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The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property

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ARTICLE

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I. INTRODUCTION

The principle of sovereign or state immunity exempts a state and its property from the judicial jurisdiction of any other state for claims relating to sovereign or governmental activities, also referred to as public acts (*jure imperii*) in contrast with private or commercial acts (*jure gestiones*). The jurisdictional immunity of a state and its property has developed over the years in the domestic courts of the various nations that have addressed cases in which private citizens have attempted to sue foreign states. This approach has resulted in a lack of uniformity in the enunciations of the principle, the reasons for granting or denying immunity, and the circumstances in which a private party can successfully bring an action against a foreign state.

With the increasing interaction between private parties and foreign states which may give rise to litigation, there is a growing need for certainty and predictability in the law of state immunity. Private parties entering into contracts with foreign states need to know the requirements for obtaining judicial redress in the event of a dispute arising out of the contract. States expanding their presence and activities around the globe need to know the circumstances in which they may be required to respond to a lawsuit filed in the court of another state. An international convention on state immunity, such as the provisional draft prepared by the International Law Commission, would provide greater clarity and consistency in this increasingly important area of international law.

This article will discuss the law of sovereign immunity as it has developed in the United States, the role of the International Law Commission (ILC) in codifying and developing customary international law, the

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ILC Draft Convention on the Jurisdictional Immunities of States and Their Property, and the future of the draft convention based on the views expressed by Member States.

II. DEVELOPMENT OF THE LAW OF SOVEREIGN IMMUNITY IN THE UNITED STATES

The United States has been at the forefront of the development of the principles of international law which govern sovereign or state immunity. The first judicial recognition of this immunity is found in a Supreme Court decision written by Chief Justice Marshall in 1812, The Schooner Exchange v. McFaddon.[1] The case concerned an armed vessel of France which had entered a U.S. port. It was alleged that the ship, the Schooner Exchange, was unlawfully seized by persons acting on behalf of France under orders of Emperor Napoleon. The Supreme Court held that the armed vessel in the service of a friendly foreign state, though clearly within the territorial jurisdiction of the United States, was immune from the jurisdiction of U.S. courts. The Court recognized immunity with regard to foreign sovereigns and the exercise of their sovereign rights based upon their independence and the equality and dignity of all states. The Court also gave weight to foreign relations considerations.[2]

The general principles and policy considerations which provided the foundation for the principle of sovereign immunity are as valid today as they were in 1812. Unfortunately, fundamental aspects of the Court's reasoning have been overlooked in the intervening years as states have encroached upon the commercial, financial, industrial, trading and other activities which have normally fallen within the domain of private citizens.[3] The immunity extended to foreign states because of *The Schooner Exchange* was recognized as a limited exception to the jurisdiction of national courts. The jurisdiction of national courts has been traditionally

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1. The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812).
2. *Id.* at 137:
   > This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him. . . . This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to wave the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.
3. Berizzi Bros. v. S.S. Pesaro, 271 U.S. 562 (1926).

considered an inherent attribute of state sovereignty and independence.[4] After *The Schooner Exchange*, the courts refrained from exercising jurisdiction in cases against the person of a foreign sovereign. Today, this is covered by the immunities extended to a sovereign or head of state *ratione personae*, or involving a foreign state in the exercise of its sovereign rights.[5] The immunity recognized in *The Schooner Exchange* did not extend to all activities of a foreign state or its agents, such as the trading activities of merchant vessels or the prince's ownership of private property in another state.[6]

The question of the extent to which a court may exercise jurisdiction over a foreign state is reflected in the restrictive and absolute theories of sovereign immunity.[7] States which have adopted the restrictive theory limit the jurisdictional immunity of a foreign state to cases involving sovereign or governmental functions and thereby allow private parties to bring claims arising out of other types of activities. In contrast, the national courts of states which apply the absolute theory cannot consider any claim which impleads a foreign state or its property. The very act of requiring a sovereign state to answer for its conduct in the courts of another state is considered an unacceptable affront to the dignity, independence and equality of the foreign state.

The absolute theory of state immunity, which might have been more persuasive during the last century when state activities were primarily of a governmental or sovereign nature, ignores the present reality of international relations in which many states are extensively involved in commercial activities within the jurisdiction of other states.[8] Absolute immunity clearly exceeds the justifications for suspending the jurisdiction of the local courts by encompassing sovereign as well as non-sovereign activities. The injustice inherent in failing to distinguish between traditionally sovereign activities and those which are not, and thereby effectively allowing states to engage in non-sovereign activities with impunity, was recognized by Sir Robert Phillimore in *The Charkieh* decision of 1873. The case concerned a public vessel used for commercial service:

> No principle of international law, and no decided case, and no doctrine of jurists of which I am aware, has gone so far as to authorize a

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4. 11 U.S. (7 Cranch) at 136.

5. *Id.* at 137.

6. *Id.* at 144-45.

7. For a discussion of the absolute and restrictive theories of sovereign immunity, see Sir Ian Sinclair, The Law of Sovereign Immunities. Recent Developments, 167 RECUEIL DES COURS 113-284 (1980); and S. Sucharitkul, Immunities of Foreign States Before National Authorities, 149 RECUEIL DES COURS 87-215 (1976).

8. *See* Documents of the 34th Session, [1982] Y.B. INT'L L. COMM'N para 117, U.N. Doc. A/CN.4/SER.A/1982/Add.1 (part 1):

> Owing to the increasing extent of entry of State Activities in the domains earlier reserved for individuals such as commercial, industrial and financial fields, supporters of an unqualified doctrine have become a diminishing minority ever since the dawn of the present century.

> sovereign prince to assume the character of a trader, when it is for his benefit; and when he incurs an obligation to a private subject to throw off, if I may so speak, his disguise, and appear as a sovereign, claiming for the first time, all the attributes of his character . . . .[9]

This debate was settled for purposes of U.S. courts in the Foreign Sovereign Immunities Act of 1976 (FSIA).[10] This was the first national legislation codifying the rules which determine when a private party can maintain a lawsuit against a foreign state or its entities and when a foreign state is entitled to immunity. The FSIA reflected an earlier decision to adopt the restrictive theory of sovereign immunity announced in the Tate letter of 1952.[11] The letter also transferred responsibility for assessing a claim of sovereign immunity in a particular case from the State Department to the courts. This came about as an effort to eliminate political considerations, to reduce foreign policy implications, and to thus ensure that all state immunity claims would be objectively decided by the judicial branch pursuant to a uniform standard. Despite the Tate letter and the FSIA, the earlier movement of U.S. courts away from the restricted holding in *The Schooner Exchange* case is still apparent in the immunity extended to a purely commercial enterprise or a merchant ship which is owned by a foreign state. The Congress has considered amendments to the FSIA which would limit the immunity extended to state enterprises and resolve some of the practical problems encountered in applying the statute.[12]

III. UNITED NATIONS CODIFICATION EFFORTS: THE ROLE OF THE INTERNATIONAL LAW COMMISSION

The International Law Commission[13] was created by the U.N. General Assembly in 1947 to promote the codification and progressive development of international law pursuant to article 13 of the United Nations Charter.[14] The Commission consists of 34 persons of recognized competence in international law who serve in their individual capacity, rather than as representatives of states. The General Assembly elects the members based on their individual qualifications and the need to assure representation of the principal legal systems of the world.[15]

As early as 1948, the United Nations recognized the importance of

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9. The Charkieh, 4 L.R. Adm. & Eccl. 59, 99-100 (1873).

10. Foreign Sovereign Immunities Act of 1976, U.S.C. § 1330, 1602-11, 1391(b), 1441(a) (1982), Pub. L. No. 94-583, 90 Stat. 2891 (1976).

11. Tate, *Tate Letter of 1952*, 26 DEP'T ST. BULL. 984.

12. Feldman, *Foreign Sovereign Immunity in United States Courts 1976-1986*, 19 VAND. J. TRANSNAT'L L. 19 (1986).

13. U.N., The Work of the International Law Commission, U.N. Sales No. E.80.V.11 (3d ed. 1980).

14. G.A. Res. 174(II), U.N. Doc. A/519, at 105 (1947). (Under Article 13 of the U.N. Charter, the General Assembly is authorized to initiate studies and make recommendations to promote the progressive development of international law and its codification.)

15. The Work of the International Law Commission, *supra* note 13, arts. 2, 3 & 8.

codifying the law of state immunity in the U.N. Survey of International Law and Selection of Topics for Codification:

> There would appear to be little doubt that the question - in all its aspects - of jurisdictional immunities of foreign States is capable and in need of codification. It is a question which figures, more than any other aspect of international law, in the administration of justice before municipal courts. The increased economic activities of States in the foreign sphere and the assumption by the State in many countries of the responsibility for the management of the principal industries and of transport have added to the urgency of a comprehensive regulation of the subject. While there exists a large measure of agreement on the general principle of immunity, the divergences and uncertainties in its application are conspicuous not only as between various States but also in the internal jurisprudence of States.[16]

In 1978, the Commission began preparing draft articles on the jurisdictional immunities of states and their property to provide the basis for the first international convention to address all of the major aspects of this important area of international law. The distinguished Special Rapporteur, Ambassador Sompong Sucharitkul, prepared eight reports and proposed draft articles which served as the basis for the Commission's work.[17] These reports provide a detailed analysis of the principle of state immunity and a survey of state practice in terms of national legislation, bilateral and multilateral conventions, decisions of national courts, official records and correspondence, and the views expressed by Member States in response to a questionnaire circulated by the Legal Counsel of the United Nations.[18]

It is important to note the limited state practice in this area of law that has developed at the national level. In addition to the United States, only six countries have enacted statutes specifically addressing state immunity, which were adopted after the FSIA in 1976: Australia, Canada, Pakistan, Singapore, South Africa, and the United Kingdom.[19] There are no decisions of international tribunals and only one multilateral convention on state immunity, the European Convention on State Immunity and Additional Protocol.[20]

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16. U.N., Survey of International Law and Selection of Topics for Codification, ¶ 52, U.N. Sales No. 1948.V.1. (I).

17. *See generally* The Report of the Special Rapporteur on the Jurisdictional Immunities of States and Their Property, 1 Y.B. INT'L L. COMM'N 1978.

18. *See* U.N., MATERIALS ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY, U.N. Doc. ST/LEG/SER.B/20 (1982).

19. Australian Foreign States Immunities Act, 196 AUSTL. ACTS P. 1985; Canadian State Immunity Act, III Can. Stat. 95 (1980-83); Pakistan State Immunity Ordinance (1981), Singapore State Immunity Act (1979), United Kingdom State Immunity Act (1978), in U.N., MATERIALS ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY, U.N. Doc. ST/LEG/SER.B/20 (1982) [hereinafter Jurisdictional Immunities].

20. European Convention on State Immunity and Additional Protocol, Counsel of Europe, No. 74 (1972), 66 AM. J. INT'L L. 923 [hereinafter European Convention].

Under the guidance of the Special Rapporteur, Ambassador Sucharitkul, the Commission completed the first reading, or the provisional adoption, of the draft articles during its 1986 session.[21] Member States were asked to provide comments on the draft by January 1, 1988, before the Commission gives its final approval during the second reading. The second reading usually progresses at a faster pace than the first. Once the Commission has approved the articles, taking into consideration the views of Member States, the draft will be reviewed by the General Assembly and the Sixth Committee of the Assembly which is responsible for international law. The General Assembly may call for a conference to formulate a convention on the basis of the Commission's final draft. If the draft is considered controversial by Member States, the Assembly may simply take note of the Commission's work or recognize the draft articles in the form of a resolution or declaration.[22] State immunity has been a controversial subject in the Sixth Committee which creates an uncertain future for the ILC articles. The Commission's reports and draft articles will serve as highly authoritative evidence on the customary law of state immunity.

IV. ILC DRAFT CONVENTION ON THE JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

The ILC draft convention[23] consists of 28 articles which are divided into five parts:

I. Introduction: which contains five articles concerning the scope of the draft, definitions and interpretative provisions, privileges and immunities not affected by the draft, and the principle of non-retroactivity;

II. General Principles: which contains five articles concerning the principle of state immunity, giving effect to this immunity, express or implied consent to jurisdiction, and the effect of counterclaims made by a state;

III. [Limitations on] [Exceptions to] State Immunity: which contains nine articles concerning the absence of state immunity for a claim relating to a commercial contract, an employment contract, personal injury or property damage, ownership or possession of property, intellectual or industrial property, taxes and import duties, participation in a corporation, commercial shipping, or arbitration;

IV. State Immunity in Respect of Property from Measures of Constraint: which contains three articles concerning the immunity of state property, the separate consent required for jurisdiction over state property, and the special protection provided for certain types of property;

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21. *See Report of the International Law Commission to the General Assembly*, 41 U.N. GAOR Supp. (No. 10) at 9-24, U.N. Doc. A/41/10 (1986), *reprinted in* [1986] 2 Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/1986/Add.1 (Part 2) [hereinafter *1986 Int'l L. Comm'n*].

22. *See* The Work of the International Law Commission, *supra* note 13, at art. 23.

23. *1986 Int'l L. Comm'n*, *supra* note 21.

and

V. Miscellaneous Provisions: which contains five articles concerning service of process, default judgment, immunity from measures of coercion, procedural immunities, and nondiscrimination.

The Commission plans to consider two additional parts on dispute settlement procedures and final provisions later, when it returns to the subject of the jurisdictional immunities of states and their property.

V. INTRODUCTION TO ILC DRAFT CONVENTION ON THE JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

A. *Scope of the ILC Draft: Articles 1 and 4*

The ILC articles on state immunity are confined by article 1 to "the immunity of one state and its property from the jurisdiction of the courts of another state."[24] Diplomatic immunities are expressly excluded from the scope of the Commission's work. Under article 4, the draft does not apply to or in any way affect the immunities extended to a state with regard to the functions of, or the persons associated with, its diplomatic, consular or special missions as well as missions or delegations to international organizations or international conferences.[25] The commentary to article 4 clearly indicates the intention "to preserve the privileges and immunities already accorded to specific entities and persons by virtue of existing general international law and more fully by relevant international conventions in force, which remain unaffected by the present articles."[26] The conventions listed in the commentary include: the Vienna Convention on Diplomatic Relations of 1961,[27] the Vienna Convention on Consular Relations of 1963,[28] the Convention on Special Missions of 1969,[29] and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of 1975.[30]

The personal immunities and privileges accorded to foreign sovereigns and other heads of state *ratione personae* are also expressly excluded from the ILC draft under article 4.[31] In contrast, the jurisdictional immunities of states covered by the articles would include the immunities extended to sovereigns or heads of state acting as state organs or state

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24. *1986 Int'l L. Comm'n, supra* note 21, at 9.

25. *Id.* at 11.

26. *Id.* at 31.

27. Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, April 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95.

28. Vienna Convention on Consular Relations and Optional Protocol on Disputes, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261.

29. Convention on Special Missions and Optional Protocol Concerning the Settlement of Disputes of 1969, G.A. Res. 2530 (XXIV) of Dec. 8, 1969, Annex.

30. Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of 1975, Doc. A/CONF. 67/16.

31. *1986 Int'l L. Comm'n, supra* note 21, at 11.

representatives.[32] Thus the distinction is between the diplomatic immunities enjoyed by an individual by virtue of his or her office and the immunities extended to a state with regard to acts performed on its behalf by a state official or representative.

It is important to differentiate between the absolute immunity accorded to a foreign sovereign or head of state and the limited jurisdictional immunity extended to a foreign state with regard to its governmental activities. As Sir Ian Sinclair, a distinguished international jurist and former member of the Commission, has pointed out:

> There is accordingly a theoretical distinction between sovereign immunity and State immunity, although the two concepts are regularly and almost indiscriminately confused. Sovereign immunity in the strict sense of the term should be taken to refer to the immunity which a personal sovereign or Head of State enjoys when present in the territory of another State. It can be argued that international law still requires absolute immunity from the jurisdiction of the local courts to be accorded to personal sovereigns or Heads of State, at least in respect of their public acts. That the immunity accorded to personal sovereigns or Heads of State is primarily an immunity *ratione personae* appears to be confirmed by the fact that it is not enjoyed by *ex*-sovereigns in respect of their private acts . . . . This initial confusion between the sovereign as Head of State and the State itself may have had some influence on the development of the absolute immunity doctrine as applied to States.[33]

As the Special Rapporteur has clearly stated, the principle of state immunity was never intended to provide an absolute immunity:

> State immunity was never considered to be an absolute principle in any sense of the term. At no time was immunity viewed as an absolute rule or a *jus cogens* or imperative norm. The rule was from the beginning subject to various qualifications, limitations and exceptions. This is recognized even in the recent legislation adopted in socialist countries. The difference of opinion seems to linger only in the areas where exceptions and limitations are put into application.[34]

The scope of the ILC draft is consistent with the various national statutes and the European Convention which address the immunity of a foreign state and its property from the jurisdiction of national courts.[35]

B. *Definitions: Article 2*

Article 2 defines two terms for purposes of the ILC draft: 1) a court;

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32. *Id.* at 27, 30.

33. Sinclair, *supra* note 7, at 197-98.

34. Documents of the 35th session, [1983] 2 Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/SER.A/1983/Add.1 (Part 1).

35. 196 AUSTL. ACTS P. 1985; III Can Stat. 95; *Jurisdictional Immunities*, *supra* note 19; FSIA, 28 U.S.C. Preamble & § 1602; *European Convention*, *supra* note 20.

and 2) a commercial contract.[36] A court is defined as a state organ, however named, entitled to exercise judicial functions. This broad description is designed to cover any exercise of judicial authority by courts or other state organs in different legal systems. Since the scope of the draft is defined with reference to courts, this definition takes on a special significance. As discussed in the commentary:

> Judicial functions may be exercised in connection with a legal proceeding at different stages, prior to the institution of a legal proceeding, or at the final stage of enforcement of judgments. Such judicial functions may include adjudication of litigation or dispute settlement, determination of questions of law and fact, order of interim and enforcement measures at all stages of legal proceedings and such other administrative and executive functions as are normally exercised by, or under, the judicial authorities of a State in connection with, in the course of, or pursuant to a legal proceeding. [37]

The principle of state immunity comes into play at every stage in a legal proceeding against a foreign state from service of process to prejudgment attachment, to adjudication on the merits and the execution of a judgment. The broad definition in article 2 would include the full range of legal actions which may be taken against a foreign state. The article 2 definition is consistent with the national statutes which define a court as any body which exercises judicial powers.[38]

A commercial contract, as defined in article 2, includes three types of contracts or transactions: 1) the sale or purchase of goods or the supply of services; 2) financial transactions, including loans and guarantees; and 3) any other contract or transaction of a commercial, industrial, trading or professional nature, with the exception of employment contracts which are dealt with separately in the ILC draft.[39]

The United Kingdom State Immunity Act uses the term "commercial transaction" which is defined as any contract for goods or services, any loan or financial transaction, or any other transaction or activity of a commercial, industrial, financial professional or other similar character not involving the exercise of sovereign authority. The laws of Australia, Pakistan, Singapore, and South Africa contain similar definitions. The European Convention does not define its use of the term "industrial, commercial or financial activity" except by reference to engaging in activity in the same manner as a private person. The Canadian law uses the term "commercial activity" meaning any transaction, act, or regular course of conduct of a commercial character. The FSIA also uses the term "commercial activity" to include a particular transaction or act, such as a contract, as well as a regular course of commercial conduct.[40] As ex-

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36. *1986 Int'l L. Comm'n, supra* note 21, at 9.
37. *Id.* at 25-26.
38. 196 AUSTL. ACTS P. 1985; *Jurisdictional Immunities, supra* note 19.
39. *1986 Int'l L. Comm'n, supra* note 21, at 9-10.
40. 196 AUSTL. ACTS P. 1985; III Can. Stat. 95; *Jurisdictional Immunities, supra* note

plained in the commentary to the FSIA, this term is intended to cover a wide range of activities:

> The courts will have a good deal of latitude in determining what is a "commercial activity" [for purposes of this bill]. It seems unwise to attempt a precise definition of this term, even if that were practicable. [Activities such as a foreign government's sale of a service or a product, its leasing of property, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation, would be among those included within the definition.][41]

The ILC term "commercial contract" does not expressly include a commercial activity or course of conduct and, therefore, appears to be more restrictive than the definitions of a "commercial transaction" or a "commercial activity" contained in the national statutes. The ILC commentary recognizes the inherent difficulties associated with the differences in technical terminology in the various official U.N. languages. The term "transaction" is intended to expand the definition to include commercial activity other than contracts. It is said to the expression "*acte de commerce.*"[42] Also the third element of the definition is a catchall category including any other commercial contract or transaction. According to the commentary, this includes: "other types of contracts or transactions of a commercial, industrial, trading or professional nature, thus taking in a wide variety of fields of State activities, especially manufacturing and possibly investment, as well as other transactions."[43]

Due to the significance of the state immunity exception for commercial activity, it is important that the definition of a commercial contract be amended to include a commercial activity or a course of conduct which does not result in a contract but may nonetheless give rise to a claim against a foreign state. This would be consistent with existing state practice reflected in the various state immunity statutes and the approach initially proposed by the Special Rapporteur who recommended using the term "trading or commercial activity" to encompass a regular course of commercial conduct as well as a particular commercial transaction or act.[44]

19; *European Convention, supra* note 20; 28 U.S.C. §§ 1330, 1602-11, 1391(b) & 1441(d).

41. *See Revised Section-by-Section Analysis of the FSIA*, 119 CONG. REC. 3433, 3436 (daily ed. Feb. 6, 1973). (hereinafter *Revised Section-by-Section*).

42. Report of the International Law Commission to the General Assembly, 38 U.N. GAOR Supp. (No. 10) at 29, U.N. Doc. A/38/10 (1983), *reprinted in* [1983] 2 Y.B. INT'L L. COMM'N 35, U.N. Doc. a/CN.4/SER.A/1983/Add.1 (Part 2) [hereinafter 1983 Int'l L. Comm'n].

43. *Id.* at 76.

44. Documents of the 32nd Session, [1980] 2 Y.B. INT'L L. COMM'N ¶ 33, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 1).

C. *Interpretative Provisions: Article 3*

The ILC draft contains two interpretative provisions in article 3 concerning: 1) the concept of a state for purposes of jurisdictional immunities; and 2) the commercial character of state conduct.[45] The commercial character of a contract or transaction is to be determined under article 3(2) which provides as follows:

> In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made primarily to the nature of the contract, but the purpose of the contract should also be taken into account if, in the practice of that State, that purpose is relevant to determining the non-commercial character of the contract.[46]

The commentary discusses this two-pronged approach which incorporates an objective and a subjective criterion for determining the commercial character of a contract or transaction:

> In the first place, reference should be made to the nature of the contract or transaction. If it is established that it is non-commercial or governmental in nature, there would be no necessity to enquire further as to its purpose. However, if after the application of the "nature" test, the contract or transaction appears to be commercial, then *it is open to the State to contest this finding by reference to the purpose of the contract or transaction.* This double criterion of the nature and purpose of the contract or transaction is designed to provide an adequate safeguard and protection for developing countries, especially in their endeavours to promote national economic development. *States should be given an opportunity to maintain that, in their practice, a given contract or transaction should be treated as non-commercial because its purpose is clearly public and supported by raison d'Etat*, such as the procurement of armaments for the defence of a State, materials for the construction of a naval base, food supplies to feed a population, relieve famine or revitalize a vulnerable area, or medicaments to combat a spreading epidemic, provided that it is the practice of that State to conclude such contracts or transactions for such public ends.[47]

This two-part test is also discussed in the commentary with regard to financial transactions:

> What is said with regard to a contract for the sale or purchase of goods or the supply of services applies equally to other types of commercial contracts . . . . For instance, a contract of loan to make such a purchase or a contract of guarantee for such a loan could be non-com-

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45. *1986 Int'l L. Comm'n, supra* note 21, at 27.

46. *Id.* at 76.

47. [Emphasis added] *See Report of the International Law Commission to the General Assembly*, 38 U.N. GAOR Supp. (No. 10) at 77, U. Doc. A/38/10 (1983), *reprinted in* [1983] Y.B. INT'L L. COMM'N 35, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 1) [hereinafter *1983 Int'l L. Comm'n, Part 1*].

> mercial in character, having regard ultimately also to the public purpose for which the contract of purchase was concluded. For example, a contract of guarantee for a loan to purchase military aircraft would usually be non-commercial because of its presumably public purpose.[48]

This approach introduces an element of uncertainty and instability, rather than clarifying and unifying the law of state immunity, by creating a self-judging standard under which a state may challenge a finding of commercial character pursuant to the nature test by alleging the relevance of a public purpose in its own state practice. This highly subjective test would involve the courts in the difficult task of determining the motive, intent or purpose of a state in entering into a transaction or engaging in a course of conduct. It would require consideration of public motives based on the proper role of a state which varies in different legal systems. Furthermore, every action taken by a state arguably advances some public good or governmental purpose. Thus a self-judging, subjective test could prevent private persons from resorting to the courts to obtain relief for claims arising out of doing business with foreign states because purely commercial transactions could inevitably be found to serve some public good. This would seriously undermine the ability to enforce commercial contracts with foreign states and therefore, would reduce substantially the trading activities between states and private parties.

A subjective standard was soundly rejected by the Special Rapporteur who initially proposed an objective test. As explained in his report:

> The activity or course of conduct or a particular act attributable to a foreign State should not be determined by reference to its motivation or purpose. An act performed for a State is inevitably designed to accomplish a purpose which is in a domain closely associated with the State itself or the public at large. In the ultimate analysis, reference to the purpose or motive of an activity of a foreign government is therefore not helpful in distinguishing the types of activity which could be regarded as commercial from those which are non-commercial. The present article proposes a reference to the nature of the activity or the character of the transaction or act. If it is commercial in nature, the activity can be regarded as a trading or commercial activity. Further reference to the purpose which motivated the activity could serve to obscure its true character. The purpose could best be overlooked in determining whether an activity is commercial or not, especially for the purpose of deciding upon the availability or applicability of State immunity.[49]

As the Special Rapporteur points out, considering the purpose of state conduct presents practical difficulties. The two-pronged approach

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48. *Id.* at 78.

49. Documents of the 32nd Session, *supra* note 44.

contained in article 3(2) introduces a self-judging element and creates uncertainty by providing for alternative nature or purpose tests. It is inconsistent with the functional approach of the restrictive theory accepted by most states and with existing state practice. The state immunity statutes of Australia, Pakistan, Singapore, South Africa, and the United Kingdom do not expressly provide a method for determining the commercial character of state conduct. However, the definitions of commercial transactions or activities contained in the statutes focus on the objective character of transactions relating to goods, services, trade or financial arrangements without any reference to a commercial or a public purpose. Similarly, the European Convention immunity exception for proceedings relating to commercial activity focuses on the industrial, commercial or financial nature of the activity without mentioning its purpose. The Canadian law expressly defines commercial activity as conduct "that by reason of its nature is of a commercial character." The FSIA also clearly adheres to the objective nature test: "The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."[50] The subjective test for determining commercial character provisionally adopted by the Commission in article 3(2) is a serious flaw in the ILC draft which should be addressed during the second reading.

Article 3(1) contains an interpretative provision concerning the term "state" as it is used in the draft.[51] As indicated in the commentary, this provision is designed to:

> [i]dentify those entities or persons entitled to invoke the immunity of the State where a State can claim immunity and also to identify certain instrumentalities and subdivisions of a State that are entitled to invoke immunity when performing acts in the exercise of sovereign authority. Accordingly, in the context of the present articles, the expression "State" should be understood as comprehending all types or categories of entities and individuals so identified which may benefit from the protection of State immunity.[52]

Under article 3, a state, for the purpose of jurisdictional immunities, includes: 1) the state and its various organs of government; 2) political subdivisions which exercise the sovereign authority of the state; 3) state agencies and instrumentalities to the extent that they perform sovereign functions for the state; and 4) state representatives acting in their official capacity.[53] While a state and its branches of government are clearly entitled to assert a claim of state immunity, other state entities or representatives may present a claim of immunity only to the extent that they exercise the sovereign authority of the state. This functional limitation is discussed in the commentary with regard to agencies and

50. *Revised Section-by-Section*, *supra* note 41, at 33, 34.
51. *1986 Int'l L. Comm'n*, *supra* note 21, at 10.
52. *Id.* at 27-28.
53. *Id.* at 10.

instrumentalities:

> The third category embraces the agencies and instrumentalities of the State but only in so far as they are entitled to perform acts in the exercise of "*prerogatives de la puissance publique.*" Beyond or outside the sphere of acts performed by them in the exercise of the sovereign authority of the State, they do not enjoy any jurisdictional immunity.[54]

The European Convention does not define a state for purposes of jurisdictional immunities. The state immunity statutes include the state and its organs of government in the definition of a state, but vary with regard to state representatives, political subdivisions, and state entities. With the exception of the FSIA which does not include state representatives, the other statutes limit state immunity to the sovereign or head of state acting in a public capacity. The Australian, Canadian and U.S. statutes recognize state immunity for political subdivisions without expressly requiring an ability to exercise the sovereign authority of the state. In contrast, the laws of Pakistan, Singapore, and the United Kingdom do not recognize state immunity for political subdivisions. Canada recognizes state immunity for any agency of a foreign state defined as "any legal entity that is an organ of the foreign state but that is separate from the foreign state." Australia expressly excludes separate entities of a foreign state from its state immunity statute. The laws of Pakistan, Singapore, and the United Kingdom also expressly exclude separate state entities, unless the proceedings relate to the exercise of sovereign authority and a state would be immune under the circumstances. The FSIA recognizes state immunity for a separate legal entity if it is an organ of or principally owned by a state or a political subdivision. Thus the state immunity statutes do not present clear and consistent guidance on this aspect of state immunity.[55]

The concept of the state as outlined by the Commission for the purpose of jurisdictional immunities captures the essence of the principle of state immunity and its foundation in the dignity, equality and independence of sovereign states by limiting the state entities entitled to assert immunity to those authorized to exercise the sovereign authority of the state. This is consistent with international law which confers upon the state as represented by the national government the requisite legal personality for acquiring rights and duties, including the right to invoke state immunity. While questions will inevitably arise as to whether a particular state entity exercises sovereign authority, this definition clearly excludes a purely commercial enterprise or ship owned by a state.

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54. *Id.* at 29.

55. 196 AUSTL. ACTS P. 1985; III Can. Stat. 95; *Jurisdictional Immunities*, *supra* note 19; 28 U.S.C. §§ 1330, 1602-11, 1391(b), & 1441(d).

D. *Non-retroactivity: Article 5*

The ILC draft would apply to a proceeding against a state in the court of another state only if the articles have entered into force for both states at the time the proceeding is instituted.[56] The non-retroactive application of the jurisdictional immunities articles could be measured from various points in time, including when the claim arises or when the suit is filed. As indicated in the commentary: "The Commission has decided to select a time which is relatively precise, namely that the principle of non-retroactivity applies to proceedings instituted prior to the entry into force of the said articles as between the States concerned."[57] The principle of non-retroactivity reflected in article 5 is consistent with the Vienna Convention on the Law of Treaties.[58]

VI. GENERAL PRINCIPLES

A. *State Immunity: Article 6*

The ILC draft contains a general statement of the principle of state immunity in article 6 which provides as follows: "A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of State subject to the provisions of the present articles [and the relevant rules of general international law]."[59]

The commentary traces the historical development of state immunity, noting the importance of the related immunities enjoyed by the local sovereign, foreign sovereigns or heads of state, and ambassadors.[60] It also recognizes the various theories concerning the nature of state immunity, while clearly rejecting the notion of absolute immunity for a state and its property:

> Some think that immunity constitutes an exception to the principle of territorial sovereignty of the State of the forum and as such should be substantiated in each case. Others refer to State immunity as a general rule or general principle of international law. This rule is not absolute in any event since unqualified of all the theories of immunity admits one important exception, namely, consent which also forms the basis for other principles of international law. Others still adhere to the theory that the rule of State immunity is a unitary rule and is inherently subject to existing limitations. Both immunity and non-immunity are part of the same rule. In other words, immunity exists to-

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56. *1986 Int'l L. Comm'n, supra* note 21, at 11.

57. *Id.* at 34.

58. Vienna Convention on the Law of Treaties, May 23, 1969, Documents of the Conference, U.N. Doc. A/CONF.39/11/Add.2 at 287 (1969).

59. *1986 Int'l L. Comm'n, supra* note 21, at 11.

60. *See* Report of the International Law Commission to the General Assembly, 35 U.N.GAOR Supp. (No. 10), U.N. Doc. A/35/10 (1980), *reprinted in* [1980] 2 Y.B. INT'L L. COMM'N 142-57, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 2) [hereinafter 1980 Int'l L. Comm'n].

gether with its innate qualifications and limitations.[61]

The limited principle of state immunity in article 6 is consistent with the European Convention and the state immunity statutes.[62]

Under article 6, the principle of state immunity is subject to the relevant rules of international law.[63] According to the commentary, this is to ensure the future development of customary international law based on the judicial, executive and legislative practice of states.[64] When Chief Justice Marshall wrote *The Schooner Exchange* decision in 1812,[65] he could not have imagined the myriad of activities which states are engaged in today from developing technology to mine the resources of the deep seabed to producing energy in nuclear power plants and launching communication satellites. The ILC draft should not be interpreted so as to foreclose the development of the principle of state immunity in response to the future activities of states.

The controversy over providing for the future development of the customary law of state immunity, which explains the brackets in article 6, is the result of the conflict between states that favor an absolute rule of immunity subject only to limited exceptions expressly agreed to in the articles and those that favor a restrictive theory of immunity for sovereign or governmental functions. If the ILC draft is viewed as recognizing a general rule of immunity subject only to the exceptions enumerated in the convention, a state whose court exercised jurisdiction over a foreign state with regard to other nongovernmental activities may be considered to have violated international law. This interpretation of the ILC draft would seriously undermine the functional approach to the jurisdictional immunities of states and their property which is the essence of restrictive state immunity. In contrast, the reference to general international law provides for the continuing development of the law of state immunity in accordance with the provisions of the draft convention and in response to cases not addressed in the draft articles.

B. *Modalities for Giving Effect to State Immunity: Article 7*

Under article 7, a state must give effect to the principle of state immunity "by refraining from exercising jurisdiction in a proceeding before its courts against another state."[66] the ILC commentary recognizes that, "[t]here are various ways in which a State can be impleaded or implicated in litigation or a legal proceeding before the court of another State."[67]

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61. *1986 Int'l L. Comm'n, supra* note 21, at 35.

62. 196 AUSTL. ACTS P. 1985; III Can. Stat. 95; *Jurisdictional Immunities, supra* note 19; FSIA, 28 U.S.C. § 1604; *European Convention, supra* note 20.

63. *1986 Int'l L. Comm'n, supra* note 21, at 11.

64. *Id.* at 35-36.

65. 11 U.S. (7 Cranch) 116 (1812).

66. *1986 Int'l L. Comm'n, supra* note 21, at 12.

67. Report of the International Law Commission to the General Assembly, 37 U.N. GAOR Supp. (No. 10) at 202, U.N. Doc. A/37/10 (1982), *reprinted in* [1982] 2 Y.B. INT'L L.

Article 7 applies to any proceeding which would in effect compel a state to submit to jurisdiction or potentially affect the rights, interests or activities of the state. It also covers a lawsuit instituted against a state organ, representative, agency, instrumentality or political subdivision concerning the exercise of the sovereign authority of the state.

The European Convention and the laws of Canada, Pakistan, Singapore, South Africa and the United Kingdom expressly provide that a court must give effect to the principle of state immunity by declining to exercise jurisdiction even if the foreign state does not appear in the proceedings. The FSIA provides that a "foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" except as provided in the statute.[68] Thus a court is precluded from exercising jurisdiction over a foreign state which is entitled to immunity. However, as explained in the FSIA commentary, this jurisdictional immunity is viewed as an affirmative defense which must be established by the foreign state:

> [The Foreign Sovereign Immunities Act] starts from a premise of immunity and then creates exceptions to the general principle. The chapter is thus cast in a manner consistent with the way in which the law of sovereign immunity has developed. Stating the basic principle in terms of immunity may be of some advantage to foreign states in doubtful cases, but since sovereign immunity is an affirmative defense which must be specially pleaded,the burden will remain on the foreign state to produce evidence in support of its claim of immunity.[69]

Article 7 imposes a legal obligation on a forum state to refrain from exercising jurisdiction in the presence of immunity as provided in the ILC draft, without defining the obligation, if any, of a foreign state to invoke or establish this immunity. The articles which outline the exceptions to state immunity, or the cases in which a court may exercise jurisdiction over a foreign state, are all phrased in terms of the inability of a foreign state to invoke immunity.[70] Therefore, if these limitations do not apply, a foreign state may invoke the principle of state immunity. A foreign state is clearly in the best position to invoke and establish its claim of immunity, especially with regard to the activities of various state agencies and instrumentalities. The ILC draft does not address this procedural aspect of the law of state immunity which may vary based on the domestic law of each state.

COMM'N 101, U.N. Doc. A/CN.4/SER.A/1982/Add.1 (Part 2) [hereinafter 1982 Int'l L. Comm'n].

68. 196 AUSTL. ACTS P. 1985; III Can. Stat. 95; *Jurisdictional Immunities, supra* note 19; 28 U.S.C. § 1330, 1602-11, 1391(b), & 1441(d); *European Convention, supra* note 20.

69. *Revised Section-by-Section, supra* note 41.

70. *1986 Int'l L. Comm'n, supra* note 21, at 14-20.

C. *Express Consent: Article 8*

The ILC draft recognizes the absence of state immunity based on the express consent of a state in an international agreement, a written contract, or a declaration before a court in a specific case.[71] As explained in the commentary, this provision is included with the general principles in Part II, rather than with the immunity exceptions contained in Part III:

> Any formulation of the doctrine of State immunity or its corollary is incomplete without reference to the notion of consent, or rather the lack of consent, as a constitutive element of State immunity or the correlative duty to refrain from subjecting another State to local jurisdiction. The existence, expression or proof of consent of the State in litigation is extinctive of immunity itself and not in any sense an exception thereto.[72]

The ILC commentary also explains that consent to jurisdiction under article 8 extends to the initial proceeding and any related review process, but not to the enforcement of a judgment which is considered a separate and distinct aspect of state immunity:

> Consent to the exercise of jurisdiction in a proceeding before a court of another State covers 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 judgement.[73]

Article 8 is consistent with the European Convention and the state immunity laws which deny immunity if a state expressly consents to jurisdiction or waives its immunity. The laws of Pakistan, Singapore, South Africa, and the United Kingdom expressly provide that a choice of law clause does not constitute submission to jurisdiction or a waiver of immunity. This issue is not addressed in ILC article 8. The Canadian and U.S. statutes prevent a foreign state from withdrawing a waiver except in accordance with its terms.[74] As explained in the FSIA commentary:

> The language, "notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver," is designed to exclude a withdrawal of the waiver both after and before a dispute arises except in accordance with the terms of the original waiver. In other words, if the foreign state agrees to a waiver of sovereign immunity in a contract, that waiver may subsequently be withdrawn only in a manner consistent with the expression of the waiver in the contract. Some court decisions have allowed subsequent and unilateral rescissions of waivers by foreign states. But the better view, and the one followed in this sec-

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71. *Id.* at 12.

72. *1982 Int'l L. Comm'n*, *supra* note 67, at 239.

73. *Id.* at 243.

74. 196 AUSTL. ACTS. P. 1985; III Can. Stat. 95; *Jurisdictional Immunities*, *supra* note 19; 28 U.S.C. §§ 1330, 1602-11, 1391(b) & 1441(d); *European Convention*, *supra* note 20.

> tion, is that a foreign state which has induced a private person into a contract by promising not to invoke its immunity cannot, when a dispute arises, go back on its promise and seek to revoke the waiver unilaterally.[75]

The ability of a state to withdraw a waiver of immunity or consent to jurisdiction contained in a written agreement is not addressed in the ILC draft, though the commentary to article 22 concerning consent to jurisdiction over state property recognizes that this consent can only be withdrawn in accordance with its terms.[76] It would be useful to include a provision in the ILC draft confirming this limitation which is consistent with the general principle of *pacta sunt servanda* recognized in customary international law.[77]

D. *Implied Consent: Article 9*

The ILC draft recognizes the absence of immunity based on implied consent in article 9. Article 9 provides that a state cannot invoke immunity in a proceeding if it has instituted, intervened in, or taken steps relating to the merits of the proceeding, except when a state intervenes for the sole purpose of invoking immunity or asserting a right or interest in property which is at issue in the proceeding.[78] The failure of a state to appear in a proceeding does not constitute consent.[79]

The implied consent exception in article 9 is consistent with existing state practice, including the FSIA which contains a general exception for implicit waivers of immunity. The European Convention and the laws of Australia, Canada, Pakistan, Singapore, South Africa and the United Kingdom expressly provide that a state which institutes, intervenes in, or takes steps in a proceeding is deemed to have submitted to jurisdiction or waived its immunity, unless the state acts merely to invoke immunity or claim an interest in property.[80]

The European Convention and the laws of Australia, Canada, Pakistan and the United Kingdom preserve the immunity of a state which takes steps in a proceeding in ignorance of facts entitling it to immunity if the facts were not reasonably ascertainable and the state claims immunity as soon as reasonably practicable. The ILC draft does not address this issue. As a matter of equity, this type of provision, which has been accepted by several states, should be considered during the second reading of the draft.

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75. *Revised Section-by-Section*, *supra* note 41.

76. *1986 Int'l L. Comm'n*, *supra* note 21, at 12-13, Y.B. at 18-19.

77. *See* Vienna Convention on the Law of Treaties, *supra* note 59, at Art. 23.

78. *1986 Int'l L.Comm'n*, *supra* note 21, Y.B. at 9.

79. *Id.*

80. 196 AUSTL. ACTS P. 1985; III Can. Stat. 95; *Jurisdictional Immunities*, *supra* note 19; 28 U.S.C §1605 (a)(11); *European Convention*, *supra* note 20.

E. *Counterclaims: Article 10*

Under article 10, a state which has instituted or intervened in a proceeding cannot invoke immunity with regard to counterclaims arising out of the same legal relationship or set of facts as the claim put forward by the state. The article also provides that a state which makes a counterclaim cannot invoke immunity with regard to the principal claim.[81]

The immunity exception for related counterclaims contained in article 10 is consistent with the European Convention and the state immunity statutes of the various countries.[82] The European Convention and the FSIA also deny immunity for independent counterclaims for which a state would not be entitled to immunity if the claim were filed as a separate proceeding. The ILC commentary recognizes the absence of immunity for this type of counterclaim, which is not expressly mentioned in article 10:

> Where the rules of the State of the forum so permit, article 10, paragraph 1, also applies in the case where a counter-claim is made against a State, and that State could not, in accordance with the provisions of the present articles, notably in part III, invoke immunity from jurisdiction in respect of that counter-claim, had separate proceedings been brought against the State in those courts. Thus independent counter-claims, arising out of different transactions or occurrences not forming part of the subject matter of the claim or arising out of a distinct legal relationship or separate facts from those of the principal claim, may not be maintained against the plaintiff State, unless they fall within the scope of one of the admissible exceptions. . . . In other words, independent counter-claims or cross-actions may be brought against a plaintiff State only when separate proceedings are available against that State under other parts of the present articles, whether or not the State has instituted a proceeding as in paragraph 1, or has intervened to present a claim as in paragraph 2 of article 10.[83]

A party to a lawsuit may wish to bring an unrelated counterclaim against a foreign state that is participating in a proceeding to avoid the time and expense associated with bringing a separate action. If a foreign state is not entitled to invoke immunity with regard to a claim, then the principle of state immunity does not provide any basis for excluding it as an unrelated counterclaim. In the interest of fairness and the efficient administration of justice, a private party should be allowed to present a counterclaim against a foreign state which has either instituted or intervened in a lawsuit. Article 10 should thus be amended to expressly include independent counterclaims which are not entitled to immunity.

The ILC commentary indicates that some jurisdictions limit counter-

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81. *1986 Int'l L. Comm'n*, *supra* note 21, at 13-14, Y.B. at 9.

82. 196 AUSTL. ACTS. P. 1985; III Can. Stat. 95; *Jurisdictional Immunities*, *supra* note 19; *European Convention*, *supra* note 20; 28 U.S.C. §1607(b).

83. *1983 Int'l L. Comm'n*, *supra* note 42, Y.B. at 24.

claims against foreign states to the kind or amount of relief sought by the foreign state. The commentary specifically refers to the FSIA as an example.[84] In fact, the FSIA creates a separate state immunity exception for counterclaims which would merely operate as a set-off.[85] As discussed in the commentary to the FSIA:

> Third, notwithstanding that the foreign state may be immune under subsections (a) and (b), the foreign state nevertheless would not be immune from a counterclaim to the extent that the counterclaim seeks relief neither exceeding in amount nor differing in kind from that sought by the foreign state. Subsection (c) codifies the rule enunciated in National Bank v. Republic of China, 348 U.S. 356 (1955). [86]

The limitation discussed in the ILC commentary, which is not included in the draft articles, would make it possible for a state to initiate or intervene in a proceeding while limiting the extent of its own liability as a result of counterclaims. State immunity does not provide any basis for such a limitation. A foreign state which presents a claim has consented to the court's jurisdiction over the matter, including related claims made by other parties. If a private party responds with an unrelated counterclaim which is not entitled to immunity, there is no justification for limiting the foreign state's liability for the claim. It would be inequitable to allow a foreign state to use the local courts to seek redress for its claims and at the same time limit the extent to which it is amenable to jurisdiction for either related counterclaims or independent counterclaims which are not entitled to immunity.

It is unlikely that states favoring a more absolute theory of immunity would agree to subject a foreign state to unrelated counterclaims which do not fall within the exceptions enumerated in the ILC articles. These counterclaims would thus be able to arise out of sovereign or governmental activities, as a set off against the foreign state's claim. There is no counterpart to the FSIA set off provision in the European Convention or the other state immunity statutes. In this regard, the FSIA exceeds the restrictive theory which provides immunity for claims relating to governmental functions whether the claims are presented in separate proceedings or as counterclaims. Nonetheless, the United States should clarify the position of the FSIA on this issue.

VII. [LIMITATIONS ON] [EXCEPTIONS TO] STATE IMMUNITY

The tension between the competing theories of restrictive and absolute immunity is reflected in the alternative bracketed language in the heading of this section which contains provisions indicating when a state is not entitled to invoke immunity.[87] The selection of one of these titles

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84. *Id.*
85. 28 U.S.C. § 1607(c).
86. *Revised Section-by-Section, supra* note 41.
87. *See 1986 Int'l L. Comm'n, supra* note 21, at 14, Y.B. at 10.

would affect the interpretation of the draft articles as a whole either by endorsing a restrictive principle of immunity subject to inherent limitations or an absolute rule of immunity subject to an exhaustive list of exceptions.

A convention on the jurisdictional immunities of states which would establish a general rule of immunity without regard to the nature of the functions performed by a state would clearly be inconsistent with restrictive state immunity as recognized by the majority of states and codified in the FSIA.[88] The majority of states and codified in the FSIA. It is important that every state retain its inherent sovereign right to exercise jurisdiction over foreign citizens or states which engage in nongovernmental activities within the jurisdiction of the state. As discussed in *The Schooner Exchange* decision, the national jurisdiction of courts is an equally important attribute of state sovereignty and independence which cannot be restricted without the consent of the state.[89] The underlying principles of sovereign independence, equality and dignity which justify refraining from exercising jurisdiction under the principle of state immunity only apply to cases which implead a foreign state with regard to its sovereign acts. Any attempt to extend this restraint on the valid exercise of jurisdiction beyond the functional limitations of state immunity would exceed the principles which justify this immunity and would be inconsistent with the clearly restrictive trend in state practice.

The future of the ILC articles depends upon the Commission's ability to accommodate the restrictive and absolute theories of immunity which influence the domestic laws of different countries. A possible compromise would be to view the ILC articles in the context of the applicability or the nonapplicability of the principle of state immunity. Thus the principle of state immunity would apply to a case impleading a foreign state with regard to its sovereign functions. In contrast, the principle would not apply to a case concerning the non-sovereign activities of a state. Using the neutral phrase "Nonapplicability of State Immunity" would avoid the acceptance or the rejection of either theory and would allow the principle to continue to develop in response to the future activities of states.

A. *Article 11: Commercial Contracts*

A state which enters into a commercial contract with a foreign individual or corporation is considered to have consented to jurisdiction with regard to disputes arising out of the contract and thus cannot claim immunity under article 11.[90] Subsequent ILC articles provide additional ex-

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88. *See Sixth Report on Jurisdictional Immunities of the States and Their Property*, U.N. Doc. A/CN.4/376 at para. 39, *reprinted in* [1984] 2 Y.B. INT'L L. COMM'N 5, at 14, U.N. Sales No. E.85.V.7 (Part I)(1985).

89. 11 U.S. (Cranch 7) at 136.

90. FSIA, 28 U.S.C. §1602.

ceptions for particular types of commercial conduct, such as employment contracts or participation in a corporate entity.

The reference to implied consent in article 11 is consistent with the absolute theory of immunity, but unnecessary for purposes of the restrictive theory. This language is discussed in the commentary:

> It is the result of continuing efforts to accommodate the differing viewpoints of those who are prepared to admit an exception to the general rule of State immunity in the field of trading or commercial activities, based upon the theory of implied consent, or on other grounds, and those who take the position that a plea of State immunity cannot be invoked to set aside the jurisdiction of the local courts where a foreign State engages in trading or commercial activities.[91]

Incorporating the notion of implied consent would not limit the exception for commercial contracts. Nonetheless, the Commission has endeavored to avoid favoring one theory of immunity over another. It would be consistent with the other ILC articles to simply provide that a state cannot invoke immunity with regard to commercial conduct without referring to the theoretical basis for the exception.

The commercial contract exception in article 11 does not apply to contracts between states or governments.[92] The commentary explains this limitation with reference to the trading practices of developing countries and socialist states:

> It is a well-known fact that developing countries often conclude trading contracts with other States, while socialist States also engage in direct State-trading not only among themselves, but also with other States, both in the developing world and with the highly sophisticated industrialized countries.[93]

State immunity has developed in response to lawsuits brought by private parties against foreign states. Conflicts between states or governments are not settled in national courts.

A commercial contract in which the parties expressly agree to certain dispute settlement procedures would also be excluded from article 11.[94] As explained in the commentary:

> Subparagraph (b) leaves a State party to a commercial contract complete freedom to provide for a different solution or method of settlement of differences relating to the contract. A State may expressly agree in the commercial contract itself, or through subsequent negotiations, to arbitration or other methods of amicable settlement such as conciliation, good offices or mediation. Any such express agreement would normally be in writing.[95]

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91. *1983 Int'l L. Comm'n*, *supra* note 42, Y.B. at 25.
92. *1986 Int'l L. Comm'n*, *supra* note 21, at 15, Y.B. at 10.
93. *1983 Int'l L. Comm'n*, *supra* note 42, Y.B. at 26.
94. *1986 Int'l L. Comm'n*, *supra* note 21, at 15, Y.B. at 10.
95. *1983 Int'l L. Comm'n*, *supra* note 41, Y.B. at 26.

This is consistent with the general principle of freedom of contract.

The absence of state immunity for claims relating to commercial conduct or contractual obligations is recognized in the European Convention and the state immunity statutes. The European Convention denies state immunity if the proceeding relates to a contractual obligation to be performed in the territory of the forum state, unless the contract is between states, the parties have otherwise agreed in writing, or the contract was concluded by a state in its territory and is governed by its administrative law. The European Convention contains a separate immunity exception for claims relating to the industrial, financial or commercial activities of a foreign state carried out by an office, agency or establishment in the forum state, unless all of the parties to the dispute are states or the parties have otherwise agreed. The Canadian statute contains a general immunity exception for any proceeding relating to any commercial activity of a foreign state. Australian law recognizes a state immunity exception for proceedings concerning a commercial transaction, unless the parties to the proceeding are foreign states or have otherwise agreed in writing. The laws of Pakistan, Singapore, South Africa and the United Kingdom prevent a state from claiming immunity in a proceeding relating to a commercial transaction or a contractual obligation to be performed in whole or in part in the forum, unless the parties to the dispute are states or the parties have otherwise agreed in writing. In the United Kingdom, Singapore, and Pakistan the state immunity exception for contractual obligations does not extend to noncommercial contracts made in the territory of the state concerned and governed by its administrative law.[96]

The FSIA contains a detailed state immunity exception for claims relating to commercial activity, including: 1) commercial activity carried on in the United States; 2) an act performed in the United States in connection with commercial forty-two activity elsewhere; or 3) an act outside of the United States in connection with commercial activity elsewhere which has a direct effect in the United States.[97] As explained in the commentary, this includes commercial acts other than contracts:

> Examples of this type of situation might include: a representation in the United States by an agent of a foreign state that leads to an action for restitution based on unjust enrichment; an act in the United States that violates U.S. securities laws or regulations; the wrongful discharge in the United States of an employee of the foreign state who has been employed in connection with a commercial activity carried on in some third country . . . . It should be noted that the acts (or omissions) encompassed in this category are limited to those which in and of themselves are sufficient to form the basis of a cause of action.[98]

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96. 196 AUSTL. ACTS P. 1985; III Can Stat. 45 (1980-83); *Jurisdictional Immunities*, *supra* note 19; *European Convention*, *supra* note 20, at 4, 7.

97. 28 U.S.C. §1605(a)(2).

98. *Revised Section-by-Section*, *supra* note 41.

It is important to note the broad jurisdictional implications of the commercial activity exception contained in section 1605(a)(2) of the FSIA which includes: "an act outside of the territory of the United States in connection with a commercial activity elsewhere [which] causes a direct effect in the United States."[99] The FSIA commentary discusses this jurisdiction over foreign commercial activity which has a substantial contact with the United States:

> [A] commercial activity carried on in the United States by a foreign state would include not only a commercial transaction performed and executed in its entirety in the United States, but also a commercial transaction or act having a "substantial contact" with the United States. This definition includes cases based on commercial transactions performed in whole or in part in the United States, import-export transactions involving sales to, or purchases from, concerns in the United States, business torts occurring in the United States . . . and, an indebtedness incurred by a foreign state which negotiates or executes a loan agreement in the United States, or which receives financing from a private or public lending institution located in the United States (e.g. loans, guarantees or insurance provided by the Export-Import Bank of the United States). It will be for the courts to determine whether a particular commercial activity has been performed in whole or in part in the United States. This definition, however, is intended to reflect a degree of contact beyond that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff.[100]

The commercial activity exception is one of the most important aspects of the restrictive theory of state immunity because of the substantial commercial interaction between states and private parties which may give rise to litigation. It is conceivable that a state which incurred some type of obligation or liability as a result of commercial activity other than a contract would be entitled to immunity under the commercial contract exception in the ILC draft and not the commercial activity or commercial transaction exception contained in the European Convention and the state immunity statutes.

Efforts to restrict this exception to commercial contracts may be the result of concerns which relate to jurisdiction rather than to state immunity. Many states reject the direct effects doctrine which is reflected in the FSIA commercial activity exception. In fact, the jurisdiction issue has been raised in the Sixth Committee of the General Assembly:

> A suggestion was made in the course of the debate in the Sixth Committee that in order to exercise jurisdiction a link should be established under article 11 [commercial activity exception] between the State of the forum and the State against which a proceeding is instituted, such as the existence in the territory of the State of the forum of an office or bureau to conduct the business or commercial transac-

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99. 28 U.S.C. §1605 (a)(2).

100. *Revised Section-by-Section*, *supra* note 41.

> tions on behalf of the foreign State concerned. Reference to the applicable rules of private international law regulating the question of jurisdiction of the courts of the territorial State has been regarded generally as providing adequate assurance of an existing connection which could be territorial or else jurisdiction could be established by mutual consent of the parties to the contract. Another view has since been expressed to the effect that apart from consent in the case of *forum prorogatum*, there should also be a genuine territorial connection to enable the court to exercise jurisdiction in regard to the commercial contract in question. The possibility of further improvement of the text of article 11 will be re-examined on second reading.[101]

The commercial contract exception, as provisionally adopted by the Commission in article 11, expressly refers to differences relating to a commercial contract which "by virtue of the applicable rules of private international law" fall within the jurisdiction of the state.[102] The ILC draft does not affect the requirements for jurisdiction under internal or international law for claims relating to commercial contracts or any other matter. While the ILC commentary recognizes the close relationship between issues of jurisdiction and immunity, the draft articles are clearly limited to the question of immunity:

> The first prerequisite to any question involving jurisdictional immunity is therefore the existence of a valid "jurisdiction," primarily under internal law rules of a State, and, in the ultimate analysis, the assumption and exercise of such jurisdiction not conflicting with any basic norms of public international law. It is then and only then that the applicability of State immunity may come into play. There appears to be a close relationship between the existence of valid jurisdiction on the matter under consideration by the court and the consequential possibility of a claim of jurisdictional immunity. Without evidence of valid jurisdiction, there is no necessity to proceed to initiate, let alone substantiate, any claim of State immunity. It should, however, be emphasized that the Commission is not concerned in the consideration of this topic with the compatibility with general international law of a State's internal law on the extent of jurisdiction.[103]

As indicated in the commentary, a foreign state has the right to challenge the jurisdiction of a court independently of any claim of immunity. Nonetheless, some states may wish to avoid the appearance of accepting the more expansive jurisdictional rules of other states. Given the disagreement within the international community on the rules of international law which circumscribe the jurisdiction of a state, it may be useful

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101. 1986 INT'L L. COMM'N, *supra* note 21, at 14, Y.B. at 10.

102. *Id.*

103. *Report of the International Law Commission to the General Assembly on the work of its Thirty-Fourth Session* (3 May—23 July 1982) [hereinafter, 1982 *Int'l L. Comm'n*], 37 U.N. GAOR Supp. (No. 10) after para. 198, U.N. Doc. A/37/10 (1982), *reprinted in* [1982] 2 Y.B. INT'L L. COMM'N 101, U.N. Doc. A/CN.4/SER.A/1982/Add.1 (Part 2), U.N. Sales No. E. 83.V.3 (Part III)(1983).

for the Commission to address this issue at some future time. However, jurisdictional issues which have not been addressed by the Commission should not be allowed to interfere with the draft articles on state immunity. If Member States are concerned about the effect that the draft articles may have on the question of jurisdiction, the Commission should consider adding a general provision expressly stating that the articles do not in any way affect the rules of international law which govern jurisdiction. With regard to article 11, it is important that the ILC draft recognize that the principle of state immunity does not preclude a state from exercising jurisdiction over a foreign state for a claim arising out of commercial activity which does not result in a contract. This would be consistent with the European Convention, the state immunity statutes, and the broader trading and commercial activity exception initially proposed by the special Rapporteur based on state practice.[104]

B. *Article 12: Employment Contracts*

Under article 12, a state cannot invoke immunity for a claim relating to an employment contract if: 1) the services are to be performed in the forum state; 2) the employee has been recruited in that state; and 3) the employee is covered by the social security laws of the forum.[105] This exception applies only if the employee is a national or habitual resident of the forum state when the employment contract is concluded and is not a national of the employer state at the time the proceeding is instituted. According to the commentary, this exception to state immunity "applies to matters arising out of the terms and conditions contained in the contract of employment."[106] Article 12 expressly excludes proceedings which relate to recruitment, employment renewal or reinstatement. It also excludes contracts in which the parties have expressly agreed to dispute settlement procedures, subject to the public policy considerations of the forum state.[107] As discussed in connection with the commercial contract exception in article 11, dispute settlement provisions are considered an element of freedom of contract.

Every state has a strong interest in regulating labor conditions and the treatment of employees within its territory, regardless of whether the employee is recruited in the forum state, a citizen or habitual resident, or covered by the social security laws. These regulations may incorporate broad policy decisions with regard to child or forced labor, as well as the particular terms of employment such as minimum wage or maximum

104. *See* 1980 INT'L L. COMM'N, *supra* note 44, Y.B., at 6-8.

105. 1986 INT'L L. COMM'N, *supra* note 21, at, 11 Y.B. at 10.

106. *Report of the International Law Commission to the General Assembly on the Work of its Thirty-Sixth Session* (7 May-27 July 1984) [hereinafter 1984 INT'L L. COMM'N], 39 U.N. GAOR Supp. (No. 6) after ¶ 214, U.N. Doc. A/39/10 (1984), *reprinted in* [1984] 2 Y.B. INT'L L. COMM'N 64, U.N. Doc. A/CN.4/SER.A/1984/Add.1(Part 2), U.N. Sales No. E.85.V.7 (Part II) (1985).

107. 1986 *Int'l L. Comm'n, supra* note 21, at 16, Y.B. at 10.

hours. Foreign employers who wish to have employment contracts performed in another state cannot reasonably expect to dictate the terms of employment free from the constraints of the local law and thereby circumvent domestic labor policies.

The ILC commentary on the exception for employment contracts recognizes the competing interests of the employer state and the state where the contract is to be performed:

> The employer State has an interest in the application of its administrative law in regard to the selection, recruitment and appointment of an employee by the State or one of its organs, agencies or instrumentalities acting in the exercise of governmental authority. It would also seem justifiable that, for the exercise of disciplinary supervision over its own staff or government employees, the employer State has an overriding interest in ensuring compliance with its internal administrative regulations and the prerogative of appointment or dismissal which results from unilateral decisions taken by the State. On the other hand, the State of the forum appears to retain exclusive jurisdiction if not, indeed, an overriding interest in matters of domestic public policy regarding the protection to be afforded to its local labour force, including enforcement of its social security provisions and enhancement of contributions to social security funds. Questions relating to medical insurance, insurance against certain risks, minimum wages, entitlement to rest and recreation, vacation with pay, compensation to be paid on termination of the contract of employment, etc., are of primary concern to the State of the forum . . . .[108]

It is important to distinguish between the employees of a foreign state who are authorized to perform acts on behalf of the state and employees who merely provide services that assist the foreign state in carrying out its functions. The ILC draft expressly excludes from the scope of the articles employees or agents that perform diplomatic or consular functions.[109] The employment contract exception in article 12 does not apply to employees that have been "recruited to perform services associated with the exercise or governmental authority."[110] This distinction is consistent with the functional approach of the restrictive theory of state immunity which recognizes immunity for sovereign or governmental activities. There is no justification for granting immunity to a foreign state with regard to employment contracts if the employee is not authorized to perform governmental acts on behalf of the state. The important criterion for purposes of state immunity is whether the services to be performed in the forum state involve the exercise of governmental authority, not whether the employee is a citizen or is covered by the social security laws.

The European Convention prevents a state from claiming immunity in a proceeding concerning an employment contract to be performed in

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108. 1984 *Int'l L. Comm'n*, *supra* note 104, Y.B. at 64.
109. *See* INT'L L. COMM'N, *supra* note 21, at 11, Y.B. at 9.
110. *Id.* at 15, Y.B. at 10.

the forum state, unless the parties have agreed otherwise in writing, the individual was neither a national nor a habitual resident of the forum state when the contract was made or is a national of the employing state when the proceedings are instituted. The laws of Australia, Pakistan, Singapore, South Africa and the United Kingdom contain similar provisions concerning contracts either made or to be performed in the forum state. All of the laws, except South Africa's statute, also provide that the claim may relate to the contract or to statutory rights or obligations arising under forum law. The Australian and South African statutes expressly exclude diplomats and consular offices from the employment contract exception.[111]

The laws of Canada and the United States do not include a separate exception for employment contracts. However, this type of contract would fall under the broad commercial activity exception contained in the state immunity statutes.[112] The FSIA commentary expressly characterizes as commercial activity not entitled to immunity "employment or engagement of laborers, clerical staff or public relations or marketing agents."[113] It also specifically refers to the absence of immunity for actions relating to wrongful termination of employment, including "the wrongful discharge in the United States of an employee of the foreign state who has been employed in connection with a commercial activity carried on in some other country."[114] While the reference to a third country raises a jurisdictional issue, the important point is that claims of unlawful termination would not be subject to immunity under the FSIA. Wrongful termination claims would also be allowed under the European Convention and the other state immunity statutes.

Some states have expressed the concern that subjecting foreign states to local jurisdiction with regard to employment contracts may discourage the employer State from hiring local employees.[115] Article 12 begins with the phrase "[u]nless otherwise agreed between the States concerned.[116] Thus every state is free to exempt other states by special agreement from the domestic labor laws or their employment contracts from the jurisdiction of local courts.

It is important that the ILC draft recognize a general state immunity exception for claims relating to employment contracts, including wrongful termination which is of particular interest to employees, unless the contract involves the performance of governmental functions or the exercise of sovereign authority.

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111. 196 AUSTL. ACTS P. 1985; III Can. Stat. 95; *Jurisdictional Immunities*, *supra* note 19; *European Convention*, *supra* note 20.

112. FSIA, 28 U.S.C. Sec. 1605(a).

113. *Revised Section-by-Section*, *supra* note 41.

114. *Id.* at 13.

115. 1984 *Int'l L. Comm'n*, *supra* note 104, Y.B. at 66.

116. 1986 INT'L L. COMM'N, *supra* note 21, at 15, Y.B. at 10.

C. *Article 13: Personal Injuries and Damage to Property*

Article 13 provides an exception to state immunity for proceedings relating to:

> [c]ompensation for death or injury to the person or damage to or loss of tangible property if the act or omission which is alleged to be attributable to the State and which caused the death, injury or damage occurred wholly or partly in the territory of the State of the forum, and if the author of the act or omission was present in that territory at the time of the act or omission.[117]

This provision requires two territorial connections. First, the person responsible for causing the harm must be in the forum state at the time of the relevant act or omission. Second, the act or omission which causes the harm must occur in whole or in part in the forum state. Thus article 13 would not apply to trans-boundary harm cases, including trans-boundary pollution or shots fired across a boundary.[118] As explained in the commentary, this article is "primarily concerned with accidents occurring routinely within the territory of the state of the forum."[119]

Article 13 refers to a tortious act or omission which is attributable to a state. It does not define the scope of the exception in terms of: 1) the relationship between the person causing the injury and the foreign state; or 2) the conduct causing the harm and the official duties of the individual on behalf of the state. These issues relate to the requirements for establishing a tort claim which would depend upon the applicable national law of agency or tort liability.

The personal injuries and damage to property exception requires an act or omission which causes harm. There is no requirement of wrongful conduct or any distinction between negligent and intentional acts. As discussed in the commentary, the purpose of the exception is to allow private parties to recover compensation from foreign states for personal injuries or property damages and to prevent insurance companies from hiding behind the immunity of a foreign state:

> The exception contained in this article is therefore designed to provide relief or possibility of recourse to justice for individuals who suffer personal injury, death or physical damage to or loss of property by an act or omission which might be intentional, accidental or caused by negligence attributable to a foreign State . . . . Furthermore, the physical injury to the person or the damage to tangible property, resulting in death or total loss or other lesser injury, appears to be confined principally to insurable risks . . . . Essentially, the rule of non-immunity will preclude the possibility of the insurance company hiding behind the cloak of State immunity and evading its liability to the in-

117. *Id.* at 16, Y.B. at 10.
118. 1984 *Int'l L. Comm'n*, *supra* note 104, Y.B. at 66-67.
119. *Id.*

jured individuals.[120]

The ILC commentary indicates that article 13 is intended to subject foreign states to compensation claims relating to actual physical injuries:

> The areas of damage envisaged in article [13] are mainly concerned with accidental death or physical injuries to persons or damage to tangible property involved in traffic accidents, such as moving vehicles, motorcycles, locomotives, or speed boats. In other words, the article covers most areas of accidents involved in the transport of goods or persons by rail, road, air or waterways . . . . In addition, the scope of article [13] is wide enough to cover also intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including political assassination. Article [13] does not cover cases where there is no physical damage. Damage to reputation or defamation is not personal injury in the physical sense, nor is interference with contract rights or any rights, including economic or social rights, damage to tangible property.[121]

Thus the purpose of the ILC exception for tort claims is to allow a private party to bring a claim for actual damages caused by a foreign state. This state immunity exception would not extend to punitive damages which may be imposed against private individuals in some jurisdictions. It is not clear whether article 13 would allow an injured party to recover for intangible losses, such as mental anguish or pain and suffering, in addition to a claim for physical damage.

Article 13 is consistent with the European Convention and the state immunity statutes which recognize a general immunity exception for proceedings relating to personal injury or tangible property damage if the events causing the harm occurred in the forum state. The Canadian statute refers to personal injury or damage occurring in Canada rather than focusing on the acts causing the injury. Pakistan's statute does not include a provision concerning personal injury or property damage.[122] In contrast, the FSIA contains a detailed provision denying immunity for claims requesting compensation for: "personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment."[123]

The FSIA exception is limited to tortious conduct by a state official or employee in the performance of official duties, including claims based on strict liability. The relevant act or omission and the resulting harm must occur in the United States. As explained in the FSIA commentary:

> Section 1605(a)(5) is directed primarily at the problem of traffic acci-

120. *Id.* at 66.
121. *Id.*
122. *Revised Section-by-Section*, *supra* note 41.
123. 28 U.S.C. §1605(a)(5).

> dents but is cast in general terms as applying to all tort actions for money damages, not otherwise encompassed by §1605(a)(2) relating to commercial activities. It denies immunity as to claims for personal injury or death, or for damage to or loss of property, caused by the tortious act or omission of a foreign state or its officials or employees, acting within the scope of their authority; the tortious act or omission must occur within the jurisdiction of the United States. . . . [The] phrase "tortious act or omission" is meant to include causes of action which are based on strict liability as well as on negligence. [124]

As in the ILC draft, the FSIA exception for noncommercial torts excludes claims which do not involve personal injury or physical damage, such as malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. However, the FSIA does not preclude the possibility of obtaining money damages for pain and suffering which accompanies physical injury. The liability of a foreign state is expressly limited to actual damages under any of the exceptions enumerated in the statute, thus prohibiting a claim for punitive damages against a foreign state.[125]

The FSIA tort exception does not apply to claims arising out of the performance or the failure to perform discretionary functions. Preserving the immunity of a foreign state for claims arising out of discretionary governmental functions is consistent with the restrictive theory. A state should not be required to explain or justify sensitive governmental decisions in the national courts of another state. This important limitation is not addressed in the European Convention, the other state immunity statutes, or the ILC draft. However, the Commission has indicated that it intends to include a reservation which will recognize this distinction.[126]

D. *Article 14: Ownership, Possession and Use of Property*

Under article 14, a state cannot invoke immunity in a proceeding which relates to: 1) a right or interest in immovable property located in the forum state; 2) property acquired by succession, gift or *bona vacantia*; or 3) property which is the subject of estate, competency, bankruptcy or corporate dissolution proceedings. The article also refers to proceedings which relate to the possession or use of immovable property.[127] Property used by a state in connection with its diplomatic or consular relations would not be covered by this article.[128]

A proceeding is considered to have been instituted against a foreign state under article 7(3) if it is "designed to deprive that other State of its property or of the use of property in its possession or control."[129] Article

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124. *Revised Section-by-Section*, *supra* note 41, at 16.
125. 28 U.S.C. §1605(a)(5), 1606.
126. 1984 *Int'l L. Comm'n*, *supra* note 104, at 67.
127. 1986 *Int'l L. Comm'n*, *supra* note 21, at 11, Y.B. at 10.
128. *Id.* at 11, Y.B. at 9.
129. *Id.* at 12, Y.B. at 9.

14 limits the ability of a third party to take advantage of state immunity in this type of proceeding. The court is not precluded from exercising jurisdiction if the foreign state itself would not be entitled to invoke immunity or in the absence of prima facie evidence of the interest or right of the state. As explained in the commentary:

> [There] would seem to be no reason to oppose such a proceeding on the grounds of State immunity, if the State itself could not have successfully invoked its immunity had the proceeding been brought against it. . . . Paragraph 2 is also needed in view of recent legal developments regarding the effect of assertions by foreign States. At least in the practice of some jurisdictions, it used to be the rule - far more absolute than today - that, if a foreign sovereign said that the property in question was his or in his possession or control the local court was obliged to decline jurisdiction. However, the more recent practice of the same jurisdictions now requires the foreign State to provide at least prima facie evidence of its title or proof that the possession was obtained in conformity with the local law. In certain circumstances, the foreign State would be obliged to furnish evidence as to the official status of an agency for which State immunity was invoked.[130]

The European Convention and the state immunity statutes contain similar provisions denying immunity for proceedings relating to immovable property in the forum state; property acquired by gift, succession, or *bona vacantia*; or property subject to judicial adminstration such as bankruptcy or estate proceedings. The Canadian statute only refers to property acquired by gift, succession, or *bona vacantia*. The South African and United States laws do not include property under judicial administration. The South African statute expressly excludes claims relating to diplomatic or consular property. The laws of the United Kingdom, Pakistan and Singapore allow a court to entertain proceedings against a third party relating to property possessed or controlled by a state or in which a state claims an interest if the state would not be entitled to immunity under the circumstances or if the claim is neither admitted nor supported by prima facie evidence. Article 14 clearly reflects existing state practice.[131]

E. *Article 15: Patents, Trademarks and Intellectual or Industrial Property*

The ILC draft recognizes a state immunity exception for cases involving intangible property rights. Under article 15, a state is not immune from proceedings which relate to the determination of a right or an alleged infringement with regard to a patent, industrial design, trademark, copyright or any other form of intellectual or industrial property.[132] As

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130. *1983 Int'l L. Comm'n, supra* note 42, Y.B. at 37.

131. 196 AUSTL. ACTS P. 1985; III Can. Stat. 95; *Jurisdictional Immunities, supra* note 19; FSIA, 28 U.S.C. §1605(a)(4); *European Convention, supra* note 20.

132. *1986 Int'l L. Comm'n, supra* note 21, Y.B. at 11.

explained in the commentary, this provision is closely related to the exceptions for commercial activity and tangible property:

> The protection afforded by the internal system of registration in force in various States is designed to promote inventiveness and creativity and, at the same time, to regulate and secure fair competition in international trade. An infringement of a patent of invention or industrial design or of any copyright of literary or artistic work may not always have been motivated by commercial or financial gain, but invariably impairs or entails adverse effects upon the commercial interests of the manufacturer or producers who are otherwise protected for the production and distribution of the goods involved. "Patents, trademarks and intellectual or industrial property" in their collective nomenclature constitute a highly specialized form of property rights which are intangible or incorporeal, but which are capable of ownership, possession or use as recognized under various legal systems.[133]

Some states expressed the view that this provision may hinder the economic and development policies of developing countries with regard to the transfer of technology essential for growth and development. The ILC commentary makes an important distinction between the domestic policy of a state within its territory and its activities in other states:

> Every State, including any developing State, is free to pursue its own policy within its own territory. Infringement of such rights in the territory of another State, for instance the unauthorized reproduction or distribution of copyrighted publications, cannot escape the exercise of jurisdiction by the competent courts of that State in which measures of protection have been adopted. The State of the forum is also equally free to tolerate or permit such infringements or to deny remedies therefore in the absence of an organized system of protection for the rights violated or breached in its own territory.[134]

Thus it is for each state to decide whether to enact legislation for the protection of intangible property rights within its territory or to enter into treaty arrangements for the extraterritorial protection of these rights.

A state has a strong interest in the determination of intangible property rights which are created, protected, and regulated by domestic law. Allowing a state to claim immunity in a proceeding initiated to settle a dispute concerning a patent, copyright or trademark would seriously undermine the often elaborate system for registering and protecting intangible property interests. It would leave the private parties in an unacceptable position of uncertainty concerning their property rights. Similarly, a state which has allegedly infringed a patent, copyright or trademark by its conduct in another state cannot reasonably expect to avoid the jurisdiction of the local courts in settling the dispute or preventing future infringements. As discussed in the commentary, article 15 requires two ter-

133. *Id.* Y.B. at 68.
134. *Id.* at 69.

ritorial connections with the forum:

> First, the alleged infringement by a State of a copyright, etc., must materialize in the territory of the State of the forum. Secondly, such a copyright, etc., of a third person must be legally protected in the State of the forum. Hence there is a limit to the scope of the application of the article. Infringement of a copyright by a State in its own territory, and not in the State of the forum, does not establish a sufficient basis for jurisdiction in the State of the forum under this article.[135]

The European Convention and the laws of Australia, Pakistan, Singapore, South Africa and the United Kingdom recognize a similar state immunity exception for proceedings relating to a state's interest in, or infringement of, intangible property rights, including the right to use a trade or business name. The Pakistan, South African, and United Kingdom statutes also refer to plant breeders' rights, a relatively new intangible property interest. Australian law preserves state immunity if the proceeding relates to goods imported into or used in Australia exclusively for noncommercial purposes. The laws of Canada and the United States do not provide a separate immunity exception for intangible property claims. However, these claims would generally fall under the broad commercial activity exceptions found in the two statutes.[136]

The ownership or infringement of intangible property rights is clearly private sector activity which does not require the exercise of sovereign or governmental authority. The ILC provision is consistent with the restrictive theory of state immunity and the recent trend in state practice.

F. *Article 16: Fiscal Matters*

Article 16 provides that a state cannot invoke immunity in a proceeding which relates to a fiscal obligation, such as a duty or a tax.[137] As discussed in the commentary, this article provides a broad exception for any type of fiscal obligation incurred by a foreign state under the law of the forum:

> Article 16 deals with the exception to the immunity of States from jurisdiction in respect of a proceeding regarding fiscal obligations such as taxes, customs or excise duties for the purchase, sale or importation of goods, including agricultural products, ad valorem stamp duties, charges or registration fees for transfer of property registered in the State of the forum, income tax derived from commercial activities conducted in the State of the forum, rates or taxes on premises occupied by the State for commercial purposes in the State of the forum, or other similar charges . . . . It should be understood that the enumeration is not meant to be exhaustive: the words "similar charges" include all other forms of duties and taxes in force in the State of the

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135. *Id.*

136. 196 AUSTL. ACTS P. 1985; III Can. Stat. 95; *Jurisdictional Immunities, supra* note 19; *European Convention, supra* note 20.

137. *1986 Int'l L. Comm'n, supra* note 21, at 19, Y.B. at 11.

forum. [138]

This exception recognizes the sovereign authority of the forum state to tax any source of income within its territory or to impose a duty on imports. However, it would not effect a tax exemption or reduced tariff rate conferred upon a foreign state in an international agreement.

Private parties as well as states engage in the activities discussed in the commentary which do not require the exercise of sovereign authority. As noted in the commentary: "Such liabilities or obligations, which are substantive liabilities, do not normally arise for a foreign State, except in cases where the State establishes a business, official or commercial, or maintains an office or agency in the territory of another State." [139] It is not clear what is meant by an "official business" of a foreign state which would be subject to local taxes. However, the state immunity exception would not apply to diplomatic or consular missions which are excluded from the scope of the articles.[140]

The laws of Australia, Pakistan, Singapore, South Africa and the United Kingdom deny immunity for claims relating to the tax liabilities of a foreign state. With the exception of the Australian statute, the laws also deny immunity for proceedings concerning customs or excise duties, and taxes or rates imposed on premises used for commercial purposes. The laws of Pakistan and the United Kingdom also refer to agricultural levies. The European Convention, the Canadian and United States statutes do not contain separate provisions concerning taxes or duties. However, this type of proceeding would generally fall under the broad commercial activity exceptions contained in these laws.[141]

G. *Article 17: Participation in Companies or Other Collective Bodies*

The ILC draft recognizes a state immunity exception for proceedings which relate to the participation of a State in a corporation or other collective body and the relationship between the State and the organization or the other participants, unless the parties have agreed otherwise in writing.[142] The entity must be incorporated under the law of the forum state, or be controlled from or have its principal place of business in that state. The immunity exception only applies to organizations which have members other than states or international organizations.

This provision is intended to cover a wide variety of entities, including corporations and nonprofit organizations. As explained in the commentary, the exception applies to cases involving the rights or obligations of a state as a participant in an organization:

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138. *1984 Int'l L. Comm'n, supra* note 104, Y.B. at 69.
139. *Id.* at 69-70.
140. *See 1986 Int'l L. Comm'n, supra* note 21, at 11, Y.B. at 9.
141. *1984 Int'l L. Comm'n, supra* note 106.
142. *1986 Int'l L. Comm'n, supra* note 21, at 19, Y.B. at 11.

> When a State participates in a collective body, such as by acquiring or holding shares in a company or becoming a member of a body corporate which is organized and operated in another State, it voluntarily enters into the legal system of that other State and into a relationship recognized as binding under that legal system. Consequently, the State is of its own accord bound and obliged to abide by the applicable rules and internal law of the State of incorporation, of registration or of the principal place of business. The State also has rights and obligations under the relevant provisions of the charter of incorporation, articles of association or other similar instruments establishing limited or registered partnerships. The relationship between shareholders inter se or between shareholders and the company or the body of any form in matters relating to the formation, management, direction, operation, dissolution or distribution of assets of the entity in question is governed by the law of the State of incorporation, of registration or of the principal place of business.[143]

When a state participates with private parties in a corporation or other entity established under the law of the forum, it clearly steps into the private sector. Participation in a body which exists by virtue of the domestic law of another country does not require the exercise of sovereign or governmental authority on the part of the foreign state. The European Convention and the laws of Australia, Pakistan, Singapore, South Africa and the United Kingdom deny immunity for proceedings relating to a state's participation in a corporation or partnership established under forum law or having its principal place of business in the forum state, unless the parties have otherwise agreed in writing. There must be at least one private person participating in the organization. The Canadian and U.S. statutes do not contain separate provisions for this type of proceeding which would usually come within the broad commercial activity exception contained in these laws.[144]

H. *Article 18: State-owned or State-operated Ships Engaged in Commercial Services*

The ILC draft recognizes an exception for any proceeding relating to a ship which is owned or operated by a state, or the carriage of cargo on such a ship, if, "at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes."[145] The term state- owned or state-operated ship includes the possession, control, management or charter of a ship.[146] This exception may arise in connection with various types of claims relating to, for example:

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143. *1984 Int'l L. Comm'n, supra* note 104, Y.B. at 71.

144. 196 AUSTL. ACTS P. 1985; III Can. Stat/ 45 (1980-83); *Jurisdictional Immunities, supra* note 19; *European Convention, supra* note 20.

145. *1986 Int'l L. Comm'n, supra* note 21 at 18-19, Y.B. at 11.

146. Report of the International Law Commission to the General Assembly, 40 U.N. GAOR Supp. (No. 10) at 154, U.N. Doc. A/40/10 (1985), *reprinted in* [1985] 2 Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/SER.A/1985/Add.1 (part 2). [hereinafter, *1985 Int'l L. Comm'n*]

an accident or collision; assistance, salvage or general average; or contracts relating to the ship for repairs or supplies.[147] As discussed in the commentary, the jurisdiction of the court will depend upon the law of the forum which varies from one country to another with regard to proceedings involving ships:

> [the] maritime law, of the forum State . . . may recognize a wide variety of causes of action and may allow a possible choice of proceedings such as *in personam* against the owner and operator or *in rem* against the ship itself, or suits in admiralty or actions to enforce a maritime lien or to foreclose a mortgage. A court may be competent on a variety of grounds, including the presence of the ship at a port of the forum State, and it need not be the same ship that caused damage at sea or other liabilities but a similar merchant ship belonging to the same owner. Courts in common law systems generally recognize the possibility of arrest or seizure of a sister ship also *ad fundandam jurisdictionem*, but once bond is posted the ship would be released and the proceedings allowed to continue. Thus, the expression "any proceeding" refers to "any type of proceeding" regardless of its nature, whether *in rem*, *in personam*, in admiralty or otherwise.[148]

Of course, a state would be entitled to assert any defense or limitation on liability which would be available to a privately-owned ship or cargo.[149]

Article 18 provides a state immunity exception for ships which are used or "intended exclusively for use for commercial [non-governmental] purposes."[150] As explained in the commentary, this "intended use" element would exclude merchant ships which a state intends to use for governmental purposes in the future:

> Thus an ordinary merchant ship may be requisitioned by a government and converted into a warship, but, before its actual commission or use as a man-of-war, attempts may be made to arrest or attach the ship intended for use as a ship of war. Such arrest or attachment would not be permitted under the test of "intended for use." Thus, the schooner "Exchange" was not at the material time intended for use as a trading vessel but as a frigate, and therefore had to be released.[151]

The "intended use" element also appears in article 18(4) with regard to cargo. A state cannot invoke immunity:

> in any proceeding relating to the carriage of cargo on board a ship owned or operated by that State and engaged in commercial [non-governmental] service provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commer-

147. *1986 Int'l L. Comm'n*, *supra* note 21, at 19, Y.B. at 11.
148. *1985 Int'l L. Comm'n*, *supra* note 146, at 156, Y.B. at 63.
149. *1986 Int'l L. Comm'n*, *supra* note 21, at 19, Y.B. at 11.
150. *Id.*
151. *1985 Int'l L. Comm'n*, *supra* note 146, at 155, Y.B. at 62-63.

cial [non-governmental] purposes.[152]

Under the functional approach of the restrictive theory, the crucial time for characterizing the governmental or non-governmental character of state activity is the time the cause of action arose. If a state is not engaged in governmental activity at that time, then the claim does not relate to governmental activity and the reasons for extending immunity do not apply. A state should not be able to avoid liability for its commercial activities by claiming that it intended to terminate these activities and then revert that activity back into the realm of a governmental activity at some time in the future. The manifest injustice of allowing a state to operate with impunity in the marketplace by subsequently invoking its sovereign character was recognized over a century ago by Sir Robert Phillimore in *The Charkieh*.[153] It is important to distinguish between a claim relating to a ship and a claim relating to cargo carried on a ship. State immunity for purposes of adjudicating the merits in a proceeding concerning a ship depends upon the governmental or non-governmental character of the ship at the time the cause of action arose. Execution of judgment is treated as a separate aspect of state immunity which is dealt with in subsequent articles of the ILC draft. For the time being, it is sufficient to note that a court may be able to exercise jurisdiction over a claim relating to a merchant ship and then be precluded from enforcing the judgment against the ship which has subsequently been requisitioned for military service. This anomaly is due to the possibility of transforming the character of a ship and the strong state interest in avoiding foreign state jurisdiction over one of its warships and exemplifies one of the reasons for granting state immunity. However, the judgment may be enforced against a bond obtained for the release of a merchant ship now used for military purposes.

In contrast, the question of state immunity for a claim relating to cargo depends upon whether the claim relates to governmental or nongovernmental activity. For example, a state is not entitled to immunity in a proceeding relating to a commercial contract for the purchase, sale or carriage of cargo. The reference to the intended use of the cargo is inconsistent with the objective criterion of the restrictive theory for determining the commercial character of a contract or transaction. Also, the type of ship on which the cargo is located may be relevant for purposes of enforcing a judgment, but not for determining the governmental or non-governmental nature of the claim relating to the cargo.

Article 18 refers to ships used by a state for "commercial [non-governmental]" or "governmental non-commercial" service.[154] This distinction is discussed at length in the commentary:

The dichotomy of service of vessels classified according to a double

152. *1986 Int'l L. Comm'n*, *supra* note 21, at 19.
153. *See* The Charkieh, *supra* note 9.
154. *1986 Int'l L. Comm'n*, *supra* note 21, at 18.

> criterion of "commercial and non-governmental" or "governmental and non-commercial" use used by Professor Gilbert Gidel. The term "governmental and non-commercial" is used in the 1926 Brussels Convention, and the term "government non-commercial in conventions of a universal character such as the 1958 Geneva Convention on the High seas and the 1982 United Nations Convention on the Law of the Sea in which ships are classified according to their use, i.e., governmental and non-commercial service as opposed to commercial service. Some members of the Commission expressed misgivings concerning this double criterion as it might suggest the possibility of a very different combination of a double criterion, such as "governmental commercial" service or "commercial and governmental" service. Other members, on the other hand, denied the likelihood of this interpretation, and considered that "commercial" and "non-governmental" could be taken cumulatively. Others again added that States, particularly developing countries, and other public entities could engage in activities of a commercial and governmental nature without submitting to the jurisdiction of national courts. Furthermore, the purchase of armaments was often concluded on a government-to-government (G to G) basis, including the transport of such armaments by any type of carrier, which would not normally be subject to the exercise of jurisdiction by any national court. The diversity of views led the Commission to maintain square brackets around the phrase "non-governmental."[155]

With regard to the "governmental, non-commercial" character of the ship or cargo, article 18 provides that: "[A] certificate signed by the diplomatic representative or other competent authority of the State to which the ship or cargo belongs and communicated to the court shall serve as evidence of the character of that ship of cargo."[156]

The double criterion of commercial non-governmental service raises the possibility of commercial governmental service which would be entitled to immunity. Under the restrictive theory of immunity, commercial activity determined on the basis of its objective character is by definition not governmental in nature. Commercial acts are acts which are regularly performed by individuals in the marketplace or the private sector and do not require the exercise of sovereign authority or involve the performance of governmental functions. Any distinction between governmental and non-governmental commercial activity could only be achieved by looking beyond the objective nature of the conduct to the subjective purpose of the state. As discussed above in connection with the commercial contract exception, this objective element is totally inconsistent with the functional approach of the restrictive theory and the practice of most states.[157]

Article 18 expressly excludes warships, naval auxiliaries or other

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155. *1985 Int'l L. Comm'n, supra* note 146.
156. *1986 Int'l L. Comm'n, supra* note 21, at 19.
157. *Id.*

ships, as well as cargo belonging to a state carried on these ships, which are used or intended for use in government non-commercial service.[158] As the commentary explains, this provision is intended to include a wide variety of ships:

> Paragraph 2 enunciates the rule of State immunity in favour of warships and naval auxiliaries, even though such vessels may be employed occasionally for the carriage of cargoes for such purposes to cope with an emergency or other natural calamities. Immunity is also maintained for other government ships such as police patrol boats, customs inspection boats, oceanographic survey ships, training vessels and dredgers, owned or operated by a State and used or intended for use in government non-commercial service.[159]

The European Convention does not address claims relating to ships or cargo. The 1926 Brussels Convention on the Immunity of State-Owned Vessels recognizes immunity for claims relating to ships owned or operated by a state and "used at the time a cause of action arises exclusively on governmental and non-commercial service." (Emphasis added.) The Brussels Convention recognizes immunity for claims relating to state-owned cargoes carried on such ships or on merchant vessels for governmental and non-commercial purposes.[160]

The laws of Pakistan, Singapore, South Africa and the United Kingdom deny immunity for claims relating to a ship owned, possessed, or controlled by a state or in which it claims an interest if the ship was in or intended for use for commercial purposes when the cause of action arose. Similarly, a state is not immune from an action *in rem* against a cargo carried on such a ship if the ship and the cargo were in use, or intended for use, for commercial purposes when the claim arose. *In personam* actions relating to the cargo only require that the ship was in use or intended for use for commercial purposes. The Canadian statute denies immunity for claims relating to a ship or cargo in use or intended for use for commercial purposes either at the time the cause of action arose or the proceedings were commenced. The Australian statute distinguishes between *in rem* actions against a ship or cargo by denying immunity if: 1) the ship was in use for commercial purposes at the time the related cause of action arose; or 2) the cargo was a commercial cargo at the time the cause of action arose. The laws of Australia, Pakistan, Singapore, and the United Kingdom also deny immunity under the concept of *in rem* sister ship jurisdiction if both ships were used for commercial purposes at the time the cause of action arose.[161]

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158. *Id.* at 19-20.

159. *1985 Int'l L. Comm'n, supra* note 146, at 155.

160. International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, Brussels April 10, 1926, art. 3, CLXXVI L.N.T.S. 200 [hereinafter, Convention for Unification].

161. 196 AUSTL. ACTS P. 1985; III Can. Stat. 45 (1980-83); *Jurisdictional Immunities, supra* note 19.

Section 1605(b) of the FSIA recognizes an exception to state immunity for admiralty suits brought to enforce a maritime lien based upon the commercial shipping of a foreign state against a vessel or cargo of that state.[162] The plaintiff must comply with specific notice requirements which prohibit the arrest of a state-owned vessel or cargo. The maritime lien is then treated as an *in personam* claim against the foreign state which owned the vessel or cargo at the time. The party loses the right to bring an in rem or an in personam claim to enforce the maritime lien if the vessel or cargo is arrested, unless the party was not aware of the state interest. The judgment awarded in such a case cannot exceed the value of the vessel or cargo at the time notice is served.

As explained in the commentary, this provision is designed to allow a plaintiff to bring an *in personam* action against a foreign state to enforce a maritime lien without having to arrest the ship or cargo:

> The purpose of this subsection is to permit a plaintiff to bring suit in a United States district court arising out of a maritime lien involving a vessel or cargo of a foreign sovereign without arresting the vessel, by instituting an *in personam* action against the foreign state in a manner analogous to bringing such a suit against the United States . . . . [It] is designed to avoid arrests of vessels or cargo of a foreign state to commence a suit . . . . If, however, the vessel or its cargo is arrested or attached, the plaintiff will lose his *in personam* remedy and the foreign state will be entitled to immunity—except in the rare case where the plaintiff was unaware that the vessel or cargo of a foreign state was involved. This would be a rare case because the flag of the vessel, the circumstances giving rise to the maritime lien, or the information contained in ship registries kept in ports throughout the United States should make known the ownership of the vessel in question, if not the cargo. If, however, the vessel or cargo is mistakenly arrested, such arrest or attachment must, under Section 1609, be immediately dissolved when the foreign state brings to the court's attention its interest in the vessel or cargo and, hence, its right to immunity from arrest.[163]

As a result of the problems that have arisen in applying this provision of the FSIA, the American Bar Association has recommended, and Congress adopted, two important changes in section 1605(b). First, the FSIA provide an excessive penalty for improper arrest of a state-owned vessel or cargo. The injured party forfeits the entire claim. Second, many procedural uncertainties result from the transformation of an admiralty claim *in rem* into an *in personam* action. Thus, the ABA proposed amendments to: 1) limit the penalty for improper arrest to the damages incurred during the detention and 2) allow the aggrieved party to enforce a maritime lien or a preferred mortgage, as defined in the Ship Mortgage Act, pursuant to the principles of law and rules of practice of suits *in*

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162. *See* FSIA 28 U.S.C. sec. 1604(a)(2).

163. *Revised Section-by-Section*, *supra* note 42.

rem. The 100th Congress enacted the proposed amendments in an effort to resolve the procedural problems that have arisen in admiralty cases under the FSIA.[164]

The immunity exception for claims relating to commercial shipping recognized in the ILC draft is consistent with the restrictive theory and state practice. However, the references to "intended use" and "commercial non-governmental service" are inconsistent with the Brussels Convention, the laws of Australian and the United States, and the functional approach of the restrictive theory.[165] Also, the question of immunity for a claim relating to cargo is not dependent upon the character of the ship on which the cargo is carried, as indicated in the ILC draft. In this regard, it would be useful for the Commission to consider the Australian statute which distinguishes between claims relating to vessels and cargoes. This important provision deserves close attention during the second reading of the draft.

I. *Article 19: Effect of an Arbitration Agreement*

The ILC draft recognizes a state immunity exception for a claim arising out of a written arbitration agreement with regard to "a [commercial contract] [civil or commercial matter]." Under article 19, a state cannot invoke immunity in a proceeding which relates to the validity or interpretation of the agreement, the arbitration proceeding, or the setting aside of the award, unless the agreement provides otherwise.[166] The enforcement of a judgment or an arbitration award is covered by Part IV of the ILC draft concerning the immunity of state property. As explained in the commentary:

> The article is based upon the concept of implied consent to the supervisory jurisdiction of a court of another State which is otherwise competent to determine questions connected with the arbitration agreement, such as the validity of the obligation to arbitrate or to go to arbitration or to compel the settlement of a difference by arbitration, the interpretation and validity of the arbitration clause or agreement, the arbitration procedure and the setting aside of arbitral awards.[167]

The state immunity exception in article 19 is expressly limited to written arbitration agreements between a state and a private individual or corporation from another state. The exception does not apply to or in any way affect the competence of the local courts with regard to arbitration agreements between states or a state and an international organization.

Two important changes were made in the language originally proposed by the Special Rapporteur. First, the title to article 19 was changed from "Arbitration" to "Effect of an Arbitration Agreement" to reflect the

164. *See* Feldman, *supra*, note 12.
165. *Convention for Unification*, *supra* note 160.
166. *1986 Int'l L. Comm'n*, *supra* note 21, at 20.
167. *1985 Int'l L. Comm'n*, *supra* note 146.

implied consent aspect of the absolute theory of immunity.[168] Second, some states suggested that the exception, which originally covered arbitration of differences relating to a civil or commercial matter, should be limited to arbitration relating to a commercial contract.[169] The alternative views concerning the scope of the exception are reflected in the bracketed language in article 19. A state which agrees to arbitrate a dispute with a private party cannot reasonably expect to avoid this obligation or the supervision of a local court which has jurisdiction over the arbitration agreement by invoking state immunity.[170] Private parties often enter into arbitration agreements and participate in arbitration proceedings. Indeed arbitration has become a common method of settling disputes which arise in international commerce because of the advantages of using neutral arbitrators rather than resorting to the local courts. The private individual or corporation relies on this dispute settlement provision when entering into the agreement with the foreign state. A state which enters into an arbitration agreement with a private party is engaging in a non-governmental activity which is not within the exclusive realm of a sovereign entity. Thus under the restrictive theory, a state is not entitled to immunity in a proceeding which concerns an arbitration agreement.

The European Convention and the laws of Australia, Pakistan, Singapore, South Africa, and the United Kingdom recognize a state immunity exception for any proceedings relating to arbitration pursuant to a written agreement, unless the arbitration agreement is between states or provides otherwise. The European Convention and the Australian statute expressly provide for the absence of immunity for proceedings relating to: the validity or interpretation of the arbitration agreement, the arbitration procedure, or the setting aside of the award.[171]

The Canadian law does not provide a separate immunity exception for proceedings relating to arbitration which would be covered by the broad commercial activity or the implied waiver provision.[172] Similarly, the FSIA, as originally enacted, did not specifically address the question of immunity in cases relating to arbitration agreements. In such cases, the United States courts denied immunity on the basis of implied waiver.[173] The American Bar Association recommended that the FSIA be amended: "to clarify that an agreement to arbitrate constitutes a waiver of immunity in an action to enforce that agreement or to enforce the resultant award . . . ."[174] The 100th Congress amended the FSIA to provide a separate exception for an action:

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168. *Id.* at 157.

169. *Id.* at 158.

170. *Id.* at 158. (The I.L.C. commentary notes that states differ in the degree to which the local courts may exercise judicial control or supervision over arbitration.)

171. 196 AUSTL. ACTS P. 45; *Jurisdictional Immunities*, *supra* note 19.

172. III Can. Stat. 45, *supra* note 19; FSIA U.S.C. § 1604(a)(2).

173. *See Jurisdictional Immunities*, *supra* note 18, at 4.

174. *Id.* at 2.

> [b]rought either to enforce an agreement made by the foreign State with or for the benefit of a private party to submit to arbitration any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United an award made pursuant to such an agreement to arbitrate.[175] [Please note minor drafting changes in the above text as approved by Congress.]

This provision applies only if: 1) the arbitration takes place, or is intended to take place, in the United States; 2) the agreement or award is governed by an international agreement in force for the United States concerning the recognition and enforcement of arbitral awards; 3) the foreign state would not be entitled to immunity for the underlying claim under the FSIA; or 4) the foreign state has waived its immunity either explicitly or by implication. The statute as amended also precludes the application of the *act of state* doctrine in cases involving arbitral agreements and provides for enforcement of a judgment based on an order confirming an arbitral award against the property in the United States of a foreign state used for the commercial activity upon which the claim is based.[176]

Article 19 is consistent with the clear trend in state practice to deny immunity for claims relating to arbitration agreements. However, the arbitration exception to state immunity is distinct from the implied consent and the commercial activity exceptions. The ILC draft should not attempt to reduce the principle of state immunity to a pervasive rule of immunity subject only to exceptions which can be traced to implied consent or a commercial contract. This narrow interpretation would be inconsistent with the functional approach of the restrictive theory and the clear trend in state practice. The ILC should adopt a broad arbitration exception to state immunity in article 19, excluding the bracketed reference to commercial contracts.

J. *Article 20: Nationalization*

The ILC draft does not prejudge "any question that may arise in regard to extraterritorial effects of measures of nationalization taken by a State with regard to property, movable or immovable, industrial or intellectual."[177] The commentary describes this provision contained in article 20 as a general reservation concerning nationalization measures which are understood to involve the exercise of sovereign authority.[178] This language was added as a result of concerns expressed in connection with the

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175. *See* Feldman, *supra* note 12.

176. *See* Testimony of Elizabeth Verville, Deputy Legal Adviser, Department of State, before the House Judiciary Committee, Subcommittee on Administrative Law and Governmental Relations, May 28, 1987 [hereinafter, Testimony].

177. *1986 Int'l L. Comm'n*, *supra* note 21, at 20.

178. *Id.* at 36.

state immunity exception in article 15 for an infringement of intangible property rights within the territory of the state seeking to exercise jurisdiction.[179]

State immunity provides a jurisdictional immunity in a proceeding which impleads a foreign state with regard to conduct involving the exercise of sovereign authority which would otherwise fall within the jurisdiction of the local courts. This immunity, which prevents a court from applying the domestic law in a particular proceeding, does not in any way affect the substantive law of a state which governs activities within its territory, including the activities of a foreign state.[180] Furthermore, it does not affect any liability which a state may incur under international law.[181] The court merely refrains from adjudicating the merits of a claim or enforcing a judgment. Thus state immunity does not affect the national or international legal norms which determine the extraterritorial effect of expropriation measures or any other act of a state in the exercise of its sovereign authority. The question of state immunity for proceedings relating to nationalization is not addressed in the European Convention or any of the state immunity statutes except for the United States statute. The FSIA provides a state immunity exception for a proceeding involving rights in property taken in violation of international law due to the arbitrary or discriminatory nature of the taking or the failure to provide compensation when required by international law.[182] Under section 1605(a)(3), a U.S. court can exercise jurisdiction over a claim relating to such property if the actual property, or any property exchanged for it, is present in the United States in connection with commercial activity.[183] As explained in the commentary, the provision includes two standards depending upon whether the property is held by a foreign state or a state entity:

> The first category involves cases where the property in question or any property exchanged for such property is present in the United States, and where such presence is in connection with a commercial activity carried on in the United States by the foreign state, or political subdivision,agency or instrumentality of the foreign state. The second category is where the property, or any property exchanged for such property, is (i) owned or operated by an agency or instrumentality of a foreign state and (ii) that agency or instrumentality is engaged in a commercial activity in the United States. Under the second category, the property need not be present in connection with a commer-

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179. *1984 Int'l L. Comm'n, supra* note 106.

180. *See* Sucharitkul, *supra* note 7.

181. *See* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 326 (3d ed. 1979).

182. *See* 22 U.S.C. § 2370(e)(1). ("The term 'taken in violation of international law' would include the nationalization of expropriation of property without payment of prompt, adequate and effective compensation required by international law. It would also include takings which are arbitrary or discriminatory in nature." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 19-20, (1976) *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6618.)

183. *See* FSIA, 28 U.S.C. § 1605(a)(3).

cial activity of the agency or instrumentality.[184]

Some U.S. courts have continued to refrain from exercising jurisdiction in expropriation cases by applying the *act of state* doctrine which is a domestic legal principle.[185] This doctrine is one of judicial restraint under which a court refuses to judge the acts of a foreign state within its own territory due to the sensitive political issues involved. The doctrine recognizes the possibility of interference with the executive branch, which is primarily responsible for foreign relations.[186] Whereas state immunity generally arises with regard to the activities or property of a foreign state within the territory of the state asserting its jurisdiction, the *act of state* doctrine is a defense often invoked by a private party in a lawsuit to prevent the court from judging the act of a foreign state within its own territory. It is a defense relating to the merits of the case which applies even if the foreign state is not a party to the proceeding.

The American Bar Association has recommended amending the FSIA to expressly provide that the *act of state* doctrine does not prevent the exercise of jurisdiction over cases involving property taken in violation of international law.[187] As Justice Powell pointed out in his concurring opinion in First National City Bank v. Banco Nacional de Cuba:

> I do not agree, however, that balancing the functions of the judiciary and those of the political branches compels the judiciary to eschew acting in all cases in which the under-lying issue is the validity of expropriation under customary international law. Such a result would be an abdication of the judiciary's responsibility to persons who seek to resolve their grievances by the judicial process. . . . Until international tribunals command a wider constituency, the courts of various countries afford the best means for the development of a respected body of international law. There is less hope for progress in this long-neglected area if the resolution of all disputes involving an "act of state" is relegated to political rather than judicial process.[188]

The proposed amendment to the FSIA would make it easier for persons whose property has been taken unlawfully by a foreign state to obtain judicial redress. The State Department has expressed reservations about this proposal.[189]

The ILC draft does not contain an express exception for expropriation cases. It is important that the United States preserves its position under the FSIA which allows a court to exercise jurisdiction over expropriation claims. The position of Congress is clear on this issue. Article 20

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184. *Revised Section-by-Section*, *supra* note 42.

185. *Id.* at 4.

186. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 763 (1972) (citing The Paquete Habana, 175 U.S. 677 (1900)); Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

187. A.B.A. SEC. INT'L L. PRAC. REP., August 1984.

188. 406 U.S. 759, 774-75 (1972).

189. *See* Testimony, *supra*, note 176.

could be amended to provide that the ILC draft does not prejudge "any question that may arise in relation to measures of nationalization."

VIII. STATE IMMUNITY IN RESPECT OF PROPERTY FROM MEASURES OF CONSTRAINT

The principle of state immunity consists of two distinct elements concerning: 1) the jurisdiction to adjudicate on the merits of a claim in which a foreign state has been impleaded; and 2) the jurisdiction to exercise control over the property of a foreign state.[190] With regard to adjudicative jurisdiction, a foreign state can invoke immunity if the proceeding relates to a sovereign or governmental activity. As discussed earlier, a state is not required to justify or explain its governmental acts and cannot be held accountable for such acts in the court of another state because of the sovereign equality, independence and dignity of all states.[191] Similarly, property which is owned, possessed, or controlled by a state and used in connection with governmental activities is not subject to the judicial jurisdiction of another state, even if the property is located in the forum state.[192] As discussed in the commentary:

> If it is admitted that "no sovereign State can exercise its sovereign power over another equally sovereign state (par in parem imperium non habet), it follows *a fortiori* that no measures of constraint by way of execution or coercion can be exercised by the authority of one State against another State and its property. Such possibility does not exist even in international litigation, whether by judicial settlement or arbitration.[193]

The immunity extended to state property is important from a practical point of view, in addition to considerations of sovereign attributes and foreign relations. The assertion of control by a state over the property of a foreign state which is used in connection with governmental activities would interfere with the foreign state's ability to carry out its governmental functions. For example, attaching an embassy bank account or repossessing all of the typewriters used by a consular mission would clearly interfere with the ability of the state to carry out its diplomatic or consular functions. A state may choose to ignore the assertion of adjudicative jurisdiction by refusing to participate in a proceeding and still enjoy protection from the enforcement of a judgment against its property. However, a state cannot simply ignore the assertion of judicial control over state property which interferes with its present use.

Thus the principle of state immunity requires a two-pronged approach. First, it requires a state immunity exception for a court to decide the merits of a claim against a foreign state. Second, it requires a separate

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190. *1986 Int'l L. Comm'n, supra* note 21, at 38.
191. *Id.*
192. *Id.*
193. *Id.* at 38.

exception for the exercise of judicial control over the property of a foreign state at any stage of the proceeding. There may be situations in which a foreign state is not entitled to invoke immunity, a judgment is entered against that state, and yet the judgment is not enforceable because the foreign state property within the forum is still entitled to immunity.

A. *Article 21: State Immunity From Measures of Constraint*

Under article 21, a state is immune from measures of constraint on the use of property owned, possessed or controlled by the state [or in which it has a legally protected interest], unless the property is specifically in use, or intended for use, for commercial [non-governmental] purposes and is related to the claim or the state entity against which the proceeding is instituted.[194] Article 21 also provides an exception for property which "has been allocated or earmarked by the state for the satisfaction of the claim which is the object of that proceeding."[195] As discussed in the commentary, this article is designed to accommodate the various measures of constraint which are available in different legal systems, including attachment, arrest and execution.[196]

The immunity from measures of constraint on the use of state property is extended to property which is owned, possessed or controlled by a state, "[or in which it has a legally protected interest]."[197] The controversial phrase which appears in brackets is explained in the commentary as follows:

> The interest of the State may be so marginal as to be unaffected by any measure of constraint, or by nature the interest of the State, whether an equity of redemption or reversionary interest, may remain intact irrespective of the measure of constraint placed upon the use of the property. Thus, an easement or servitude in favour of a State could continue to subsist and remain exercisable by the State, despite transfer of ownership or a change of hands in the possession or control of the property. Some members thought that there was room for maintaining this phrase while others thought that to do so would unduly widen the scope of State immunity from execution. The Commission awaits reactions from governments on this point to which it will return on second reading. [198]

The restrictive theory of state immunity provides a limited, functional immunity for property which is owned, possessed or controlled by a state as a sovereign entity. The purpose of the immunity is to prevent the exercise of judicial control over the property of a foreign state which would interfere with its governmental functions. Sir Ian Sinclair discussed the functional nature of the immunity accorded to state property

194. *Id.* at 20.
195. *Id.* at 21.
196. *Id.* at 37, 39.
197. *Id.* at 20.
198. *Id.* at 39.

in his lecture at the Hague Academy of International Law:

> It will be seen that in recent years, there has been a marked trend in the direction of limiting or qualifying the rule of absolute immunity from execution, particularly in those jurisdictions which apply the restrictive doctrine of jurisdictional immunity. Nonetheless, the predominant tendency in comparative case-law is to acknowledge that there is a clear distinction between jurisdictional immunity and immunity from execution, so that it does not follow automatically from the fact that a court may be entitled to exercise jurisdiction in respect of the non-sovereign activities of a foreign State that it or any other court can authorise measures of execution against any property of the foreign State situate in the territory of the State of the forum. One has to look at the nature of the property against which measures of execution are sought to be levied. If that property is devoted to the sovereign or public purposes of the foreign State, execution cannot be levied, notwithstanding that the original claim may have been based on the *jure gestionis* activities of the State.[199]

Measures of constraint imposed by the forum state on property other than that which is owned, possessed or controlled by a foreign state would not interfere with its ability to perform governmental functions. The immunity is intended to provide protection for property which is actually being used in connection with a governmental activity. For purposes of state immunity, this would include property in which the state has a direct and present interest, such as ownership, possession or control. Property in which the state has an indirect, conditional or future interest is not property that is currently used or required for governmental functions.

The two exceptions to the immunity of state property contained in article 21 are discussed in the commentary:

> The principle of immunity is subject to two conditions which, if either is met, would result in non-immunity: (a) property specifically in use or intended for use by the State for commercial [non-governmental] purposes, or (b) property allocated or earmarked by the State for the satisfaction of a claim. In subparagraph (a), the property must have a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed. [200]

The earmarked property exception is explained in the commentary:

> In subparagraph (b) the property can be subject to measures of constraint only if it has been allocated or earmarked for the satisfaction of the claim or debt which is the object of the proceeding. This should have the effect of preventing extraneous or unprotected claimants from frustrating the intention of the State to satisfy specific claims or to make payment for an admitted liability. Understandably the question of whether a particular property has or has not been allocated for

199. *See* Sinclair, *supra* note 7, at 242.
200. *1986 Int'l L. Comm'n*, *supra* note 21, at 40.

> satisfaction of a claim may remain in some situations ambiguous and should be resolved by the court.[201]

This provision may interfere with domestic law and public policy to the extent that the forum provides special protection or preferences for certain creditors or claimants. It may also be unfair to allow a state to earmark property for a particular claimant or creditor to the detriment of other similarly injured claimants or creditors who had entered into transactions with the state without notice of the earmarked property. Cases involving a secured creditor or an express waiver of immunity with regard to specific property in a particular case would fall within the state immunity exception for consent. That is the subject of ILC article 22. There is no counterpart to the earmarked property exception in the European Convention or in the state immunity statutes.

The commercial property exception is consistent with the functional approach of the restrictive theory, with the exception of the subjective "purpose" element for determining the commercial character of the property and the double criterion in the phrase "commercial [non-governmental] purposes." The serious problems raised by the subjective test and the double criterion are discussed in connection with the definition of a commercial contract in article 3 and the commercial shipping exception in article 18 respectively.[202] The concerns raised in connection with the immunity from adjudicative jurisdiction also apply to the immunity extended to state property.

The commentary discusses the time at which the character of state property should be determined for purposes of immunity:

> The use of the word "is" in subparagraph (a) indicates that the property should be specifically in use or intended for use by the State for commercial [non-governmental] purposes at the time the proceeding for attachment or execution is instituted. To fix an early time could unduly fetter the State's freedom to dispose of its property. It is the understanding of the Commission that States would not encourage or permit abuses of this provision, for example, by changing the status of their property in order to void attachment or execution.[203]

Determining the character of the property at the time the proceeding is instituted would allow a state to transfer the commercial property which is the subject of the dispute to non-commercial use or from one state agency to another to avoid jurisdiction over the property. Once the property is protected from jurisdiction, the private party would be left with an unenforceable judgment because the commercial property exception in article 21 requires a nexus between the property and either the claim or the state agency or instrumentality involved in the lawsuit. As a matter of public policy, a court should not give effect to a foreign state's

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201. *Id.*
202. *Id.* at 19, 20 & 70.
203. *Id.* at 40.

attempt to circumvent the administration of justice by shielding commercial property. The ILC draft does not address this problem.

The underlying principles which justify state immunity do not provide any reason for limiting the enforcement of a judgment to property which is related to the claim. Indeed certain claims, such as those involving personal injury or property damage, may arise independently of any particular property or in connection with property which is destroyed as a result of the state conduct responsible for the injury. The issue under the functional approach of restrictive immunity is whether or not the property is being used in connection with a governmental activity. A plaintiff who has obtained a judgment against a foreign state should be able to enforce it against any state property which is subject to jurisdiction and which is not entitled to immunity.

The European Convention contains an optional provision which denies immunity from execution to property used exclusively in connection with commercial activity. The state immunity statutes of Canada, Pakistan, Singapore, South Africa and the United Kingdom deny immunity for property in use, or intended for use, for commercial purposes at the time of enforcement. Australian law allows a judgment to be enforced against property substantially in use for commercial purposes. The European Convention and most state immunity statutes provide that the property of a state entity which exercises sovereign authority is entitled to immunity only if the property of a state would be entitled to immunity under the circumstances. Canadian law denies immunity to property of a state agency which is not entitled to immunity in the initial proceeding on the merits. Property of separate state entities is not included in the immunity recognized in the Australian statute.[204]

The FSIA recognizes a general principle of immunity for state property from attachment, arrest and execution in section 1609, and it recognizes various exceptions in sections 1610 and 1611.[205] State property may be subject to prejudgment attachment if two conditions are met: 1) the state has expressly waived its immunity for this type of attachment; and 2) the attachment is to secure satisfaction of a judgment and not to obtain jurisdiction. As explained in the FSIA commentary:

> Attachments for jurisdictional purposes have been criticized as involving United States courts in litigation not involving any significant U.S. interest or jurisdictional contacts, apart from the fortuitous presence of property in the jurisdiction. Such cases frequently require the application of foreign law to events which occur entirely abroad. Such attachments can also give rise to serious friction in the United States foreign relations. In some cases, plaintiffs obtain numerous attachments over a variety of foreign government assets found in various parts of the United States. This shotgun approach has caused signifi-

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204. 196 AUSTL. ACTS P. 1985; III Can. Stat. 45 (1980-83); *Jurisdiction Immunities*, *supra* note 19; *European Convention*, *supra* note 20, at 26-27.

205. *See* FSIA, 28 U.S.C. § 1605.

> cant irritation to many foreign governments. At the same time, one of the fundamental purposes of this bill is to provide a long-arm statute that makes attachment for jurisdictional purposes unnecessary in cases where there is a nexus between the claim and the United States.[206]

The commercial property exception in section 1610(a)(2) provides that state property used for a commercial activity in the United States is not immune from proceedings to obtain satisfaction of a judgment if "the property is or was used for the commercial activity upon which the claim is based."[207] In contrast with the ILC provision, the FSIA exception is phrased in terms of property which "is or was used" for a commercial activity. The FSIA commentary discusses the difficulties which may arise in determining the character and ownership of state property:

> The language "is or was used" in paragraph (2) contemplates a situation where property may be transferred from the commercial activity which is the subject of the suit in an effort to avoid the process of the court. This language, however, does not bear on the question of whether particular property is to be deemed property of the entity against which the judgment was obtained. The courts will have to determine whether property in the custody of an agency or instrumentality is property of the agency or instrumentality, whether property held by one agency should be deemed to be property of another, whether property held by an agency is property of the foreign state.[208]

As discussed with regard to ILC article 21, the nexus required between the claim and the property is inconsistent with the functional approach of the restrictive theory and the two distinct aspects of state immunity concerning jurisdiction and enforcement. The ABA has recommended that the FSIA be amended to "provide for execution of judgment against any property of a foreign state which is used or intended to be used for a commercial activity in the United States."[209]

The State Department opposes removing the nexus requirement in section 1610(a) and argues that the requirement is not a significant problem in cases involving commercial activity for the following reasons:

> Most states value their commercial reputation and honor commercial debt; much state commercial activity is carried out by state agencies and instrumentalities the property of which is all, under current law, subject to execution to satisfy any judgment against the entity; these basic matters of dispute settlement and security are regulated by contract in commercial or financial dealings; and arbitration is increasingly used to settle disputes between private business and foreign sovereigns.[210]

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206. *See 1986 Int'l L. Comm'n, supra* note 21, at 27.
207. *See* FSIA, 28 U.S.C. § 1610 (a)(2).
208. *1986 Int'l L. Comm'n, supra* note 21, at 30.
209. *See Jurisdictional Immunities, supra* note 19.
210. *See* Testimony, *supra* note 176.

The executive branch is concerned about the use of unrelated commercial property to satisfy judgments in politically sensitive tort cases, such as *The Letelier*[211] case involving the assassination of a former Chilean diplomat.[212] A court may refrain from exercising jurisdiction in a case involving particularly sensitive foreign relations issues which are properly left to the executive branch under the political question doctrine.[213] Assassination is not the type of activity which is likely to be the subject of a claim of state immunity during the adjudicative phase of a proceeding. A state would not want to argue that assassination is a legitimate governmental function. In the enforcement phase of a proceeding, the question of the immunity of state property is determined by the governmental or non-governmental use of the property and not by the substance of the claim.

Under section 1610(b), the property of a foreign state agency or instrumentality engaged in commercial activity in the United States is not entitled to immunity if the entity has explicitly or implicitly waived this immunity, or if the claim falls within the state immunity exceptions in section 1605 for commercial activity, unlawful expropriation, injury to person or property, or admiralty claims, regardless of whether the property is related to the claim. As explained in the commentary, this exception would apply to governmental or non-governmental property:

> Section 1610(b) provides for execution against the property of agencies or instrumentalities of a foreign state in circumstances additional to those provided in §1610(a). However, the agency or instrumentality must be engaged in commercial activity in the United States. If so, the plaintiff may obtain an attachment in aid of execution or execution against any property, commercial or noncommercial, of the agency or instrumentality, but only in the circumstances set forth in paragraphs (1) and (2).[214]

There are really two separate issues which arise in cases involving state entities. The first is whether the entity authorized to perform governmental activities is entitled to invoke immunity. A purely commercial enterprise cannot claim immunity with regard to any of its property because it would not be authorized to perform governmental functions. The second, assuming the entity is authorized to perform governmental functions, is whether the property in question is used in connection with those functions. A state entity which is authorized to engage in governmental activities would be entitled to claim immunity for property used in connection with those activities under the restrictive theory of immunity. Exercising jurisdiction over property used for governmental functions by a state entity in the absence of consent, as suggested in the FSIA commentary, would be inconsistent with the principle of state immunity regard-

211. de Letelier v. Republic of Chile, 502 F.Supp. 259 (D.D.C. 1980).
212. *Id.*
213. Baker v. Carr, 369 U.S. 186 (1962).
214. *See 1986 Int'l L.Comm'n, supra* note 21, at 32.

less of the nature of the underlying claim. However, state immunity would not extend to unlawfully expropriated property because the state would not have a valid claim of ownership, possession, or use.

In general, the separate immunity for state property and the commercial property exception contained in the ILC draft are consistent with restrictive immunity and state practice. However, article 21 should be amended to exclude: 1) the nexus requirement, "[a legally protected interest]"; and 2) "commercial [non-governmental] purposes."

B. *Article 22: Consent to Measures of Constraint*

Article 22 recognizes an exception to the immunity for state property if the state has expressly consented to such measures by international agreement, written contract, or by a declaration before the court in a particular case.[215] As the commentary explains, the "express consent can be given generally with regard to measures of constraint or property, or given for particular measures or particular property or, indeed given for both measures and property."[216]

A state which consents to jurisdiction to decide the merits of a claim has not consented to jurisdiction over state property for attachment or execution. A separate express consent is required for measures of constraint against state property. As discussed in the ILC commentary, consent given in an international agreement or a written contract can be withdrawn only in accordance with its terms, usually before a proceeding is instituted.

The European Convention and the state immunity statutes recognize an exception to the immunity of state property based on express written consent. The European Convention requires express consent for a particular case. The laws of Australia, Canada, and the United States refer to an express waiver which can only be withdrawn in accordance with its terms. The Canadian and U.S. statutes recognize an express or implied waiver.[217] The FSIA commentary provides examples of an express or implied waiver: "A foreign state may have waived its immunity from execution inter alia by the provisions of a treaty, a contract, an official statement, or certain steps taken by the foreign state in the proceedings relating to judgment or to execution."[218]

ILC article 22 requires a separate and express consent to jurisdiction over state property. This requirement is consistent with the distinct nature of the immunity accorded to state property and the importance of this immunity which is generally relevant for purposes of the second phase of a proceeding concerning the enforcement of a judgment. The

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215. *Id.* at 21.

216. *Id.* at 41.

217. *See* 196 AUSTL. ACTS P. 1985; III Can. Stat. 45 (1980-83); *Jurisdictional Immunities, supra* note 19.

218. *See 1986 Int'l L. Comm'n, supra* note 21, at 30.

exception contained in article 22, excluding the reference to other property in which the state has a legally protected interest, is consistent with the restrictive theory of state immunity and existing state practice.

C. *Article 23: Specific Categories of Property*

Article 23 excludes from attachment or execution the following types of property: property including a bank account which is used or intended for use in connection with a diplomatic or consular mission; military property used or intended for use for military purposes; property of a central bank or other monetary authority; and property which is part of a state's cultural heritage or archives or forms part of a scientific or historical exhibition. The property listed above is subject to measures of constraint only if the state has specifically consented or has earmarked the property to satisfy a claim.[219] The state property accorded immunity in ILC article 23 is usually associated with governmental functions. This provision is consistent with the restrictive theory and existing state practice. The European Convention provides broad immunity for state property subject only to express written consent in a particular case. Most of the state immunity statutes expressly preserve the immunity of diplomatic, military or central bank property. The other types of property not expressly mentioned in the statutes, such as state archives or cultural heritage property, would enjoy the immunity extended to state property and would not be subject to the commercial property or express consent exceptions.[220]

IX. MISCELLANEOUS PROVISIONS

A. *Article 24: Service of Process*

Under article 24, a proceeding against a foreign state can only be instituted in following ways: 1) by service of process in accordance with a special arrangement between the claimant and the state; 2) in accordance with an applicable international convention which is binding on the forum state and the foreign state; 3) by transmission through diplomatic channels to the Minister of Foreign Affairs; or, 4) by registered mail or by other means permitted by the laws of both the forum state and the foreign state. Service of process through diplomatic channels or registered mail is effective when received. The documents must be accompanied by a translation into the official language of the foreign state, if necessary. A state which enters an appearance on the merits can not assert inadequate service of process.[221]

The European Convention recognizes diplomatic channels as the acceptable method for transmitting documents. The state immunity stat-

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219. *Id.* at 22.

220. *See* 196 AUSTL. ACTS P. 1985; III Can. Stat. 45; *Jurisdictional Immunities, supra* note 19.

221. *1986 Int'l L. Comm'n, supra* note 21, at 22.

utes provide for service of process through diplomatic channels or in any manner in which the state has agreed; for example, in an international agreement between the states concerned or an agreement with the claimant. The European Convention and the national laws provide that a state which appears in a proceeding waives any objection to the method of service. The FSIA provides for service by registered mail.[222]

The ILC draft provides a hierarchy of acceptable methods for transmitting documents to a foreign state. Article 24 gives preference to the methods recognized in the European Convention and in the national laws. As alternatives, it also authorizes service by registered mail or by other means permitted by the laws of the states concerned.

B. *Article 25: Default Judgment*

A default judgment can not be rendered against a foreign state unless the claimant has complied with the requirements for service of process in article 23, and not less than three months have passed since the service was affected. A copy of the judgment, and a translation if necessary, must be sent to the state by the means provided for service. The foreign state must be given at least three months from the time notice is received to have the judgment set aside.[223]

The European Convention and the state immunity laws contain similar provisions concerning default judgments. The claimant must properly transmit notice of the proceeding and the judgment. The foreign state must have sufficient time to enter an appearance on the merits and then to have the judgment set aside. The Australian law requires a court to determine that a foreign state is not entitled to immunity before granting a motion for a default judgment. The U.S. statute requires a claimant to establish "his claim or right to relief by evidence satisfactory to the court" before a default judgment is entered against a foreign state.[224] As explained in the FSIA commentary, this is the same requirement for default judgments against the United States Government.[225] The commentary also provides that: "In determining whether the claimant has established his claim or right to relief, it is expected that courts will take into account the extent to which the plaintiff's case depends on appropriate discovery against the foreign state."[226]

It is important that a court be satisfied as to the basis for the claim against a foreign state before entering a default judgment to avoid frivolous or unfounded judgments. However, the burden of the party to provide some evidence of the claim should not extend to materials within the

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222. *See* 196 AUSTL. ACTS P. 1985; III Can. Stat. 45 (1980-83); *Jurisdictional Immunities*, *supra* note 19.

223. *See 1986 Int'l L. Comm'n*, *supra* note 21, at 23.

224. 196 AUSTL. ACTS. P. 1985; III Can. Stat. 45 (1980-83); *Jurisdictional Immunities*, *supra* note 19.

225. *1986 Int'l L. Comm'n*, *supra* note 21, at 25.

226. *Id.* at 26.

exclusive control of the foreign state. This issue is not addressed in ILC article 25 or the commentary.

C. *Article 26: Immunity from Measures of Coercion*

The ILC draft recognizes the immunity of a state from measures requiring it either to perform or to refrain from performing a specific act lest it incur a financial penalty. The immunity from measures of coercion in connection with a judicial proceeding refers to preliminary measures rather than the final judgment.[227]

The European Convention prohibits any measure of coercion against a foreign state. The laws of Canada, Pakistan, Singapore, South Africa, and the United Kingdom prohibit any relief against a foreign state in the form of an injunction or in the form of an order for specific performance, unless the state has expressly consented. In contrast, Australian law provides for any order for interim or final relief not inconsistent with a foreign state's immunity under the statute, except for an order requiring a foreign state to employ or to reinstate a person in employment. However, the Australian statute does not allow a penalty by way of fine or imprisonment for failure to comply with an order made against a foreign state.[228]

There is no counterpart to this provision in the FSIA. The general statement of immunity from jurisdiction contained in section 1604 would include the exercise of jurisdiction by a court at any stage in the proceeding, including a pretrial restraining order or an injunction. However, the FSIA incorporates the restrictive theory of immunity and would presumably limit immunity from pretrial relief to proceedings relating to governmental activities. For example, there is no reason to deny injunctive relief against a foreign state in a proceeding relating to commercial activity. Nonetheless, foreign relations considerations would encourage restraint at this initial stage in a proceeding.

The complete prohibition against preliminary coercive measures contained in ILC article 26 is consistent with the European Convention and most of the state immunity statutes. However, it is clearly inconsistent with the Australian law, probably inconsistent with the FSIA, and exceeds the immunity required by the functional approach of the restrictive theory.

D. *Article 27: Procedural Immunities*

The ILC draft recognizes certain procedural immunities for a foreign state. Under article 27, a state cannot be required to produce documents or disclose information with the failure to do so resulting in a fine or

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227. *Id.* at 23.

228. 196 AUSTL. ACTS P. 1985; III Can. Stat. 45 (1980-83); *Jurisdictional Immunities*, *supra* note 19; *European Convention*, *supra* note 20.

penalty. Also, a state cannot be required to provide a bond or deposit to guarantee the payment of the costs involved in the proceeding.[229] Some members of the Commission expressed reservations about extending this second aspect of procedural immunity to a plaintiff state which voluntarily avails itself of the courts of the forum state.[230] Article 27 is explained in the commentary as follows:

> Sometimes States, for reasons of security or their own domestic law, may be prevented from submitting certain documents or disclosing certain information to a court of another State. Therefore, States should not be subject to penalties for protecting their national security or for complying with their domestic law. At the same time, the legitimate interests of the private litigant should not be overlooked. . . . Courts are bound by their own domestic rules of procedure. In domestic rules of procedure in many States, the refusal for any reason, to submit evidence by a litigant, would allow or even require the judge to draw certain inferences which may affect the merits of the case. Such inferences by a judge under the domestic rules of procedure of the State of the forum, when permitted are not considered a penalty. The final sentence specifies that no fine or pecuniary penalty shall be imposed.[231]

With the exception of the FSIA, the European Convention and the state immunity statutes recognize immunity from a fine or imprisonment for the foreign state's failure or refusal to disclose information or to produce documents.[232] The European Convention expressly allows a court to draw any conclusion deemed appropriate from such failure or refusal. The Australian law provides that this refusal to disclose information does not, by itself, constitute sufficient grounds to dismiss a complaint.[233]

Only the European Convention recognizes the immunity of a foreign state from the requirement of posting a bond or deposit. Normally a foreign state that voluntarily initiates a proceeding in a court is presumed to consent to the procedural requirements of the forum. These requirements may include providing some type of deposit or bond to guarantee the payment of costs associated with the proceeding.

The procedural immunities in the ILC draft are generally consistent with state practice. However, distinguishing between foreign state plaintiffs and defendants for purposes of the requirement to provide a bond or guarantee would be useful.

E. *Article 28: Non-discrimination*

The ILC articles must be applied on a non-discriminatory basis be-

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229. *1986 Int'l L. Comm'n*, *supra* note 21, at 24.

230. *Id.* at 50.

231. *Id.* at 49.

232. 196 AUSTL. ACTS P. 1985; III Can. Stat. 45 (1980-83); *Jurisdictional Immunities*, *supra* note 19; *European Convention*, *supra* note 20.

233. *1986 Int'l L. Comm'n*, *supra* note 21, at 24.

tween states party to the convention. Article 28 recognizes two exceptions based upon the principle of reciprocity or on a special agreement between the states concerned,[234] as explained in the commentary:

> After prolonged discussion, the Commission agreed to adopt article 28 based on the analogy to article 47 of the Vienna Convention on Diplomatic Relations of 1961 and other Corresponding Conventions. A certain degree of flexibility was considered desirable for those marginal instances where a restrictive application of the present articles might be applied by the State of the forum in respect of another State, because that other State has adopted the same restrictive application of the articles to the State of the forum. This reciprocal treatment resulting in restrictive application of the articles is not to be taken as a discriminatory measure against the other State adopting the same restrictive application.[235]

This reciprocity provision is consistent with the European Convention and with the state immunity laws of the various countries, except the United States, which restricts immunity based upon reciprocity.[236] The United States has adopted a policy of "reverse reciprocity" whereby it limits its assertions of immunity in foreign courts in accordance with the rules applied to foreign states in United States courts. Nondiscrimination and special agreements are not addressed in the convention or in the statutes.

X. CONCLUSION

While there is disagreement about particular aspects of the law of state immunity there appears to be a general agreement on the importance of this area of the law and on the value of adopting a convention on jurisdictional immunities. Members States have expressed support in the Sixth Committee of the General Assembly for the Commission's attempt to codify this area of law. Mr. Al-Baharna of Bahrain stated that:

> [The] question of jurisdictional immunities of States and their property had gained practical significance with the increase in the commercial activities of modern States, necessitating codification of the subject. No other topic of international law had such profound implications for national law and procedures.[237]

Prince Ajibola of Nigeria expressed the view that:

> [The] complexity of the topic "Jurisdictional immunities of States and their property" could not be underestimated in the light of increasing economic development and interdependence, and varying

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234. *Id.* at 51.

235. 196 AUSTL. ACTS P. 1985; III Can. Stat. 45; *Jurisdictional Immunities*, *supra* note 19; *European Convention*, *supra* note 20.

236. McDowell, Digest of United States Practice in International Law 1976, at 323 (State Department 1977).

237. 41 U.N. GAOR C.6 (38th mtg.) ¶ 62, U.N. Doc. A/C.6/41/SR.38 (1986).

> State practice among industrialized, socialist and developing countries such as Nigeria, which engaged in State trading as a means of economic survival. . . . The fact that a national court could decide on the scope and application of the existing law on State immunity caused friction in international relations. His delegation believed that the work of the Commission on the topic of jurisdictional immunities was of paramount importance, particularly to developing countries.[238]

Mr. Calero Rodrigues of Brazil indicated that:

> The development of activities of States in fields outside the usual framework had suggested that some adjustments in the application of the traditional concept of absolute immunity would be appropriate. On the other hand, some national legislations and court decisions had gone too far in failing to recognize immunity and had seemed to dismiss lightly the basic principle of sovereign equality of States. In the chaotic situation being created, the international community needed a compendium of basic rules in order to re-establish some order in a domain of the utmost importance. That could be done only by striking a careful balance between long-standing practices and emerging needs.[239]

There are inherent difficulties in the codification of the law of state immunity. International practice in this area in terms of treaties and decisions of international tribunals is relatively scarce. The principle of state immunity has developed primarily in the national courts of states which have addressed cases in which private parties have brought claims against foreign states. Thus, the law of state immunity is closely related to the domestic rules of procedure in the various countries. States have acknowleged these difficulties in their comments before the Sixth Committee of the General Assembly.

Mr. Guillaume of France expressed the view that:

> The topic was a difficult one for two reasons: first, international customary law in that area was fairly limited, and existing conventions had not been a resounding success; second, national law was diverse and, as in his country, often the outcome of jurisprudence in courts where views were susceptible to change.[240]

Mr. Al Khasawneh of Jordan stated that:

> The difficulties inherent in attempting to translate varying and sometimes divergent State practice into a single uniform international instrument could not be overstated. . . . That difficulty was compounded by the fact that in the absence of decisions by international tribunals and given the scarcity of diplomatic practice, such varying practices had, of necessity, to provide the main part of the source material for the codification and progressive development of the law of State

238. 41 U.N. GAOR C.6 (37th mtg.) ¶ 73, U.N. Doc. A/C.6/41/SR.37 (1986).
239. 41 U.N. GAOR C.6 (28th mtg.) ¶ 1, U.N. Doc. A/C.6/41/SR.28 (1986).
240. 41 U.N. GAOR C.6 (41st mtg.) ¶ 29, U.N. Doc. A/C.6/41/SR.41 (1986).

immunity.[241]

Another factor which complicates the codification of this area of law is the close relationship between the concept of the state and the state activities which are entitled to immunity. There are fundamental differences as to the proper role of the state in the western democracies, the socialist states, and developing countries.

Mr. Guevorguian of the USSR expressed the view that:

> A State's economic activities, including those carried out through commercial contracts, were not less important to the State than other forms of activity. The State engaged in economic activities, not as a private individual, but as a sovereign entity. A State sector of the economy existed in all countries. In socialist countries, it was the predominant sector; in many newly independent States, it was developing more and more strongly. His delegation therefore objected to the attempts made in the draft to single out and set aside so-called commercial activities on the pretext that they were not State activities proper.[242]

Mr. Al-Qaysi of Iraq stated that:

> Conceptual differences centered principally on safeguards that would duly accommodate the concerns and needs of the developing countries and give reasonable protection to their sovereign right to pursue policies commensurate with their economic and social development objectives. In international relations, every State was both a grantor and beneficiary of jurisdictional immunities; the question that arose, then, related to the balance to be struck in a given set of circumstances involving a conflict of sovereignties. The acceptability and durability of that balance depended on its responsiveness to the actual needs of the vast majority of the members of the international community.[243]

The future of the draft convention on state immunity depends upon the Commission's ability to accommodate the divergent views of states and to resolve differences over particular aspects of state immunity in light of the discussion in the Sixth Committee and in the formal written comments submitted by Member States.[244] The preliminary report of the newly appointed special rapporteur, Mr. Motoo Ogiso of Japan, contains various proposals for resolving these differences when the Commission begins its second and final reading of the draft articles.[245]

While the new Special Rapporteur's preliminary report has yet to be considered by the Commission, it is worth noting his proposals for impor-

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241. 41 U.N. GAOR C.6 (33rd mtg.) ¶ 52, U.N. Doc. A/C.6/41/SR.33 (1986).

242. 41 U.N. GAOR C.6 (31st mtg.) ¶ 32, U.N. Doc. A/C.6/41/SR.31 (1986).

243. 41 U.N. GAOR C.6 (34th mtg.) ¶ 53, U.N. Doc. A/C.6/41Sr.34 (1986).

244. The written comments submitted by 28 Member States and Switzerland are contained in U.N. Doc. A/CN.4/410 and Adds 1-5, to be published in Documents of the 40th Session [1988] 2 Y.B. INT'L L. COMM'N (Part 1).

245. *Preliminary Report*, *supra* note 24.

tant aspects of the draft articles: 1) the relationship between the proposed convention and general rules of international law; 2) the relationship between the principle of state immunity and the cases in which a state is not entitled to claim immunity; 3) limitations on the immunity of state enterprises; 4) the basis for determining the commercial character of a contract for the purpose of denying immunity; and 5) the controversial concept of "commercial non-governmental" state activity.[246]

With regard to the relationship between a convention and the general principles of international law, the Special Rapporteur recognizes that states are clearly divided up on whether to retain the bracketed reference in article 6 to the relevant rules of international law. Many Member States have commented on this issue in the Sixth Committee.

Mr. McKenzie of Trinidad and Tobago expressed the view that:

> [The] reference by the International Law Commission to a "grey zone" attested to a number of legal theories in existence relating to the exact nature and basis of State immunity. In the view of his delegation, the final text of draft article 6 should contain a reference to "the relevant rules of general international law," because it was doubtful that universal agreement was possible on the exact dividing line between immunity and non-immunity.[247]

Sir John Freeland of the United Kingdom stated that:

> Since it considered that the draft articles should not seek to put an end to future development of the law in that area, his delegation favoured the retention of the words in square brackets at the end of article 6.[248]

Prince Ajibola of Nigeria stated that:

> The phrase in square brackets should be an integral part of that article. Otherwise, the rule of immunity would not be subject to the future development of international law. General international law included customary rules of international law based on the practice of States. The future development of State practice should be left unfrozen and undeterred by the formulation of the draft articles.[249]

In contrast, Mr. Abdel Khalik of Egypt stated that:

> The main purpose of drafting a convention to codify the jurisdictional immunities of States and their property was to unify the applicable international rules. If different interpretations of what constituted the relevant general international law were permitted, the applicability of the draft articles as a whole could be jeopardized.[250]

Mr. Mahiou of Algeria expressed the view that:

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246. *Id.*
247. 41 U.N. GAOR C.6 (44th mtg.) ¶ 60, U.N. Doc. A/C.6/41/SR.44 (1986).
248. 41 U.N. GAOR C.6 (39th mtg.) ¶ 7, U.N. Doc. A/C.6/41/SR.39 (1986).
249. 41 U.N. GAOR C.6 (37th mtg.) ¶ 74, U.N. Doc. A/C.6/41/SR.37 (1986).
250. 41 U.N. GAOR C.6 (37th mtg.) ¶ 49, U.N. Doc. A/C.6/41/SR.37 (1986).

> Every treaty provision was subject to the test of time, and its interpretation depended on the practice of the international community. His delegation believed that the interpretation should be neither too rigid nor too flexible. It hoped that the Commission would delete the phrase in square brackets.[251]

Mr Hayes of Ireland stated that:

> The draft articles on jurisdictional immunities of States represented a laudable effort to codify the law in a particularly sensitive and uncertain area. The retention of that phrase would constitute an abandonment of that objective and would cast doubt on the usefulness of adopting a set of draft articles with such a reduced scope. If the inclusion of the phrase should be necessary to ensure the adoption of the articles, it would mean that the subject was not yet amenable to codification.[252]

Mr. Lacleta of Spain stated that:

> Once the rules laid down in the draft acquired the status of codified rules, they would be applicable in their own right and would therefore not require any supplementary reference to other relevant rules of general international law, which would of course continue to apply to issues not covered by the draft articles.[253]

In summarizing the formal written comments on the draft, the Special Rapporteur concluded that the states which support retaining this language seek "to maintain sufficient flexibility and to accommodate any further developments in State practice and the corresponding adoption of general international law."[254] States opposing the language adhere to the absolute principle of state immunity and argue that, "to seek exceptions from immunity outside the framework of the draft articles is illogical and . . . would only serve to encourage unilateral restrictions of the immunity of a State and leave room for different interpretations."[255] The Special Rapporteur has proposed deleting the language which, in his view, "could perpetuate controversy, not only on matters in the grey zone but also on matters that belonged to limitations or exceptions under the future Conventions."[256]

The Special Rapporteur has sidestepped the controversial question of the relationship between the principle of state immunity and the cases in which a state is not entitled to claim immunity. This controversy is reflected in the title to Part III: "[Limitations on] [Exceptions to] State Immunity." He recognizes that states are split on this issue according to

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251. 41 U.N. GAOR C.6 (37th mtg.) ¶ 66, U.N. Doc. A/C.6/41/SR.37 (1986).

252. 41 U.N. GAOR C.6 (32nd mtg.) ¶ 4, U.N. Doc. A/C.6/41/SR.32 (1986).

253. 41 U.N. GAOR C.6 (36th mtg.) ¶ 31, U.N. Doc. A/C.6/41/SR.36 (1986).

254. Report of the International Law Commission to the General Assembly, 43 U.N. GAOR Supp. (No. 10) at 259, U.N. Doc. A/43/10 (1988), to be reprinted in [1988] 2 Y.B. INT'L L. COMM'N (Part 2). (hereinafter 1988 Int'l L. Comm'n)

255. *Supra* note 24, at 46.

256. *1988 Int'l L. Comm'n, supra* note 254, at 260.

their support for the absolute or for the restrictive theory of immunity. The serious nature of this division is apparent in the statements of Member States in The General Assembly.

Mr. Badr of Qatar expressed the view that:

> The Commission's general approach to the subject of the jurisdictional immunities of States and their property, which assumed the existence of a rule of public international law requiring all States to grant immunity from the jurisdiction of their courts to all other States and which therefore limited the Commission's work to the identification of agreed exceptions to that rule, was a source of difficulties because it tended to reduce to a minimum the number of such exceptions. Both the doctrine and the case-law of many States attested to the fact that the existence of a general rule of immunity was far from being recognized by the majority. One must not be misled by such maxims as *par in parem non habet imperium*, which furthermore dated only from the fourteenth century. If the myth of a general rule of immunity were abandoned, it would be easier to reach agreement on a truly restrictive approach to immunity such as that reflected in multilateral conventions and in a great deal of recent national legislation.[257]

In contrast, Mr. Makarevitch of the USSR stated that:

> The draft articles on jurisdictional immunities of States and their property should be based on the concept of full immunity not limited or functional immunity. Such an approach was dictated by the principal of sovereign equality of States, a fundamental principle of international law. The consistent use of the concept of full immunity in the drafting of all the articles on the topic was an important prerequisite if the future convention was to have meaning and be generally acceptable to States with different socio-economic systems. His delegation strongly objected to the tendency to use the concept of "limited" State immunity in the text of specific draft articles.[258]

The Special Rapporteur has suggested that this question will be more easily resolved "after all the issues pertaining to the rest of the draft have been settled, without prejudice to the doctrinal position of each Government."[259]

The Special Rapporteur has recommended two new provisions concerning state enterprises. The first provision would be added to the definition of a state for the purpose of jurisdictional immunities contained in draft article 3. The proposed language would exclude state enterprises from the definition:

> [a] State enterprise which is distinct from the State, has a right of possessing and disposing of a segregated State property and is capable of suing or being sued, shall not be included in the agencies or instru-

257. 41 U.N. GAOR 1C.6 (27th mtg.) ¶ 99, U.N. Doc. A/C.6/41/SR.27 (1986).
258. 41 U.N. GAOR C.6 (29th mtg.) ¶ 2, U.N. Doc. A/C.6/41/SR.29 (1986).
259. *Preliminary Report*, *supra* note 24, at 65.

> mentalities of that State, even if the State enterprise has been entrusted with public functions.[260]

The second recommendation for state enterprises relates to draft article 11 concerning commercial contracts. The proposed language would limit the ability of a state to invoke immunity for claims relating to commercial contracts entered into by state enterprises.[261]

The nature and role of state enterprises is the subject of controversy reflecting disagreement over the public or private character of the economic activities of a state. The recommended provisions would seem to add more confusion than clarity to this controversial issue. Under draft article 3, as provisionally adopted, a state entity would be entitled to claim immunity only to the extent that it is entitled to perform acts in the exercise of the sovereign authority of the state. The exercise of sovereign authority is the essential criterion for the application of state immunity, not the ability to possess or to dispose of segregated State property. Similarly, the absence of immunity for a claim relating to a commercial contract is based on the commercial nature of the transaction, as indicated in the existing draft article 11. It is unclear how these proposals will be received by the Commission.

The Special Rapporteur has also proposed a new approach to the question of determining the commercial character of a contract. Under his proposed amendment, the general rule would be an objective criterion based on the nature of the contract or transaction. However, states would be free to provide for the consideration of the subjective purpose of a contract in determining its character either by international agreement or by the terms of the contract.[262] This new approach would protect the interest of a private party that enters into a commercial contract with a state and, at the same time, would accommodate those states which favor consideration of the purpose of a contract.

The phrase "commercial [non-governmental]" appears in the provisions concerning the commercial shipping activities of a state and the immunity of state property contained in articles 18, 21, and 23. This controversial double criterion creates the possibility of "commercial governmental" activity. The Special Rapporteur has characterized the use of the term "non-governmental" as ambiguous and an unnecessary source of controversy. Thus he has proposed deleting the word "non-governmental" from the relevant provisions.[263]

The Commission has yet to determine the final form of the draft articles on jurisdictional immunities. There are fundamental issues which must be resolved during the Commission's second and final reading of the

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260. *1988 Int'l L. Comm'n*, *supra* note 254, at 262.

261. *Id.* at 263.

262. *Preliminary Report*, *supra* note 24, at 26; *1988 Int'l L. Comm'n*, *supra* note 254, at 262.

263. *Id.* at 98, 111, 121.

draft, either on the basis of amendments suggested by the new Special Rapporteur, or proposals which may emerge from the discussion in the Commission. Once the Commission has completed its work, it will be for the General Assembly to decide whether to pursue an international convention on the basis of the Commission's draft. While the future of the draft articles is uncertain, there can be no doubt that the ILC reports and draft articles on this subject represent a major contribution to achieving a greater understanding of the law of state immunity.