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SECOND REPORT ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

by

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Addendum

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II. COMMENTS ON PART III, [LIMITATIONS ON] [EXCEPTIONS TO] STATE IMMUNITY (continued)

Article 18 (continued)

1. With regard to article 18, two Governments pointed out that an introduction into the draft article of the concept of segregated State property would be desirable for resolving problems concerning State-owned or State-operated ships in commercial service. 1/ In view of those comments and the necessity of a new draft provision similar to the proposed draft article 11 bis 2/ introduced by the Special Rapporteur in his first report, he suggests that the following paragraph be included after paragraph 1 of article 18.

Recommended paragraph 1 bis of draft article 18

> If a State enterprise, whether agency or separate instrumentality of the State, operates a ship 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.

2. 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, such entities can easily qualify for immunity. As an attempt to curtail this opportunism, the Special Rapporteur had proposed draft article 11 bis. The same consideration would hold true for draft article 18.

3. 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. 3/ This question has been governed by treaties of international civil aviation law, which include the following:

1/ See the comments by the Byelorussian Soviet Socialist Republic and the Union of Soviet Socialist Republics, A/CN.4/415 and Corr.1 and 2, pp. 99 and 102 respectively.

2/ See A/CN.4/415 and Corr.1 and 2, p. 72.

3/ See the comment by Switzerland, A/CN.4/415 and Corr.1 and 2, p. 101.

(a) Paris Convention for the Regulation of Aerial Navigation with a number of amending Protocols (1919);

(b) Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air (1929);

(c) Rome Convention on Precautionary Attachment of Aircraft (1933);

(d) Chicago Convention on Civil Aviation (1944); and

(e) Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (1952). 4/

4. In the Chicago Convention, a distinction was made between State aircraft and civil aircraft; the Convention applies to the latter. State aircraft comprise "aircraft used for military, customs and police service" (article 3 (b)). 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 for military customs and police service. 5/ 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 (article 1). Thus, the Chicago Convention is based on the assumption that a State cannot invoke its immunity in the case where aircraft owned

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4/ See, respectively, United Kingdom, Treaty Series, No. 2 (1922), Cmd. 1609; League of Nations, Treaty Series, vol. XI, p. 173, and United Nations, Treaty Series, vol. 478, p. 371; League of Nations, Treaty Series, vol. CXCII, p. 293; United Nations, Treaty Series, vol. 15, p. 298; ibid., vol. 310, p. 182. The Rome Convention on Precautionary Attachment of Aircraft of 1933 exempts the following aircraft from that attachment: "(1) aircraft assigned exclusively to government service, the postal service included, commerce excepted; (2) aircraft actually on a scheduled public transportation, together with indispensable reserve aircraft; and (3) any other aircraft used for transport of persons or property on charter, but only when such aircraft is ready to depart for such transport, and not in cases involving a debt contracted for the trip which is about to be made 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, vol. 10 (1979), p. 27. According to the resolution made by the International Civil Aviation Conference (1944), this Convention was adopted for the reason that "the seizure or detention of aircraft where the attaching creditor cannot invoke a judgement and execution obtained beforehand in the ordinary course of procedure, or an equivalent right of execution, affect[ed] the expeditious movement of aircraft in international commerce". See B. Cheng, The Law of International Air Transport (London, Stevens, 1962), pp. 502 and 503.

5/ L. J. Bouchez, op. cit., p. 27.

or operated by that State, being used in commercial service, makes use of the rights and privileges granted by that Convention.

5. The 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. 6/ The following provisions should be noted:

(a) "This convention shall apply to all international transportation of persons, baggage or goods performed by aircraft for hire"; (article 1 (1)).

(b) "This convention shall apply to transportation performed by the State or by legal entities constituted under public law provided it falls within the conditions laid down in article 1" (article 2 (1)) 7/ (emphasis added).

Furthermore, pursuant to the Rome Convention of 1952, civil actions concerning obligations or liabilities could 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 agreement. 8/ The following provisions of the Convention are noteworthy:

(a) "This Convention shall not apply to damage caused by military, customs or police aircraft" (article 26);

(b) "The liability for compensation contemplated by article 1 of this Convention shall attach to the operator of the aircraft". The operator was defined as (1) the person who was making use of the aircraft at the time the damage was caused, provided that control of navigation of the aircraft was retained by that person as well as (2) the registered owner of the aircraft (article 2, paras. 1, 2 (a) and 3).

(c) "Person" for the purposes of the Convention means any natural or legal person, including a State (article 30).

6. 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 English scholar observed in 1967 that the practice was not uniform with regard to State-owned or State-operated aircraft and that the United Kingdom of Great Britain and Northern Ireland used to grant immunity to them, taking into account the extent

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6/ See note 4 above.

7/ The "conditions" are related to the meaning of international transportation.

8/ See note 4 above.

of State ownership or control in each case. 9/ According to the view of socialist countries, aircraft engaging in international transport are their State property (which is the fixed assets funds under operative management of the nationally owned enterprise) and the immunity of the aircraft is not waived in general. 10/ According to another scholar, the Soviet airline Aeroflot is not a domestic person and all actions concerning liability of the airline for damage arising out of international air carriage may not be brought in a foreign State. 11/ However, since the Soviet Union is a party to the Warsaw Convention of 1929 and the Rome Convention of 1952, 11/ it may be inferred that, in spite of the above legal explanation, the USSR practically accepts non-immunity for State-owned commercial aircraft operated by Aeroflot in accordance with the rules on liabilities established by those two Conventions. Nevertheless, apart from those treaties, relevant legal cases which may constitute State practice are scanty. 12/ The

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9/ G. Schwarzenberger, A Manual of International Law, 5th ed., (London, Stevens, 1967), p. 103.

10/ For this view of the German Democratic Republic, 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, vol. 10 (1979), p. 123. The German Democratic Republic is a party to the Warsaw Convention of 1929 (the signature and ratification of which were effected by Germany on 30 September 1933), by virtue of a note dated 1 September 1955 that it considered itself bound by the said Convention (Shawcross and Beaumont, Air Law, 3rd ed., 1975, vol. 2, appendix A, p. A-1-7).

11/ C. Osakwe, "A Soviet perspective on foreign sovereign immunity: law and practice", Virginia Journal of International Law, vol. 23 (1982), pp. 24 and 25. The Union of Soviet Socialist Republics has been a party to the Warsaw Convention of 1929 since 1934 and the Rome Convention of 1952 since 1982.

12/ With regard to the relevant cases in the United States, see Sugarman v. Aeromexico, Inc., 626 F.2d 270 (3d Cir.1980), in which the Court held that the Mexican airline had waived State immunity in the action relating to 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; and Aboujdid v. Singapore Airlines, 761 F.2d 1527 (11th Cir.1985), in which the Court held that State immunity did not apply to commercial transactions, even if the alleged negligent acts of the airlines occurred outside of the United States without causing direct effect in the United States.

See also Barkanic, v., General Administration of Civil Aviation of the People's Republic of China, 822 F.2d 11 (2d Cir.), cert. denied, 108 S.Ct. 453 (1987). In this case 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 -operated airline qualifies as a foreign State

Special Rapporteur would therefore suggest that the question of aircraft be dealt with along the line set out in the above commentary, instead of introducing a special provision concerning aircraft in draft article 18.

Article 19

7. With regard to the two bracketed alternative provisions contained in draft article 19, the Special Rapporteur considers that the term civil or commercial matter is preferable to "commercial contract". 13/ If the rationale of draft article 19 is the implied consent, there is no reason why denying immunity in cases involving agreement to arbitrate should be linked with one of the exceptions such as a commercial contract exception. 14/ 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

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under the Foreign Services Immunity Act, and the national air carrier has to waive its immunity in the actions concerning air carriers operating flights to or from the United States when it must obtain a foreign air carrier permit from the United States. It would be expected that the relevant cases in this area are almost all dealt with by the application of the rule of commercial contract or transaction exception to State immunity under the Foreign Services Immunity Act.

13/ For comments by Governments, see A/CN.4/415 and Corr.1 and 2, pp. 104 and 105-107. One member of the Commission has observed, however, 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". (Razafindralambo, Yearbook ... 1985, vol. I, p. 243, para. 17).

On this point, F. A. 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", British Yearbook of International Law, vol. 42 (1967), p. 8.

14/ See C. Schreuer, State immunity: some recent developments, (1988), p. 69.

commercial contracts. 15/ Furthermore, the reference to "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.

8. As to the reference to a court, draft article 19 uses the words "before a court of another State which is otherwise competent", while the original proposal by the former Special Rapporteur was "a court of another State on the territory or according to the law of which the arbitration has taken or will take place". 16/ The Special Rapporteur prefers the latter formulation.

9. Although it is sometimes said that arbitration is a particular procedure of dispute settlement distinct from adjudication by a court of law, 17/ ordinary courts have played a supportive role in arbitration. 18/ In the light of such legal practice, article 19 introduces in the draft Convention 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

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15/ The European Convention (article 12) refers to arbitration on a civil and commercial matter. The British State Immunity Act (section 9), the International Law Association Montreal Draft Convention (article III) and the Australian Act (section 17) deal with the arbitration in general. For the texts, see United Nations materials on jurisdictional immunities of States and their property, ST/LEG/SER.B/20 (1982), p. 44; G. M. Badr, State immunity, an analytical and prognostic view, 1984, p. 232; and Foreign State Immunity, The Law Reform Commission (Report No. 24), 1984, pp. 116 and 117.

16/ A/CN.4/376, para. 256.

17/ See, e.g., the view of Mr. René-Jean Dupuy, which was cited by Maniou in Yearbook ... 1985, vol. I, p. 238, para. 28; and the comment by Bulgaria, A/CN.4/415 and Corr.1 and 2, p. 105.

18/ See the sixth report by Sompon Sucharitkul, Yearbook ... 1984, vol. II (Part One), p. 56, document A/CN.4/376, paras. 247-248; C. Schreuer, op. cit., pp. 71-75. Mr. Sucharitkul stated as follows: "Arbitration may exist as a legal process in court or out of court. As an out-of-court settlement, an arbitral proceedings is still not entirely free from judicial control, by way of judicial review, appeal or enforcement order." (loc. cit., p. 54, para. 234).

One member of the Commission clearly admitted this supportive function as follows: "An arbitration agreement necessarily entailed a waiver of jurisdictional immunity with repsect to the arbitral tribunal and also with respect to a domestic court for any action relating to arbitration." The action is related to some questions such as an appointment of arbitrators and an appeal to a court, which the parties must refer to an external and impartial judicial body. (Razafindralambo, loc. cit., p. 243, para. 16).

function by domestic courts may vary with 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. 19/ Some domestic laws concerning civil procedure provide that the setting aside of the award will take place for the reason of public policy. The New York Convention of 1958 provides that the setting aside of the awards may be ordered only by a court of the State in which the arbitration has taken place.

10. On this question of the extent of proceedings involving the exercise of supervisory jurisdiction by a court of another State, one Government suggested that a proceeding relating to the "recognition and enforcement of an arbitral award" should be added in paragraph (c) of article 19. 20/ The former Special Rapporteur seemed to consider that the subject would be covered in part IV dealing with enforcement in general. He expressed the view in 1985 as follows: "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". 21/ On the other hand, he suggested, in the discussion of article 19, that some courts of States in which arbitration took place would need authority to confirm and enforce the arbitral award, going beyond usual supervision of arbitration. 22/ This would be a correct view but, as Reuter pointed out, with regard to the question of the enforcement of arbitral awards, there are two other cases: (a) the case of the enforcement of awards by a court of another State in accordance with the law of which the arbitration has taken or would take place; (b) enforcement by another State in which the property at issue is located. 23/ The Special Rapporteur, therefore, calls the Commission's attention to the question of the enforcement of arbitral awards in article 19.

19/ See Yearbook ... 1985, vol. II (Part Two), p. 63, commentary to draft article 20, para. 1.

20/ See the comment by Qatar, which stated that "the obvious fact that the enforcement of an arbitral award may depend on judicial participation has to be recognized". (A/CN.4/415 and Corr.1 and 2, p. 106).

21/ Yearbook ... 1985, vol. I, p. 249, para. 13.

22/ 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." (Emphasis added.) Yearbook ... 1984, vol. II (Part One), pp. 57 and 58, document A/CN.4/376, para. 255.

23/ Yearbook ... 1985, vol. I, p. 241, para. 47.

11. Except for the Australian Act of State Immunity, 24/ recent codifications do not regard the submission by a State to arbitration as a waiver of immunity from enforcement jurisdiction. They make no reference to the question of enforcement of arbitral awards as in article 19, 25/ or simply treat it within their general provisions concerning enforcement. 26/ 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 can not 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 immunity from enforcement in any other State where the award can be enforced. In one case, the United States court enforced an arbitral award made in Switzerland against Nigeria because of Nigeria's waiver of immunity implied from the arbitration agreement. 27/ This agreement provides 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. 28/ A Swedish court decided that the acceptance

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24/ The Australian State Immunity Act (section 17) admits the exercise of the supervisory jurisdiction of a court in proceedings (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) the setting aside of the award. Furthermore, it provides for the 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. See Foreign State Immunity, op. cit., pp. 116 and 117.

25/ See, e.g., the European Convention and the United States Act. For the texts, see note 15 above and G. M. Badr, op. cit., pp. 185-191.

26/ See, e.g., the United Kingdom Act (section 13 (2) to (4)) and the International Law Association Draft Convention (article VIII). For the texts, see note 15 above.

27/ Ipitrade International, S.A. v. Federal Republic of Nigeria, 465 F.Supp.824 (D.D.C.1978), United States District Court, 25 September 1978. See International Law Reports, vol. 63 (1982), pp. 197 and 198. In this case, though Nigeria refused to participate in the arbitration proceedings, relying on the defence of State immunity, the arbitrator issued an award which was final and binding under Swiss law. (Id., p. 197).

28/ Ibid. After issuing the award, Ipitrade applied to confirm it on 7 June 1978 in the United States District Court under article 5 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), to which Nigeria and Switzerland were also parties. (Id., pp. 197 and 198). A similar position was taken by the same court in 1980 in Libyan American Oil Company v. Socialist People's Libyan Arab Jamahiriya. After receiving the Libyan American Oil Company's petition to confirm and enforce the arbitration award of 12 April 1977 made in Switzerland, the Court held that "by agreeing to the

of an arbitration clause by a State had constituted a waiver of its immunity, including proceedings relating to the enforcement of the award. 29/

12. The other view is that the arbitration agreement cannot always be taken as a waiver of State immunity in proceedings concerning enforcement. According to the recently proposed amendment to the United States Act of State immunity (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, if (a) 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. 30/ In addition to those views, it should also be noted that Switzerland refused enforcement of an arbitral award against a foreign State which had been rendered in Switzerland itself because the merits of the dispute did not have a "sufficient domestic relationship". In other words, 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 the award-creditor from the Zurich District Court in 1977. 31/ Perhaps, in those

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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 was not exercised because the dispute was non-arbitrable under the law of the United States, that is, the Court was precluded from ruling on the validity of the nationalization as an act of State (see International Law Reports, vol. 62 (1982), pp. 220 and 221; see also C. Schreuer, op. cit., p. 82).

29/ Libyan American Oil Company v. Socialist People's Arab Republic of Libya, Svea Court of Appeals, 18 June 1980 (International Law Reports, vol. 62 (1982), pp. 225-227). For the purpose of enforcing the arbitration award mentioned above (see note 14 above), the Libyan American Oil Company requested that it be executed as a binding Swedish judgement (Id., 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" (Id., p. 228).

30/ See T. B. Atkeson and S. D. Ramsey, "Proposed Amendment of the Foreign Sovereign Immunities Act", American Journal of International Law, vol. 79 (1985), p. 771.

31/ See M. Blessing and T. Burckhardt, "Sovereign Immunity - a pitfall in State arbitration?", in Swiss Essays on International Arbitration, 1984, pp. 113 and 114; see also Socialist People's Libyan Arab Jamahiriya v. LIAMCO, Federal Tribunal (1980), International Legal Materials, vol. 20 (1981), pp. 151 et seq.

rather confusing State practices, the Commission would have avoided referring, in article 19, to the proceedings with regard to the enforcement of arbitral awards. One scholar has observed that "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", 32/ while another considers the more recent judicial practice concerning the enforcement of arbitral awards as being far from clear. 33/ In the light of this, the Special Rapporteur believes that the question of the enforcement of the awards had been dealt with correctly but negatively in the draft Convention, in spite of the comment by Australia suggesting the need for a more explicit treatment. 34/

13. 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 draft article 19. On this point, attention should be given to the fact that, as far as the arbitration is concerned, 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 Convention, and the other is "turning the award into a judgement or a title equivalent to a judgement by providing it with an exequatur or some similar judicial certificate". 35/ Quite apart from the first type of enforcement of the award by execution, it is not 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 one considers the proceedings to be brought to turn an arbitral award into an order of the domestic court a "final point" of arbitration proceedings, rather than the beginning of execution, a

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32/ 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.

33/ C. Schreuer, op. cit., p. 76. See also J. W. Dellapenna, Suing Foreign Governments and Their Corporations (1988). Dellapenna reasons as follows:

> "No consensus exists among nations either on recognition of foreign judgements or on the proper means of enforcing judgements against foreign States ... If one has obtained formal recognition abroad of a judgement 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." (Id., pp. 401 and 402).

34/ See the comment by Australia, A/CN.4/415 and Corr.1 and 2, p. 105.

35/ F. A. Mann, "State contract and international arbitration", British Yearbook of International Law, vol. 42 (1967), p. 18.

State party to an arbitration agreement would have to be regarded as not immune from those proceedings. 36/

14. If one approaches the question from the view that "an application for enforcement serves no useful purpose except as a first step towards execution", the plea of State immunity would be allowed in that proceeding to obtain the preliminary order in so far as its consent has not been given to the jurisdiction of the courts relating to actual execution. 37/ On the other hand, if one considers that, distinguishing the recognition of an award from its execution, recognition is the "natural complement of the binding character of any agreement to submit to arbitration and should not be impaired by considerations of sovereign immunity", the immunity would apply to the process of execution but not to the preceding recognition of the arbitration award. 38/

15. With regard to this question, mention should also be made of the practice of the French courts in which a strict distinction was 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 1970,

> "(1) By the very fact of becoming party to an arbitration clause the Yugoslav State had 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;
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> "(2) Waiver of jurisdictional immunity did not in any way imply waiver of immunity from execution. The order granting an exequatur for the award did not, however, constitute a measure of execution but merely a preliminary measure prior to measures of execution." 39/

36/ Ibid.

37/ Id., p. 19.

38/ See G. Delaume, Transnational Contracts: Applicable Law and Settlement of Disputes, vol. 2 (1982), pp. 36-37, cited in P. M. McGowan, op. cit., p. 424, footnote 102. The Tribunal de grande instance of Paris also held 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 a State. (Emphasis added.) International Law Reports, vol. 65 (1984), p. 47. See also footnote 25 below.

39/ Socialist Federal Republic of Yugoslavia v. Société Europeenne d'Etudes et d'Entreprises, 1970, International Law Reports, vol. 65 (1984), p. 47.

The same position was also taken by the Court of Appeal of Paris in 1981. 40/ Though it might be France's "own peculiar method of dealing with applications to enforce arbitral awards against foreign States", 41/ 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 the addition of "(d) the recognition of the award," with the understanding that it should not be interpreted as implying waiver of immunity from execution.

40/ Benvenuti et Bonfant SARL v. Government of the People's Republic of the Congo, 1981, id., pp. 89 and 91. In this case, a French company was granted an exequatur - though subject to obtaining of prior permit for any measures of execution - by the Tribunal de grande instance to enforce an arbitral award which was rendered by an arbitral tribunal constituted under the Convention on the Settlement of Investment (1965). Though article 55 of the Convention provided that nothing in article 54, which governed a procedure for obtaining an exequatur for awards, was to be construed as restricting the immunity from execution, the Court of Appeal of Paris held that "the order granting an exequatur for an arbitral award does not constitute a measure of execution but simply a preliminary measure prior to measures of execution". (Id., pp. 88-91).

41/ C. Schreuer, op. cit., p. 77.