingdom courts admitted the applicability of the restrictive theory in *The "Philippine Admiral"* (1975).[27] In this case the Judicial Committee of the Privy Council, breaking the tradition, held that a foreign State could not claim immunity from jurisdiction in an action *in rem* against a vessel owned by that State if the vessel was being used in commercial service by the Government of that State.[28] In this connection, reference to the opinion of two members of the English Court of Appeal, Lord Denning and Lord Justice Shaw, in *Trendtex Trading Corporation Ltd.* v. *Central Bank of Nigeria* (1977)[29] is not without significance; they held that the Bank was not entitled to immunity in an action *in personam*, since the letter of credit on which the plaintiff had sued the Bank was a commercial document. As Lord Denning remarked, in an *obiter dictum* in this case, their position indicates the adoption of the principle that a foreign State has no immunity when it enters into a commercial transaction with a trader in the United Kingdom.[30] Subsequent to this case, the United Kingdom enacted the *State Immunity Act 1978*, which represented the restricted immunity theory.

8. In the Federal Republic of Germany, the former position in favour of the absolute immunity doctrine was decisively rejected in the *Danish State Railways in Germany* case (1953)[31] by the District Court of Kiel, which held that "a State must be subject to the jurisdiction of foreign courts in respect of activities of a private and civil nature", such as the operation of bus services by a foreign State in Germany. This restrictive doctrine was also recognized in the decision of the Federal Constitutional Court in 1963 in the *X* v. *Empire of* . . . [Iran] case.[32] After a comprehensive survey of the judicial practice in other States, relevant treaties and the various codification efforts,[33] the Court supported the theory of restricted immunity as follows:

> As a means for determining the distinction between acts *jure imperii* and *jure gestionis* one should rather refer to the nature of the State transaction or the resulting legal relationships, and not to the motive or purpose of the State activity. It thus depends on whether the foreign State has acted in exercise of its sovereign authority, that is in public law, or like a private person, that is in private law.[34]

Such an approach on the issue of State immunity was followed by the courts of other countries, for example by the Austrian Supreme Court in *Dralle* v. *Republic of Czechoslovakia* (1950)[35] and *Holubek* v. *United States* (1961),[36] by the Court of Appeal of Brussels in *S. A. "Eau, gaz, électricité et applications"* v. *Office d'Aide*

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[20] *Ibid.*, pp. 126-132.

[21] *Rau, Vanden Abeele et Cie.* v. *Duruty* case (*Pasicrisie belge, 1879* (Brussels), part 2, p. 175).

[22] E. W. Allen, *The Position of Foreign States before National Courts, Chiefly in Continental Europe* (New York, Macmillan, 1933), p. 301, cited in Sinclair, *loc. cit.* (footnote 14 above), p. 134.

[23] See H. Lauterpacht, "The problem of jurisdictional immunities of foreign States", *The British Year Book of International Law, 1951*, vol. 28, pp. 250-272.

[24] *United States Reports*, vol. 271 (1927), p. 562.

[25] See Sucharitkul, *loc. cit.* (footnote 11 above), p. 155; and G. M. Badr, *State Immunity: An Analytical and Prognostic View* (The Hague, Martinus Nijhoff, 1984), p. 36.

[26] Published in *The Department of State Bulletin* (Washington, D.C.), vol. 26 (1952), pp. 984-985. See Sinclair, *loc. cit.* (footnote 14 above), pp. 161-163.

[27] *Owners of the ship "Philippine Admiral"* v. *Wallem Shipping (Hong Kong) Ltd. and others* (*The All England Law Reports, 1976*, vol. I, p. 78).

[28] See Badr, *op. cit.* (footnote 25 above), pp. 48 and 79; and Sinclair, *loc. cit.* (footnote 14 above), pp. 154-155.

[29] *The All England Law Reports, 1977*, vol. I, p. 881.

[30] See R. Higgins, "Recent developments in the law of sovereign immunity in the United Kingdom", *American Journal of International Law* (Washington, D.C.), vol. 71 (1977), pp. 425-430. See also Badr, *op. cit.* (footnote 25 above), pp. 49-50; and Sinclair, *loc. cit.* (footnote 14 above), pp. 155-156.

[31] *Juristenzeitung* (Tübingen), vol. 9 (1954), p. 117; *International Law Reports, 1953* (London), vol. 20, 1957, p. 178.

[32] *Entscheidungen des Bundesverfassungsgerichtes* (Tübingen), vol. 16 (1964), p. 27; *International Law Reports* (London), vol. 45 (1972), p. 57; United Nations, *Materials on Jurisdictional Immunities* . . ., p. 282.

[33] *International Law Reports*, vol. 45, pp. 63-73.

[34] *Ibid.*, p. 80.

[35] *Österreichische Juristen Zeitung* (Vienna), vol. 5 (1950), p. 341, case No. 356; *International Law Reports, 1950* (London), vol. 17 (1956), case No. 41, p. 155; United Nations, *Materials on Jurisdictional Immunities* . . ., p. 183.

[36] *Juristische Blätter* (Vienna), vol. 84 (1962), p. 43; *International Law Reports* (London), vol. 40 (1970), p. 73; United Nations, *Materials on Jurisdictional Immunities* . . ., p. 203.

mutuelle (1956)[37] and by Netherlands courts in *Krol* v. *Bank Indonesia* (1958),[38] *N. V. Cabolent* v. *National Iranian Oil Company* (1968)[39] and *Parsons* v. *Republic of Malta* (1977).[40]

9. Furthermore, several domestic statutes similar to those adopted by the United Kingdom and the United States of America have recently been enacted by other countries, including Singapore (1979), Pakistan (1981), South Africa (1981), Canada (1982) and Australia (1985). These codification efforts clearly refused the general principle of the absolute immunity of a foreign State and adhered to the restrictive principle of State immunity. Attention has also been drawn to certain relevant treaty practice, particularly in the field of commercial activities by a foreign State and its agencies. The 1926 Brussels Convention and its Additional Protocol of 1934 preserved State jurisdictional immunity only for public vessels of a non-commercial nature. This principle was confirmed by the 1958 Convention on the Territorial Sea and the Contiguous Zone,[41] which treated public ships operated for commercial purposes in the same manner as private merchant ships, abandoning the distinction between public and private ships based only upon their ownership.[42]

10. In the light of the preceding brief sketch of State practice from the nineteenth century to the present period, it can no longer be maintained that the absolute theory of State immunity is a universally binding norm of customary international law.[43] However, it might be argued that the doctrine of absolute immunity is still the norm on which States that have not consented to its modification could rely. But, as the previous Special Rapporteur suggested in his sixth report,[44] unless the advocates of the absolute doctrine provide "concrete evidence of a judicial decision allowing immunity in cases where it would have been denied in countries practising restricted immunity", the restrictive trends could not be denied simply by enunciation of an opposing doctrine or by mere declaration of an absolute principle.[45] A crucial fact is that "the judicial practice of the States that had upheld absolute immunity has now radically changed"[46] and, therefore, there is no general consensus in favour of absolute immunity.

11. The Special Rapporteur will refer next to the rule of State immunity from the opposite point of view. The question is whether general international law now leaves a State free to deny immunity to other States as it sees fit. If the rule of State immunity is governed by international law, we can suppose that international law contains a norm limiting the freedom of States to deny immunity to other States. However, the problem of the scope of limitations on this freedom has not been resolved so as to permit any precise formulation which would meet general consensus. Indeed, advocates of the restrictive doctrine of State immunity have proposed that acts of a foreign State can be divided into two categories, acts *jure imperii* and acts *jure gestionis*, and that the foreign State is entitled to immunity only with respect to the first category. Unfortunately, in practice this distinction has posed difficulties in its application to various types of State activity.[47] This seems to be one of the reasons why adherents of the doctrine of absolute immunity are hesitant to accept the restrictive trend.[48]

12. With respect to that distinction, the Special Rapporteur will next turn his attention to the question of the so-called "purpose or nature" test. According to the restrictive theory, acts *jure imperii* are acts done by a State for a "public purpose", and it is only for such acts that immunity is or should be accorded. But the purpose criterion has been rejected in judicial practice and criticized by international lawyers because all acts performed by a State could be assumed to have some public purpose.[49] Therefore, some courts have considered the nature of the act of a foreign State determinative.[50] According to the nature test, the foreign State is not entitled to immunity if the act is of such nature that a private person could perform it. Yet the nature test also gives rise to difficulties. A foreign State being sued for breach of a contract with a private person should not be granted immunity; but, if one supposes that private persons in general do not maintain armed forces, it follows that a foreign State is entitled to immunity in a proceeding concerning a contract for the purchase of supplies for such forces.[51]

13. As to the difficulty in applying the "purpose or nature" test, one scholar, examining recent judicial

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[37] *Pasicrisie belge* (Brussels), 1957, part II, p. 88; *International Law Reports, 1956* (London), vol. 23 (1960), p. 205.

[38] *Nederlandse Jurisprudentie* (Zwolle), No. 164 (1959); *International Law Reports, 1958-II* (London), vol. 26 (1963), p. 180.

[39] *Nederlandse Jurisprudentie* (Zwolle), No. 484 (1969); *International Law Reports* (London), vol. 47 (1974), p. 138; United Nations, *Materials on Jurisdictional Immunities . . .*, p. 344.

[40] See *Netherlands Yearbook of International Law*, vol. IX (1978), pp. 272-273.

[41] United Nations, *Treaty Series*, vol. 516, p. 205.

[42] See Brownlie, *op. cit.* (footnote 18 above), p. 329; see also the argumentation of the Federal Constitutional Court in *X* v. *Republic of the Philippines* (1977) (United Nations, *Materials on Jurisdictional Immunities . . .*, pp. 310-311).

[43] See, for example, Sinclair, *loc. cit.* (footnote 14 above), pp. 214-217.

[44] Document A/CN.4/376 and Add.1 and 2 (see footnote 4 above), para. 46.

[45] Badr also refers to this "implicit general acquiescence in the restricted rule of immunity" as follows:

"A fact worthy of being pointed out is that there is no record of any protests or other diplomatic representations made over the years to any of the States applying the restrictive rule by those other States who have failed in their pleas before the courts of the former. Had there been a perception that under international law States were entitled to immunity from the jurisdiction of other States, those increasing 'violations' of such a rule of general international law would not have failed to elicit appropriate reactions from the 'injured' States." (*Op. cit.* (footnote 25 above), pp. 33-34.)

[46] Document A/CN.4/376 and Add.1 and 2 (see footnote 4 above), para. 47.

[47] See, for example, Sinclair, *loc. cit.* (footnote 14 above), pp. 210-214.

[48] According to C. Schreuer, *State Immunity: Some Recent Developments* (Cambridge, Grotius Publications, 1988):

"In fact, one of the main arguments of the proponents of absolute immunity has always been that it is impossible to draw the line between the two types of State activity. . . ." (P. 41.)

[49] See, for example, Brownlie, *op. cit.*, (footnote 18 above), pp. 330-332.

[50] See, for example, Sucharitkul, *loc. cit.* (footnote 11 above), p. 187.

[51] See, for example, Sinclair, *loc. cit.* (footnote 14 above), pp. 213-214; Brownlie, *op. cit.*, p. 331.

practice in a number of countries in a work published in 1988,[52] remarks that, while the more recent cases of "contracts for the purchase, transportation or financing of goods for public works" in a defendant foreign State are almost invariably regarded as commercial and non-immune cases, "borderline questions" still remain in cases of "State-run services in areas like transportation, telecommunication or education".[53] In the latter cases, he indicates, the judicial practice varies from country to country, or even from court to court in the same country. However, he goes on to say:

> A borderline area will always remain. But this grey zone can be narrowed if we employ the right criteria and if courts are prepared to look beyond national confines to try and find common international standards.[54]

It may also be noted that the same approach was suggested in 1979 by Ian Brownlie, according to whom the "least objectionable technique" is to clarify the exception from immunity of "a particular type of activity or subject-matter, for example government ships operated for commercial purposes", leaving aside any attempt to establish general criteria for distinguishing between acts *jure imperii* and acts *jure gestionis*.[55]

14. In sum, there is no single, generally accepted meaning either of acts *jure imperii* or of acts *jure gestionis*, though a number of scholars support the principle of restricted immunity. At the same time, however, now that we cannot neglect "a clear and unmistakable trend towards recognition of the principle that the jurisdictional immunity of States is not unlimited",[56] the Special Rapporteur understands that both acts *jure imperii* and acts *jure gestionis* need to be elaborated and defined in objective legal terms.

15. The formulation of article 6 of the draft will be considered from the above point of view. One possible formulation of a general rule of State immunity is as follows:[57]

"*Article 6. State immunity*

"In general, a foreign State shall be immune from the jurisdiction of a forum State for acts performed by it in the exercise of its sovereign authority, i.e. *jure imperii*; it shall not be immune in the circumstances provided in the present articles."

This formulation does not entitle the foreign State to automatic residual immunity, because the foreign State must demonstrate that the conduct subject to litigation was performed in its *jure imperii* capacity, even if the conduct does not fall within one of the express exceptions. Yet such a formulation, which imposes on the foreign State the burden of proving its entitlement to immunity, has never been proposed and is not adopted in the present article 6.[58] The more usual approach in drafting is that, if none of the express exceptions applies, a foreign State is entitled to immunity from jurisdiction; the first alternative formulation of this approach begins with a general rule of immunity and then lists the exceptions to the immunity of a foreign State,[59] and the second alternative lists the exceptions and then provides a residual general rule of immunity.[60]

16. The first alternative formulation mentioned above was used in article 6, but there are two conflicting views as to the possible addition of the bracketed phrase, "and the relevant rules of general international law".[61] The deletion of the phrase might restrict the jurisdiction of some States whose courts are already applying the rule of restricted immunity.[62] It is actually conceivable that some cases covered by the domestic rule fall outside the cases of non-immunity provided for in the draft. In view of the recent developments supporting the doctrine of restricted immunity, the retention of the phrase would not be illogical, as it would allow for the future development of the law on this subject.

17. On the other hand, the retention of the phrase may result in increasing the number of exceptions to immunity by subjecting the provision to unilateral interpretation by a court of the forum State, which would lead to undue restrictions on acts *jure imperii*.[63] Should the deletion of the phrase be admitted for this or other reasons, the Special Rapporteur would propose the inclusion in the draft of the following new article 6 *bis* for the purpose of keeping a balance between the two different views referred to above:

"*Article 6* **bis**

"Notwithstanding the provision of article 6, any State Party may, when signing this Convention or depositing its ratification, acceptance or accession, or at any later date, make a declaration of any exception to State immunity, in addition to the cases falling under articles 11 to 19, according to which the court of that State shall be able to entertain proceedings against another State Party, unless the

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[52] Schreuer, *op. cit.* (footnote 48 above), pp. 17-31.

[53] *Ibid.*, pp. 18 and 26.

[54] *Ibid.*, p. 41.

[55] Brownlie, *op. cit.* (footnote 18 above), p. 331.

[56] Sinclair, *loc. cit.* (footnote 14 above), p. 196.

[57] An example of such a formula may be found in the ILA Montreal Draft Convention on State Immunity approved by ILA at its Sixtieth Conference (Montreal, 29 August-4 September 1982), article II of which reads:

> "*Article II. Immunity of a foreign State from adjudication*
>
> "In general, a foreign State shall be immune from the adjudicatory jurisdiction of a forum State for acts performed by it in the exercise of its sovereign authority, i.e. *jure imperii*. It shall not be immune in the circumstances provided in article III."

(Article III of the draft provides for several exceptions to jurisdictional immunity.) See ILA, *Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), pp. 5 *et seq.*, resolution No. 6, "State immunity".

[58] Article 6 as adopted on first reading provides:

> "*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]." (See footnote 1 above.)

[59] See, for example, the United States Foreign Sovereign Immunities Act of 1976, sects. 1604 and 1605; the United Kingdom State Immunity Act 1978, sects. 1 (1) and 2-11; and the ILA Montreal Draft Convention on State Immunity (see footnote 57 above), arts. II and III.

[60] See, for example, the 1972 European Convention, arts. 1-15.

[61] See document A/CN.4/415 (footnote 2 above), paras. 59-65.

[62] See document A/CN.4/410 and Add.1-5 (footnote 3 above), comments of, for example: Australia, paras. 14-15; Federal Republic of Germany, para. 6; Nordic countries, para. 3; Switzerland, para. 23.

[63] *Ibid.*, comments of: Bulgaria, para. 9; German Democratic Republic, para. 15; USSR, para. 9.

latter State raises objection within thirty days after the declaration was made. The court of the State which has made the declaration cannot entertain proceedings under the exception to State immunity contained in the declaration against the State which has objected to the declaration. Either the State which has made the declaration or the State which has raised objection can withdraw its declaration or objection at any time."

18. It might be too early to predict whether the proposed new article 6 *bis* will be acceptable to a number of States, but the Special Rapporteur believes that it is consistent with the current general trend in State practice towards the restrictive rule of State immunity in international law; in cases falling outside the scope of articles 11 to 19, the draft does not prejudice the extent of jurisdictional immunity already recognized in States which have made the optional declaration under the proposed articles 6 *bis*. At any rate, this provision might be conducive to the formation of a precise rule of customary international law, which could be based upon regular and uniform judicial practice among States—something which thus far has not yet occurred. In this connection, the Special Rapporteur's view is that, if the proposed new article 6 *bis* on the optional declaration is adopted and if the bracketed phrase of article 6 is deleted, article 28 may have to be reconsidered.

Interpretative provisions (article 3)

19. The Special Rapporteur suggested in his preliminary report that paragraph 2 of article 3 be aligned on paragraph 3 of the new article 2 proposed in that report[64] in the light of the fact that several Governments did not agree to the purpose criterion included in the former paragraph because of its subjective or artificial nature. Paragraph 2 of article 3 had been a compromise formula proposed by the Drafting Committee at the thirty-fifth session.[65] The Commission, encountering strong objections to the adoption of the nature test in determining whether or not a contract is commercial, had had to seek a criterion which would also take into account the motive or the ultimate purpose that a foreign State was seeking to achieve by concluding the contract with a private party. That is how the paragraph came to be introduced into the draft. However, this double criterion, referring primarily to the nature of the contract but also to the relevant practice of a foreign State, could lead to uncertainties in application, since the practice of the State is not necessarily clear, and lean to the doctrine of absolute immunity. As far as the text is interpreted literally, the purpose test is to be used as a supplementary one in cases of doubt. But, according to the commentary to paragraph 2 of article 3, "if after the application of the 'nature' test, the contract or transaction appears to be commercial, then it is open to the State to contest this finding by reference to the purpose of the contract or transaction".[66] As one Government commented, the purpose of the contract would almost always be determined on a one-sided basis.[67] Indeed, the double criterion was designed to provide an appropriate protection for developing countries' endeavours in their national economic development. Though the Special Rapporteur does not deny this necessity in formulating this article, he feels that a more balanced criterion could be ensured by the formula appearing in paragraph 3 of the proposed new article 2, according to which reference should be made primarily to the nature of the contract, while its purpose should also be taken into account to the extent that public purpose is clearly stipulated in an international agreement between the States concerned or a written contract between the foreign State and the private party.

[64] A/CN.4/415 (see footnote 2 above), para. 29.

[65] See *Yearbook ... 1983*, vol. I, p. 291, 1805th meeting, para. 68.

[66] *Yearbook ... 1983*, vol. II (Part Two), p. 35, para. (2) of the commentary.

[67] See document A/CN.4/410 and Add.1-5 (footnote 3 above), comments of the United Kingdom, para. 9.

II. Comments on part III of the draft: [Limitations on] [exceptions to] State immunity

ARTICLE 13 (Personal injuries and damage to property)

20. As the previous Special Rapporteur indicated in his fifth report,[68] the relevant provisions in recent codifications provide for the denial of immunity for illegal acts of foreign States which cause death or personal injury or damage to or loss of property. Those enactments usually require a territorial jurisdiction as a limiting factor in the application of the torts exception; for example, in the United Kingdom the State Immunity Act 1978 provides, in section 5 (*b*), that a State is not immune as regards proceedings in respect of certain injury or damage "caused by an act or omission in the United Kingdom". On the other hand, there are two cumulative requirements in article 13 of the draft, which is very similar to article 11 of the 1972 European Convention: "... the author of the act or omission ... [must be] present in that territory at the time of the act or omission". Though in his preliminary report the Special Rapporteur suggested the deletion of the second territorial requirement,[69] this tort exception would not be applicable to tort committed abroad or other transfrontier injurious acts because of the first requirement of territorial connection: the

[68] Document A/CN.4/363 and Add.1 (see footnote 4 above), paras. 86-98.

[69] Document A/CN.4/415 (see footnote 2 above), para. 141.

relevant act or omission must occur "in whole or in part in the territory of the State of the forum".

21. As to the question of State responsibility, the illegality of the act or omission referred to in article 13 is not determined by the rules of international law. According to the commentary to this article, "This exception to the rule of immunity is applicable only to cases or circumstances in which the State concerned would have been liable under the *lex loci delicti commissi*".[70] In other words, the applicable law is in principle the law of the forum State. Next, the Special Rapporteur understands that the phrase "the act or omission which is alleged to be attributable to the State" is not governed by the general requirement of State responsibility. This point should also be clarified in the light of the comments of some Governments.

22. Furthermore, while article 13 covers literally physical injury to the person or damage to tangible property, it might be arguable that the scope of the article would be too wide to get the support of a significant number of States for its formulation. In fact, as far as the intent of the Commission reflected in the commentary is concerned, article 13 was designed to cover mainly accidents occurring routinely within the territory of the forum State. The present text of article 13, which was adopted by the Commission in 1984, is identical with that originally submitted by the previous Special Rapporteur in 1983; it had been replaced in the intervening time by a revised version which narrowed down its application to traffic accidents, for which insurance coverage could usually be sought.[71] In any event, the Commission should reconsider the scope of the article in the light of the fact that liability cases connected with criminal offences have thus far been very few in practice.

ARTICLE 15 (Patents, trade marks and intellectual or industrial property)

23. Some developing countries have raised objections to article 15 because it would have a detrimental effect on their economic growth and development. In general, they think that refraining from enacting legislation to protect industrial or intellectual property is consistent with their national interest, since free reproduction of any new technological advancement in their countries may be for the benefit of the society as a whole. However, article 15 does not in any way affect the competence of a State to select and implement its domestic policies within its territory. In fact, the article has placed two specific territorial restrictions on this proposed exception to State immunity. First of all, the alleged infringement must have occurred within the territory of the forum State, and second, the case must involve rights which are protected in the forum State. Therefore, under article 15 a domestic court could not be empowered to decide infringement occurring outside the territory of the forum State.

ARTICLE 18 (State-owned or State-operated ships engaged in commercial service)

24. The Special Rapporteur proposes that the expression "non-governmental" be deleted because if it is retained paragraphs 1 and 4 could be interpreted to mean that a ship owned by a State and used in commercial service enjoys immunity from the jurisdiction of another State; while all commercial ships in service under a State-trading system might invoke immunity, a commercial ship operating under the free-market system would be subject to local jurisdiction. Such an uneven legal consequence is quite unacceptable to a significant number of States. It was pointed out that, in countries having the State-trading system, a State is the owner of the ship but authorizes an entity separated from the State to use and operate that ship for commercial purposes. In such a case, unless the State could allow the separate operator (the "State enterprise" referred to in article 11 *bis* proposed by the Special Rapporteur in his preliminary report[72]) to answer a claim arising out of the operation of the ship, the State should always be answerable for any causes of action relating to the operation of that ship. This proposal would be consistent with the general trend emerging from such international conventions as the 1926 Brussels Convention, the 1958 Convention on the Territorial Sea and the Contiguous Zone[73] and the 1982 United Nations Convention on the Law of the Sea.[74] In the Brussels Convention, it was recognized that State-owned or State-operated ships and cargoes carried on them were subject to local jurisdiction in the same manner as ordinary private merchant ships, and that State immunity was claimable only in respect of State-owned ships which were used for public or non-commercial purposes. Such a distinction may also be found in the conventions on the law of the sea: the distinction between government ships operated for commercial purposes and those operated for non-commercial purposes.

25. Following the rationale and the wording of these international conventions, the expression "non-governmental" should be deleted in paragraphs 1 and 4 of article 18. With regard to paragraph 6, the Special Rapporteur considers that it should be redrafted because it could be misinterpreted to the effect that States may plead all measures of defence, prescription and limitation of liability only in proceedings relating to the operation of the relevant ships and cargoes. Finally, the Special Rapporteur doubts whether granting immunity to ships owned or operated by the developing countries is advantageous to them in the long run. If they are not answerable for claims in respect of the operation of ships and the cargoes on board those ships, private parties in the developed as well as other developing countries would hesitate to engage in commercial service with the ships owned or operated by such developing countries.

26. With regard to article 18, two Governments said that the introduction into the draft articles of the concept of segregated State property could facilitate the solution of problems relating to State-owned or State-operated ships in commercial service.[75] In view of those comments and the necessity for a new provision similar to the article 11 *bis* proposed by the Special Rapporteur in his pre-

[70] *Yearbook ... 1984*, vol. II (Part Two), p. 66, para. (2) of the commentary to article 14 (now article 13).

[71] *Yearbook ... 1983*, vol. II (Part Two), p. 20, footnote 59.

[72] Document A/CN.4/415 (see footnote 2 above), para. 122.

[73] See footnote 41 above.

[74] *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

[75] See document A/CN.4/410 and Add.1-5 (footnote 3 above), comments of: Byelorussian SSR, para. 13; USSR, para. 15.

liminary report,[76] he suggests that the following new paragraph 1 *bis* be included in article 18:

1 *bis*. If a State enterprise, whether agency or separate instrumentality of the State, operates a ship owned by the State and engaged in commercial service on behalf of the State and, by virtue of the applicable rules of private international law, differences relating to the operation of that ship fall within the jurisdiction of a court of another State, the former State is considered to have consented to the exercise of that jurisdiction in a proceeding relating to the operation of that ship, unless the State enterprise with a right of possessing and disposing of a segregated State property is capable of suing or being sued in that proceeding.

27. The Commission must duly identify the crucial differences between the two major politico-economic systems in the world today, especially in the light of their growing trade relations. However, socialist countries have a distinct advantage under the absolute theory. That is because their trade organizations are an essential part of the State and can easily qualify for immunity. As an attempt to curtail this opportunism, the Special Rapporteur had proposed article 11 *bis*. The same consideration would hold true for article 18.

28. Next, also as regards article 18, one Government suggested that the Commission consider the question of State-owned or State-operated aircraft engaged in commercial service.[77] This question is governed by treaties of international civil aviation law, which include the following:

(*a*) Convention relating to the Regulation of Aerial Navigation (Paris, 13 October 1919)[78] and several additional protocols;

(*b*) Convention for the Unification of Certain Rules relating to International Carriage by Air (Warsaw, 12 October 1929);[79]

(*c*) Convention for the Unification of Certain Rules relating to the Precautionary Attachment of Aircraft (Rome, 29 May 1933);[80]

(*d*) Convention on International Civil Aviation (Chicago, 7 December 1944);[81]

(*e*) Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome, 7 October 1952).[82]

29. In the 1944 Chicago Convention, a distinction is made between State aircraft and civil aircraft; the Convention applies to the latter. According to article 3 (*b*) of the Convention, State aircraft comprise "aircraft used in military, customs and police service". This implies that an aircraft is not to be considered a State aircraft merely by reason of its ownership or operation by the State. It is therefore justifiable to draw the conclusion that State immunity cannot be invoked in proceedings relating to State-owned or State-operated aircraft, except for aircraft used in military, customs and police service.[83] In other words, an aircraft owned or operated by a foreign State is assimilated to a privately owned and operated aircraft (civil aircraft) and is subject to the jurisdiction of the territorial State based on its territorial sovereignty (art. 1). Thus, the Chicago Convention is based on the assumption that a State cannot invoke its immunity in the case where an aircraft owned or operated by that State, being used in commercial service, makes use of the rights and privileges granted by that Convention.

30. The 1929 Warsaw Convention established certain uniform rules relating to the conditions of international carriage by air, including documents of carriage and the liability of the carrier. However, it does not provide for any reservation relating to State immunity. The following provisions should be noted:

Article 1

1. This Convention applies to all international carriage of persons, baggage or goods performed by aircraft for reward. . . .

. . .

Article 2

1. This Convention applies* to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in Article 1.[84]

. . .

Furthermore, pursuant to the 1952 Rome Convention, civil actions concerning obligations or liability can be brought by private claimants in the case of collisions or other accidents of aircraft owned or operated by a State, at least within the framework of that international agree-

[76] See footnote 72 above.

[77] See document A/CN.4/410 and Add.1-5 (footnote 3 above), comments of Switzerland, para. 30.

[78] "1919 Paris Convention" (League of Nations, *Treaty Series*, vol. XI, p. 173).

[79] "1929 Warsaw Convention" (*ibid.*, vol. CXXXVII, p. 11).

[80] "1933 Rome Convention" (*ibid.*, vol. CXCII, p. 289). Article 3 of this Convention exempts the following aircraft from precautionary attachment:

"(*a*) Aircraft assigned exclusively to a Government service, the postal service included, commerce excepted;

"(*b*) Aircraft actually put in service on a regular line of public transportation and indispensable reserve aircraft;

"(*c*) Any other aircraft assigned to transportation of persons or property for hire, when it is ready to depart for such transportation, except in a case involving a debt contracted for the trip which it is about to make or a claim arising in the course of the trip."

(See L. J. Bouchez, "The nature and scope of State immunity from jurisdiction and execution", *Netherlands Yearbook of International Law, 1979*, vol. X, p. 27.)

The International Civil Aviation Conference (Chicago, 1 November-7 December 1944), in its resolution VI, recommended that the States represented at the Conference consider the desirability of ratifying or adhering to the Rome Convention, if they had not already done so, because:

". . . the seizure or detention of aircraft where the attaching creditor cannot invoke a judgment and execution obtained beforehand in the ordinary course of procedure, or an equivalent right of execution, affects the expeditious movement of aircraft in international commerce". (*International Civil Aviation Conference, Final Act and Related Documents* (Washington, D.C., 1945), Department of State publication 2282, p. 38.)

[81] "1944 Chicago Convention" (United Nations, *Treaty Series*, vol. 15, p. 295).

[82] "1952 Rome Convention" (*ibid.*, vol. 310, p. 181).

[83] Bouchez, *loc. cit.* (footnote 80 above).

[84] The "conditions" are related to the meaning of "international carriage".

ment. The following provisions of the Convention are noteworthy:

Article 2

1. The liability for compensation contemplated by Article 1 of this Convention shall attach to the operator of the aircraft.

2. (*a*) For the purposes of this Convention the term "operator" shall mean the person who was making use of the aircraft at the time the damage was caused, provided that if control of the navigation of the aircraft was retained by the person from whom the right to make use of the aircraft was derived, whether directly or indirectly, that person shall be considered the operator.

. . .

3. The registered owner of the aircraft shall be presumed to be the operator . . .

Article 26

This Convention shall not apply to damage caused by military, customs or police aircraft.

Article 30

For the purposes of this Convention:
—"Person" means any natural or legal person, including a State.
. . .

31. The Special Rapporteur is inclined to the view that, apart from the above-mentioned treaties, there is not a uniform rule of customary international law concerning the immunity of State-owned or State-operated aircraft. One scholar observed in a work published in 1967 that the practice was not uniform with regard to State-owned or State-operated aircraft and that the United Kingdom granted immunity to them, taking into account the extent of State ownership or control in each case.[85] According to the view of socialist countries, aircraft engaging in international transport are State property (i.e. fixed assets funds under the operative management of the nationally owned enterprise) and the immunity of the aircraft is not waived in general.[86] According to Soviet law, the Soviet airline Aeroflot is not a juridical person and no suit concerning liability of the airline for damage arising out of international air carriage may be brought in a foreign State.[87] However, since the Soviet Union is a party to the 1929 Warsaw Convention and the 1952 Rome Convention, it may be inferred that, in spite of its legal position, the USSR practically accepts non-immunity for State-owned commercial aircraft operated by Aeroflot in accordance with the rules on liability established by those two Conventions. Nevertheless, apart from those treaties, relevant legal cases which may constitute State practice are scanty.[88] The Special Rapporteur would therefore suggest that the question of aircraft be dealt with along the lines set out in the above comments, instead of introducing a special provision concerning aircraft in article 18.

ARTICLE 19 (Effect of an arbitration agreement)

32. With regard to the two bracketed alternative provisions contained in article 19, the Special Rapporteur considers that the expression "civil or commercial matter" is preferable to "commercial contract".[89] If the rationale of article 19 is the implied consent, there is no reason why denying immunity in cases involving agreement to arbitrate should be linked to one of the exceptions such as a commercial contract exception.[90] Indeed, arbitrations between States and private persons of foreign nationality are often envisaged in commercial contracts concluded between them, but this fact does not seem to be directly related to the recognition of the arbitration exception to immunity. Most of the recently enacted State immunity laws also contain the rule of non-immunity deriving from the existence of arbitration agreements, which are not necessarily concerned with commercial contracts.[91] Furthermore, the reference to

[85] G. Schwarzenberger, *A Manual of International Law*, 5th ed. (London, Stevens, 1967), p. 103.

[86] Concerning the position of the German Democratic Republic in particular, see F. Enderlein, "The immunity of State property from foreign jurisdiction and execution: Doctrine and practice of the German Democratic Republic", *Netherlands Yearbook of International Law 1979*, vol. 10, p. 123. The German Democratic Republic is a party to the 1929 Warsaw Convention (the signature and ratification of which were effected by Germany on 30 September 1933) by virtue of a note dated 1 September 1955 to the effect that it considered itself bound by the said Convention (see C. N. Shawcross and K. M. Beaumont, *Air Law*, 3rd ed. (London, Butterworth, 1975), appendix A, p. 7).

[87] See C. Osakwe, "A Soviet perspective on foreign sovereign immunity: Law and practice", *Virginia Journal of International Law* (Charlottesville, Va.), vol. 23 (1983), pp. 24-25. The Union of Soviet Socialist Republics has been a party to the 1929 Warsaw Convention since 1934 and to the 1952 Rome Convention since 1982.

[88] Some relevant cases have been decided in the United States of America. In *Sugarman* v. *Aeromexico, Inc.* (1980) (*Federal Reporter*, 2nd series, vol. 626 (1980), p. 270), the court held that the Mexican airline had waived State immunity in an action relating to its operations to the United States when it obtained a foreign air carrier permit, not referring to the commercial activity exception of section 1605 (*a*) (2) of the Foreign Sovereign Immunities Act of 1976; in *Aboujdid* v. *Singapore Airlines Ltd.* (1986) (*New York Supplement*, 2nd series, vol. 503, p. 555), the court held that State immunity did not apply to commercial transactions, even if the alleged negligent acts of airlines occurred outside the United States without causing direct effect in the United States. In *Barkanic* v. *General Administration of Civil Aviation of the People's Republic of China* (1987) (*Federal Reporter*, 2nd series, vol. 822 (1987), p. 11; *United States Reports*, vol. 484 (1987), p. 964 (*certiorari* denied)), the court held that it had subject-matter jurisdiction over a foreign State's airline if an American passenger bought and paid for a ticket in the United States from an agent of the foreign airline and used the ticket for passage. In general, a foreign State-owned or State-operated airline qualifies as a foreign State under the Foreign Sovereign Immunities Act of 1976, and it has to waive its immunity in actions concerning flights which it operates to or from the United States when it obtains from the United States a foreign air carrier permit. It may be expected that the relevant cases in this area would almost all be dealt with by the application of the rule of commercial contract or transaction exception to State immunity under the above-mentioned Act of 1976.

[89] For comments by Governments, see document A/CN.4/415 (footnote 2 above), paras. 193-199. At the thirty-seventh session of the Commission, however, Mr. Razafindralambo observed that the "formulation 'out of a civil or commercial matter' could also pose problems in the case of investment, for an investment contract was hybrid *sui generis* and might contain clauses under administrative law, such as clauses on public works or clauses concerning concessions" (*Yearbook . . . 1985*, vol. I, p. 243, 1917th meeting, para. 17).

On this point, Mann argued that a concession was still a contract under municipal law depending upon the proper law applicable in a given case, even if the concession was a contract under public law and not an ordinary commercial contract. (F. A. Mann, "State contracts and international arbitration", *The British Year Book of International Law, 1967*, vol. 42, p. 8.)

[90] See Schreuer, *op. cit.* (footnote 48 above), p. 69.

[91] The 1972 European Convention (art. 12) refers to arbitration on "a civil or commercial matter". The United Kingdom State Immunity Act 1978 (sect. 9), the ILA Montreal Draft Convention on State Immunity (see footnote 57 above) (art. III) and the Australian Foreign States Immunities Act 1985 (sect. 17) deal with arbitration in general.

"civil" matters seems to have the advantage of not excluding cases such as the arbitration of claims arising out of the salvage of a ship which may not be regarded as solely commercial.

33. As to the reference to a court, article 19 uses the words "before a court of another State which is otherwise competent", while the original proposal made by the previous Special Rapporteur in his sixth report was "a court of another State on the territory or according to the law of which the arbitration has taken or will take place".[92] The Special Rapporteur prefers the latter formulation.

34. Although it is sometimes said that arbitration is a particular procedure of dispute settlement distinct from adjudication by a court of law,[93] ordinary courts have played a supportive role in arbitration.[94] In the light of such legal practice, article 19 introduces in the draft a denial of State immunity before domestic courts in proceedings relating to arbitration, even if one party thereto is a foreign State. Of course, modalities of that supervisory function of domestic courts may vary with the relevant rules of each domestic law. According to the text of article 19 and the commentary thereto, the supervision of arbitrations extends over "questions connected with the arbitration agreement", such as the interpretation and validity of that agreement, the arbitration procedure and the setting aside of arbitral awards.[95] Some domestic laws concerning civil procedure provide that the setting aside of the award will take place for reasons of public policy. The 1958 New York Convention[96] provides that the setting aside of an award may be ordered only by a court of the State in which the arbitration has taken place.

35. On this question of the extent of proceedings involving the exercise of supervisory jurisdiction by a court of another State, Qatar suggested that a mention of a proceeding relating to the "recognition and enforcement" of an arbitral award should be added in subparagraph (*c*) of article 19.[97] The previous Special Rapporteur seemed to consider that the subject would be covered in part IV of the draft, dealing with enforcement in general. Expressing this view at the thirty-seventh session, he said that "arbitration was also linked to pre-trial attachment, enforcement and execution, all of which would be dealt with in more detail in part IV of the draft".[98] On the other hand, he suggested, in the discussion of article 19 (then article 20), that some courts of States in which arbitration took place would need authority to confirm and enforce the arbitral award, going beyond the usual supervision of arbitration.[99] This would be a correct view but, as Reuter pointed out with regard to the enforcement of arbitral awards, there are two other cases: (*a*) enforcement by a court of another State in accordance with the law of which the arbitration has taken or would take place; (*b*) enforcement by a court of another State in which the property at issue is located.[100] The Special Rapporteur, therefore, calls the Commission's attention to the question of the enforcement of arbitral awards in article 19.

36. Except for the Australian Foreign States Immunities Act 1985,[101] recent codifications do not regard the submission by a State to arbitration as a waiver of immunity from enforcement jurisdiction. In contrast to article 19 of the draft, they make no reference to the question of enforcement of arbitral awards[102] or simply treat it within their general provisions concerning enforcement.[103] In State practice, it also appears that two conflicting views have been asserted as to whether, by entering into an agreement to arbitrate, a State cannot invoke its immunity in proceedings relating to the enforcement of the resulting award against it. One point of view is that it should be taken to have waived its

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[92] Document A/CN.4/376 and Add.1 and 2 (see footnote 4 above), para. 256 (art. 20).

[93] See, for example, the view of R.-J. Dupuy, the sole arbitrator in *Texaco and Calasiatic* v. *Government of Libya* (1977) (*International Law Reports* (Cambridge), vol. 53 (1979), p. 389, para. 44 of the award), cited by Mr. Mahiou in *Yearbook ... 1985*, vol. I, p. 238, 1916th meeting, para. 28. See also document A/CN.4/410 and Add.1-5 (footnote 3 above), comments of Bulgaria, para. 12.

[94] See Schreuer, *op. cit.* (footnote 48 above), pp. 71-75. See also the sixth report of the previous Special Rapporteur, document A/CN.4/376 and Add.1 and 2 (footnote 4 above), paras. 247-248. Mr. Sucharitkul stated:

"... Arbitration may exist as a legal process in court or out of court. As an out-of-court settlement, an arbitral proceeding is still not entirely free from judicial control, by way of judicial review, appeal or enforcement order. ..." (*Ibid.*, para. 234.)

Mr. Razafindralambo clearly admitted this supportive function as follows:

"... An arbitration agreement necessarily entailed a waiver of jurisdictional immunity with respect to the arbitral tribunal and also with respect to a domestic court for any action relating to arbitration. ..." (*Yearbook ... 1985*, vol. I, p. 243, 1917th meeting, para. 16.)

The action is related to questions, such as the appointment of arbitrators and an appeal to a court, which the parties must refer to an external and impartial judicial body.

[95] See *Yearbook ... 1985*, vol. II (Part Two), p. 63, para. (1) of the commentary to article 20.

[96] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) (United Nations, *Treaty Series*, vol. 330, p. 3).

[97] According to that State, "The obvious fact that the enforcement of an arbitral award may depend on judicial participation has to be recognized." (See document A/CN.4/410 and Add.1-5 (footnote 3 above), comments of Qatar, para. 9.)

[98] *Yearbook ... 1985*, vol. I, p. 249, 1918th meeting, para. 13.

[99] *Ibid.*, p. 249, para. 10. He had stated in his sixth report as follows:

"Once a State agrees in a written instrument to submit to arbitration disputes which have arisen or may arise between it and other private parties to a transaction, there is an irresistible implication, if not an almost irrebuttable presumption, that it has waived its jurisdictional immunity in relation to all pertinent questions arising out of the arbitral process, from its initiation to *judicial confirmation and enforcement of the arbitral awards**. ..." (Document A/CN.4/376 and Add.1 and 2 (see footnote 4 above), para. 255.)

[100] *Yearbook ... 1985*, vol. I, p. 241, 1916th meeting, para. 47.

[101] The Australian Act (sect. 17) admits the exercise of the supervisory jurisdiction of a court in a proceeding (*a*) by way of a case stated for the opinion of a court, (*b*) to determine a question as to the validity or operation of the arbitration agreement or as to the arbitration procedure, or (*c*) to set aside the award. Furthermore, it provides for the foreign State's non-immunity in proceedings concerning "the recognition as binding for any purpose, or for the enforcement, of an award made pursuant to the arbitration, wherever the award was made", under certain conditions.

[102] See, for example, the 1972 European Convention and the United States Foreign Sovereign Immunities Act of 1976.

[103] See, for example, the United Kingdom State Immunity Act 1978 (sect. 13, paras. (2) to (4)) and the ILA Montreal Draft Convention on State Immunity (footnote 57 above) (art. VIII).

immunity from enforcement in any other State where the award can be enforced. In the *Ipitrade International, S.A.* v. *Federal Republic of Nigeria* case,[104] Ipitrade requested[105] the United States District Court, District of Columbia, to confirm the arbitral award made in Switzerland on 25 April 1978 against Nigeria.[106] On 25 September 1978, the Court ordered the award enforced, on the grounds that Nigeria had waived its immunity by concluding the arbitration agreement.[107] A similar position was taken by the same court in *Libyan American Oil Company (LIAMCO)* v. *Socialist People's Libyan Arab Jamahiriya* (1980).[108] After receiving LIAMCO's petition to confirm and enforce the arbitration award made in Switzerland on 12 April 1977,[109] the Court held that, by agreeing to the arbitration clauses in the concessions, Libya had impliedly waived its sovereign immunity in the United States, since the clauses provided that the arbitration might take place anywhere. Although the Court admitted its jurisdiction, it did not exercise it.[110] The Svea Court of Appeals in Sweden, to which LIAMCO then applied, held, in its judgment of 18 June 1980, that the acceptance of an arbitration clause by a State had constituted a waiver of its immunity, with respect also to proceedings relating to the enforcement of the award.[111]

37. The other view is that the arbitration agreement cannot always be taken as a waiver of State immunity in proceedings concerning enforcement. According to a recently proposed amendment to the United States Foreign Sovereign Immunities Act of 1976, an agreement to arbitrate by a foreign State would amount to non-immunity in proceedings to compel submission to arbitration or to confirm, recognize or enforce an award, for example (*a*) if the arbitration takes place in the United States or (*b*) if the award is or may be governed by a treaty in force for the United States calling for the recognition and enforcement of arbitral awards.[112] In addition to those views, it should also be noted that in Switzerland the Federal Tribunal refused enforcement of an arbitral award which had been rendered at Geneva in 1977 against Libya because the merits of the dispute did not have a "sufficient domestic relationship".[113] Perhaps, in view of the rather confusing State practice, the Commission could have avoided referring, in article 19, to proceedings with regard to the enforcement of arbitral awards. One scholar has observed: "Recent decisions in the United States and other countries . . . have denied foreign States immunity from execution on the basis of the foreign State's agreement to arbitrate";[114] while another considers the more recent judicial practice concerning the enforcement of arbitral awards as being far from clear.[115] In the light of this, the Special Rapporteur believes that the question of the enforcement of arbitral awards has been dealt with correctly but negatively in the draft, in spite of the comment by Australia suggesting the need for a more explicit treatment.[116]

38. Furthermore, there is a particular question concerning the enforcement of arbitral awards on which the Commission should take a clear position in reconsidering the present article 19. On this point, attention should be given to the fact that there are at least two types of enforcement of arbitral awards. One is execution in the generally accepted sense of the term, which would be a proper subject of part IV of the draft, and the other is "turning the award into a judgment or a title equivalent to a judgment by providing it with an *exequatur* or some similar judicial certificate".[117] Quite apart from the first type of enforcement of the award by execution, it is not

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[104] *Federal Supplement, 1979*, vol. 465, p. 824; *International Law Reports* (Cambridge), vol. 63 (1982), p. 196.

[105] In accordance with article 5 of the 1958 New York Convention (see footnote 96 above), to which Nigeria and Switzerland were also parties.

[106] Though Nigeria refused to participate in the arbitration proceedings, relying on the defence of State immunity, the award was considered final and binding under Swiss law.

[107] The agreement provided that performance of the contract would be governed by the laws of Switzerland and that any disputes arising under the contract would be submitted to arbitration by the International Chamber of Commerce.

[108] *Federal Supplement, 1980*, vol. 482, p. 1175; *International Law Reports* (Cambridge), vol. 62 (1982), p. 220.

[109] See *International Law Reports*, vol. 62, p. 198.

[110] The dispute was non-arbitrable under the law of the United States, i.e. the Court was precluded from ruling on the validity of the nationalization as an act of State. See Schreuer, *op. cit.* (footnote 48 above), p. 79.

[111] For the purpose of enforcing the arbitration award of 12 April 1977 mentioned above (para. 36), LIAMCO had requested the Court to rule that it be executed as a binding Swedish judgment (see *International Law Reports*, vol. 62, p. 225). However, two judges expressed a dissenting opinion to the effect that a sovereign State had immunity from the jurisdiction of Swedish courts, which also applied to the *exequatur* proceedings, and that the arbitration clause contained in the concession agreements might not be equiparated with an explicit waiver of the right to invoke immunity (*ibid.*, p. 228).

[112] See T. B. Atkeson and S. D. Ramsey, "Proposed amendment of the Foreign Sovereign Immunities Act", *American Journal of International Law* (Washington, D.C.), vol. 79 (1985), p. 771.

[113] *Socialist People's Libyan Arab Jamahiriya* v. *Libyan American Oil Company (LIAMCO)*, judgment of the Federal Tribunal of 19 June 1980 (*Annuaire suisse de droit international, 1981*, vol. 37, p. 217; *International Legal Materials* (Washington, D.C.), vol. 20 (1981), p. 151). Since the dispute was related to the financial consequences arising from the cancellation of an oil concession in Libya, the Federal Tribunal held that Libya was immune from the attachment order obtained by LIAMCO from the Zurich District Court in 1977. See M. Blessing and T. Burckhardt, "Sovereign immunity—A pitfall in State arbitration?", *Swiss Essays on International Arbitration* (Zurich, Schulthess, 1984), p. 113.

[114] P. M. McGowan, "Arbitration clauses as waivers of immunity from jurisdiction and execution under the Foreign Sovereign Immunities Act of 1976", *New York Law School Journal of International and Comparative Law*, vol. 5 (1984), p. 430.

[115] Schreuer, *op. cit.* (footnote 48 above), p. 76. See also J. W. Dellapenna, *Suing Foreign Governments and Their Corporations* (Washington (D.C.), Bureau of National Affairs, 1988). Dellapenna reasons as follows:

> "No consensus exists among nations either on recognition of foreign judgments or on the proper means of enforcing judgments against foreign States. . . .
>
> "If one has obtained formal recognition abroad of a judgment from a United States court against a foreign State, one will then confront the extent to which the law of the enforcing country permits execution or other enforcement against a foreign State. Most countries long continued to follow the tradition of absolute immunity from execution even when firmly committed to restrictive immunity from suit . . . [and] probably still adhere to this tradition." [pp. 401-403.]

[116] See document A/CN.4/410 and Add.1-5 (footnote 3 above), comments of Australia, para. 37.

[117] Mann, *loc. cit.* (footnote 89 above), p. 18.

clear whether the proceeding to obtain a preliminary order for an *exequatur* of the award is precluded from the proceedings to which State immunity cannot be invoked by article 19. If the proceedings to be brought to turn an arbitral award into an order of the domestic court are considered the "final point" of the arbitration proceedings, rather than the beginning of execution, a State party to an arbitration agreement would have to be regarded as not immune from those proceedings.[118]

39. If one approaches the question from the view that "an application for enforcement serves no useful purpose except as a first step towards execution",[119] the plea of State immunity would be allowed in that proceeding to obtain the preliminary order in so far as the State's consent has not been given to the jurisdiction of the courts relating to actual execution. On the other hand, if one considers that—distinguishing the recognition of an award from its execution—recognition is "the normal complement of the binding character of the arbitration agreement and should not be affected by considerations of sovereign immunity",[120] the immunity would apply to the process of execution but not to the preceding recognition of the arbitral award.

40. With regard to this question, mention should also be made of the practice of the French courts, in which a strict distinction has been drawn between recognition of arbitral awards and actual execution of the awards. According to the decision of the Tribunal de grande instance of Paris in the *Socialist Federal Republic of Yugoslavia* v. *Société européenne d'études et d'entreprises* case (1970):[121]

> By the very fact of becoming a party to an arbitration clause the Yugoslav State agreed to waive its immunity from jurisdiction with regard to arbitrators and their award up to and including the procedure for granting an *exequatur* which was necessary for the award to acquire full force;
>
> Waiver of jurisdictional immunity does not in any way involve waiver of immunity from execution. The order granting an *exequatur* for the disputed arbitral award does not, however, constitute a measure of execution but simply a preliminary measure taken prior to measures of execution. . . .

The same position was taken by the Court of Appeal of Paris in the *Benvenuti and Bonfant SARL* v. *Government of the People's Republic of the Congo* case (1981).[122] Though it might be France's "own peculiar method of dealing with applications to enforce arbitral awards against foreign States",[123] the Special Rapporteur considers that the method would provide the Commission with a useful guide for rethinking the question and he would therefore suggest that the Commission consider adding to article 19 the following subparagraph (*d*):

"(*d*) the recognition of the award,"

on the understanding that it should not be interpreted as implying waiver of immunity from execution.

ARTICLE 20 (Cases of nationalization)

41. The provision of article 20 of the draft has to be reviewed in connection with article 15. The position of the developing countries with regard to article 15 is that, since their economic policies require the expropriation or nationalization of certain businesses or industries which may involve intangible property, subparagraph (*b*) of article 15 might operate to hinder their economic and industrial development in regard to their competence to take measures of expropriation or nationalization affecting the rights mentioned in the article. After similar concerns were expressed by some members of the Commission, article 20 was proposed as a general saving clause.[124] The Special Rapporteur considers that article 20 should be retained in the draft. In fact, a domestic court might be required to judge the lawfulness of foreign nationalization measures in connection with a proceeding concerning intellectual or industrial property rights. Let us assume (i) that company A, incorporated under the laws of State X, has registered a patent in State X and also in State Y, to which company A exported its product, and further (ii) that State X nationalized company A and then applied to the authorities in State Y for the patent in State Y to be reissued or registered in the name of State X. In this case, if State Y's patent office reissued the patent for State X and company A brought an action for patent infringement, State Y's court would encounter the issue of the validity of State X's nationalization. Under article 15, subparagraph (*b*), of the draft, State X could not invoke State immunity in the court of State Y, and the court could judge the lawfulness of State X's nationalization under the existing rules of international law. In such a case, irrespective of the provision of article 20, the domestic court may apply the existing rules of international law concerning nationalization.

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[118] *Ibid.*

[119] *Ibid.*, p. 19.

[120] See G. R. Delaume, *Transnational Contracts: Applicable Law and Settlement of Disputes* (Dobbs Ferry, N.Y., Oceana Publications), binder II, booklet 16 (1990), chap. XIV, p. 19, para. 14.03 (publication in fascicle form). The Tribunal de grande instance of Paris also held, in the *Socialist Federal Republic of Yugoslavia* v. *Société européenne d'études et d'entreprises* case (see para. 40), that the order granting an *exequatur* for the award,

> ". . . affirming the validity of the award for all purposes, *constituted merely the necessary sequel to the award** and did not violate in any way the immunity from execution enjoyed by the Yugoslav State". (See footnote 121 below.)

[121] *Journal du droit international* (Clunet) (Paris), 98th year (1971), p. 131 and in particular pp. 132-133; *International Law Reports* (Cambridge), vol. 65 (1984), pp. 46 *et seq.*

[122] *Journal du droit international* (Clunet) (Paris), 108th year (1981), p. 843, at p. 845; *International Law Reports* (Cambridge), vol. 65 (1984), p. 89. An arbitral award had been made in this case, in 1980, in accordance with the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (United Nations, *Treaty Series*, vol. 575, p. 158). At the request of Benvenuti and Bonfant, the Tribunal de grande instance of Paris granted the company an *exequatur* to enforce the award, subject to the condition that it would obtain prior authorization for any measures of execution. The company then appealed to the Court of Appeal of Paris to revoke this condition. The Court held that, though article 55 of the Washington Convention provided that nothing in article 54, which governed the procedure for obtaining an *exequator* for awards, was to be construed as restricting the immunity from execution, "the order granting an *exequatur* for an arbitral award did not . . . constitute a measure of execution but simply a preliminary measure prior to measures of execution".

[123] Schreuer, *op. cit.* (footnote 48 above), p. 77.

[124] Corresponding to paragraph 2 of former draft article 11 (see *Yearbook . . . 1984*, vol. II (Part Two), p. 59, footnote 200, and *ibid.*, p. 69, para. 12 of the commentary to article 16 (now article 15)).

III. Comments on part IV of the draft: State immunity in respect of property from measures of constraint

42. The majority view of Governments as well as writers is that immunity from measures of constraint is separated from the jurisdictional immunity of a State. However, there are some writers who argue that allowing plaintiffs to proceed against foreign States and then withholding from them the fruits of successful litigation through immunity from execution may put them into the doubly frustrating position of being left with an unenforceable judgment and expensive legal costs.[125] Among Governments, Switzerland points out that immunity from execution is not different in nature from immunity from jurisdiction and that the Commission's draft departs appreciably from that of the 1972 European Convention with regard to measures of execution.[126] The 1972 European Convention adopts a complicated solution. The basic rule is a general prohibition of enforcement measures subject to the possibility of an express waiver. However, the Convention provides for a direct obligation of contracting States to (voluntarily) abide by a judgment given against them. In the case of non-compliance, the judgment creditor is given the possibility of instituting proceedings before a court of the State against which the judgment has been given. Alternatively, an additional protocol opens the possibility of bringing an action before a special tribunal on State immunity, the European Tribunal. There is also a possibility for States parties to make an optional declaration which restores the possibility of taking enforcement measures after all. As between the States making the optional declaration, judgments arising from industrial or commercial activities may be enforced against property of the debtor State which is used exclusively for such activity. The system under the European Convention is based on the obligation of States parties to abide voluntarily by the judgment rendered against them, and it would therefore be difficult to apply elsewhere the same system in its entirety.

43. In addition to a waiver, the United Kingdom State Immunity Act 1978 permits enforcement of a judgment or an arbitral award in respect of property which is for the time being in use or intended for use for commercial purposes. The United States Foreign Sovereign Immunities Act of 1976 establishes a general rule of immunity from execution with a number of exceptions. However, the exceptions refer only to commercial property. One of the differences between the United Kingdom Act and the United States Act is that under the United States Act a waiver is only possible with respect to commercial property, while under the United Kingdom Act a waiver can apply to non-commercial property. The general tendency of State practice in European countries is to permit enforcement with regard to commercial property but deny it in the case of property designated for public purposes. Article 21 of the draft has been drawn up along these lines. The only point for consideration is whether the phrase in subparagraph (*a*) "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, as suggested by several Governments.[127] Practice in European countries would be better reflected if this suggestion were adopted. If the phrase is not deleted, the addition of the words "Unless otherwise agreed between the States concerned" at the beginning of the article might alleviate the difficulties on the part of those countries which prefer the deletion of the above-mentioned phrase from subparagraph (*a*).

44. Bank accounts of a State are involved in many cases concerning constraint measures. One possible view is that bank accounts are inherently commercial assets which may not be regarded as serving any public purpose. Another view is that a mere future possibility of public use is sufficient to consider the bank account immune. Both views are somewhat extreme. In the *National Iranian Oil Company* (NIOC) case (1983),[128] involving the attachment of assets of NIOC held in various banks in the Federal Republic of Germany, the Federal Constitutional Court found that the mere possibility of future use of the funds for sovereign functions was no basis for immunity. A similar judgment was rendered by the District Court of Frankfurt in the *Non-resident Petitioner* v. *Central Bank of Nigeria* case (1975).[129] Moneys in bank accounts under the control of a diplomatic or consular mission carry the presumption of a public purpose and, therefore, immunity.[130] According to the United Kingdom Act, immunity from execution would apply if it could be shown "that the bank account was earmarked by the foreign State solely . . . for being drawn on to settle liabilities incurred in commercial transactions".[131] The burden of proof would lie on the judgment creditor. Indeed, the present wording of article 23, paragraph 1 (*a*), seems to express the understanding on customary law sufficiently clearly.

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[125] See Schreuer, *op. cit.* (footnote 48 above), p. 125.

[126] See document A/CN.4/410 and Add.1-5 (footnote 8 above), comments of Switzerland, para. 31.

[127] *Ibid.*, comments of: Australia, para. 39; Canada, para. 2; Nordic countries, para. 11; Qatar, para. 11; United Kingdom, para. 33 (*c*); Switzerland, para. 31.

[128] *Entscheidungen des Bundesverfassungsgerichtes* (Tübingen), vol. 64 (1984), p. 1; *International Law Reports* (Cambridge), vol. 65 (1984), p. 215.

[129] *Neue juristische Wochenschrift* (Frankfurt), vol. 23 (1976), p. 1044; *International Legal Materials* (Washington, D.C.), vol. 16 (1977), p. 501; United Nations, *Materials on Jurisdictional Immunities . . .*, pp. 290 *et seq.*

[130] The 1961 Vienna Convention on Diplomatic Relations (United Nations, *Treaty Series*, vol. 500, p. 95) has no express provisions concerning bank accounts.

[131] Lord Diplock's dictum in *Alcom Ltd.* v. *Republic of Colombia* (1984) (*The All England Law Reports, 1984*, vol. 2, p. 13).

45. As to the account of the central bank, the British Court of Appeal has twice denied immunity to the Central Bank of Nigeria.[132] On the other hand, the United States Foreign Sovereign Immunities Act of 1976 preserves the immunity from attachment and execution of property belonging to a foreign central bank or monetary authority held for its own account. Taking into account the provisions of the United States Act and the comments of the Federal Republic of Germany,[133] article 23, paragraph 1 (*c*), could be reformulated as follows: "(*c*) property of the central bank or other monetary authority which is in the territory of another State and serves monetary purposes, unless that property is allocated or earmarked within the meaning of subparagraph (*b*) of article 21;" and, as a consequence, paragraph 2 could be deleted.

[132] See *Trendtex Trading Corporation Ltd.* v. *Central Bank of Nigeria* (1977) (see footnote 29 above); and *Hispano Americana Mercantil S.A.* v. *Central Bank of Nigeria* (1979) (*Lloyd's Law Reports, 1979*, vol. 2, p. 277; reproduced in United Nations, *Materials on Jurisdictional Immunities . . .*, p. 449).

[133] See document A/CN.4/410 and Add.1-5 (footnote 3 above), comments of the Federal Republic of Germany, para. 31.

Proposed changes

46. The Special Rapporteur suggests that the following changes be made in articles 21 and 23:

ARTICLE 21 (State immunity from measures of constraint)

Addition of the following words at the beginning of the article: "Unless otherwise agreed between the States concerned";

or

Deletion of the following words in subparagraph (*a*): "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed".

ARTICLE 23 (Specific categories of property)

Addition of the following words at the end of paragraph 1 (*c*): "and serves monetary purposes".