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JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

Comments and observations received from Governments

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INTRODUCTION

1. At its thirty-eighth session, held in 1986, the International Law Commission adopted provisionally, on first reading, the draft articles on jurisdictional immunities of States and their property. The Commission decided that, in accordance with articles 16 and 21 of its statute, these draft articles should be transmitted through the Secretary-General to Governments for comments and observations and that it should be requested that such comments and observations be submitted to the Secretary-General by 1 January 1988. 1/

2. By paragraph 9 of resolution 41/81 of 3 December 1986, and again by paragraph 10 of resolution 42/156 of 7 December 1987, both entitled "Report of the International Law Commission", the General Assembly urged Governments to give full attention to the request of the International Law Commission transmitted through the Secretary-General for comments and observations on the draft articles on jurisdictional immunities of States and their property.

3. Pursuant to the Commission's request, the Secretary-General addressed to Governments circular letters, dated 25 February 1987 and 22 October 1987 respectively, inviting them to submit their comments and observations by 1 January 1988.

4. The replies which had been received by 4 February 1988 are reproduced in the present document. Further replies which might be forthcoming will be reproduced in addenda.

I. COMMENTS AND OBSERVATIONS RECEIVED FROM MEMBER STATES

AUSTRALIA

[Original: English]

[19 January 1988]

General comments

The Government of Australia welcomes the draft articles prepared by the International Law Commission. It considers them to be a valuable contribution to the development of law in the area. It particularly supports the general principles set out in part II and part III of the draft. However, the provisions of part IV are not regarded by the Government as being as satisfactory as those in the other parts of the draft articles. In its view, this part, containing the execution provisions, may prove unsatisfactory. The execution provisions in part IV do not represent a reasonable balance having regard to the exceptions to

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1/ Official Records of the General Assembly, Forty-first Session, Supplement No. 10 (A/41/10), para. 21.

jurisdictional immunity contained in part III. The provisions in part IV are too open to avoidance. The articles can be critized as they may induce private litigants to sue with all the attendant costs of litigation, yet a successful outcome may not give rise to a right to execute against the property of the judgement debtor.

The comments that are set out below are provided to assist in further consideration of the draft articles. Some concentrate primarily on matters of drafting and are designed to improve the draft articles; others are not limited to drafting suggestions and go to issues of substantive law.

It should be noted that Australia, at this stage, has reached no final decision on the use that should be made of the draft articles. It reserves its position on whether the draft articles should be incorporated in a convention or should be used primarily as guidelines for national legislation.

The present draft articles could be improved by clarifying the different States to which reference is intended to be made in the particular articles, that is, whether reference is to the State of the forum or another State.

There is confusion in the present draft articles stemming from the use of the word "State" to signify both the State the courts which are being asked to exercise jurisdiction (e.g. article 7) and the State which is claiming immunity (articles 8, 9, 10, etc.). The use of "a State"/"another State" is not a satisfactory formula, especially when the roles are reversed (from article 7 to article 8). The expressions "forum State" and "foreign State" would be clearer.

It would also seem desirable in articles 12 to 18 to replace the words "unless otherwise agreed between the States concerned" with a new introductory article dealing with the power of States to contract out of an exception to immunity in part III of the draft articles.

In general terms, to allow States by agreement to vary the position otherwise applicable does raise questions of fairness as far as an individual is involved where a dispute with a foreign State is concerned. An agreement between States can be made with varying degrees of formality and it is possible to envisage a situation where an ad hoc arrangement is made to exclude an exception to immunity with regard to a particular case. Whether or not the individual is aware of the change is immaterial: such a step would be extremely unfair, particularly if business had been transacted with a foreign State on the basis of a particular assumption about that State's position with regard to immunity.

Two measures might be considered to remedy the situation:

(a) That some system be implemented of registering and/or publishing agreements that derogate from exceptions to immunity provided for in the future instrument, backed up by a provision that, in the absence of such a registration and/or adequate publication, the derogation should not operate against an individual unless it could be proved that he was aware of the derogation;

(b) That a derogation should not, in any case, be effective with regard to a transaction entered into before the forum State and the foreign State party agreed to derogate from the exception to immunity provided for under the future instrument.

Even if those proposals are not acceptable, some limitation on the form of agreement might be desirable.

Specific comments on individual articles

Article 3

The difference between article 3 as an interpretative provision and article 2 which contains definitions is not apparent.

The following specific comments are also made on this article. The definition of "State" does not make clear the position of agencies or instrumentalities of a political subdivision. These should be included in article 3 (1) (c). There also seems no reason to confine the articles to political subdivisions of a State which are entitled to perform acts "in the exercise of the sovereign authority of the State". The determination of whether a body exercises sovereign authority is not always easy. In the case of constituent units of federal States, for instance, these should be granted the same immunities as those of a central government, without any additional requirement to establish sovereign authority.

The most significant aspect of article 3 (2) is that it is, in effect, imposing a requirement of reciprocity. It is not for the State of the forum to decide whether or not it will take into account the purpose of a transaction in order to determine its non-commercial character. The reference to "that State" is intended to point to the "foreign State" which is impleaded in an action (see the commentary on article 3 (2) in the report of the International Law Commission on the work of its thirty-eighth session, 2/ which reads as follows: "The expression 'that State' ... refers exclusively to the State claiming immunity and not to the State of the forum"). To avoid ambiguity, that identification should be made clear by employing the expression "the foreign State" for the State impleaded in an action. However, the issue still remains of whether it is acceptable for a forum State to have to examine and then apply the practice of the foreign State in this regard. There is also the question of whether, if the forum State itself applies a purpose test, but the foreign State does not, the forum State is being invited to apply the less restrictive rules of the foreign State to the latter's disadvantage.

The reference to the practice of the impleaded State may itself give rise to difficulties. Practice suggests a course of conduct. Many States have little contact with issues of sovereign immunity, except perhaps for a rare appearance as defendant before some foreign forum. On what evidence should a court base its assessment of such practice, when this might consist of little more than an assertion before the court by the defendant State that it based its approach to

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2/ *Official Records of the General Assembly, Forty-first Session, Supplement No. 10* (A/41/10), p. 30, para. (7).

determining the character of a transaction on the purpose for which that transaction was entered into? Is the practice referred to the practice of the agency, instrumentality, subdivision or representative, or is it the practice of the State as a whole?

If this clause is to be retained in some form, it would seem preferable to identify when the purpose of a transaction should be taken into account.

Article 4

Article 4 (1) should be amended to make it clear that the privileges and immunities referred to are those conferred by international law. This could be achieved by inserting the phrase "under international law" after the word "State". This amendment would serve not only to clarify the meaning and intention of this paragraph but also bring it into line with article 4 (2).

Article 5

The specific time limitation contained in the principal clause of draft article 5 is problematical. The cut-off date means that the articles are not to apply to any question of immunity arising in a proceeding instituted prior to the entry into force of the articles for the States concerned. There is nothing (other than presumably a statute of limitations) to stop the plaintiff in such a proceeding from recommencing his action as soon as the latter event occurs. Accordingly, it is doubtful whether there is much value in imposing any such restriction on the operation of the proposed draft articles.

As far as alternatives are concerned, an attempt could be made to restrict the specific operation of the proposed articles to disputes or facts or events giving rise to a proceeding which occur after the entry into force or acceptance of the articles by the forum State. If it is found necessary to incorporate a cut-off date in the draft articles, there may be value in including an additional "optional clause", allowing the articles to operate with regard to any cause of action arising within, say, the six years preceding the date upon which the future instrument entered into force between the States concerned. At the time of acceptance, a State could signify that it was prepared to accept the obligation contained in the "optional clause" in relation to any other party accepting the same obligation.

Article 6

Australia would prefer to delete the words in square brackets because retention, at least in their present form, would suggest that all the relevant rules of foreign State immunity are not included in the draft articles. It would be preferable to indicate what rules are not covered.

If there is a strong desire to retain these words, retention of the words in square brackets could serve to reflect the fact that the law is always in a state of development and point to the fact that customary international law can modify the impact of a "law-making" treaty.

One possibility to reflect this more clearly than has been done at present would be to reword the words in brackets to read:

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

An alternative might be:

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

Article 7

While draft article 6 bestows the privilege of immunity on the foreign State, draft article 7 (1) imposes the obligation upon the forum State to give effect to that immunity. Paragraph 1 should therefore be redrafted in the form: "A forum State shall give effect ...".

Article 7 (2) is too wide. Its effect is that a proceeding will be considered to have been instituted against a foreign State in cases where it could not be said that the State was party to the proceedings but where a determination by the court affects "the property, rights, interests or activities of that other State". A narrower formulation of article 7 (2) would be preferable.

Article 7 (3) is superfluous. The wide definition of "State" in article 3 (1) ensures that proceedings against, for example, one of the agencies of a State would be regarded as a proceeding against a State.

In the event that paragraph 3 is retained, it could be made less complex by a simple reference to the various institutions of the State as defined in draft article 3 (3).

Paragraphs 2 and 3 of article 7 could in any event be simplified. It may be necessary to retain something of the form of these paragraphs to fit in with paragraph 1. Nevertheless, even the formula "A/The forum State shall be considered to have exercised jurisdiction against another/a foreign State ..." is less convoluted, and would harmonize better with paragraph 1.

Article 8

Article 8 is in keeping with international practice in recognizing in subparagraphs (a) and (b) formal procedures whereby a State can expressly consent to the exercise of jurisdiction. Subparagraph (c) reflects the original proposition of English law that only a submission in the face of the court would be effective (Mighell v. Sultan of Johore (1894) 1 QB 149). However, once it is recognized that a State can express its consent to the exercise of jurisdiction by (a) international agreement or (b) written contract, there is no reason for limiting subparagraph (c) to declarations made before the court. It would be preferable to adopt the less restrictive provision of the equivalent

subparagraph (c) of article 2 of the European Convention on State Immunity 3/ allowing submission to be "by an express consent given after a dispute between the parties has arisen". This is in keeping with the civil law principle of forum prorogatum and is much to be preferred.

In draft articles 8, 9 and 10, the expression "in a proceeding before a court" is employed. In accordance with universal practice, a submission to jurisdiction would involve "the exercise of jurisdiction by appellate courts in any subsequent stage of the proceeding up to and including the decision of the court of final instance, retrial and review, but not execution of judgment" (Yearbook of the International Law Commission, 1982, vol. II (Part Two), p. 109, para. (12)). It would be worth while, for the sake of clarity, to include a definition along the above lines in draft article 2 (1), because it could be argued that "a proceeding before a court" excludes proceedings before another court (i.e. the appellate tribunal).

Article 10

Articles 10 (1) and (2) could be redrafted to give the same legal effect by condensing the paragraphs into one. Suggested wording is as follows:

> "Neither a foreign State which institutes a proceeding nor a foreign State which intervenes to present a claim in a proceeding before a court of the forum State can invoke immunity from jurisdiction in respect of any counterclaim against the foreign State arising out of the same legal relationship or facts as the principal claim."

Article 11

Draft article 11 (1) uses the rather strange, and inconsistent, wording "the State is considered to have consented to the exercise of ... jurisdiction". There is no need to rely upon a theory of implied consent in such circumstances. Moreover, this article is in part III of the draft articles, not part II. Therefore it should not use the language of part II ("the State ... accordingly cannot invoke immunity from jurisdiction") but should be drafted in language similar to that employed elsewhere in part III:

> "The immunity of a foreign State cannot be invoked before the court of a forum State in a proceeding arising out of a commercial contract between the foreign State and a natural or juridical person of another State where, by the relevant rules of private international law, differences relating to the contract fall within the jurisdiction of a court of the forum State."

Given the wording of article 11 (1), paragraph 2 (a) hardly seems necessary because "if a State enters into a commercial contract with a foreign natural or juridical person", this would in any event not apply to a commercial contract "concluded between States or on a Government-to-Government basis".

3/ Council of Europe, European Treaty Service (Strasbourg), No. 74 (1972).

If paragraph 2 (a) is deleted, it would probably be simpler to incorporate subparagraph (b) as part of the main part of the draft article. A useful protection for a person contracting with a State might be to require any contracting out to be in writing and to be stated in the commercial contract. Article 11 would then start with the words:

> "Unless the parties to the commercial contract have otherwise expressly agreed in writing as part of the commercial contract, ...".

Article 12

The reference in article 12 (1) to "a contract of employment ... for services performed or to be performed" is confusing, particularly in view of the definition in article 2 (b) of "commercial contracts". Such a contract specifically includes the "supply of services" but specifically excludes "a contract of employment of persons". In article 12 the two concepts have been amalgamated in a way which makes unclear whether the contract is intended to refer to a contract of employment or a contract for services.

The reference to the social security provisions in article 12 (1) is unncessary, given the fact that some States might not make such provisions for their work force. It is also possible to envisage situations where the applicable social security provisions would be those of the employer rather than the forum State, and where this would constitute no reason for denying jurisdiction to the courts of the latter. Moveover, Australia is concerned to ensure that the fullest legal protection is available to all employees who are recruited in Australia and who are permanent residents of Australia (although we recognize that special rules may apply to foreign employees brought into the country and employed, for example, as (foreign) embassy staff). In our view, the best way to achieve this measure of protection would be to delete the reference in article 12 (1) to social security provisions.

Article 12 (1) is in any case unduly restrictive in that for immunity to be unavailable to the foreign State, it requires both:

(a) That the contract of employment be performed in whole or in part in the territory of the forum State; and

(b) That recruitment be made in the latter State and be subject to the social security provisions of the latter State.

Having regard to article 12 (2), and on the basis that it is understandable that there should be a nexus between the contract and the forum State, there is no reason why both these elements should be required. Accordingly, even if the social security requirement is omitted, the text makes cumulative what in many national enactments are alternative exceptions to immunity. The Australian Foreign States Immunities Act 1985, section 12 (1), for example, would deny immunity either where the contract was made in Australia or where it was performed in whole or in part here. The Australian model is preferable to the current draft article 12 (1).

Another criticism of article 12 (2) is that draft article 12 (2) (c) and (d), in attempting to balance any conflict of nationality or residence between the States involved, has given no role to the principle of dominant nationality, and thereby also unduly restricts the employee's right of redress. By virtue of the latter provision, if, at the time the action is commenced, the individual concerned is a national of the employer State, the latter is entitled to immunity. On the other hand, immunity is also available if the employee was not a national or a habitual resident of the forum State at the time the contract of employment was concluded. Although expressed in this negative form, this requirement is in fact a qualification on the exercise of jurisdiction by the forum State, i.e. at the time the contract was made, the employee must have been a national or a habitual resident of that State. This approach is acceptable enough where there has been a change of nationality between the time of contract and the time the proceedings are brought from the forum State to the employer State, but less satisfactory where the employee has dual nationality throughout the period, or even retains this original forum State nationality when acquiring that of employer State. Certainly in the first of those two situations it would be reasonable to apply a test of dominant nationality in order for the employer State to establish that it is entitled to immunity vis-à-vis the forum State. This is a factor which might support that State's claim to be the dominant nationality, but it should not necessarily be conclusive on the issue of immunity. Indeed, in any case of a change of nationality to that of the employer State, the question needs to be asked whether, in all the circumstances of the case, it is appropriate that this fact should entitle the employer State to immunity from the jurisdiction of the courts of the former, perhaps even a continuing, nationality. It is not unknown for a person to acquire a nationality without comprehending fully the implications of such a step as far as his legal rights are concerned.

Article 13

The pre-condition that the author of the act or omission must be present in the territory at the time of the act or omission seems to be unnecessary; it adds nothing in terms of logic, may well be unduly restrictive and creates difficulties if there is more than one author, not all of whom are so present at the time.

In the context of the exclusion of immunity, the place where the injury occurred should establish the necessary jurisdictional basis, unless a closer relationship can be shown to exist with the foreign State pleading immunity. Such an approach would have the advantage of being in harmony with the principle, expressed in a number of Anglo-Australian cases, as well as the Court of the European Communities, that a court, in deciding whether to exercise jurisdiction over an action in tort, should identify where the substance of the cause of action arose.

Article 14

The object of subparagraphs (c), (d) and (e) of draft article 14 is to deal with situations in which a court of the forum is called upon to exercise a supervisory jurisdiction over such matters as those referred to, and where, incidentally, property rights might have to be determined. This appears, at least as far as trust property was concerned, to have been the position in both the

United States, and England, prior to the passing of the State immunity legislation. The British legislation provides, in section 6 (3), that the fact that "a State has or claims an interest in any property shall not preclude any court from exercising in respect of it any jurisdiction relating to the estates of deceased person or persons of unsound mind or insolvency, the winding up of companies or the administration of trusts". However, it would appear that the legislation does not alter the pre-existing law that a State would be entitled to immunity if the State itself or its agent were the administrator holding the trust fund. As Romer L J explained in Nizam of Hyderabad v. Jung (1957), Ch 185 at 250, the trust cases "are only properly applicable where the court finds a trust fund in the hands of a person who is an independent trustee, and that they should not be extended to cases in which the person who controls the fund combines the character of trustee with that of agent for the foreign State which is setting up an interest in the fund. The contrary view, as it seems to me, would stretch what has hitherto been regarded as an exception to the doctrine to a point at which it ceases to be reconcilable with the doctrine itself."

If, as the International Law Commission suggests, the basis for excluding immunity in this group of situations is so as not to hamper the courts' supervisory role, it is surprising that the court's jurisdiction should not extend to a situation where the person whose activities would be subject to control is otherwise entitled to immunity. This is particularly so in view of the fact that the justification given in the Nizam of Hyderabad case for immunity being available in such a situation was that, for the court to exercise jurisdiction in those circumstances would be too great a departure from the doctrine of absolute immunity then in vogue. Any statutory exceptions were accordingly read down so as not to undermine the basis of the doctrine. Given the move away from this doctrine, supervision over property impressed with a trust would seem to be a legitimate basis for exercise of jurisdiction by the forum State, provided that the property is otherwise subject to the jurisdiction of the courts of that State. Article 14 should make plain that the immunity cannot be invoked even where the State itself or its agent is the administrator holding the trust fund.

Article 18

Australia agrees with the intention expressed by the International Law Commission in the travaux, that warships are to enjoy a total immunity from suit whether they be on the high seas or in the waters of another State. This position not only accords with the rules of customary international law but is also reflected in the provisions of the Convention on the Territorial Sea and the Contiguous Zone, articles 21 to 23; the Convention on the High Seas, articles 8 and 9 and the United Nations Convention on the Law of the Sea, articles 29 to 32 and 95 to 96.

Article 18 (2), as presently drafted, leaves the matter unclear. It should be redrafted to spell out the immunity in specific terms.

These comments apply mutatis mutandis to government ships operated for non-commercial purposes.

Accordingly, this article should be redrafted along the lines of the following:

"Warships and other ships owned or operated by a State and used in government, non-commercial service have complete immunity from the jurisdiction of any State other than the flag State."

Article 19

Article 19, especially if the first variant in square brackets is adopted, is far too narrow, since it is concerned only with questions of arbitral procedure, the validity and interpretation of the award, etc. In respect of "private law" arbitrations, there is no reason to limit the forum State's jurisdiction in this way. Whatever supervisory jurisdiction of the courts of the forum State is provided for in local legislation should be able to operate. The position with respect to the enforcement of arbitral awards raises different and very difficult problems which should be dealt with explicitly. Compare section 17 of the Australian Foreign State Immunities Act 1985.

Article 20

The meaning and precise significance of this draft article are far from clear. Its effect is not to provide for a limitation or an exception to State immunity. Consequently, it is doubtful whether, in its present formulation, it should be contained in part III of the draft articles. Its removal is recommended.

Article 21

The insistence in draft article 21 (a) on a link between the property and the object of the claim, alternatively with the agency or instrumentality of the foreign State, seems unnecessary and is far too limiting, particularly in view of the fact that many contractual situations will not involve a dispute over a specific property as such. It is similarly arbitrary to allow a court to levy execution against property which happens to belong to the agency or instrumentality involved in the dispute but not to have similar powers in relations to State property; after all, all the property belongs to the State in question. A limitation such as that in article 21 (a) invites evasion. Article 21 (b) would appear to be adequately met by article 22. The reference to [non-governmental] should be deleted, as article 23 clarifies what property is covered.

Article 22

The means whereby the foreign State's consent to measures of constraint might be expressed are contained in the comments on draft article 8 (c). Draft article 22 (1) (c) contains the same wording as draft article 8 (c). In relation to the latter provision, it was suggested that it would be preferable to use the formula employed in article 2 (c) of the European Convention whereby a State can submit to the jurisdiction "by an express consent given after a dispute between the parties has arisen". The same form of words should be used in draft article 22 (1) (c). The effect of this formula is similar to article 23 of the European Convention whereby "measures of execution or preventative measures against

the property of a Contracting State" can only be taken "where and to the extent that the State has expressly consented thereto in writing in any particular case".

Paragraph 2 could be improved by clarifying that consent to measures of constraint may be given at the same time and as part of the original consent to jurisdiction.

Article 23

This article is too restrictive. For instance, there is no requirement in article 23 (1) (a) that the property be wholly or even substantially in use for diplomatic purposes. There is no clear justification for a complete immunity of central bank property which may well be used for ordinary investment purposes.

Article 28

Article 28 is not really concerned with the question of discrimination or non-discrimination; it is concerned essentially with the question of reciprocity of treatment. The article should be redrafted to reflect this.

Given that the issue is one of reciprocity of treatment, there seems to be no rational basis for limiting such reciprocity to "agreement" in article 28 (2) (b). Such reciprocity could equally take place by State practice or arise out of an application of customary international law.

BELGIUM

[Original: French]

[13 January 1988]

General comments

The draft articles uphold the principle of State immunity. This immunity is not, however, absolute; it is subject to exceptions. These exceptions concern either the attitude adopted by the State during the jurisdictional proceeding or specific categories of acts.

The articles relating to immunity from jurisdiction are, to a large extent, close to those of the European Convention on State Immunity, done at Basel on 16 May 1972. On the other hand, in the matter of immunity from execution, the International Law Commission's draft departs from the European Convention, since in the latter forcible execution is in all cases subject to the express consent of the State.

The Government has no fundamental objection to make regarding the draft articles. However, it suggests some changes in the following articles.

Specific comments on individual articles

Article 12

The scope of this article is less broad than that of the corresponding article of the European Convention. In view, in particular, of the restrictions set forth in paragraph 2, it seems pointless to retain in paragraph 1 the words "if the employee has been recruited in that other State and is covered by the social security provisions which may be in force in that other State".

Furthermore, it would be advisable to delete subparagraph 2 (a): "the employee has been recruited to perform services associated with the exercise of governmental authority". The concept of "governmental authority" is imprecise and allows an excessively broad interpretation of the exception. Moreover, this exception does not appear in the European Convention.

Article 14

Paragraph 2 is not at all clear: either the property belongs to the State, in which case the State is necessarily a party to the proceeding, or the property does not belong to the State but to a private individual, in which case the problem of State immunity does not arise. It would be preferable to delete paragraph 2.

Article 18

Paragraph 7 should be deleted. The draft should avoid having the commercial character of the ship depend on the assessment of the State. Only objective criteria should be taken into consideration.

Article 21

The concepts of "property in its control" and "property in which it has a legally protected interest" are too vague. It would be advisable to retain only the concepts of property and possession, which alone have a precise legal application. Moreover, subparagraph (b) seems to duplicate subparagraph (a).

BULGARIA

[Original: English]

[29 January 1988]

General comments

The codification and progressive development of international law in the area of jurisdictional immunities of States and their property is linked to the comprehensive study of the international law doctrine and of the international practice of States in this field on the basis of the generally accepted international legal norms.

In this respect, the Government of the People's Republic of Bulgaria highly appreciates the tireless and constructive work of the International Law Commission, which at its thirty-eighth session adopted on first reading the draft articles on jurisdictional immunities of States and their property. The text of the draft articles proposed for consideration is marked by legal precision, but in so far as the functional immunity of States is fully laid down in it, this text could hardly serve as a basis for the codification of norms of international law in this field.

The principle of jurisdictional immunity of States is univerally recognized in international law as being a logical consequence of the principles of sovereignty and sovereign equality of States, which provide for the non-submission of one State to the authority of another (par in parem imperium non habet).

These principles of contemporary international law function in all spheres of inter-State relations, be they political, economic, trade, social, scientific-technological or cultural ones. Therefore, the State always acts as imperium, a purveyor of State authority in its external relations, and no additional circumstances, such as the development of State functions, can undermine the sovereignty and the principle of non-submission of one State to the jurisdictional authority of another.

This requires that the draft articles on jurisdictional immunities of States and their property should be based on the generally acknowledged and traditional tenet of full State immunity, regulating only a limited number of clearly specified exceptions to it, which would be acceptable to the overwhelming majority of States. The draft articles submitted for consideration could not serve as a basis for a universally applicable concept in this field, since in their drafting the legislation of only a limited number of developed Western States has been taken into consideration and consulted. The draft articles should reaffirm the concept of immunities of States and their property, rather than undermine it through many exceptions encompassing important spheres of State activity, thus largely reducing it to a mere legal fiction.

The economic system and the system of legal regulation in the People's Republic of Bulgaria, as well as in the other socialist countries, are characterized by a certain peculiarity relating to the fact that the individual entities of State property have been turned over to the socialist economic organizations for possession, use and management. These economic organizations are separated as juridical persons from the State and are individually responsible for their obligations solely within the limits and to the extent of the specific State property that they possess. On the other hand, the State is distinguished from juridical persons and their activity when in its capacity as a subject of international law it enters into economic and trade relations, and therefore should enjoy immunity from the jurisdiction of another State. This concept, which is reflected in Bulgaria's legislation, as well as in the legislation of other States, is closely related to the subject-matter regulated by the draft articles and should find due reflection therein.

Specific comments on individual articles

The formulations of some specific draft articles are objectionable, among which the Government of the People's Republic of Bulgaria would like to point out draft articles 6, 13, 14, 19, 21 and 23.

Article 6

The current draft article 6, containing a reference to "the relevant rules of general international law", is unacceptable. The draft article is meant to codify the principle of immunities of States and their property from foreign jurisdiction, rather than deprive it of content by referring to exceptions to it.

Article 13

Draft article 13 also poses some difficulties. It is inadmissible that a State should be given the right and the option to determine alone the grounds for the international responsibility of another State in cases of personal injuries and damage, as well as to give a court of that State the discretion to attribute responsibility.

Article 14

Draft article 14 contains some very general formulations which could hardly be adopted before having analysed carefully and in depth any possible hypotheses which they may contain, as well as the legal consequences which could follow from the various legal systems.

Article 19

The logic of draft article 19 is also unacceptable. An arbitration agreement between a State and a natural or juridical person should not mean the automatic waiver of immunity from jurisdiction even in the cases specified in the text. On the contrary, an arbitration agreement means that the State is unwilling to waive its immunity from jurisdiction relating to possible specific disputes and accepts arbitration as a means of their out-of-court settlement.

Articles 21 and 23

No less problematic are draft articles 21 and 23, which are fully premised on the concept of functional immunity of States. These draft articles define rather broadly the scope of the term "property used for commercial (non-governmental) purposes", positively in draft article 21, and negatively, through the method of exclusion, in draft article 23. If this formulation allows an interpretation according to which the said exceptions are exhaustive, then such an interpretation contradicts the right of States to determine in each specific case the purposes for which their property is used.

The Government of the People's Republic of Bulgaria wishes to express its confidence that, along the lines of the comments and observations submitted by States, the International Law Commission will make a major contribution to the

codification and progressive development of the norms of international law in the area of jurisdictional immunities of States and their property.

CANADA

[Original: French]

[31 December 1987]

The Government of Canada considers that the draft articles on the jurisdictional immunities of States and their property constitutes an excellent basic document that deserves to be studied in greater detail. The International Law Commission has based its approach on the principle of the restricted immunity of States, a practice which is applied in Canadian law. Canada believes that a State does not enjoy jurisdictional immunity in respect of its activities of a commercial nature. However, as this concept is still evolving, Canada would prefer that the Commission not labour over-long with the details of part III, since every detail might increase the points of divergence. Canada would like commercial activity to be defined by the nature of the act, rather than by its purpose. Part IV, concerning State immunity in respect of property from measures of constraint, calls for clarifications. Canada considered that the property of the foreign State used within the framework of a commercial activity should not enjoy immunity from execution and that the criterion of linkage with the object of the claim, in article 21, should not be necessary. Similarly, the foreign State should not be able to invoke immunity from measures of constraint in respect of such property. Article 22 should be clarified to that effect. The basis for the concept of restricted immunity was that the foreign State, when pursuing an activity of a commercial nature, should be considered on the same footing as any other commercial partner. The requirement of prior consent to measures of execution seems to be a negation of this principle.

With regard to part V, the service of process provided for in article 24, paragraph 2, should be deemed to have been effected by the "transmission" of the documents to the Ministry of Foreign Affairs, rather than by their "receipt".

CHINA

[Original: Chinese]

[28 December 1987]

The Chinese Government maintains that the jurisdictional immunity of States and their property is a long-established and universally recognized principle of international law based on the sovereign equality of States. The draft articles on the subject formulated by the International Law Commission need to spell out the status of this principle in international law.

The draft articles should affirm the principle mentioned above and, on the basis of a thorough study of the practice of States, including the socialist and

developing countries, pragmatically identify those "exceptions" whose necessity and reasonableness are borne out by reality, e.g. "ownership, possession and use of immovable property", "ships engaged in commercial service", so as to accommodate the present state and the development of international relations, particularly international economic and commercial links.

The object of establishing a legal régime for the jurisdictional immunities of States should be to strike the necessary balance between the limitation and prevention of abuses of national judicial process against foreign sovereign States and the provision of equitable and reasonable means of resolving disputes, thus helping to safeguard world peace, develop international economic co-operation and promote friendly contacts between peoples. Judged against this objective, the present draft articles undeniably show obvious defects and require further work before they will be acceptable to the international community as a whole.

DENMARK*

[Original: English]

[21 December 1987]

The following constitutes the comments and observations of the Governments of Denmark, Finland, Iceland, Norway and Sweden on the draft articles on "jurisdictional immunities of States and their property" as adopted by the International Law Commission at its 1972nd meeting in June 1986 (A/41/498).

General comments

The Governments of the Nordic countries are in favour of the concept of restrictive State immunity and support the Special Rapporteur's endeavours to draw workable lines of distinction between activities of States performed in the exercise of sovereign authority, acta jure imperii, which are covered by immunity, and other State activities, acta jure gestionis, which should not be covered by immunity due to their commercial character or other adherence to the province of private law. The draft articles on immunity from lawsuit and execution are in general harmony with this restrictive view which more or less corresponds to the trend in current international law on State immunity.

Specific comments on individual articles

Article 3

As regards draft article 3, paragraph 2, it is therefore the view of the Governments of Denmark, Finland, Iceland, Norway and Sweden that, in determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should only be made to the nature of the contract and not to the purpose of the contract. By taking into account the purpose of the contract

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* Reply submitted jointly by the five Nordic countries: Denmark, Finland, Iceland, Norway and Sweden.

and the practice of a State, the general distinction between acta jure imperii and acta jure gestionis - the central idea of the restrictive theory - is in jeopardy. It is a necessity to develop a uniform practice of this concept. Hence, in determining whether a contract is commercial, weight should only be attached to an objective criterion, i.e. the nature of the contract.

Article 6

With regard to the fundamental article 6 in the draft a formula should be chosen that takes into account the future development of international law through the practice of States, national legislation and judicial proceedings of national courts. The law in this field is not advanced or ripe enough to warrant a final codification, or a legal "freeze", covering all situations. The Governments of the Nordic countries consequently support the inclusion of the bracketed language at the end of draft article 6, namely the words "and the relevant rules of general international law".

Part III

The heading of part III should read "Limitations on State immunity", and not "Exceptions to State immunity", in order to reflect a less static approach to the subject (see the argumentation concerning article 6, above).

Article 11

Article 11 on commercial contracts is carefully formulated to present accurately this, the most important of limitations to State immunity. The Governments of Denmark, Finland, Iceland, Norway and Sweden agree with the supporters of the current wording that the application of the rules of private international law is probably a more suitable criterion for giving effect to this limitation than the possible existence in the State of the forum of, e.g., an office or bureau. On another point, however, difficulties in the application of this article might arise. In recent years, State activity in the private sector has assumed diverse and complex forms as a result of which the question of when a State can be said to have entered into a commercial contract will often be difficult to decide in concrete cases. The said Governments expect that it might at some stage during the codification process be beneficial to the solution of such difficulties to include in article 11 a criterion concerning the structural relationship between the State and the commercial contract in question.

Article 18

With regard to draft article 18 on State-owned and State-operated ships, the Governments of the Nordic countries are of the firm opinion that the concepts of "commercial service" and "commercial purposes" should not be confused by the added qualification of "non-governmental". The bracketed phrase should be deleted so as not to blur the distinction between acta jure gestionis and acta jure imperii.

Article 19

Regarding article 19 on "effect of an arbitration agreement", the Governments of the Nordic countries are of the view that it would not be in line with existing customary law to restrict the scope of non-immunity in arbitration matters to disputes over commercial contracts. Consequently, with regard to the two bracketed alternatives, "commercial contract" contra "civil or commercial matter", the latter should be chosen.

Part IV

The Governments of Denmark, Finland, Iceland, Norway and Sweden are of the opinion that in general the right balance has been struck between the interests of the acting State, the territorial State and the private claimant. The principles laid down in articles 21 to 23 furthermore seem to reflect a major trend in current State practice.

Articles 21 and 22

The bracketed phrase "or property in which it has a legally protected interest" might permit a widening of the present scope of State immunity from execution, which has little to say for it, since the preceding words "on the use of its property or property in its possession or control" must be regarded as covering all State interest in property that is neither marginal nor, by its very nature, unaffected by the various measures of constraint. Hence, the identical bracketed sentence in article 22 should also be deleted.

Furthermore, the Governments of the Nordic countries agree that it was rightly pointed out in the debate in the Sixth Committee that the current doctrine of restrictive immunity rests on the assumption that once a foreign State has entered the market-place it should be treated in the same way as others in the market-place.

Hence, with reference to subparagraphs (a) and (b) of article 21, the right to execute should not be limited to property that "has a connection with the object of the claim" or property that "has been allocated or earmarked by the State for the satisfaction of the claim"; the right to execute should apply to all property specifically in use for commercial purposes or intended for such use.

Article 23

With regard to draft article 23 on categories of property that shall not be considered in use for commercial purposes, the Governments of the Nordic countries have the following comment. In paragraph 1 (c), property of central banks in the territory of other States is unconditionally excluded from execution. This rule seems to be based on the view that because central banks are instruments of sovereign authority any activity they undertake must be covered by immunity from execution. However, if the foreign property of a central bank is used or intended for use by the State for commercial purposes, it might be logical not to treat it differently from other State property that fulfils this condition.

Article 24

Finally, the Governments of Denmark, Finland, Iceland, Norway and Sweden should like to make a comment as regards draft article 24 on "Service of process". Paragraph 1 (a) provides for the possibility of special arrangements for service of process between the claimant and the State concerned. In many national legal systems special arrangements of this kind between the parties cannot be taken into account. Article 24 therefore seems to be drafted on the assumption that States would be willing to modify their domestic rules of civil procedures if a national ratification or accession would require that. In that sense, draft article 24 seems to be over-ambitious.

FINLAND

[See the comments and observations reproduced under Denmark above.]

GERMAN DEMOCRATIC REPUBLIC

[Original: English]

[7 January 1988]

General comments

The German Democratic Republic has devoted great attention to the codification project "Jurisdictional immunities of States and their property". It holds the view that the envisaged convention will be of major significance as regards the implementation of the principle of sovereign equality of States.

Therefore, the German Democratic Republic welcomes the fact that the International Law Commission has presented the full set of articles, thus creating the prerequisite for expediting work on the project with a view to its early completion.

Throughout the codification process, the German Democratic Republic has taken the view that the envisaged convention should serve to strengthen the institution of the immunities of States and their property. The task is to work out a set of rules which, taking into account the legitimate interests of all States, will put an end to what has been an increasing number of attempts in the last few years to minimize the immunity of States and their property through unilateral acts.

Consideration of the relevant practice in all groups of States will be required to ensure success in the effort to codify and further develop the institution of the immunities of States and their property. The codification process should result in a kind of immunity which is defined with regard to both persons and subject-matter and based on a clearly defined principle and precisely and conclusively specified exceptions thereto.

The German Democratic Republic welcomes the fact that the draft articles adopted by the International Law Commission on first reading, unlike those proposed in the reports of the former Rapporteur, do not follow the thinking that immunity should be granted only in respect of so-called acta jure imperii and/or of State property used for this purpose.

The International Law Commission proceeds from the premise that the envisaged convention should strengthen the principle of the immunity of the State and its property while States could agree on the lowest possible number of exceptions thereto. Precisely and conclusively specified exceptions would in the future preclude any unilateral restrictions of immunity going beyond that, thus contributing to ensuring, in the interest of all States, the desired state of legal security.

Specific comments on individual articles

The German Democratic Republic will assist the International Law Commission in its efforts to seek compromise formulas acceptable to all States. To this end we are putting forward the following modifications and alterations to some of the draft articles. Particular significance is attached to the proposals concerning article 3, paragraph 1, and article 6, since the content of these articles will be decisive in determining the future position on the convention on the jurisdictional immunities of States and their property.

The German Democratic Republic is submitting the following specific proposals.

Articles 2 and 3

The German Democratic Republic holds that the definition of the term "court" (article 2, para. 1 (a)) should include a precise explanation of the term "judicial functions". Since there are different legal systems, respective explanations should be incorporated in the commentary.

Article 2, paragraph 1 (b) (Definition of the term "commercial contract") and article 3, paragraph 2 ("Determination of the commercial character of a contract") deal with one and the same subject and should therefore be combined. Moreover, the term "commercial service" used in article 18 should be explained in greater detail.

Article 3, paragraph 1 ("Interpretation of the expression 'State'") does not make it sufficiently clear that State-owned, self-supporting legal entities, which are established exclusively for the purpose of performing commercial transactions and which act on their own behalf, do not represent the State and are therefore not entitled to immunity under international law in respect of themselves and their property.

For that reason, the German Democratic Republic proposes to include in article 3 the following new paragraph 2:

> "The expression 'State' as used in the present articles does not comprehend instrumentalities established by the State to perform commercial transactions as defined in article 2, if they act on their own behalf and are liable with their own assets."

The express exclusion from the scope of the envisaged convention of self-supporting legal entities not entitled to perform acts in the exercise of sovereign authority is regarded by the German Democratic Republic as a decisive criterion in assessing the draft articles in their entirety.

In view of the fact that the International Law Commission has confined itself in articles 2 and 3 to the definition of a few terms and a limited number of interpretative provisions, and recognizing that the distinction between the two categories is not perceptible, the two articles should be merged.

Article 6

The German Democratic Republic views article 6 ("State immunity") as the centrepiece of part II of the draft articles since there the principle of the immunity of the State and its property is established. The German Democratic Republic holds that the formulation "and the relevant rules of general international law", which has been retained in article 6 between square brackets, is inconsistent with the purpose of the future convention, i.e. to create a set of clear-cut rules for the immunity issue in the form of a relevant international instrument.

The bracketed formulation would only serve to encourage unilateral restrictions of the immunity of a State and its property and leave room for differing interpretations. A norm which contains a reservation so extensive as to make the norms in effect non-binding should not be the result of the codification process and is not acceptable to the German Democratic Republic. The bracketed formulation, "and the relevant rules of general international law", should be deleted for the reasons stated. Only in that way will it be possible to achieve the purpose of the convention, i.e. to define precisely the principle of immunity, including possible exceptions thereto.

Articles 7 et al.

Some draft articles, e.g. article 7 ("Modalities for giving effect to State immunity"), contain terms and expressions which are used only by a few legal systems and even there are not sufficiently clearly defined.

Such terms, notably "interests of a State" and "property in its control", in the view of the German Democratic Republic, are unsuitable and tend to complicate the future application of the convention. Therefore, care should be taken not to use such terms in any of the draft articles.

Article 11

With regard to article 11, paragraph 1, the German Democratic Republic proposes that the exercise of jurisdiction be made dependent upon a significant territorial relationship between the commercial contract, the parties thereto and the State of jurisdiction, since in the more recent past courts in several States have claimed authority to deal with relevant disputes without there being such a relationship.

Article 12

The German Democratic Republic believes that there is no practical need for including in a future convention provisions on proceedings relating to contracts of employment. It proposes that in the redrafting process article 12 be deleted in order to reduce the number of exceptions to the principle of immunity. Even the Vienna Convention on Diplomatic Relations does not contain a provision for a court decision in the case of an employment dispute. Moreover, deleting article 12 would not prejudice the applicability of a given domestic substantive law to employment contracts in which foreign States are participating.

Article 13

The German Democratic Republic feels that the effect of article 13 ("Personal injuries or damage to property") would be that a foreign State, in respect of one and the same act, would enjoy less immunity than its diplomats, who are protected under article 31 of the Vienna Convention on Diplomatic Relations.

Mindful of the small number of immunity disputes in that field - which is due to the existence of corresponding insurance contracts and the settlement of pertinent problems through diplomatic channels - it should be possible to delete article 13, as is advocated by the German Democratic Republic.

Article 14

As regards article 14 ("Ownership, possession and use of property"), the words "movable or immovable" should be deleted in paragraph 1 (b) in order also to encompass protected privileges which may form part of such property. Paragraph 1 (e) of article 14 should also be deleted.

Article 20

The inclusion in the draft of article 20, concerning measures of nationalization, does not meet with the approval of the German Democratic Republic. It is its basic position that measures of nationalization clearly constitute sovereign acts and as such are not subject to the jurisdiction of another State. Article 20, however, allows the conclusion that nationalization measures are an exception to the principle of immunity. The article should therefore be deleted.

Article 21

It is generally held that measures of constraint against the property of a State (part IV of the draft articles) curb the latter's ability for international action to a greater extent than court procedures leading to a judgement. This is borne out by the fact that even States with a one-sided, restrictive immunity practice refrain from measures of constraint. Apart from the possibility of taking measures of constraint against another State on the basis of the United Nations Charter, it is not permissible as a matter of principle to exercise judicial compulsion against another State.

In accordance with international law, only the principle of immunity of a foreign State from measures of constraint, laid down in the first part of article 21 ("State immunity from measures of constraint"), should therefore be incorporated in the future convention, while subparagraphs (a) and (b) should be deleted. It is up to a State itself to respect and follow a judicial decision passed against it. Compulsory enforcement of court decisions against a State is strictly rejected by the German Democratic Republic.

Article 23

Article 23 ("Specific categories of property") was originally intended to protect certain categories of property against any measures of contraint, i.e. to preclude also any waiver of immunity. However, paragraph 2 of article 23, as presently worded, annuls this special precautionary measure and should therefore be eliminated.

Article 24

The German Democratic Republic holds that service of process or other document (article 24) should be effected, as a matter of principle, by transmission through diplomatic channels. This would ensure that the foreign ministries both of the State of jurisdiction and the foreign State would be apprised of any suit filed, so that they could, if they so decided, take appropriate action for an extrajudicial settlement of the matter. This possibility, which would be in the interest of all States, could not always be guaranteed if such service were effected to the defendant by transmission by post or other means. This is also supported by the fact that diplomatic channels would be available even if no diplomatic relations are maintained. Therefore, article 24 should be redrafted along these lines.

Article 25

The German Democratic Republic agrees to the time-limits set under article 25 ("Default judgement"). However, the possibility of implying under this article that a State received certain documents should be eliminated in the redrafting process. This would meet the legitimate need of all States for legal security.

Article 28

With regard to article 28 ("Non-discrimination"), the German Democratic Republic has considerable doubt about the need for it.

The principle of reciprocity is recognized under international law just as the right of States to conclude, by mutual consent, agreements on all issues concerning them, in accordance with the cogent norms of international law (jus cogens).

Discussions on this article in the International Law Commission show clearly that there is indeed reason to fear that it might be invoked to justify unilateral restrictions of immunity that are incompatible with the articles. Therefore, the German Democratic Republic proposes that this article be deleted.

Additional comments

In view of what are sometimes considerable legal costs payable for proceedings instituted solely to determine the immunity of a State and its property, and also mindful of the difficulties arising therefrom for a number of States when the protection of their sovereign rights is concerned, it appears only fair and right to provide for exemption from legal costs in respect of these kinds of proceedings as well as for payment of lawyer's fees by the State of jurisdiction in cases where immunity is affirmed. A relevant provision should be incorporated in part V, "Miscellaneous provisions".

The German Democratic Republic would like to point out that on second reading certain drafting improvements need to be made to the entire set of draft articles, so as to ensure uniformity in the use of terminology. Moreover, the German Democratic Republic believes that to be consistent part III of the draft articles should be entitled "Exceptions to State immunity".

ICELAND

[See the comments and observations reproduced under Denmark above.]

MEXICO

[Original: Spanish]

[28 December 1987]

Specific comments on individual articles

Article 1

This article looks acceptable since, in defining the material scope of the convention, it implicitly acknowledges that the immunity of a State exists independently of the provisions of the convention, which apply thereto solely for the purpose of determining, by mutual agreement, the manner in which such immunity is to be exercised and respected and how far it extends. It would, nevertheless, be more appropriate if at the outset the convention set forth the general principle of immunity from jurisdiction of sovereign States.

Article 2

Paragraph 1 (a)

The activities of some State organs intended to resolve disputes, such as administrative tribunals, labour boards and consumer affairs agencies, are not strictly judicial but jurisdictional.

Some countries have proceedings which, although conducted in association with a jurisdictional action, are not conducted by an organ of the State but by the parties themselves or their lawyers. For this reason, the juridical nature of such proceedings must be clearly established. A definition of the concept of "judicial proceedings" thus needs to be included.

Paragraph 1 (b)

Many services are offered publicly by the State, often against payment of fees which, as a rule, are much lower than the true costs of the goods or services provided; e.g., the publication and sale of basic educational textbooks, the postal service, or social security systems. Such operations fulfil a social function, and should not be considered as commercial contracts.

Paragraph 1 (b) (ii)

Obligations assumed internally by a State through acts of State, such as domestic public bond issues, over which the courts of the issuing State have sole jurisdiction, should likewise not be considered as commercial contracts.

Article 3

Paragraphs 1 (b) and (c)

Political subdivisions and agencies and instrumentalities of the State always form an integral part of the State and should hence be accorded immunity on the same terms. For that reason the definition of the expression "State" should include them even in cases where they do not act in the exercise of the sovereign authority of the State. If an exception to immunity is not applicable to a State, it should likewise not apply to an agency, instrumentality or political subdivision under the same conditions. Such entities must thus be allowed the same procedural prerogatives as are attributable to the State even when jurisdiction can be exercised over them. It would be ridiculous not to grant immunity to a parastatal organization because it is not empowered to perform acts in the exercise of sovereign authority if it has not performed acts within the State of the forum which would warrant an exception to immunity from the jurisdiction of that State.

Paragraph 1 (d)

It is important to acknowledge that representatives of the State exist in that capacity even when proceedings are taken out against them in their own names as private individuals, provided that the acts in connection with which the proceedings are taken out were performed as part of their official functions.

It is, therefore, highly important to define judicial functions, in view of the fact that the functions exercised by some administrative organs, such as labour boards or tax courts, are not strictly judicial but jurisdictional. Judicial functions should also include all legal formalities performed by individuals, such as service of process and the location or the collection of evidence in connection with or for the purpose of initiating judicial proceedings, since the State is also immune in respect of such judicial acts.

Paragraph 2

The purpose of a contract may be extremely difficult to determine but it is highly important that it should be considered, for on it may depend whether a foreign court may pass judgement on public services which appear to be of a commercial nature but in actual fact are not.

Article 4

This wording of the current draft is an improvement inasmuch as the reference to the diplomatic and other immunities which are not covered by this convention is generic, not restricted to the immunity granted under particular multilateral conventions as in the earlier draft.

Paragraph 2

It is only appropriate that the immunities of heads of State should be excluded from this convention, being qualitatively different from the immunity of the State, and given the position of the persons enjoying them and the nature of those persons' functions, which may not be challenged or constrained in any manner by foreign courts.

Article 5

It might perhaps be advantageous were certain articles of this convention setting forth current principles of international law to apply retroactively. If, under its domestic law, a State does not provide for jurisdictional immunity in instances where the convention does, cases where jurisdiction has been unduly asserted notwithstanding the principles of international law ought to be overturned when the convention is signed.

Article 6

A State enjoys jurisdictional immunity under international law irrespective of the provisions of the convention, the purpose of which is to codify the relevant norms of international law but not to restrict them; otherwise it would have the effect of legislating contra legem.

Article 7

Paragraph 3

An action instituted against a State official or representative for acts performed in the exercise of his official duties should be regarded as a suit against the foreign State even if instituted against the official in his personal capacity.

Provision must also be made for cases in which the purpose of the proceeding is to prevent or restrict the free exercise of functions or rights by a State or an agency or subdivision thereof, even when this fact is not explicitly stated in the suit.

Article 8

The immunity that pertains to a State cannot be waived, being one of the fundamental characteristics of a State without which its sovereignty would be dangerously compromised. Hence it must be pointed out that a "waiver" of immunity or "consent to the exercise of jurisdiction" is given solely in regard to activities in which the State acts as an individual and, as the text of this convention recognizes, State immunity does not apply to such activities. It should also be pointed out that, as a general rule, no public official is empowered to compromise the sovereignty of his State; any waiver of State immunity would therefore have to be made by the highest authorities of the State, for otherwise it would be of no legal force.

Article 9

Paragraph 1

This exception should not apply in cases where the State has not been properly impleaded, for if the suit is not transmitted through the right channels there is a risk that it will fall into the hands of unqualified persons who will have difficulty in satisfactorily asserting the rights of a State, even if they entrust the defense to a lawyer of the State of the forum, if that lawyer is not familiar with the defence of foreign States, which normally requires a high degree of specialization.

Paragraph 2

It should also be mentioned that the mere appearance of the State or its representatives before a jurisdictional organ in performance of the duty of affording protection to others of the same nationality or with a view to reporting crimes or giving evidence in a case should not be deemed to constitute assent to the exercise by the court of jurisdiction over the State represented.

Article 13

For the purpose of identifying an "act or omission which resulted in death, injury or damage", regard should be had only to those acts of the State which directly caused such injury or to the undertaking by virtue of which the State assumed responsibility for the safety of the author of the act or the said author's property, not to activities by the State which could be indirectly or remotely related to such injury.

Injury and damage caused in the reasonable defence or preventive protection of internationally protected persons, such as public officials of a State on official visits, or in defence or protection of diplomatic, consular and special missions, should not render either a State or its officials subject to the jurisdiction of the courts of the State of the forum.

Article 14

Paragraphs 1 (b) and (c)

This paragraph is unnecessary, for if the State has an interest in the property concerned it will appear voluntarily before the court in order to assert its rights, thus submitting to the court's jurisdiction.

The mere appearance of a State to renounce a legacy should not be construed as submission to the jurisdiction of a court.

Paragraph 1 (d)

This paragraph is likewise unnecessary, for if the State has an interest in the property concerned, it will appear voluntarily before the court in order to assert its rights, thus submitting to the court's jurisdiction.

Paragraph 2

If the State has or exercises a right in the property in question, it must be impleaded and granted the procedural prerogatives due to it under the convention so that the judgement can protect it against loss. The effect otherwise would be to deny the State any possibility of defence.

Paragraph 2 (b)

Immunity exists even when no evidence is adduced, for the burden of proof should rest with the party arguing that State immunity is not applicable in the case concerned.

Article 15

Subparagraph (a)

This exception should apply only to the use of intellectual, industrial or commercial rights in the State of the forum, not to the determination of ownership of such rights, provided that they have been validly obtained under the laws of the defendant State and are publicly used solely within its territory.

Article 17

Subparagraphs (a) and (b)

Are these provisions disjunctive or cumulative?

Article 18

Paragraph 7

A simple statement by the competent authorities must always be regarded as reliable evidence that an activity, person or item pertains to a State, and the burden of proof should always rest with the party arguing otherwise.

The fact that a court may assume jurisdiction over a foreign State by virtue of one of the exceptions listed should not furnish grounds for that court to hear other questions, in which its jurisdiction has not been invoked. E.g., a foreign judge should not hear suits relating to extra-contractual responsibility stemming from an accident in the territory of the defendant State merely on the grounds that commercial activities by the defendant State unrelated to the accident would satisfy jurisdictional prescriptions in the State of the forum.

Article 19

The setting aside of the arbitration agreement should prevent a court which had had jurisdiction by virtue of that agreement from continuing to hear the case without first verifying whether it retains jurisdiction over the defendant State in the light of other legal prescriptions.

Article 20

This article is excessively confused. It is, nevertheless, extremely important to establish unambiguously the doctrine of the act of a State, under which public acts performed by one State in its own territory may not be challenged by a foreign court regardless of any extraterritorial effects that such acts may have.

Article 21

This article would be clearer in the following formulation:

"Article 21

"State immunity from measures of constraint

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

"Immunity as referred to above is not applicable to property which is specifically in use or intended for use by the State for non-State, commercial purposes and has a connection with the object of the claim or with the agency or instrumentality against which the proceeding was directed."

It would seem appropriate to point out that no court may require a State to post bond or designate property with a view to the execution of a judgement.

Article 22

Paragraph 1

The immunity that pertains to a State cannot be waived, being one of the fundamental characteristics of a State without which its sovereignty would be dangerously compromised. Hence it must be pointed out that a "waiver" of immunity or "consent to the exercise of jurisdiction" is given solely in regard to activities in which the State acts as an individual and, as the text of this convention recognizes, State immunity does not apply to such activities. It should also be pointed out that, as a general rule, no public official is empowered to compromise the sovereignty of his State; any waiver of State immunity would therefore have to be made by the highest authorities of the State, for otherwise it would be of no legal force. In these circumstances it should be understood that any waiver in regard to measures of execution is valid only if made in respect of proceedings in which, because they relate to private activities by the said State, the State does not enjoy immunity. Additionally, it should be noted that property in respect of which execution is agreed to must be in the territory of the State of the forum and related directly to the activities which gave rise to the suit. It should likewise be pointed out that consent to execution may be given only by the competent organ of State.

Article 23

Paragraph 2

Certain property, such as the cultural heritage of a State (historical and artistic items etc.), the property of the central bank or the property of a diplomatic or consular representative may not be subject to measures of constraint even if consent to execution is given.

Article 24

Paragraph 4

It should be borne in mind that if service of process is not duly effected or if the defendant State or one of its organs responds to the suit without adequate knowledge of this convention or the laws of the State of the forum, the defendant State might be unable to assert its rights effectively even with the assistance of a lawyer of the State of the forum, if that lawyer is not familiar with aspects of international law, the law of the defendant State or local procedures relating to the defence of the State and its immunities; this usually requires a high level of specialized multidisciplinary knowledge. It is therefore imperative that service of process should always be effected in a regular manner so that the matter can be dealt with through appropriate channels and the State is not left undefended. Consequently, if a State is not duly impleaded, it should be accorded the right to seek annulment of the proceedings.

Article 26

The earlier formulation was more appropriate, since measures of coercion ordered by courts do not consist solely in monetary penalties.

Article 27

Paragraph 2

Furthermore, a State should not be required to offer surety or bond against execution of sentence on the premise of being granted access to a higher court.

It is also necessary to acknowledge the right of each State under international law to invoke immunity from jurisdiction or execution through its own diplomatic or consular representatives or other officials designated for that purpose, without needing to be represented by local lawyers.

Article 28

A subparagraph should be included to the effect that discrimination shall not be regarded as taking place if the State of the forum extends greater immunity than is granted under the convention.

Article 30

Conciliation and arbitration procedures should apply only to the interpretation of the articles of this convention, and must not commit the State in any manner whatsoever to the jurisdiction of such bodies for the settlement of litigation.

This article is extremely important, since without it the settlement of disputes stemming from State immunities would be left solely to the judicial authorities: thus the executive arm of the State of the forum, the body legally responsible for international relations, would be left powerless to intervene, and this could undoubtedly result in unforeseen circumstances entailing international responsibility on the part of the State of the forum for having left the defendant State in a completely undefended position.

NORWAY

[See the comments and observations reproduced under Denmark above.]

QATAR

[Original: English]

[12 March 1987]

Specific comments on individual articles

Article 3, paragraph 2

There appears to be a basic misunderstanding as to the meaning of the term "commercial contract" in the terminology of the law of State immunity. Those trained in the civil law tradition, where a distinction between civil law and commercial law is made, may tend to carry over to the law of State immunity the civil law concept according to which commercial activities, governed in their system by the commercial code, are by definition those which are motivated by profit-making and are generally concluded as part of the pursuit of a business. In the area of State immunity, however, parties entering into "commercial contracts" need not be motivated by profit-making. The English term "commercial contract" is not the equivalent of the French term "acte de commerce". Commercial activities of a State are simply non-public or non-governmental activities, i.e. activities which are not carried out in the exercise of public authority. These include all kinds of contracts and other transactions to the likes of which private individuals or entities may be party, regardless of any intention of making a profit or of being engaged in a business. It will be noted that draft article 2, on the use of terms, does not mention the profit motive in its definition of a "commercial contract" in subparagraph (b), and rightly so. But unfortunately, the false criterion of profit-making appears to have influenced the language of paragraph 2 of draft article 3 where, contrary to the observable current trend in the development of the law in this area, the purpose of the contract is to be taken into account for determining its non-commercial character. This clearly implies that if profit-making was not the motive behind the contract, the latter would not be a commercial activity. This intrusion of the purpose of the contract into its characterization as a public act entitled to immunity is contrary to the unmistakable trend in recent years where more and more States, from the Members of the Council of Europe in their 1972 Convention to Australia in its 1985 statute, through Singapore in 1979 and Pakistan in 1981, have opted for the nature of the act as the sole criterion of its public or private character. This trend is likely to continue in the future and objectively represents the progressive development of the law in this area. It is reflected in the case-law of many other countries which enacted no recent statutes on State immunity, as well as in the work of learned bodies such as the International Law Association and in the recent literature on the subject. Any return to the criterion of the purpose of the act would be a regressive development and would indeed lack the acceptability which is the only measure of the success of any new formulation of legal norms by the Commission. This is why paragraph 2 of draft article 3 deserves a further hard look with a view to ruling out the purpose of the act as a measure of its public nature, thus bringing this draft article into line with the spontaneous progressive development of the law on this point.

Furthermore, the text recognizes the actual practice in this regard of the particular defendant State as the criterion for whether or not the purpose of the act should be taken into account. Since State practices differ, what we have here is not a true objective criterion but a number of previously unknown pseudo-criteria of which both the obscurity and the diversity are obstacles to the certainty and predictability which codification is intended to promote in the field of legal transactions. The Commission's basic task is the unification of the norms of international law. Here, with regard to paragraph 2 of draft article 3, what we have is the opposite of unification. If definitively adopted as is, this provision would leave the door wide open for the invocation by different States of different, hitherto unknown practices and the Commission would have contributed to further confusion is this area rather than to the unification and certainty expected to flow from its work.

Article 12

Draft article 12 on contracts of employment calls for one minor observation. The article as adopted by the Commission uses the applicability to the employee of the social security provisions of the forum State as a test for lack of immunity (para. 1). The wider test of the applicability of the whole body of labour law should be used instead. Not all States have social security provisions in the narrow sense of the term. Furthermore, the forum State has a legitimate interest in other areas of employment relations besides the particular area of social security. The overriding interest of the State of the forum does not stop at the enforcement of its social security provisions but extends to the application of its labour law in general. The wording of draft article 12 should be amended accordingly.

Article 19

This article on arbitration omits all mention of recognition and enforcement of an arbitral award from the list of matters with regard to which a State cannot claim immunity before the courts. The obvious fact that the enforcement of an arbitral award may depend on judicial participation has to be recognized. It is therefore suggested that subparagraph (c) of draft article 19 be amended to read:

> "(c) the recognition and enforcement or the setting aside of the award."

In fact, seeking the setting aside of an award and seeking its enforcement are two faces of one and the same coin. There is no possible justification for providing for one and not the other.

Article 21

With regard to draft article 21 on enforcement measures, it is preferable to see the use or intended use of the property or funds for commercial purposes adopted as the sole yardstick for lack of immunity. This was in fact what the Special Rapporteur had proposed in an earlier draft. This also reflects the general trend in recent national legislation on the subject. Instead, draft article 21, subparagraph (a), in its present form, adds a further requirement, *namely* that the property or funds have a connection with the object of the claim.

This additional requirement goes counter to the concept of the unity of all the assets and obligations of a physical or juridical person, designated in Islamic law by the term "dhimma" and in French law by the term "patrimoine". This additional requirement also unduly restricts enforcement with regard to funds which are admittedly used or intended to be used for commercial purposes and therefore have no claim to being immune.

The last phrase of subparagraph (a) of draft article 21, while not objectionable, is in fact redundant. The separate juridical personality of the particular agency or instrumentality which is the judgement debtor would normally restrict enforcement measures to its own property or funds rather than the property or funds of another agency or instrumentality or of the State as such.

Article 23

With regard to the funds of central banks or monetary authorities, recent national legislation on the subject requires that the funds rendered immune be in use for central banking or monetary purposes. Other funds of a central bank or a monetary authority, i.e. funds used or intended to be used for non-governmental purposes, are not immune. This is a sounder and more logical approach than the one reflected in draft article 23, paragraph 1 (c), as adopted by the Commission. It is to be hoped that the Commission will give this provision further consideration in the light of these comments and in the interest of a wider acceptability ensured by conformity to the current trend in the development of the law in the area of State immunity.

SPAIN

[Original: Spanish]

[21 December 1987]

The Spanish Government has studied with great attention and interest the International Law Commission's draft articles on the jurisdictional immunities of States and their property, adopted in first reading at the thirty-eighth session, and wishes to make the following preliminary comments and observations in response to the requests of the Commission and of the General Assembly. 4/

General comments

Spanish law contains no legal provision or other regulation governing the question of the jurisdictional immunity of foreign States sued before national courts. Consequently, in each specific case, the courts have determined whether or not they have jurisdiction. A study of court decisions between 1960 and the present reveals: (1) some decisions of courts of first instance declaring

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4/ General Assembly resolution 42/156 of 7 December 1987.

themselves competent to hear claims against foreign States, because those States had acted jure gestionis; (2) a series of decisions of courts of first instance and territorial courts declaring themselves incompetent to hear some claims, since it is difficult to ascertain the capacity in which the foreign State had acted; (3) a series of decisions of the Supreme Labour Court and the Central Labour Court in labour-related claims proclaiming either the jurisdictional immunity of the foreign State or that of diplomatic missions or consular posts.

So far as the Spanish position is concerned, when the Spanish State is sued before foreign courts, Royal Decree 1654/80 of 11 July applies, which is based on the principle of relative immunity, since jurisdictional immunity should be invoked not on every occasion but only "when appropriate".

The decisions mentioned reveal that Spanish theory and practice have not rejected the theory of restricted immunity, but have embraced it when this was considered appropriate.

Having summarized in the preceding paragraphs the state of national theory and practice, the Spanish Government wishes to state that it endorses the main thrust of the draft articles, since they allow exceptions to the principle of immunity and recognize that it is in the nature of jus dispositivum. Indeed, international practice shows that the jurisdictional immunity of States is not regarded as an absolute principle; divergencies arise when an attempt is made to specify the sectors that constitute exceptions to the rule. The drafting of a convention on the latter subjects would obviously enhance legal certainty in this area. After these general comments, the Spanish Government has the following specific comments.

Specific comments on individual articles

Article 3

Article 3, paragraph 2, specifies criteria for determining whether a contract for the sale or purchase of goods or the supply of services is commercial; in making this determination, the main criterion will be the nature of the contract, but the purpose of the contract should also be taken into account "if in the practice of that State that purpose is relevant to determining the non-commercial character of the contract". The determination of the nature of the contract is important because, in accordance with article 11, in the case of differences relating to commercial contracts between a State and a foreign natural or juridical person which fall within the jurisdiction of another State, the former State is considered to have consented to the exercise of jurisdiction and cannot invoke immunity. All this indicates that a commercial contract may by its nature cease to be one because of its purpose, with the result that differences arising from the contract in question would be covered by the principle of jurisdictional immunity. The Spanish Government wishes, however, to draw attention to the extremely subjective nature of the criterion of purpose, which introduces a certain amount of legal uncertainty in the application of the exception to immunity envisaged in draft article 11.

Article 4

Article 4, paragraph 1 (a), specifies that the draft articles are without prejudice to the privileges and immunities enjoyed by a State in relation to the exercise of the functions of its diplomatic missions, consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences. However, although the jurisdictional immunity of all these missions and posts is commonly recognized, the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions and the 1975 Convention on the Representation of States in Their Relations with International Organizations of a Universal Character do not expressly and directly provide for the jurisdictional immunity of diplomatic missions, consular posts, special missions, missions to international organizations or delegations to international organizations or to international conferences. It is therefore the opinion of the Spanish Government that the provision in article 4, paragraph 1 (a), has not satisfactorily resolved the question. For example, it is not at all clear whether the rule in article 12, paragraph 2 (a), which establishes the jurisdictional immunity of a State with regard to contracts of employment concluded in another State and to be executed there, if the employee has been recruited to perform services associated with the exercise of governmental authority, applies to personnel recruited by diplomatic missions, special missions or consular posts to perform administrative and technical services and domestic services for the diplomatic mission or consular post.

In the view of the Spanish Government, article 4, paragraph 2, should mention not only the privileges accorded under international law to heads of State but also those recognized for heads of Government, Ministers for Foreign Affairs and persons of high rank. In that respect, it should be noted that article 21, paragraph 2, of the 1969 Convention on Special Missions recognizes that all these persons enjoy privileges, facilities and immunities under international law.

Article 6

The words in square brackets ("and the relevant rules of general international law") should be deleted from article 6, provided that the preamble of the future convention includes a paragraph worded as follows:

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

This is the usual practice in conventions for the codification and progressive development of international law prepared under the auspices of the United Nations.

Part III

The title of part III of the draft articles contains two alternatives: "Limitations on State immunity" or "Exceptions to State immunity". The Spanish Government prefers the expression "Exceptions to ...", because the content of part III refers to cases in which not only is there no limited immunity but immunity simply does not exist, unless there is an agreement to the contrary.

Article 13

With regard to article 13 (Personal injuries and damage to property caused by an act or omission attributable to the State which occurred in the territory of the State of the forum), it should be noted that this act or omission may constitute an internationally wrongful act and that, in addition, the solution of any possible dispute between the State to which the act or omission is attributable and the State of the forum, or the extent of liability or compensation, may be governed by international treaties or agreements; examples of this type of provision will be found in agreements on the status of foreign forces and in international conventions on civil aviation and commercial shipping. Consequently, the Spanish Government considers it appropriate to include in the article a second paragraph referring to the provisions of such treaties or agreements. In fact, this second paragraph appeared in one of the Special Rapporteur's proposals (see Yearbook of the International Law Commission, 1983, vol. II (Part Two), p. 20, footnote 59). The Spanish Government suggests that the paragraph could be worded as follows:

> "2. Paragraph 1 is without prejudice to the provisions in treaties or other bilateral agreements or regional arrangements or international conventions specifying or limiting or otherwise regulating the extent of liabilities or compensation or establishing specific methods of dispute settlement."

Article 16

With regard to article 16 (Fiscal matters), the Spanish Government proposes that the words "or under the international agreements in force between the two States" should be added after the words "for which it may be liable under the law of the State of the forum". Quite often the fiscal obligations of a State or of one of its organs or agencies in another State are governed by international agreements, in which case it would not be the lex fori that stipulates the taxes to which the foreign State or one of its organs or agencies is liable.

Article 18

Article 18 deals with "State-owned or State-operated ships engaged in commercial service" and establishes the rule of exception to immunity. The Spanish Government considers, however, that the terminology of this article should be brought into line with that of article 96 of the 1982 United Nations Convention on the Law of the Sea ("Immunity of ships used only on government non-commercial service"). Consequently, the word "State" which is used throughout article 18 should be replaced by "government"; and the adverb "exclusively" should be replaced by "only".

Article 25

For the purpose of the Spanish translation, it is pointed out that in Spanish law the expression used in article 25, "fallo en ausencia" should be "fallo (or sentencia) en rebeldía".

SWEDEN

[See the comments and observations reproduced under Denmark above.]

THAILAND

[Original: English]

[17 November 1987]

General comments

Under the Thai judicial system, a State as a political unit, in the sense of a "country" in more common parlance, cannot sue or be sued. Therefore, the theme of the draft articles, especially draft articles 1, 3 (a), 7 (2) and 10, finds no place in Thai courts. Moreover, property of the thai Government is immune from measures of constraint taken in pursuance of judicial judgements, decisions or awards.

Evolution in the Thai legal process and law on State immunities is not unexpected. However, it is still uncertain as to which direction the evolution is heading. Therefore, Thailand's reaction to the envisaged international convention on jurisdictional immunities of States and their property is unpredictable.

Hence, the comments and observations submitted herein can only be provisional, without prejudice to the Thai position whether at present or in the future.

Specific comments on individual articles

Part I

Article 2

The meanings of "commercial contract" as given in subparagraphs (b) (i) and (iii) are both circular and unhelpful. The word "commercial" in subparagraphs (i) and (iii) should be deleted.

Part II

Article 6

The phrase in square brackets should be deleted. As the draft articles cannot be regarded as actually cofifying all "the relevant rules of general international law", the phrase would give rise to uncertainty in the application of the draft articles which may, in some cases, contradict the existing "relevant rules of general international law". Moreover, if the draft attempts to codify all the relevant rules of general international law through the process of progressive development of international law, State practice ensuing from the draft would create "relevant rules of general international law" through opinio juris sive necessitatis binding upon themselves anyway.

Article 8

For the sake of clarity and to avoid any misinterpretation of the intention of the foreign State, the words "in force" are to be added to "international agreement" in subparagraph (a), while subparagraph (c) should be amended to read "by a written declaration submitted to the court in a specific case".

Furthermore, there should be a proviso at the end of this draft article to read:

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

Article 10

There should be a proviso to the effect that in the cases of paragraphs 1, 2 and 3 a foreign State cannot invoke immunity from jurisdiction only to the extent that the claim or counter-claim against it does not seek relief exceeding in amount or differing in kind from that sought by the foreign State itself. (Cf. section 1067 (c) of the United States Foreign Sovereign Immunities Act 1976, and Alfred Dunhill of London, Inc. v. Rep. of Cuba 15 International Legal Materials 485 (1976).)

Part III

The term "exceptions to" is preferred to "limitations on". The cardinal principle of State immunity is a general rule. As such, there may only be "exceptions to" the general rule, but certainly not "limitations on" something which, by its very nature, is general.

Article 12

Some States do not have "social security" in the widely known sense (e.g. the United Kingdom social security). However, they may have laws or regulations protecting welfare of their citizens. Therefore, in paragraph 1 the words "and the like" ought to be added to the words "the social security provisions", and the phrase "which may be" deleted because it is meaningless within the context of that paragraph.

Article 13

This draft article creates a lacuna by leaving out incidents of cross-frontier injurious acts or omissions. Should this be so?

Article 14

It should be made clear that, during the proceedings mentioned in paragraph 1, a foreign State is not to be subject to eviction.

Article 15

Thailand wishes to reserve its right to make a comment and observation on this draft article on "Patents, trade marks and intellectual or industrial property" at a later occasion.

Article 16

The phrase "and without prejudice to the established rules of international diplomatic law," should be inserted after the phrase "Unless otherwise agreed between the States concerned". This is due to the fact that only charges for services may be incurred against diplomatic agents, who may be qualified, for the purpose of the draft articles, as "State" by virtue of draft article 3 (1).

Article 17

In order to have international organizations/bodies created by international agreements/treaties which are on the international plane unequivocally excluded from the scope of this draft article, the draft article should:

(a) Either have another paragraph to the effect that paragraphs 1 and 2 do not apply to bodies or organizations of whatever nature which are created by international agreements/treaties;

(b) Or in paragraph 1, substitute the words "membership" and "members" for "participation" and "participants", respectively.

This is because a body which is an international organization can only have States as "members" although it may have "participants" other than States (e.g. the Executive Chairman of the International Tin Council). The United Kingdom State Immunity Act 1978 (s.8), and Australia's Foreign State Immunities Act 1985 (s.16 (1)), to cite just two examples, also use the terms "membership" and "members" in this connection.

Article 18

The word "non-governmental" in paragraphs 1 and 4 should be retained without square brackets.

Article 19

The term "commercial contract" is preferred to "civil or commercial matter" because the meanings of the words "civil" and "matter" are too broad and, consequently, would severely jeopardize the general jurisdictional immunity of States.

Article 20

This draft article is a "reservation" clause which has no connection with "Exceptions to State immunity". As such, it should make its appearance in part I as a chapeau for the entire draft articles.

Part IV

Article 21

The words ", or property in which it has a legally protected interest," and "non-governmental" should be retained without square brackets.

The draft article is not intended to give exhaustive examples of measures of constraint. However, certain proceedings such as the winding-up proceedings and appointment of a receiver under English law fall into a "grey area" because it is uncertain whether they are measures of attachment, arrest or execution. It is therefore wise to make this draft article encompass such a "grey area" by adding the phrase "and measures taken pursuant to judicial decisions, directions or awards" to the phrase "including any measures of attachment, arrest and execution".

Article 22

As in draft article 21, the words ", or property in which it has a legally protected interest," should be retained without square brackets.

As in draft article 8, the words "in force" should be added to "international agreement" in paragraph 1 (a), while paragraph 1 (c) should be amended to read "by a written declaration submitted to the court in a specific case".

Article 23

As in draft articles 18 and 21, the word "non-governmental" in paragraph 1 should be retained without square brackets.

UNION OF SOVIET SOCIALIST REPUBLICS

[Original: Russian]

[26 January 1988]

Since the question of the jurisdictional immunities of States involves fundamental principles of international law, codification in this area must involve the elucidation of generally recognized norms and the formulation of provisions acceptable to all, with due regard for State legislation and practice. It appears that the goal of the elaboration of a convention on this subject could be to reaffirm and strengthen the concept of the jurisdictional immunity of States and their property, with clearly stated exceptions. This would halt the trend towards legal uncertainty resulting from the fact that States espouse different conceptual views regarding the issue.

Such an approach represents a reasonable compromise in the interests of all States.

The position of the Soviet State, expressed in normative documents, practice and doctrine, has always consisted of recognition for the State and its property of full jurisdictional immunity derived from the principles of international law concerning sovereignty, sovereign equality and non-interference in the affairs of other States.

It is well known, however, that a tendency is currently emerging in the practice of certain States and in their legislation and doctrine to reject jurisdictional immunity of States in the traditional sense and to substitute for it the concept of "functional" immunity. Although this concept is by no means shared by everyone, it considerably weakens the effectiveness of the principle under consideration and thus leads to situations of conflict in relations between States.

By way of a general appraisal of the draft articles, it should be noted that they attempt to codify the principle of the jurisdictional immunity of States and their property to a considerable extent on the basis of the theory of functional immunity. They do not take into account the position of those countries which do not endorse this concept; this is unacceptable in the formulation of an international legal instrument of a universal character.

Work on the draft articles must be continued in order to eliminate this shortcoming. Parts III and IV in particular should be reviewed. The number of cases in which a State cannot invoke immunity should clearly be reduced. At present, the number of such cases reduces to a fiction the very principle of the jurisdictional immunity of States and their property. The draft articles need to be expanded considerably.

In the light of the legislation of a number of countries, including the USSR, it would be desirable for the draft articles to reflect the concept of "segregated" State property, which is widely recognized in the socialist countries and has also been reflected in a number of international conventions (see article II of the Protocol of 23 September 1978 to amend the Rome Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface, of 7 October 1952; see also article 1 of the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969, and article 2, paragraph 1, of the Convention on the Limitation of Liability of Owners of Inland Navigation Vessels of 1 March 1973). It will be recalled that the essence of the concept of segregated property is that a State enterprise (society), being a juridical person, possesses a segregated part of the national property. Its property consists of fixed and circulating capital, as well as other material assets and financial resources. The enterprise has the possession, use and right to dispose of such property. The State is not liable in connection with the obligations of the enterprise. The enterprise is not liable in connection with the obligations of the State, or of other enterprises, organizations and institutions.

The general attitude of the USSR to the draft articles of the International Law Commission will depend to a great extent on whether the concept of segregated State property is adequately reflected therein.

In this context, the correct formulation of the fundamentally important article 6, concerning State immunity, is extremely significant. A reference in

that article to "the relevant rules of general international law" would render all the draft articles quite meaningless and would be conducive to unilateral limitations on immunity. Yet the point of the future convention is to establish the precise meaning both of the principle of immunity and of possible exceptions thereto.

As can be seen from the draft articles, while the International Law Commission reaffirms in article 6 the principle of the jurisdictional immunity of States and their property, it proposes further exceptions to this principle.

The traditional theory of immunity permits exceptions for specific issues or categories of issues and types of property, with the explicit agreement of the States concerned - which in this case means the agreement of the parties to the future convention on this subject.

In view of the foregoing, it seems possible to include in part III of the draft articles a series of exceptions which, as noted above, should not be too numerous so as not to undermine the principle itself.

Substantive comments follow on the exceptions included in this part of the draft articles.

For instance, in article 13 concerning personal injuries and damage to property, reference is made to an act or omission, the "author" of which is a juridical person, distinct from the State and present in the territory of the State of the forum. The draft envisages the possibility of a court attributing (imputing) such acts or omissions to a foreign State and holding it responsible. At the same time, it is well known that personal injuries and damage to property may be caused by the acts or omissions of natural or juridical persons. In both cases, legal relationships arise in this connection, the regulation of which is outside the scope of these draft articles.

When the question of State responsibility arises, the illegality of the deed is determined by the rules of international law, with the help of international proceedings, and cannot be established by national courts. Such rules are contained in countless international conventions.

The present content of the article makes it unacceptable.

Article 14 would deprive States of jurisdictional immunity with regard to ownership, possession and use of property or of a company in circumstances specified in the article. It must be pointed out that the article as a whole is too broadly formulated and would seem to cover ownership, possession and use in respect of nationalized property situated in the territory of the State of the forum. Since article 20 is extremely imprecise in content, it cannot be the basis for an exception to the general rule laid down in article 14. In addition, the rules contained in article 14, paragraph 1 (b) to (e), could be interpreted as opening the door to foreign jurisdiction even in the absence of any links between the property or company concerned and the State of the forum.

Draft article 18, concerning State-owned or State-operated ships engaged in commercial service, creates a number of complex problems for many States. It seems that the introduction into the draft articles of the concept of segregated State property could considerably facilitate the solution of these problems.

Article 20 ("Cases of nationalization") could be interpreted in a manner which would undermine the principle, enshrined in international law, that nationalization laws are applicable outside the national territory.

Article 21 ("State immunity from measures of constraint") states in its opening phrase the principle of the inadmissibility of measures of constraint against a State on the basis of a decision by a foreign court. This approach reflects the requirements of contemporary international law. However, subparagraph (a) of this article significantly limits the principle proclaimed therein. It would seem that article 21 and article 23 ("Specific categories of property") could be considered together and reworked in the light of this comment.

The examples given do not exhaust the possible comments and demonstrate the need for serious work on the draft articles.

In conclusion, emphasis must be placed in the importance which the USSR attaches to the reflection in the draft articles of the positions of principle set out in these comments, so that work on the text may proceed in a constructive spirit.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

[Original: English]

[22 January 1988]

General comments

The United Kingdom Government commend the International Law Commission, and in particular its Special Rapporteur, Mr. Sompong Sucharitkul, for the draft articles which the Commission provisionally adopted on first reading at its thirty-eighth session, held in 1986. The United Kingdom Government welcome these draft articles. They see them as offering a good prospect, when they have been modified and refined in the light of these and other comments and of further discussion, of providing a sound basis for the eventual elaboration of a final draft which could meet with the approval of the majority of States.

If that final draft is to secure such approval, however, the United Kingdom Government consider it essential that it should accurately reflect what has become a substantial body of State practice in this field, arising from and responsive to the growing involvement of States in commercial, trading and industrial activities. At the same time, the draft should embody sufficient flexibility to accommodate the future developments and refinements in State practice which can certainly be expected.

Among the important developments in recent years have been the elaboration and adoption of the European Convention on State Immunity of 1972 and the enactment by various States of the necessary domestic legislation to give effect to it: in the United Kingdom, the State Immunity Act 1978, which also gives effect to the Brussels Convention of 1926 (on the Immunity of State-owned Ships) and its Supplementary Protocol of 1934. Other States, though not themselves parties to the European Convention or the Brussels Convention and Protocol, have enacted corresponding legislation which proceeds on substantially similar principles and produces substantially similar results. The United Kingdom Government consider that this congruence of recent international and national practice points clearly to the position which the draft articles should themselves express if they are indeed accurately to reflect current international law. The United Kingdom Government would therefore urge the closest possible approximation of the draft articles to the provisions of the European Convention and the Brussels Convention and Protocol and to the provisions of the national legislation which implements those instruments (or corresponding rules of customary international law).

The United Kingdom Government do not consider that it would be helpful to engage, in these comments, in a debate on the fundamental theoretical principles from which the law relating to the jurisdictional immunities of States may be thought to derive. They prefer to take the pragmatic position that, irrespective of which theory is favoured, a statement of international law as it stands in the late twentieth century can be regarded as accurate and balanced only if its effect is to recognize the full weight that State practice now attaches to the rule of law, that is to say, the entitlement of those who find themselves engaged in legal disputes with the Government of a foreign State, acting in a non-sovereign capacity, to have those disputes adjudicated upon and determined by the ordinary processes of the law. That approach by no means involves disregarding or undervaluing the claims of State sovereignty (as expressed in the maxim par in parem non habet imperium); but it strikes the proper balance by embodying the principle that the claims of the rule of law are to be respected in every case where there cannot be demonstrated to be a genuine functional need, if State sovereignty is not to be prejudiced, to interpose the barrier of jurisdictional immunity. That is the basis on which the European Convention and the United Kingdom's own legislation are founded and it is one which the United Kingdom Government suggest should also inform the International Law Commission's draft articles.

Specific comments on individual articles

The following detailed comments on particular provisions of the draft articles relate primarily to matters of substance, though they occasionally advert also to points of drafting or presentation where it is thought that to do so at this stage might be helpful to the International Law Commission. The United Kingdom Government reserve the right to offer further comments at a later stage.

Article 3

Paragraph 1

The United Kingdom Government cannot support the way in which subparagraphs (b) and (c) of this paragraph deal with the question of the extent to which "political sub-divisions" of a State or "agencies or instrumentalities" of a State should enjoy, in any given situation, such jurisdictional immunity as the State itself may be entitled to. As the United Kingdom Government understand it, the effect of subparagraph (b) is, when read with the substantive articles conferring immunity upon States, to confer the like immunity on a "political sub-division" if, in any respect, and to whatever extent "that sub-division" exercises the sovereign authority of the State, even if the area in which it exercises such authority is wholly unrelated to the transaction giving rise to the dispute in respect of which the question of immunity arises. In other words, a "political sub-division", if it is invested at all with the exercise of sovereign authority, becomes invested also and automatically, ratione personae, with all the jurisdictional immunity of its parent State. The effect of subparagraph (c) may be similarly to confer immunity on "agencies or instrumentalities" if they are entitled to exercise the sovereign authority of their State - again, apparently, irrespective of whether they were exercising that authority in the particular transaction which gave rise to the relevant dispute. (This interpretation of subparagraph (c) may, however, not give the phrase "to the extent that they are entitled" the effect intended by the draftsmen of the article; but it is indeed difficult to be sure what was intended and what the precise purport and effect of that phrase is.)

In the view of the Government of the United Kingdom, the correct proposition according to current international law is the one expressed (albeit using different terminology) by articles 27 and 28 of the European Convention (and in United Kingdom domestic law by section 14 of the State Immunity Act 1978). That proposition is that "agencies or instrumentalities" and "political sub-divisions" of a State are entitled to jurisdictional immunity only ratione materiae, that is to say, if and only if:

(a) The proceedings in question relate to anything done by them in the exercise of sovereign authority; and

(b) The circumstances are such that their parent State would have been so immune.

The United Kingdom also notes what it considers to be the correct formulation employed in draft article 7 (3).

Paragraph 2

The United Kingdom Government have considerable reservations about the present formulation of this paragraph, and indeed about the justification for retaining it at all. They recognize that it reflects an attempt by the International Law Commission to find a balanced compromise between the position, in this context, of those States, such as the United Kingdom, which favour the so-called restrictive

theory of State immunity and those which favour the so-called absolute theory. But they doubt whether that attempt has been successful. It is a cardinal feature of the former theory that when a State chooses to enter into a commercial contract with a foreign natural or juridical person it places itself in a situation where, other considerations being absent, there is no room for the operation of State immunity. That appears also to be accepted, as a description of the practical position, even by the proponents of the so-called absolute theory. Whether a particular transaction is indeed a commercial contract may be a matter of dispute but in the last analysis that is an objective question, the answer to which is to be gathered from all the objective circumstances of the case. The United Kingdom Government see no reason why, in the particular case of a contract for the sale or purchase of goods or the supply of services, subjective factors such as the "purpose" of the contract should be introduced.

The draft's approach to this matter seems particularly unfortunate in that it envisages a reference to the "purpose" of the contract being made on a very artificial and one-sided basis. It is artificial because it involves determining a question that arises in the special context of State immunity by reference to a "practice" (and it is not clear what sort of "practice" is envisaged, or how and in what circumstances it would be manifested, or how it would be proved) that must, by definition, operate in quite a different context. It is one-sided because it requires regard to be had to the relevant practice of only one of the parties to the contract, the defendant State, and not to the practice or intention or understanding of the other party. (Incidentally, since the article contains no antecedent mention of any particular State at all, the phrase "that State" is not appropriate, and causes the reader some initial confusion, as a means of indicating that the reference in this paragraph is to the defendant State and not the State of the forum.) Even the terminology used in this paragraph has a prejudicial flavour in that it suggests that it is only where the defendant State's practice regards the purpose of the contract as relevant to determine the non-commercial character of the contract that that purpose should be taken into account. As the United Kingdom Government see it, this feature of the draft (that is to say, this direction to have regard to the defendant State's attitude to the relevance of the purpose of the contract) is tantamount to the introduction by a side-wind, and in a context where it has no proper place, of the notion of the defendant State's consent to the jurisdiction.

The United Kingdom Government appreciate the practical problem which underlies the International Law Commission's thinking on this point, namely the problem of defence contracts and contracts of a similar nature. They are not unsympathetic to the wish to provide a mechanism whereby, in particular cases, a State, while entering into a contract for what it regards as defence or similar purposes but which is intrinsically - and certainly in the eyes of the other party to the contract - a commercial contract (e.g. a contract for the purchase of clothing and equipment for its army), may yet reserve the possibility of invoking State immunity if any dispute arises in respect of that contract. The draft articles, however, already provide an appropriate mechanism of this kind, i.e. the ability of the parties expressly so to agree when they conclude their contract (see article 11 (2) (b). There is therefore no need, for that purpose, to accept the distortion which article 3 (2) at present imposes on the essential logic and structure of the basic provisions of the draft that relate to commercial contracts,

i.e. article 11 (1) read together with article 2 (1) (b). Accordingly, the United Kingdom Government suggest that at least the second half of article 3 (2) should be deleted. It may then be thought that the first half of article 3 (2) (or at any rate the word "primarily") will be otiose and could also be omitted without loss.

Article 4

The United Kingdom Government, of course, regard it as crucial that the draft articles should not prejudice the immunities conferred in accordance with the Vienna Conventions on Diplomatic Relations and Consular Relations, and they suggest that, as these two conventions are now so widely accepted, the International Law Commission might consider whether a specific reference to these two conventions is called for. On a minor matter, perhaps little more than a question of drafting, consideration might be given to the desirability of broadening the language of paragraph 2 so that it expressly covers the position of certain persons connected with a head of State, e.g. members of his family forming part of his household and his personal servants (see paragraph (7) of the International Law Commission's commentary on this article in its report on the work of its thirty-eighth session).

The United Kingdom Government consider that it would also be desirable if a further paragraph were added to article 4 to provide that the present articles are without prejudice to the question of the privileges and immunities enjoyed by the armed forces of one State while present in another State with the latter's consent. They draw attention in this connection to the Agreement regarding the Status of Forces of Parties to the North Atlantic Treaty, done at London, on 19 June 1951, to which the United Kingdom is a party.

Article 5

The United Kingdom Government consider that it is premature to comment on this article in advance of a decision on the status which is eventually to be accorded to the draft articles as a whole and in advance of the final formulation of the other articles in the draft.

Article 6

For the reasons indicated in paragraph 2 above (i.e. the need to maintain sufficient flexibility to accommodate further developments in State practice and the corresponding adaptation of general international law), the United Kingdom Government favour the retention of the words "and the relevant rules of general international law", which at present appear in square brackets, or the inclusion of another formula having a similar effect. The United Kingdom Government also reserve their position on the formulation of the whole of the article until such time as it is possible to judge whether the other articles of the draft adequately provide for all relevant situations.

Article 7

The United Kingdom Government have no comment on the substance of this article. But they suggest that further consideration should be given to the necessity for retaining paragraph 3 in the light of the interpretation now placed

on the term "State" by article 3 (1). (Article 7 (3) was of course provisionally adopted by the International Law Commission at a time when the draft seemed likely to contain no definition of "State"; see paragraph (21) of the International Law Commission's commentary on article 7 in its report on the work of its thirty-fourth session.) Provided that article 3 (1) (b) and (c) are revised in accordance with the comments made in the commentary on article 3 (1), above - which are, so to speak, corrobated by the formula correctly used in article 7 (3) ("the proceeding is instituted against one of the organs of that State, or against one of its political sub-divisions or agencies or instrumentalities in respect of an act performed in the exercise of sovereign authority") - the whole of paragraph 3 of article 7 appears to be otiose, since all but the last two lines merely reproduce the effect of paragraphs 1 and 2 (read together with article 3 (1), while the last two lines appear to add nothing to the last two lines of paragraph 2.

Article 8

In general, the United Kingdom Government are content with the formulation of this article. But they suggest that consideration should be given to the question whether the requirement expressed in subparagraph (c), i.e. that a consent given in relation to a specific case in which a dispute has already arisen is effective only if given in facie curiae, may not be more stringent than current international law warrants.

Article 9

In general, the United Kingdom Government are content with this article. But it is for consideration whether paragraph 1 (b) needs qualifying to provide for the case where the State in question took a step relating to the merits of a proceeding before it had knowledge of facts on which a claim to immunity might be based (see article 3 (1) of the European Convention).

Part III

The United Kingdom Government note the International Law Commission's assurance that the title of this part is not intended "to express any preference on the divergent doctrinal interpretations of immunities of States". They would therefore regret disproportionate controversy over the choice between the words at present in square brackets in the draft. Nevertheless, they have a firm preference for the words "Limitations on". They see these as more accurately reflecting the functions of the various substantive provisions in part III, that is to say, to define those areas and situations in which, or those transactions in respect of which, international law does not recognize that the State concerned has jurisdictional immunity.

Article 11

The United Kingdom Government have no difficulty with the substance of this article, subject to the comments and reservations which they have expressed (see the commentary on article 3 (2) above) in relation to the definition of "commercial contract" in article 2 and the related interpretative provision in article 3 (2). On the question of whether it is desirable, or even possible, for this article to

indicate specifically the necessary jurisdictional link between the State of the forum and the State against which the proceedings are instituted, the United Kingdom Government consider that the reference to "the applicable rules of private international law" is both effective and sufficient. They have serious doubts, however, about the phrase "the State is considered to have consented to the exercise of that jurisdiction in a proceeding arising out of that commercial contract". They see that phrase as suggesting that we are here concerned with a case of implied ad hoc consent to the jurisdiction. The United Kingdom Government consider that such a suggestion would not be in accordance with current international law, which does not recognize that, in the situations with which this article deals, there exists any jurisdictional immunity which needs to be ousted or suspended by any process of consent, whether express or implied. The United Kingdom Government will therefore hope to see some modification of the drafting of the article to meet this concern. Moreover, the United Kingdom Government also entertain similar doubts concerning the formula "the State ... cannot invoke immunity", or its equivalent in other articles (e.g. "the immunity of a State cannot be invoked"; see articles 12, 13, 14, 15, 16 and 17); this formula suggests that the State concerned has voluntarily waived the immunity, whereas, in the view of the United Kingdom Government, the proper analysis is that the immunity does not exist in the relevant circumstances. In addition, the phrase is particularly unfortunate, and liable to misconstruction, in article 11 because it is there connected by the word "accordingly" with the express reference to a deemed consent.

Article 12

The United Kingdom Government are in general content with the substance of this article. However, they have reservations about the following detailed aspects of it to which they suggest that further consideration should be given:

(a) While noting the explanation given in paragraph (9) of the International Law Commission's commentary on this article in its Report on the work of its thirty-sixth session, the United Kingdom Government question whether it is necessary to include the words "Unless otherwise agreed between the States concerned" at the beginning of paragraph 1 of the article (and also at the beginning of articles 13, 14 (1), 15, 16, 17 (1) and 18 (1)). Their appearance in this particular context but not in other contexts, where the thought which they express is equally valid, could give rise to confusion;

(b) The concept underlying the phrase "if the employee has been recruited in that other State" may need to be expressed with more precision. The United Kingdom Government read it as equivalent to, or at least as embracing, cases where the contract of employment was made in the State of the forum; and, if this is correct, they can accept it. However, they consider that this criterion for non-immunity should be separate from and alternative to (and not, as the draft envisages, cumulative upon) the criterion that the services contracted for are to be performed wholly or partly in the territory of the State of the forum;

(c) The United Kingdom Government do not consider that the phrase "and is covered by the social security provisions which may be in force in that other State" is sufficiently certain in its scope or has a sufficiently objective content to be acceptable as the definition of an additional criterion for non-immunity.

Indeed, they are not satisfied that there is any justification for imposing an additional criterion of this kind. They therefore cannot support either the retention of the phrase in its present form, or the proposed search for an alternative wording "so as to provide an additional indication of the intention or consent of the State which has employed a local staff abroad in a particular case not to invoke its immunity in respect of that contract of employment"; see footnote 18 to the text of the draft article as set out in the report of the International Law Commission on the work of its thirty-eighth session;

(d) On a drafting point, the United Kingdom Government consider that it would be useful if the conditions set out in paragraph 2 were specifically stated to be alternatives, as is presumably intended;

(e) The United Kingdom Government would have some difficulty in supporting the inclusion of paragraph 2 (a) of this article in its present formulation, which appears to them to be dangerously vague and likely to cover an excessively wide range of employees. They do not consider that paragraph (11) of the International Law Commission's commentary on the article (in its report on the work of its thirty-sixth session) offers a convincing justification for such a broad exception to the general principle enunciated in paragraph 1 of the article. While there can be no objection to such an exception being made for "officials of established accreditation", it is not apparent, in the case of many of the other instances given, why questions relating to the contracts of employment of these employees should be thought to have, invariably, a closer connection with the legal system of the employing State than with that of the State of the forum, given that (by definition) the basic criteria for non-immunity set out in paragraph 1 of the article have been satisfied and that none of the other exceptions specified in paragraph 2 (e.g. as to nationality and residence) are applicable. (It is also relevant that there is no question of the employing State being compelled to engage or retain or re-employ any particular person; see article 26, and see also the comment, below, on paragraph 2 (b) of article 12.) Accordingly, the United Kingdom Government suggest that further thought be given to the possibility of identifying with greater precision what degree or kind of involvement in "the exercise of governmental authority" is necessary to bring this exception into play;

(f) The United Kingdom Government are not clear as to the actual or intended effect of paragraph 2 (b). It appears from paragraph (12) of the commentary on this article (see subpara. (e) above) that its object is to prevent a court of the State of the forum from holding that the other State is under an obligation to employ, or to retain in its employment, or to re-employ, a particular individual, while not preventing the court, in appropriate cases, from finding an obligation to pay compensation or damages in lieu of such employment, etc. If that is right, the United Kingdom Government have no objection to it in substance but they question whether it is necessary - particularly in view of draft article 26 (see the commentary on article 26, below) - or, at any rate, is sufficiently clearly drafted;

(g) On paragraph 2 (e), the United Kingdom Government suggest that it might be desirable to make clear that it is for the law of the State of the forum alone to determine whether, by virtue of the subject-matter of the proceedings, the relevant "considerations of public policy" exist;

(h) The United Kingdom Government observe that this article does not contain any provision corresponding to article 7 of the European Convention, read together with article 5 (3) of that Convention. Those provisions have the effect that, where the services to be performed under a contract of employment are to be performed for an office, agency or other establishment maintained by the employing State in the territory of the State of the forum for the purpose of industrial, commercial or financial activity, the exceptions to non-immunity which are provided by paragraph 2 (c) and (d) of this article do not apply unless the employee was, at the time when the contract was concluded, habitually resident in the employing State. The United Kingdom Government consider that provision to that effect ought to be included in this article also.

Article 14

The United Kingdom Government have no comment on the substance of this article. While reserving their position on the correctness of the formulae used in this article (see the commentary on article 11 above), the United Kingdom would question, on what is probably only a point of drafting, whether in paragraph 1 the formulation "the immunity of a State cannot be invoked to prevent a court of another State ... from exercising its jurisdiction in a proceeding" is entirely appropriate. That formulation may be appropriate in paragraph 2, which deals with "indirect impleading", but it appears to be out of place in paragraph 1, where the appropriate formula would seem to be the one used in other analogous articles, i.e. "the immunity of a State cannot be invoked before the court of another State ... in a proceeding".

The United Kingdom Government also question the appropriateness of the words "the determination of" at the end of the introductory passage in paragraph 1. It is not clear what effect these words were intended to have but, if the intention was to confine the scope of subparagraphs (a)-(e) to cases where the issue is the existence or extent of the "right or interest", the United Kingdom Government cannot accept that that is justifiable. In any event, the words make no sense in relation to the phrase "or its possession or use of" in subparagraph (a).

Article 15

The United Kingdom Government regard the terms of this draft article as substantially satisfactory. They would, however, suggest that subparagraph (a) ought to include a reference to plant breeders' rights. Although such rights would probably be regarded as a "similar form of intellectual or industrial property", they are perhaps sufficiently different from the other items listed to be worthy of mention. (It is noteworthy that plant breeders' rights are not mentioned in the definition of "intellectual property" in article 2 (viii) of the Convention establishing the World Intellectual Property Organization.) Secondly, the United Kingdom Government would in any event suggest the deletion of the word "similar" from the phrase "any other similar form of intellectual or industrial property". The United Kingdom Government note that there are various kinds of rights, such as rights in computer-generated works, which are in their infancy, and about the classification of which there is as yet no consensus; it would appear undesirable and unnecessary to have to consider whether such rights are "similar" to the listed rights.

On a different point, the United Kingdom Government have a reservation about the use of the words "the determination of" in subparagraph (a) of this article similar to the reservation expressed in the second paragraph of the commentary on article 14, above, in relation to their use in article 14 (1). The United Kingdom Government note what is said on this matter in paragraph (6) of the International Law Commission's commentary on this article but remain of the opinion that the words may import an unjustifiable restriction on the scope of this provision.

Article 16

The United Kingdom Government have gone on record as stating that it "has found it difficult to deduce from detailed examination of the practice of other States in the field of taxation of foreign sovereigns any very clear rules or principles in this area". 5/ Accordingly, the United Kingdom Government believe that it would be desirable for the present article 16 to be omitted and for a provision along the lines of article 29 (c) of the European Convention to be substituted.

Article 18

The United Kingdom Government are, in general, content with this article, which substantially reflects the Brussels Convention of 1926 and its Supplementary Protocol of 1934, but consider that as at present drafted it fails in two respects to give full effect to the principle which it seeks to enunciate. This is the principle that when a State allows a ship which it owns or operates to be employed in commercial service it has no immunity from the jurisdiction of the courts of another State in proceedings relating to such commercial operation.

The first respect in which the draft is defective is the inclusion of the word "non-governmental" in paragraphs 1 and 4 (twice in each case). The United Kingdom Government consider that the introduction of this adjective in addition to the adjective "commercial" results, at best, in a redundancy which can serve only to create uncertainty and confusion in the interpretation of the article. More dangerously, it may be thought to import some additional restriction (not implicit in the word "commercial") on the scope of the provisions in question and thereby unwarrantably to enlarge the circumstances in which States can claim immunity in respect of their commercial activities.

The second respect in which the United Kingdom Government consider the draft to be defective is the use of the word "exclusively" in the same two paragraphs, i.e. in paragraphs 1 and 4. Here, also, the United Kingdom Government consider that the draft, if that word is retained, is excessively limitative and unjustifiably derogates from the basic principle that a State is not entitled to jurisdictional immunity in respect of its commercial activities.

5/ "Materials on jurisdictional immunities of States and their property", United Nations Legislative Series, vol. 20 (United Nations publication, Sales No. E/F.81.V.10), p. 626.

It will be appreciated that the deletion of the word "non-governmental" from paragraphs 2 and 4 will entail consequential modifications in paragraphs 5 and 7.

The United Kingdom Government are doubtful about the adequacy of the definition of "proceeding relating to the operation of that ship" in paragraph 3. In substance it appears to have been taken from the second sentence of article 3 (1) of the Brussels Convention of 1926, which, however, serves a very different and more restrictive purpose. Moreover, the use of the phrase "inter alia" indicates that the definition is not intended to be exhaustive, but it is not clear what other proceedings might also be covered. The United Kingdom Government rather doubt if any definition is required, and note that no definition is given for the purposes of article 1 of the Brussels Convention of 1926. However, if a definition is thought to be useful, then the United Kingdom Government would draw attention to the more extensive definition of "maritime claim" given in article 1 (1) of the International Convention relating to the Arrest of Seagoing Ships, signed at Brussels on 10 May 1952.

The United Kingdom Government understand that any certificate provided in accordance with paragraph 7 of this article would not be conclusive.

Article 19

The United Kingdom Government are, in general, content with this article. They do, however, have some doubts as to whether it is desirable to limit its scope to arbitrations relating to civil or commercial matters - and still less to arbitrations relating to commercial contracts - and they therefore favour the omission of both of the limitative phrases at present in square brackets in the draft. In effect, therefore, they would wish the relevant passage of the draft to read simply "... to submit differences to arbitration". They also place a broad interpretation on subparagraphs (a), (b) and (c), and in particular they interpret subparagraph (b) as embracing cases in which the arbitral tribunal refers to the courts of the forum State questions of law arising in the course of arbitration.

Article 21

While the United Kingdom Government have no difficulty in endorsing the general thrust of this article, there are three features of it which they are not able to support.

(a) They consider that the phrase "or property in which it has a legally protected interest" (which at present appears in square brackets in the draft) is vague in itself and uncertain in its effect as part of the whole provision. In the light of paragraph (4) of the International Law Commission's commentary on this article in its report on the work of its thirty-eighth session, the United Kingdom Government wonder whether a phrase such as "rights or interests in property" might be more apposite. On the other hand, if, as the third sentence of that commentary seems to suggest, the objective is to exclude, from the immunity with which the article is concerned, cases where the interest of the State in the property in question would remain intact and unaffected by the proposed measures of constraint, the United Kingdom Government do not see the need for any additional words to

achieve it: by definition, if a State's interest in property will be unaffected by proposed measures against the property, those measures do not constitute measures of constraint against that State;

(b) For the reasons given in relation to article 18 (see the second paragraph of the commentary on that article, above), the United Kingdom Government consider that the word "non-governmental", which appears in square brackets in subparagraph (b) of this draft article, should be omitted;

(c) The United Kingdom Government take exception to the words "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceedings was directed", which also appear in subparagraph (b) of the draft. In addition to what the United Kingdom Government see as the fatal vagueness of that phrase - they find it very difficult to understand what sort or degree of connection is envisaged or what, for that matter, is meant by "the object of the claim" in this context - the United Kingdom Government see the inclusion of the phrase as imposing an unnecessary limitation upon the cases in which property may legitimately be subject to measures of constraint. Given that the property in question here is, by definition, property which is "specifically in use or intended for use ... for commercial purposes", the United Kingdom Government fail to understand the logic of the proposed inclusion of the words and they note that no reason for it is given in the International Law Commission's commentary.

Article 22

In general, the United Kingdom Government are content with this article, although they would refer back to the commentary on article 8, above (commenting on the similar provision in that article) as to the requirement that consent which is given other than by international agreement or in a written contract must be given in facie curiae.

Article 23

If the purpose of paragraph 1 of this article is merely to identify, for greater clarity, certain particular categories of property which, in the respective circumstances described, are intrinsically not in use or intended for use for commercial purposes in the context of article 21 (a), the United Kingdom Government find it acceptable, though perhaps superfluous. However, it will clearly be necessary to examine the drafting of the various subparagraphs very carefully in order to ensure that they are not so widely framed as to embrace cases where property of the kind in question is in fact used for commercial purposes and ought therefore not to be protected by State immunity. On the face of it, the current draft appears to be satisfactory in that respect, though it may be desirable in subparagraph (a) to make clear (as was the International Law Commission's intention) that the phrase "for the purposes of the diplomatic mission" refers to the purposes of the mission's purely diplomatic functions (and correspondingly for the other entities listed). Similarly, there may be room for misinterpretation of the phrase "of a military character" in subparagraph (b). Accordingly, the United Kingdom Government may wish in due course to comment further on the drafting of particular aspects of paragraph 1 of this article, and they suggest that the International Law Commission may in any case wish to give it further study.

Article 26

The United Kingdom Government endorse the objective of this article but suggest that consideration should be given to reframing it so that the immunity which it confers is immunity not merely from the liability to a monetary penalty if an order of the kind referred to is disobeyed but immunity from the very possibility of having such an order made against it (unless, of course, it has expressly consented to that possibility). While there can be no objection to a court, in proceedings to which a foreign State is properly a party, declaring the rights and obligations of that State according to the law of the forum, and while it is to be assumed that the State concerned will then act accordingly, it does not seem to the United Kingdom Government to be appropriate for a domestic court to order the Government of another State, without its consent, to do or not to do particular acts whether or not any penalty is threatened. In any event, there is in general no method of enforcing such a penalty against a foreign State (see articles 21-23) and it is a principle of most legal systems that courts will not make orders which they cannot enforce; it would seem right for this article, too, to reflect that principle.

Article 27

The United Kingdom Government have no comment on paragraph 1 of this article. They do, however, have some reservations about the application of paragraph 2 to cases where the foreign State is the plaintiff in the proceedings. They see no reason why a State which voluntarily invokes the jurisdiction of the courts of another State against a private person (whether a natural person or a corporation or similar entity) should enjoy a more advantageous position vis-à-vis the defendant, in the respect covered by this paragraph, than a private plaintiff would enjoy.

Article 28

The United Kingdom Government consider that it is desirable for the draft articles to include a provision on the lines of this article - together with the retention of the words in square brackets in article 6 (see the commentary on article 6, above) - in order to preserve the flexibility necessary to accommodate further developments in State practice and the corresponding adaptation of international law and, more generally, to accommodate special relationships arising between particular States. They are not satisfied, however, that the wording of the present draft, modelled as it is on article 47 of the Vienna Convention on Diplomatic Relations of 1961, is entirely apt to give effect to the intention underlying the article. They therefore suggest that the International Law Commission should reconsider the formulation of this article during its second reading of the draft articles as a whole, and they themselves reserve the right to comment further on it in the light of the Commission's renewed deliberations.

VENEZUELA

[Original: Spanish]

[28 December 1987]

General comments

During the debate on the item concerning the report of the International Law Commission, in the Sixth Committee at the forty-first session of the United Nations General Assembly, the delegation of Venezuela expressed satisfaction at the conclusion of the first reading of the draft articles, which had been under study since 1979. On that occasion, Venezuela stated that it attaches the utmost importance and considers that top priority should be given to the formulation of the rules governing the jurisdictional immunity of States and their property, particularly since some States have enacted provisions which increasingly restrict the possible exercise of the right of jurisdictional immunity protecting States and their property.

Venezuela also expressed concern at the fact that the International Law Commission had opted for a system which allows numerous exceptions to the sovereign immunity of States and their property. This detracts from the general principle that States are immune among themselves and, in the opinion of Venezuela, is prejudicial to the developing countries, where owing to the lack of private capital the State has to undertake diverse and varied activities related to the international economy and commercial relations. In this connection, it was stressed that the developing countries should endeavour to ensure that, in the final text, the exceptions to or limitations on the sovereign immunity of States and their property are fewer in number or lesser in scope.

Specific comments on individual articles

After these considerations of a general nature, some specific comments are made below on the draft articles.

Articles 2 and 3

Since draft articles 2 and 3 contain definitions relating to the terms "court", "commercial contract" and "State", it would seem appropriate to try to combine the two articles. In our opinion, it would be preferable, in order to make the text more systematic and clearer, to incorporate in a single article all the definitions and concepts to be used throughout the document.

Article 6

In article 6, the square brackets and the words between them ("and the relevant rules of general international law") should be deleted. If that phrase were retained, it could be interpreted as comprehending customary rules of international law based on the judicial, executive and legislative practice of States. This would vitiate and nullify the entire effort of codification and development of the principle relating to the jurisdictional immunity of States and

their property. In our view, the international community should be guided in this area solely by the provisions in the articles which are being drafted by the International Law Commission and which will be approved by States subsequently in the appropriate form. We believe that, in order to reflect the evolution of international law and future concerns of States, some provisions should be included concerning revision and modification of the text.

Article 7

Article 7, paragraph 3, is designed to specify when a proceeding before a court of a State is considered to have been instituted against another State. Since article 3, paragraph 1, attempts to define the term "State", it would perhaps be advisable to review this matter again in order to avoid contradictions, doubts and ambiguities and to establish the necessary correlation between article 7, paragraph 3, and the definition adopted for the "State" concept, avoiding in this paragraph the repetition of elements which should appear only in the definition.

Article 8

Article 8 specifies that a State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has expressly consented to the exercise of jurisdiction by that court with regard to the matter in a written contract. In this regard, we think that the International Law Commission could try to soften this provision by allowing some exceptions to this rule, because there could be a fundamental change in the circumstances prevailing at the time of the signature of the contract in question or some other reason why it would be advisable or necessary for the State which signed the contract containing that clause not to participate in the relevant proceeding before a court of the other State.

Part III

The title of part III of the draft articles should be "Exceptions to State immunity"; this is more restrictive than if the word "limitations" were used. As stated above, as a general principle this part III should contain the minimum number of rules or provisions establishing exceptions to the sovereign immunity of States and their property.

Article 21

In order that the immunity of a State with regard to measures of constraint affecting its property may be as broad as possible, we think that in the chapeau of article 21 the square brackets should be deleted and the words between them should be retained. Thus the final text would include the phrase "or property in which it has a legally protected interest".

Article 23

Although we consider that the wording of paragraph 1 (a) of article 23 is perfectly clear and does protect property which is in the territory of another State and is used or intended for use for the purposes of the diplomatic mission of

the State or its consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences, we do not agree with the interpretative commentary on this subject appearing on page 44 of the report of the International Law Commission on the work of its thirty-eighth session. In this connection, Venezuela is of the opinion that the paragraph should be retained in its present wording, with its link to the chapeau of article 23, on the understanding that such property should not be considered as property used or intended for use specifically by the State for commercial purposes.

Article 25

The last part of article 25, paragraph 2, should be clarified; it is not clear, although this may be a problem of translation.

YUGOSLAVIA

[Original: English]

[4 February 1988]

The principle of the jurisdictional immunity of States and their property (hereinafter referred to as immunity) and the question of its contents are a matter of serious and delicate differences among States in the present-day international community. This principle deeply touches upon the question of State sovereignty, while determination of its contents is most closely linked to the internal legislation and practice of States. Therefore, the work of the International Law Commission on the codification of this matter has been and will continue to be comprehensive and difficult, and the final fate of the draft articles will depend on the extent to which successful compromise solutions can be found.

Yugoslavia considers that the draft articles constitute a sound basis for further codification work, although they require to be further elaborated, clarified and completed. Since it has already explained its basic positions on immunity as well as the solutions provided for in its own legislation, in its previous reply to the Secretary-General of the United Nations, 6/ the Government of Yugoslavia will confine its reply to certain draft articles, more particularly to those providing for alternative solutions.

The Yugoslav Government is not convinced of the need to have an interpretative provision defining the expression "State" (article 3, para. 1). However, since it has been included in the draft, it would perhaps be useful if the relationship between the various elements of this expression as defined in subparagraphs (a), (b) and (c) were reconsidered.

6/ Ibid., p. 641.

Article 3, paragraph 2, provides that in qualifying a contract reference should be made to the nature of the contract as the basis criterion and to its purpose as an additional criterion. The Yugoslav Government feels that in determining the character of a contract both these criteria should be used at the same time and given the same importance, since it is the only way of determining precisely the character of the contract in question.

The provision alternatively provided for in article 6 to the effect that a State enjoys immunity subject to the relevant rules of general international law, should be deleted. Such a formulation may lead to ambiguities and different interpretations by courts, since the rules of general international law on immunity are vague and not precise.

The question of the relationship between commercial (non-governmental) and non-commercial (governmental) services (arts. 18 and 21) is not precise enough and calls for further consideration and clarification. Since the purpose of these rules is to regulate a particular legal situation, it is necessary that their meaning be determined by a detailed analysis rather than in a semantic way. The possibility of a ship being used for commercial but also governmental purposes should also be taken into account.

Article 19, concerning the conclusion of an arbitration agreement, envisages the possibility of differences relating to a "commercial contract" or alternatively, "a civil or commercial matter". It would be more precise to keep the term "commercial contract" and to delete the alternative.

Articles 21 and 22 concerning the precise interpretation of the expression "State property" for which immunity from execution can be invoked contain a provision in brackets. These articles deal with State property or property in the possession or control of the State or "property in which the State has a legally protected interest". It is considered that the expression "State property or property in its possession or control" should be kept.

In relation to the title of part III, it is considered that the term "Exceptions to" is to be adopted rather than "Limitations on", since the latter suggests acceptance of the limited immunity concept and may therefore be difficult for the opponents of this concept to accept.

It would be useful to consider the possibility of making reservations with regard to some provisions, especially in view of the possible need to bring into accord the provisions of the future agreement as well as to facilitate and speed up its ratification.

II. COMMENTS AND OBSERVATIONS RECEIVED FROM NON-MEMBER STATES

SWITZERLAND

[Original: French]

[19 January 1988]

The Permanent Observer of Switzerland to the United Nations has the honour to transmit below the comments of the Swiss Government on the draft articles on jurisdictional immunities of States and their property, provisionally adopted by the International Law Commission.

The Swiss Government is grateful to the Secretariat for the opportunity afforded it to submit its comments on the draft articles in question. These will be set out in three parts. The first part will give a broad description of the judicial precedents of the Federal Tribunal relating to State immunity from jurisdiction and execution. The second part will contain commentaries on the general scheme of the draft. The last part will be devoted to consideration of some of the provisions of the draft.

Judicial precedents of the Federal Tribunal relating to State immunity from jurisdiction and execution

The Federal Tribunal has long endorsed the restrictive concept of State immunity. Thus, it ruled in 1918 that foreign States are subject to Swiss jurisdiction when writs are served on them as subjects of private law and by reason of undertakings requiring execution in Switzerland. 7/ In accordance with those judicial precedents, the principle of jurisdiction from immunity is not an absolute rule and not of absolutely general application. It must, on the contrary, be ascertained whether the foreign State is acting by virtue of its sovereignty (jure imperii) or as holder of a private right (jure gestionis). The Federal Tribunal has in several instances had occasion to confirm its judicial precedents. In a later decision, 8/ it saw fit to stipulate that, where the foreign State acted by virtue of its sovereignty in the legal relationship at issue, it may invoke the principle of immunity from jurisdiction absolutely but that, where it acted as the holder of a private right, it may be summoned before Swiss courts and be subjected to measures of execution in Switzerland, provided, however, that the legal relationship at issue is linked with Swiss territory, i.e., that it arose or must be executed in Switzerland, or, at the very least, that the debtor performed certain acts of a nature to create grounds for execution in Switzerland. 9/

7/ Recueil des arrêts du Tribunal fédéral, 44, (I) 49; French translation in Journal des Tribunaux, 1918, 594.

8/ Ibid., 82 (I) 75.

9/ *Ibid.*

The distinction between governmental acts and business acts is not always easy to apply. The judge must base his ruling not on their purpose but on their nature and consider whether, in that regard, the act derives from public authority or is similar to that which any individual might perform. The judge may also draw upon criteria external to the act itself. In that regard, the place where the foreign State acted may sometimes provide some indications. Thus, where a State enters into a relationship with an individual outside its frontiers and in the territory of another State without its diplomatic relations with the latter being involved, that is a serious indication that it is performing an act jure gestionis. 10/ All the interests involved must, in fact, be weighed: that of the foreign State in enjoying immunity, that of the forum State in exercising its jurisdictional sovereignty and that of the claimant in obtaining judicial protection of his rights. 11/

According to the Federal Tribunal, it is unjustifiable to draw a distinction between the jurisdictional power and the executive power of the authorities of a State with regard to a foreign State. In particular, it has pointed out that, as soon as it is admitted in certain cases that a foreign State may be a party before Swiss courts to a proceeding intended to establish its rights and obligations deriving from a legal relationship in which it intervened, it must also be admitted that it may in Switzerland be the subject of measures to ensure the execution of the judgement rendered against it. 12/ The Federal Tribunal obviously considers that immunity protects the property of the foreign State where, independently of the legal relationship at issue, the State has earmarked it for its diplomatic service or for other tasks incumbent upon it as the holder of public authority.

It derives from the foregoing that, in Swiss practice, immunity from execution covers not only the administrative property of the foreign State but also other property earmarked for public business. That fact that the disputed claim emanates from a private law relationship (jure gestionis) cannot, in itself, justify the sequestration of goods belonging to a foreign State and situated in Switzerland. This legal relationship must also involve a sufficient link with Swiss territory. According to judicial precedents, a sufficient link exists, for example, where the debt relationship arises in Switzerland or must be executed there or where the foreign State performed in Switzerland acts of a nature to establish a place of execution there, but not by reason of the mere fact that some property of the debtor is located in Switzerland or that the claim for which sequestration is requested was established by an arbitral tribunal that had established its seat in Switzerland. 13/

10/ Ibid., 86 (I) 23.

11/ Ibid., 110 (II) 255; Journal des Tribunaux, 1985, 283.

12/ Ibid., 82 (I) 75; summarized and partially translated into French in the Annuaire suisse de droit international, 1975, vol. XXXI, p. 219 et seq.

13/ Ibid., 106 (Ia) 148, preambular paras. 3b, 4 and 6.

Switzerland has been a party since 7 October 1982 to the European Convention on State Immunity, adopted on 16 May 1974 under the auspices of the Council of Europe. In the opinion of the Federal Tribunal, the principles contained in that instrument may be considered as expressing the current trend of modern international law and as such may be taken into consideration. Switzerland has also made the declaration provided for in article 24, whereby Contracting States have the option of declaring, by notification addressed to the Secretary General of the Council of Europe, that their courts shall be entitled to entertain proceedings against another Contracting State to the extent that they are entitled to entertain proceedings against third States. In other words, the system applied with regard to State immunity by the courts of a State which has made this declaration is not affected by the entry into force of the Convention and may even evolve, on the understanding that this declaration cannot prejudice the immunity from jurisdiction enjoyed by foreign States in respect of acts performed in the exercise of public authority (jure imperii).

A foreign State which considers that its immunity from jurisdiction or from constraint has been violated may, in accordance with article 71 of the Federal Act on Administrative Procedure, 14/ denounce at any time to the Swiss Government (Federal Council) the actions that, in the public interest, call for automatic intervention against an authority. The Federal Council, which is entrusted, under article 102 (8), of the Federal Constitution with "attending to the Confederation's interests abroad, particularly the observation of its international relations" and which is, in general, responsible for foreign relations, is empowered under this head to take such measures as it deems advisable. It is also permissible for the foreign State, just like any citizen, to lodge a public law appeal by invoking the violation of international treaties (article 84 (1) c of the Federal Act on Judicial Organization (JO)), 15/ to which the customary rules of the law of nations are assimilated, or of prescriptions of federal law on the delimitation of competence of authorities by reason of subject-matter or by reason of place (OJ, article 84 (i) d). The foreign State which opposes, for example, a measure of sequestration, by insisting on its immunity is thereby challenging the competence of this authority. The Federal Act on the Institution of Legal Proceedings for Debt and Bankruptcy 16/ does not contain any provision relating to the conditions in which the sequestration of assets belonging to a foreign State may be ordered. These have been established in the legal precedents of the Federal Tribunal described above, to which Swiss judicial and persecuting authorities must in principle conform.

Comments on the general scheme of the draft

The draft articles prepared by the International Law Commission achieve to some extent a synthesis between the concept of absolute immunity from jurisdiction

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14/ Récueil systématique du droit fédéral, 172.021.

15/ Ibid., 173.110.

16/ Ibid., 281.1.

and that of relative immunity from jurisdiction. In article 6, they lay down the principle of immunity from jurisdiction and then, without expressly referring to the distinction between jure gestionis acts and jure imperii acts, define, in articles 11 to 20, a series of situations in which, saving Treaty provisions to the contrary, this immunity may not be invoked.

This approach, following the line of that adopted in the elaboration of the European Convention on State immunity, can only be approved. It is undeniable that one notes, both in practice and in theory, a movement in favour of new limitations on State immunity or even a strong tendency to authorize the effective seizure of State property and measures of execution against such property. Thus, it may be affirmed that general international law is being interpreted increasingly as excluding from immunity acts performed by the State as holder of a private right. This evolution is due to the unprecedented development of State activities in the commercial, industrial or other service sectors in recent decades.

Within the framework of the debates held in the Sixth Committee of the General Assembly at its forty-first session, some representatives stated that it was inadmissible for a court to consider the activities of a foreign State and to qualify them in one manner or another without regard to that State's own opinion, because that in itself would be equivalent to actual interference in the internal affairs of States. Thus, the State, even when concluding an operation of a commercial nature, would be deemed to be acting as a special subject of civil law in that it was not acting in the interest of personal profit of private individuals but in the interest of the State and the economic and social development of the country (A/CN.4/L.410, para. 63). In the opinion of the Swiss Government, such an argument cannot be upheld.

Of course, the act whereby a State makes a transaction of a commercial nature has perhaps a different end than the act of an individual, who may be presumed to act in his own interest. However, the difference is insignificant, because the criterion that makes it possible to distinguish a jure gestionis act from a jure imperii act lies primarily in its nature. Thus, a State that enters into a private law relationship in the same way as any individual (physical or legal person) is not justified in pleading its immunity from jurisdiction in order to escape from a possible legal proceeding instituted within the framework of that same private law relationship. In the final resort, it is a question of the security of transactions. Like any individual, a State must know that in business it cannot escape the consequence of its undertakings. The Swiss Government therefore approves the general orientation of the draft articles in so far as concerns State immunity from jurisdiction.

The question has sometimes been raised according to what law the jure gestionis or jure imperii nature of the contested act is to be determined. The criteria adopted by the national law of the foreign State do not seem appropriate, particularly since the constitutional theory or practice of certain States consider as acts of public authority acts which before the courts of the forum would be only jure gestionis acts. It is thus for the State of the forum to qualify the nature of the act, within the limits, however, of abuse of right. The

situation would not be a new one in international law. As one author says, 17/ it would be comparable to that existing, for example, in respect of nationality or the régime governing aliens. The Swiss Government wonders, however, whether it would not be advisable, in order to avoid any dispute, for the competence of the forum State to qualify the act to be expressly recognized in the draft articles.

If the Commission's draft is closely based on solutions retained in the European Convention on State Immunity with regard to immunity from jurisdiction, it departs from it appreciably with regard to immunity from execution. The above-mentioned Convention does indeed provide in article 23 that no measures of execution or preventive measures against the property of a contracting State may be taken in the territory of a contracting State, except in the case of formal renunciation. This prohibition on seizure must, however, be read in the light of article 20, which imposes on a State party to the Convention the duty to give effect to a judgement given against it by a court of another contracting State, a provision which is strengthened by a procedure for monitoring the obligation to give effect to a foreign judgement (article 21). Furthermore, in conformity with the optional régime established by the Convention, execution of a judgement against the property of the foreign State may be obtained in the State of the forum and preventive measures may be taken against the property with a view to ensuring eventual execution of the judgement, where both States have made the declaration provided for in article 24. The draft articles provide that a State shall enjoy immunity from measures of constraint unless the property against which the measure is directed is used for commercial purposes and has a connection with the object of the claim (article 21) or unless the State against which the measure is directed has expressly consented thereto. Furthermore, it specifies various categories of property which are not subject to any measure of constraint. The solution retained by the Commission is not contrary to the judicial practice of the Federal Tribunal. It seems, however, more restrictive to the extent that it stipulates that property that may be the object of a measure of execution must have a special connection with the case in question, whereas the Federal Tribunal merely sets the requirements that the property in question should not be earmarked for the diplomatic service or the administration machinery of the foreign State and, in cases of sequestration, must have a sufficient link with Swiss territory. The Swiss Government regrets, therefore, that, in spite of the intrinsically complementary character of the two aspects of State immunity, the draft articles present, from this point of view, a certain imbalance, inasmuch as part IV on immunity from execution lags behind part II (articles 7-10) and part III (articles 11-19), concerning immunity from jurisdiction.

To sum up, the Swiss Government commends the efforts made with a view to endorsing, at the universal level, the tendency in international law, to restrict, on the one hand, those cases in which a State may invoke immunity before foreign courts and, on the other hand, to ensure the execution of judgements given against a State. The Swiss Government considers the draft articles drawn up by the Commission to be a useful working basis with a view to a diplomatic codification conference.

17/ Ignaz Seidl-Hohenveldern, in Droit international - L'immunité de jurisdiction des Etats et des organizations internationales, Pedone, Paris, 1981, p. 134.

Specific comments on some provisions of the draft

Lastly, the Swiss Government would like to make specific comments on some provisions of the draft.

Article 2, paragraph 1

It would be advisable to avoid defining the expression "commercial contract" by a reference to any contract or agreement "of a commercial nature" (subpara. (b) (iii)). That gives rise to a kind of tautology, which is not entirely removed by the rule of interpretation laid down in article 3, paragraph 2.

In the French text, the phrase "ne préjudicient pas à l'emploi de ces expressions ni au sens qui peut leur être donné" might more felicitously be replaced by the words "ne préjugent pas l'emploi de ces expressions ni le sens qui peut leur être donné".

Articles 2 and 3

Articles 2 and 3 have the same purpose, namely, to define and specify the meaning of the terms used in the draft. They should therefore be merged in a single provision, proceeding from the general to the particular (beginning with the concept of "State" and continuing with the definition of the concepts of "court" and "commercial contract"). It may be wondered whether it is advisable to give an introductory definition of the term "commercial contract", since it reoccurs only once in the text of the convention, in article 11. It is in this later provision that the definition in question should be included. On the other hand, it would be justifiable to give an introductory definition of the concept of "commercial contract" if the expression were also to occur in article 19, where it is currently placed in brackets. Furthermore, some other expressions would merit definition, such as the rather vague terms "interest" or "property" of a State (occurring, for example, in article 14). Thus, it should be asked whether the expression "State property" encompasses the property over which a State has a proprietary right or other rights under its domestic law or also under international law.

The purpose of introductory definitions is to make it possible to lighten the rest of the treaty text; this being so, it does not seem necessary to reproduce the definitions given at the beginning of the instrument (for example, article 7, para. 3). The draft articles might be reconsidered by the Commission from this angle.

According to article 3, paragraph 1 (c) - a provision which must be read in conjunction with article 11, paragraph 3 (a) - transactions such as investments made by central banks with other central banks abroad enjoy immunity from jurisdiction, unlike investments made with commercial banks. In the view of the Swiss Government, only assets actually and recognizably earmarked for purposes of public authority should enjoy such immunity. Thus, reserves held by States abroad, whether invested with central banks or commercial banks, are not outside the jurisdictional competence of the forum State when they are not a component of the financial patrimony of the other State or when it is not recognizably clear that the other State is the owner of the assets in question.

Article 4

Care should be taken to ensure that this article, as presently worded, cannot be used by States in order to extend ratione personae the circle of persons to whom diplomatic law accords privileges and immunities. The concept of "persons connected" with diplomatic missions, consular posts or other representational bodies seems somewhat vague in this regard.

Article 6

The reference to the "relevant rules of general international law", which is placed in brackets in the draft, should be retained, since immunity from jurisdiction exists independently of the draft articles as a fundamental principle of the law of nations. The rule of State immunity would then also be subordinated to the future development of international law, which seems to be evolving towards increased limitation of immunity.

Article 7

On the repetitive character of the definition given in paragraph 3, see the comment made under articles 2 and 3 below.

Article 8

Some representatives in the Sixth Committee pointed out that there might be a fundamental change in the circumstances existing at the time when the contract was signed and that subparagraph (b) might be modified to cover such an eventuality. Such a proposal, if followed, would be inopportune, because it would reintroduce in contractual relations an element of legal insecurity which it was precisely the purpose of the contractual renunciation of immunity from jurisdication to obviate.

Article 11, paragraph 2 (a)

"A commercial contract concluded between States on a Government-to-Government basis" enjoys immunity from jurisdiction. That constitutes an exception to the principle set forth in paragraph 1 of this provision. It follows that all commercial contracts concluded by a State agency (see article 3, para. 1 (b) and (c)) are outside of the jurisdictional competence of the State of the forum. The scope of this exception should be reduced, bearing in mind the fact that in many countries whole sectors of economic activity are in public hands.

Article 12, paragraph 1

The word "and" in the expression "if the employee has been recruited in that other State and is covered by the social security provisions" should be replaced by "or" in order to take into account the fact that certain States do not have social security systems. Furthermore, it would be preferable to replace the expression "if the employee has been recruited in that other State" by the words "if the employee has been recruited outside the territory of the employing State", because

the initial undertaking may not have taken place in the employing State or in the forum State but in a third State. 18/

Article 12, paragraph 2 (c)

Rather than using the expression "habitual resident", it would be better to use the term "permanent resident", which already occurs in various conventions codifying international law, in particular, the Vienna Convention on Diplomatic Relations of 18 April 1961, the Vienna Convention on Consular Relations of 24 April 1963 and the Convention on Special Missions of 1 September 1976.

Article 16

Inasmuch as the duties, taxes or other charges mentioned in article 16 arise if not exclusively at least principally from the commercial activities described in articles 11 to 15 and 17 to 18, i.e., those which create an exception to the principle of immunity from jurisdiction, it would seem advisable to place that provision after article 18.

Article 18

This article deals with ships engaged in commercial service that are owned or operated by States. It would be advisable to consider the appropriateness of introducing an analogous provision for aircraft.

Articles 20 to 23

The Swiss Government wishes to reaffirm that, in its view, immunity from execution is not different in nature from immunity from jurisdiction. It is, in fact, a corollary thereof. It therefore expresses the wish that immunity from execution should follow immunity from jurisdiction, on the model of the system adopted - with some reservations, it is true - by the European Convention on State Immunity. Article 21 of the draft does establish an exception to the general principle of immunity from measures of constraint by providing that, in certain circumstances, a State's property may be attached. In order for that to happen, the property in question must be specifically in use or intended for use by the State for commercial purposes and have a connection with the object of the proceedings. In the view of the Swiss Government, this dual requirement places an excessive restriction on the right to proceed to emergency measures against the property of a State. The scope of the exception to the general principle of immunity from measures of constraint (article 21) is weakened still further by article 23, which sets forth various categories of State property which are not subject to any measures of constraint. In fact, the draft articles afford States too many possibilities for pleading immunity from execution, and in this regard they might be improved.

18/ Recueil des arrêts du Tribunal fédéral, 110 (II) 255; French translation in Annuaire suisse du droit international, 1985, vol. XLI, p. 172.

Article 23, paragraph 1 (a)

In order to benefit from immunity, bank accounts must not only meet the criterion of actual use for the needs of the diplomatic mission, consular post or official delegation but must also be recognizably ascribed to the State. In other words, a State which opens a bank account for purposes of public authority, but under an assumed name, would not be justified in claiming immunity from execution.
