



Explanatory Report to the European Convention on State Immunity

Basel, 16.V.1972

I. The European Convention on State Immunity and its Additional Protocol, drawn up within the Council of Europe by a committee of governmental experts under the authority of the European Committee on Legal Co-operation (CCJ), were opened to signature by the member States of the Council on 16 May 1972, at Basle, on the occasion of the VIIIth Conference of European Ministers of justice.

II. The text of the explanatory reports prepared by the committee of experts and submitted to the Committee of Ministers of the Council of Europe, as amended by the CCJ, do not constitute instruments providing an authoritative interpretation of the text of the Convention and of its Additional Protocol, although they might be of such a nature as to facilitate the application of the provisions therein contained.

Introduction

1. "State immunity" is a concept of international law, which has developed out of the principle *par in parem non habet imperium*, by virtue of which one State is not subject to the jurisdiction of another State.

2. For many years State immunity has occupied the attention of eminent jurists. It is also the object of abundant case law. The development of international relations and the increasing intervention of States in spheres belonging to private law have posed the problem still more acutely by increasing the number of disputes opposing individuals and foreign States.

There are, at present, two theories, that of absolute State immunity which is the logical consequence of the principle stated above and that of relative State immunity which is tending to predominate on account of the requirement of modern conditions. According to this latter theory, the State enjoys immunity for acts *iure imperii* but not for acts *iure gestionis*, that is to say when it acts in the same way as a private person in relations governed by private law. This divergence of opinion causes difficulties in international relations. States whose courts and administrative authorities apply the theory of absolute State immunity are led to call for the same treatment abroad.

3. There have been several attempts on the international level to solve these difficulties.

The first was the draft International Regulations on the jurisdiction of Courts in proceedings against sovereign States or Heads of foreign States, which were the subject of a resolution of the plenary Assembly of the Institute of International Law on 11 September 1891. On 30 April 1954, the Institute adopted new resolutions on the immunity of foreign States from jurisdiction and execution (*Annuaire de l'Institut de Droit International*, Vol. 45 (11) (1954), pp. 293-294).

On 10 April 1926 the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels was opened for signature in Brussels. This Convention is in force between a number of States and is, so far, the only attempt at international unification in the field of State immunity which has proved successful in practice. On 24 May 1934 a Protocol was added to the Convention.

Also worthy of mention are : a comprehensive draft prepared by Harvard University in 1932 (Harvard Research in International Law: "Competence of Courts in regard to Foreign States", *American Journal of International Law* 26 (1932), Suppl. pp. 453 et seq.) ; studies by the International Law Association in 1952 (International Law Association, Report on the 45th Conference 1952, pp. VI et seq.) and a resolution adopted by the International Bar Association at its meeting in Salzburg in July 1960.

The League of Nations, and, more recently, the United Nations International Law Commission, have also included the problem of State immunity in their work programme but without reaching positive conclusions.

In addition, the Afro-Asian Legal Consultative Committee has recently considered the question of State immunity.

4. By Resolution (63) 29, of 13 December 1963, the Committee of Ministers of the Council of Europe included the subject of State immunity in the Council of Europe Intergovernmental Work Programme.

5. At the third Conference of European Ministers of Justice in Dublin in May 1964, the Austrian delegation submitted a detailed report on the problem connected with the concept of State immunity and in particular on the advisability and prospects of Council of Europe action in this field. This report was largely based on the article "Zur Frage der Staatenimmunität" ("Observations on the question of State immunity") by K. Herndl, *Juristische Blätter* 1962, pp. 15 et seq. Shortly after the publication of this article, an important decision of the German Federal Constitutional Court of 30 April 1963 (*Entscheidungen des Bundesverfassungsgerichts*, Vol. 16, pp. 27 et seq. ; see also *Neue Juristische Wochenschrift*, 1963, p. 1732 et seq.) adopted the principle of relative State Immunity.

This report dealt not only with jurisdictional immunity but also with immunity from execution. The question of whether it is possible to proceed to measures of execution against the property of foreign States is controversial. In certain States, such execution is prohibited while in others it is permitted, and in yet others it depends on authorisation. In the two latter cases, it cannot however take place against the property of a foreign State which is used for public purposes and it is sometimes difficult to distinguish such property from that which is used for private purposes. The report therefore recommended that execution should not be levied against the property of foreign States, but that an attempt should be made to reach an international agreement whereby States would comply voluntarily with judgments given against them.

In Resolution No. 4, the third Conference of European Ministers of justice recommended that the European Committee on Legal Co-operation (CCJ), a sub-committee of the CCJ, or a committee of experts, should be instructed to make a study of the problems of State immunity. The Committee of Ministers accepted this recommendation.

6. A committee of experts, which met on a number of occasions during the years 1965 to 1970, has drawn up a draft European Convention on State immunity. If this Convention is ratified by the requisite number of States, it will be the first international Convention of a general nature in the field of State immunity, the Brussels Convention of 1926 being concerned only with State-owned vessels.

General comments

7. By limiting the number of cases in which States can invoke jurisdictional immunity, the Convention is consistent with the trend taking place in the case-law and legal writings in the majority of countries.

The Convention requires each Contracting State to give effect to judgments rendered against it by the courts of another Contracting State. It is in particular for this reason that it operates only between the Contracting States on the basis of the special confidence subsisting among the Members of the Council of Europe. The Convention confers no rights on nonContracting States ; in particular, it leaves open all questions as to the exercise of jurisdiction against non-Contracting States in Contracting States, and vice versa.

8. The Convention applies only to the jurisdiction of courts, whether judicial or administrative. It does not deal with the treatment of Contracting States by the administrative authorities of other Contracting States.

9. Consideration was given to the question whether the Convention could not have been confined to immunity from jurisdiction, by simply determining the cases in which a State could not invoke immunity. It was argued in support of this proposition that such a Convention would represent in itself a considerable step forward compared with the present situation, and that difficulties concerning execution of judgments given on the basis of the Convention would not be so great that they could not in due course be overcome by the application of the provisions of treaties on the recognition and enforcement of foreign judgments ; the result would then be an identical regime applicable to States and private persons.

This approach did not, however, commend itself. For States which already draw the distinction between acts *iure gestionis* and acts *iure imperii*, the drawing-up of a catalogue of cases in which the State could not invoke immunity would have represented no advance over the present situation,

Moreover, it must be acknowledged that difficulties concerning immunity from execution are at least as great as those arising in connection with immunity from jurisdiction. Recourse to treaties on the recognition and enforcement of foreign judgments, in so far as those treaties might be applicable to judgments given against States, did not seem adequate to meet these difficulties. There is as yet no extensive network of bilateral and multilateral agreements between member States of the Council of Europe. Furthermore, there are deep-seated differences between national laws, which would be keenly felt in the absence of treaties according reciprocity of treatment. A harmonisation of the laws of the member States of the Council of Europe would not therefore have been achieved.

Finally, the absence of any provision relating to problems of immunity from execution would have left unresolved the question whether execution can be levied in the State of the forum against the property of the State against which a judgment had been given in application of the Convention. Uncertainty on this point would have made it more difficult for some States to accept the Convention.

10. The broad lines of the Convention are :

1. The cases in which immunity from jurisdiction is not granted to a Contracting State are listed, in Chapter 1. The list of cases incorporates a series of connecting links, which are designed to prevent proceedings being instituted against a State in the courts of another State where the dispute is not sufficiently closely related to the territory of the State of the forum to justify the exercise of jurisdiction by a court in that State. These links are also necessary to establish bases of jurisdiction which would be accepted when the foreign judgment comes to be submitted for recognition and enforcement (see No. 3). The connecting links do not themselves confer jurisdiction

on the courts of Contracting States. Only such jurisdiction can be exercised as is already provided for by national legislation or international agreements.

2. Immunity from jurisdiction must be granted in all cases which are not included in the list (Article 15).

3. A Contracting State must give effect to judgments rendered against it in cases where it cannot claim immunity under Articles 1 to 13. In order to ensure that this obligation is effectively discharged, judicial safeguards are provided in Article 21. These judicial safeguards have been inserted because Article 23 prohibits execution being levied in one Contracting State against the property of another Contracting State.

4. Chapter 4 of the Convention contains an optional system. If the States make use of the faculty provided for in Article 24, they may declare that their courts are entitled to entertain proceedings against another Contracting State to the extent that they are so entitled against States not Party to this Convention. The obligation to give effect to judgments rendered in cases not falling within Articles 1-13, exists only as between States which have made this declaration (Article 25). Moreover, these States accept an exception to the general rule which prohibits execution against the property of a foreign State (Article 26).

5. Entities established by a Contracting State do not enjoy immunity. However, the possibility remains that the courts of a Contracting State might be required not to entertain certain proceedings brought against such entities (see Article 27).

11. In addition to these fundamental provisions, the Convention contains rules on other important questions connected with the participation of foreign States in court proceedings, which have often led to difficulties in practice. These rules relate in particular to the service of judicial documents on foreign States, the exemption of foreign States from having to provide security for costs, and the prohibition of penalties against a State which, being a party to proceedings, refuses to produce evidence.

Comments on the Articles of the Convention

Title and Preamble

12. The Convention does not cover the problem of immunity in proceedings before administrative authorities of another State. On the other hand, it includes provisions on matters other than immunity, which arise in judicial proceedings to which a State is a party : for example, service of process on a State. It also lays upon States the duty to give effect to certain judgments. Since immunity is the central theme, the title of the Convention for reasons of brevity and descriptiveness refers to that alone.

13. The introductory and final recitals of the preamble follow the same lines as other Council of Europe conventions in the legal field. The preamble also mentions particular reasons for the conclusion of this Convention, and stresses that its aim is to resolve problems of immunity solely in the relations between Contracting States which are Members of the Council of Europe (as to the possibility of accession by non-member States of the Council of Europe, see Article 37).

CHAPTER I

Article 1

14. A State which of its own will institutes legal proceedings as claimant or intervening party may not subsequently invoke immunity. It is obliged, like any other party, to respect the rules of procedure of the national law of the court to which the case has been referred. This principle is modified to some extent by Article 18 which is based on the British concept of "Crown Privilege".

15. Submission to the jurisdiction of another State extends to proceedings before appeal courts. It also covers the case where a court decides, on account of its own lack of competence, to refer the matter to another court in the same State.

Such submission does not, however, extend to proceedings concerning the enforcement of a judgment given against the State.

16. The word "intervenes" does not include cases of compulsory intervention provided for in the law of certain States, except where the State participates actively in the proceedings without invoking its immunity.

17. By advancing claims in bankruptcy or similar proceedings, the State assumes the role of a claimant and, as such, submits to the jurisdiction of the courts of the State where the proceedings were instituted ; it is subject to this jurisdiction even where, for procedural reasons, the role of the parties is reversed. That might be the case, for example, if the debt claimed by the State is contested by another creditor or by the trustee in bankruptcy.

18. Paragraph 2 deals with a counterclaim brought either against a State which is the claimant in the proceedings or, if the rules of procedure in force in the State of the forum so permit, against a State which intervenes in the proceedings.

The wording of the connecting link in sub-paragraph (a) is based on Article 11 (2) of the Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

The provision contained in sub-paragraph (b) provides that the State which institutes proceedings or intervenes cannot claim immunity in respect of a counterclaim if it could not have claimed immunity had these proceedings been instituted against it as a principal claim. The position of the State, in the case of a similar counterclaim, must not be different from that which would result from proceedings brought against it on the basis of Articles 2 to 13.

19. Paragraph 3 concerns the defendant State which brings a counterclaim. In this case, the submission to the jurisdiction of the courts of the State of the forum operates not only in relation to the counterclaim but also to the principal claim.

20. Article 3, paragraph 2 and Article 13 contain a limitation on the possible application of Article 1, paragraph 1.

Article 2

21. This article concerns cases in which a Contracting State has expressly undertaken to submit to the jurisdiction of a foreign court. It applies to submission to the jurisdiction of a specific court, as well as to submission to the jurisdiction of any of the courts in a specified State to which the dispute may, in this case, be referred as the court which is competent *ratione materiae* and *ratione loci*.

22. Any person or body empowered to conclude written contracts in the name of the State is also deemed to have the authority to submit that State to the jurisdiction of a foreign court, in the case of disputes arising from such contract.

23. The use of the term "contract in writing" in Article 2 sub-paragraph (b), is meant not only to exclude contracts concluded orally, but also any implication of a tacit submission for instance as a result of the acceptance by the State of a clause waiving immunity, inserted by the other party in an invoice.

24. For the purposes of this article, a specification that the law of a particular State is to be applied, does not by itself imply submission to the jurisdiction of the courts of that State.

Article 3

25. This article determines the extent to which a State's conduct in proceedings amounts or does not amount to a waiver of immunity. The form of a waiver is not determined by the Convention. The term "if it appears" also covers the State as intervening party.

Article 4

26. In principle, immunity should not be granted to a State with respect to any contracts it has concluded. The article compensates to a certain degree for the relatively narrow scope of Article 7 (see below).

According to the procedural law of some States, the jurisdiction of a court depends on the place where the disputed contractual obligation arose or where it was discharged or falls to be discharged. Other States do not recognise this basis of jurisdiction or do so only in special circumstances. The connecting link in Article 4 therefore represents a compromise.

27. Where a contract imposes several obligations, immunity cannot be invoked in the courts of the State where the particular obligation which is the subject of the dispute falls to be discharged.

28. The contract need not be in writing if an oral contract is valid under the applicable law. The requirement that the obligation must be discharged in the territory of the State of the forum is not to be regarded as unsatisfied merely because the defendant claims that the obligation has already been discharged.

29. The Convention is intended to improve the legal position of individuals in their relations with States. It is not concerned with the protection of one State against another (paragraph 2, sub-paragraph (a)).

There is no reason in principle for disregarding the express intention of the parties to a contract. The words "have agreed Otherwise" in paragraph 2, sub-paragraph (b) can refer to different possibilities. The parties may agree that the State should be entitled to immunity or that some court other than that of the place of performance should have jurisdiction, or that the dispute should be submitted to arbitration. The parties may also simply agree that Article 4 (1) of the Convention shall not apply.

By virtue of sub-paragraph (c), the State may invoke its immunity if two conditions are fulfilled, that is to say, if the contract has been concluded on its territory and if the obligation of the State is governed by the administrative law of that State. The fulfilment of these two conditions is intended to ensure that Article 4 should not have too broad a scope by including contracts concluded by a State in the exercise of its sovereign powers, for example contracts relating to scholarships or subsidies.

Article 5

30. This article concerns contracts of employment. A distinction has been drawn between contracts of employment and other contracts (Article 4) because in certain circumstances it may be justifiable to accord immunity to a defendant State under a contract of employment particularly when the employee is a national of the employing State (see paragraph 2, sub-paragraph (a)). The same is true when the employee is a national neither of the State for whom he works, nor of the State where he works, and where the contract of employment was not concluded on the territory of the latter State namely where the employee is a foreign worker who has not been locally recruited (see paragraph 2, sub-paragraph (b)). In both cases the links between the employee and the employing State (in whose courts the employee may always bring proceedings), are generally closer than those between the employee and the State of the forum.

The article uses the expression "contract of employment" (in French : *contrat de travail*). This expression is to be understood in a wide sense, comprising the contracts with manual workers as well as contracts with other employees.

Paragraph 2, sub-paragraph (c) enables a Contracting State to invoke immunity where the contract of employment contains a clause in writing providing for the settlement of disputes by a court other than that of the State of the forum, for example a court of the employing State or an arbitral tribunal. But such a clause would not have the effect of making the employing State immune from the jurisdiction of the State of the forum where that State's law on employment confers exclusive jurisdiction on its own courts jurisdiction is not exclusive for this purpose if resort may be had to arbitration.

Article 5 also covers contracts between an individual and a State for work to be done as an employee of an office, agency or other establishment referred to in Article 7. But the grant of immunity to the employing State as provided in paragraph 2, sub-paragraphs (a) and (b) can only be justified where the individual has his habitual residence in the territory of that State at the time of the conclusion of the contract (paragraph 3). "Habitual residence" is to be understood as a question of fact.

As regards contracts of employment with diplomatic missions or consular posts, Article 32 shall also be taken into account,

Article 6

31. This article concerns the participation of a State in companies, associations or other legal entities whether or not they are endowed with legal personality. Whether these entities are profit-making or not is immaterial. The expression "participates" indicates that the article is concerned with the rights and obligations of members of the company, association or other legal entity as such. The article is, therefore, not concerned with the State as a creditor or debtor of such entities. International organisations are excluded from the application of the article. On the other hand, all entities recognised by municipal law, even "public law" entities, are included. Instances of a State participating in a "public law" entity of another State will, admittedly, be rare.

In the phrase "with one or more private persons", the term "private persons" is intended to cover legal entities as well as natural persons.

Moreover, while it is necessary that at least one private person participates in the entity, nothing prevents one or more "public law" entities participating therein also.

32. The entity in which the State participates must have certain links with the territory of the State of the forum. Paragraph 1 mentions several alternative criteria which are generally accepted. The seat is normally the place from which the entity is directed : the registered office is generally the place where the entity is formally constituted or incorporated ; and the principal place of business means the place where the major part of its business is conducted.

33. With regard to paragraph 2, the reader is referred to the commentary on Article 4, paragraph 2, sub-paragraph (b) (paragraph 29 above).

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33. With regard to paragraph 2, the reader is referred to the commentary on Article 4, paragraph 2, sub-paragraph (b) (paragraph 29 above).

34. The expression "if it is otherwise agreed" in paragraph 2 should be interpreted broadly. It applies not only to contracts between members or between a member and an entity, but also to terms in the constitution of the entity, even though the instrument establishing the constitution may not be considered as a contract in all States.

Article 7

35. This article covers the principal activities of a State *iure gestionis*. Had the Convention dealt simply with questions of jurisdictional immunity, it might have been possible to frame the article in more general terms so as to extend, it to cover all cases where a State engages in industrial, commercial or financial activities having a territorial connection with the State of the forum. As the Convention requires States to give effect to judgments rendered against them, it was necessary to insert a connecting link to found the jurisdiction of the courts of the State of the forum, namely the presence on the territory of this State of an office, agency or other establishment of the foreign State. This limitation is counter-balanced by the broad terms of Article 4 : most industrial, commercial or financial activities carried on by a State on the territory of another State where it has no office, agency or establishment would probably give rise to contractual obligations which are dealt with by Article 4.

36. The concept of establishment is to be understood as one of fact. This connecting link is in line with the provisions on jurisdiction contained in various agreements on the enforcement of judgments (see Article 10 (2) of the Hague Convention of 11 February 1971 on the Recognition and Enforcement of Foreign judgments in Civil and Commercial Matters).

37. The expression "in the same manner as a private person" (*more privatorum*) is to be construed in the abstract. In particular, the fact that the law of the State of the forum or that of the defendant State would prohibit private persons from exercising the relevant activity, would permit only certain categories of persons to do so, or would contain special rules governing the exercise of that activity by the State, is to be left out of account. If, for example, a State undertaking not having a legal personality distinct from that of the State, embarks on a

commercial activity on the territory of another State where it has an agency, the courts of that State may entertain proceedings against the undertaking even if (unlike a private person) it was under no obligation to be listed in the trade register.

38. The connecting links provided for in paragraph 1 need not exist at the time when the proceedings are instituted. A link must however have existed at the time when the act which gave rise to the dispute occurred.

39. Consideration was given to the question whether the connecting links would not have the effect of excluding loans issued abroad from the application of Article 7. However it appeared on investigation that in respect of such loans, States normally submit to the jurisdiction of the courts of the State of issue. In that event Article 2 (b) will apply, and the debtor State will not be able to invoke immunity. Under Article 4 (1) it is also subject to the jurisdiction of any other State on whose territory it has undertaken to refund the capital or pay the interest.

With regard to paragraph 2, the reader is again referred to the first two paragraphs of the commentary on Article 4 (2), sub-paragraphs (a) and (b) (paragraph 29 above).

Article 8

40. This provision has been drafted so as to cover all cases where a State is involved in a dispute relating to one of the rights mentioned in sub-paragraphs (a) to (d), provided there is an adequate connection with the State of the forum.

The expression "other similar right" (sub-paragraph (a)) applies to any other rights of the same nature as those expressly mentioned, which may be applied for, registered or deposited.

Proceedings relating to the rights of an employee in his invention may, depending upon the circumstances and the law which is applicable, fall within the scope of Article 5 or Article 8.

41. Sub-paragraphs (b) and (c) provide an instance of the Convention not allowing immunity from claims relating to tortious acts of foreign States (see the commentary to Article 11).

42. Reference is made in sub-paragraph (d) to a "trade name" in order to avoid any doubt as to the inclusion of such names in the general list in sub-paragraph (a). The term "right to the use of a trade mark" is to be interpreted in a broad sense to attract all possible forms of protection. This provision applies in particular to disputes relating to the registration of a trade name.

Article 9

43. This article provides that there shall be no immunity in proceedings concerning the rights and obligations of a State in, or in connection with, immovable property situated in the territory of the State of the forum. It should be read in conjunction with Article 32.

Under certain legal systems possession is not strictly speaking a right in the sense attributed to that term. For this reason express reference is made to it in sub-paragraphs (a) and (b) of this article.

44. The expressions "rights", "use" and "possession" must be interpreted broadly.

Article 9 covers inter alia :

1. proceedings against States concerning their rights in immovable property in the State of the forum ;

2. proceedings relating to mortgages whether the foreign State is mortgagor or mortgagee ;
3. proceedings relating to nuisance ;
4. proceedings arising from the unauthorised (permanent or temporary) use of immovable property including actions in trespass, whether an injunction is claimed or damages or both ;
5. proceedings concerning rights to the use of immovable property in the State of the forum, for example, actions to establish the existence or non-existence of a lease or tenancy agreement, or for possession or eviction ;
6. proceedings relating to payments due from a State for the use of immovable property, or of a part thereof, in the State of the forum, with the exception of dues or taxes (see Article 29, sub-paragraph (c)) ;
7. proceedings relating to the liabilities of a State as the owner or occupier of immovable property in the State of the forum (for example accidents caused by the dilapidated state of the building, *actio de eiectis vel effusis*).

Article 10

45. According to this article immunity may not be claimed in disputes relating to rights arising by way of succession, gift or *bona vacantia*.

However, it has not been possible to provide for connecting links. In virtually no other sphere of private international law are there such differences between legal systems as there are in determining the competent jurisdiction or the applicable law. Some States regard the domicile of the deceased as the determining factor, whereas others recognise only the competence of the authorities of the State of which the deceased was a national, and apply the law of that State. Moreover, at least in regard to any immovable property forming part of the estate, the State in which that property is situated is often considered to have exclusive jurisdiction.

In consequence a special system has had to be set up concerning the obligations of a State to give effect to a judgment rendered against it (see Article 20 (3)).

46. A State's right to the undisposed goods of a deceased person is in certain legal systems considered a right of succession, in others a right of forfeiture of goods without ownership (*bona vacantia*). Separate mention was made of *bona vacantia* to cover the latter concept.

Article 11

47. This article has been drafted on the lines of Article 10 (4) of the Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign judgments in Civil and Commercial Matters.

48. Where there has been injury to the person or damage to property, the rule of non-immunity applies equally to any concomitant claims for non-material damage resulting from the same acts, provided of course that a claim for such damage lies under the applicable law (e.g. in respect of *pretium doloris*). Where there has been no physical injury and no damage to tangible property, the article does not apply. This is the case, for example, as regards unfair competition (subject to the applicability of other articles of the Convention, such as Article 7) or defamation.

49. The author of the damage must have been on the territory of the State of the forum at the time the damage was caused ; this requirement does not apply, however, to the person whose liability is in issue. For example, when a vehicle belonging to a State is involved in a traffic accident, then, provided the driver of the vehicle was present, the State as owner or possessor of the vehicle may be sued, even though the plaintiff does not seek to establish the personal liability of the driver.

Article 12

50. A party to an arbitration agreement may in certain cases be required to appear before a national court. The most important are those mentioned in paragraph 1 (a) to (c) of this article. Sub-paragraph (b) is mainly concerned with measures to initiate the arbitration (appointment of arbitrators), but also covers other instances of judicial control over arbitration procedures known to certain national systems (for example decisions concerning a challenge to the arbitrator).

51. It should be made clear that proceedings concerned with the enforcement of arbitral awards are outside the scope of the Convention and governed by domestic law and any international convention which may be applicable ; Article 20 does not therefore apply.

52. The written requirement has been provided for because of the importance of the agreement of a State to arbitration. This may lead to some slight deviation from the practice followed under other international agreements on arbitration.

53. It could be questioned whether decisions to which Article 12 applies are of such a nature that a foreign State can be required to give effect to them under Article 20. For they are not judgments ordering performance or payment, but declaratory judgments on matters of fact or law or merely procedural directions. The foreign State is nevertheless bound to give effect to them. The State may not, for instance, institute proceedings before its own courts in respect of a dispute if the validity of an arbitration agreement covering that dispute has been judicially confirmed.

Article 13

54. This article introduces an exception to Article 1, paragraph 1. It concerns the special case in which a State intervenes in proceedings to which it is not a party in order to invoke its immunity. In common law countries, a judicial decision can sometimes affect third parties ; such is the case, for example, with actions *in rem*. By permitting a State to claim immunity in such cases notwithstanding the provisions of Article 1, paragraph 1, Article 13 gives States a chance to safeguard their rights or interests in the property which is the subject of the dispute.

Article 14

55. This provision is intended to prevent State immunity from obstructing the legal administration of property. Apart from the administration of the estate of a bankrupt or a trust, there are other cases of the judicial administration of property such as the administration of the estates of deceased persons and, in many countries, arrangements and compositions with creditors. The rule in Article 14 applies whether the court administers the property itself or merely arranges for, or supervises, the administration. Consequently, the fact that a foreign State claims a right or interest in a part of the property of the estate will not prevent the court from administering or supervising the administration of the property, including that part of it over which the State claims a right or interest.

Article 15

56. The Convention represents a compromise between the doctrines of absolute and relative State immunity. A State cannot claim immunity in cases falling under Articles 1 to 14. On the other hand, it is entitled to immunity, in respect of all other acts even those which are according to the doctrine of relative State immunity, *acta iure gestionis*.

This rule is, however, subject to qualification (see paragraph 96 below).

The Convention relates only to immunity or non-immunity from the jurisdiction of the courts of another Contracting State. Article 15 cannot therefore be invoked as a ground for claiming immunity from proceedings which are not of a judicial character.

57. A foreign State's immunity from jurisdiction must be recognised *ex officio* where that State does not appear and the proceedings do not fall within Articles 1 to 14.

CHAPTER II

Article 16

58. Difficulties often occur in connection with the service of writs in proceedings against States. The rules concerning the representation of States in judicial proceedings are frequently complex, and vary from State to State. The plaintiff, and even the court may not know on whom a writ issued against a State should be served.

The authorities of the defendant State are also faced with problems. In the time allowed to parties to enter an appearance, which is frequently very short, the competent authority in the defendant State must be identified and informed and the necessary consultations held.

Article 16 safeguards the interests of both parties by providing that transmission of the most important documents to the Foreign Ministry of the defendant State constitutes effective service and by ensuring adequate time-limits.

This article implies that it is the State as such which is sued ; the question whether, according to national law, it is represented by one of its organs, falls outside the scope of the Convention. Moreover, this article is not concerned with determining which authorities are competent to represent the State in proceedings brought against it.

The terminology used in the French text, *signification ou notification* takes account of the methods provided for the service of judicial documents in different legal systems, as does the Hague Convention of 15 November 1965 concerning *La signification et la notification à l'étranger des actes judiciaires et extrajudiciaires en matière civile ou commerciale*.

59. It was originally thought that provision should be made for documents instituting proceedings to be transmitted to the Foreign Ministry of the defendant State through the diplomatic channels of that State. Although this practice will probably be adopted in the large majority of cases, the article does not specifically mention diplomatic channels, as relations between member States of the Council of Europe are not always conducted through these channels.

60. Paragraph 2 contains the rules for transmitting documents by which proceedings are instituted and copies of judgments by default ; it thus applies to what may be considered the two most important cases from the point of view of safeguarding the defendant. The Foreign Ministry is obliged to accept writs served on it even if believes that the proceedings brought against the State are unjustified, that the court is not competent to entertain the proceedings, or that the defendant State may claim immunity. On the other hand, by accepting the

documents, the defendant State in no way renounces its right to invoke its grounds of defence or to claim immunity.

The Foreign Ministry is not obliged to accept process directed against a legal entity which is distinct from the State and is capable of suing or being sued (see Article 27).

The procedural concepts referred to in Article 16 (in particular "the document by which the proceedings are instituted" and "judgment by default") are to be given the meaning they have in the *lex fori*, as it does not at present seem possible to reach unification of practice or even common definitions on this point. Consequently, the applicability of Article 16 to documents relating to the introduction of appeals also depends on the *lex fori*.

61. When transmitting a document instituting proceedings to the Foreign Ministry, the diplomatic mission of the State of the forum should ensure that it provides the information necessary to enable the authority which is competent to represent the defendant State to be identified. If necessary, the diplomatic mission may be asked to give additional information.

62. The translation which must accompany the documents referred to in paragraph 2 is solely for purposes of information. The Convention does not require the translator to have any special qualifications or that the accuracy of the translation be confirmed by a duly authorised person.

As a result of the absence of any provision in the Convention on the subject, no legalisation or like formality is required either for the documents transmitted or for the letters of transmission.

63. Paragraph 3, which constitutes an innovation for most judicial systems, takes account of the interests both of the plaintiff and of the defendant State. It safeguards the plaintiffs interests by facilitating determination of the date on which service is deemed to have been effected. It safeguards the defendant State's rights by protecting it from any form of service which is deemed to have been effected by a fiction, such as service on the *parquet*, and from time-limits which begin to run from the date on which the document is posted.

64. The time-limits allowed to parties for the entering of an appearance or for bringing appeals vary from one State to another. Paragraph 4 might have been drafted so as to extend by two months the time-limits provided by the national law but that would have necessitated the incorporation in each legal system of special time-limits when the defendant is a Contracting State. It therefore seemed more convenient simply to postpone by two months the date from which time begins to run. This two month period should be sufficient to permit the Foreign Ministry to give notice to the competent authority in its own State and for the necessary consultations to take place in that State.

65. Paragraph 5 takes account of the situation in certain legal systems, in particular Scandinavian systems.

66. Paragraph 6 refers only to the method of service of the document by which the proceedings are instituted. It does not prevent a State from appearing, in accordance with the procedure in force in the State of the forum, in order to claim that it had not been allowed the time for entering an appearance provided for in paragraphs 4 and 5.

This paragraph also applies when the foreign State participates in the proceedings only in order to assert its immunity.

67. Paragraphs 6 and 7 are particularly important when interpreted in conjunction with Article 20 (2) (d) (see paragraph 82 below).

Article 17

68. Under Article 17 of the Hague Convention of 1 March 1954 relating to civil procedure, only nationals of Contracting States are exempt from the obligation to provide security for costs. The authorities indicate that this exemption covers legal persons and commercial companies. Whether it would include the foreign State as plaintiff is doubtful. Article 17 of the present Convention is based on Article 17 of the 1954 Hague Convention. It was thought unnecessary to confine the article to foreign States which are plaintiffs or intervening parties, since, at any rate under the law of the States which took part in the drafting of the Convention, a defendant is not required to provide security for costs.

69. By contrast, the second sentence requiring a foreign State to pay costs, applies only to a State as plaintiff or intervening party. The second sentence differs from Articles 18 and 19 of the 1954 Hague Convention in that it does not provide for the enforcement of decisions on the payment of costs but rather imposes an obligation on the foreign State to pay the costs and expenses which the Court Or other competent authority of the State of the forum has ordered it to pay. Article 20 paragraphs (2) and (3) cannot be invoked as grounds for a refusal to pay costs, Moreover the obligation to pay is not subject to the control procedure provided for in Article 21 (see below). On the other hand, Article 23 and, where it applies, Article 26 do apply to orders for costs against a State.

Article 18

70. In some States, penalties may be imposed on a party which fails or refuses to comply with a court order to produce evidence (contempt of court). Article 18 provides that these penalties may not be imposed on States. However, the court retains whatever discretion it may have under its own law to draw the appropriate conclusions from a State's failure or refusal to comply.

71. The refusal of a State to produce evidence is generally based on a desire not to divulge secrets, more especially for reasons of national security. The Convention does not require a State to give reasons for its refusal.

Article 19

72. This article deals with pending proceedings. Proceedings based on the same facts should not be brought against a State in different courts. The introductory sentence follows the pattern of numerous agreements on the recognition and enforcement of foreign judgments, for example, Article 20 of the Hague Convention of 1 February 1971 which has been mentioned above. A choice is given to the court between discontinuing or staying the proceedings, in accordance with the *lex fori*, which must however permit one or the other. The duration of the stay is also determined by the *lex fori*. However, where subparagraph (b) applies, proceedings may not be resumed until it is reasonably certain that the proceedings which were the first to be instituted will not result in a decision to which the State must give effect in accordance with Article 20.

73. Article 19, paragraph 1 does not prevent the court also taking account of pending proceedings in cases and on conditions other than those mentioned therein where the *lex fori* so provides.

74. The principal object of paragraph 1, sub-paragraph (a) is to prevent subsequent applications to the court of another Contracting State by a person who fears that he may not be successful in the proceedings he has already instituted against a State before one of its own courts. Sub-paragraph (b) prevents a defendant State from instituting proceedings before its own courts (for example, for a declaratory judgment) in order to be able to invoke Article 20 (2) (b), or (e), and to evade its obligation to give effect to a foreign judgment.

75. Paragraph 2 of Article 19 permits derogation from the obligations contained in this article.

CHAPTER III

Article 20

76. The structure of the Convention consists of a list of cases where immunity cannot be granted and a general provision (Article 15) specifying that immunity shall be granted in all other cases. This is supplemented by an obligation imposed on foreign States to give effect to judgments rendered against them : this is the object of Article 20.

The expression "give effect" does not necessarily imply the making of a payment or, indeed, any transfer of property. It may signify an obligation to accept a state of affairs determined by a declaratory judgment. The State must submit to the judgment in good faith ; this may even involve acquiescence in the dismissal of an action instituted in a foreign country (and consequently refraining from instituting further proceedings based on the same facts before one of its own courts or before a court of a third State.

The Convention is concerned only with the obligation of a State to give effect to a judgment. Judgments given in favour of States against private persons will continue to be governed by the ordinary rules (the national law, or international Conventions on recognition and enforcement of judgments).

The Convention deliberately abstains from providing any machinery of recognition or enforcement since the primary obligation of the State is to give effect to the judgment. Moreover, enforcement against the property of a foreign State is considered by some States to be contrary to international law while in others it is governed by special rules of a restrictive nature. The system established under the Convention safeguards as effectively as possible the rights of the person in whose favour judgment has been given.

77. Article 20, paragraph 1 (a) makes reference not only to Articles 1 to 12, but also to Article 13, which supplements Article 1. On the other hand, it does not refer to Article 14 which (in order to cover a situation which can arise in some countries) is intended purely to permit a court to administer property even when a Contracting State claims a right in that property ; here the State does not submit to the jurisdiction so as to be obliged to give effect to the judgment.

78. The conditions laid down in paragraph 1 (a) require no comment. The terms used in paragraph 1 (b) take account of the fact that forms of appeal or review vary from State to State.

79. In some States, both the authorities and the case-law distinguish between international and domestic *ordre public*. Paragraph 2 (a) uses the term in the narrower of the two senses, i.e. international *ordre public*.

The concept of *ordre public* has no exact equivalent in English, the term "public policy" being insufficiently comprehensive. The expression "either party had no adequate opportunity fairly to present his case" has been added to the English text to take account of the procedural aspect of the concept of *ordre public*. This expression is based on the wording of Article 5 (1) of the Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign judgments in Civil and Commercial Matters. The inclusion of the word "manifestly" is intended to underline the exceptional nature of cases where objections can be raised on grounds of *ordre public*. On this point, the draft follows certain recent conventions of the Hague Conference on Private International Law (e.g. the above-mentioned provision of the Hague Convention of 1 February 1971).

80. Paragraph 2 (b), which makes the existence of pending proceedings a ground for a refusal to give effect to the judgment, corresponds to Article 19. Where a judgment has been given by a court of first instance, but is not yet final, the law of some States regards the case as still pending ; in other States such a judgment has the effect that the proceedings are no

longer considered to be pending. In the latter group of States, recognition of the foreign judgment would be refused on account of the judgment being now *res judicata*. For the application of the Convention, this doctrinal difference has little practical effect, since paragraph (b) and (e) make both *lis pendens* and *res judicata* grounds for refusing to give effect to a judgment.

It will often be difficult to foresee whether proceedings first instituted before a court of another Contracting State will result in a decision to which a State will be obliged to give effect. Under the terms of sub-paragraph (b) (ii), it is sufficient that such a decision may result.

81. Paragraph 2 (c), which makes the existence of another (conflicting) decision a reason for not giving effect to the judgment, is drafted in wider terms than the provision dealing with pending proceedings. Here it is not a question of proceedings instituted on the same grounds and having the same purposes. It is sufficient that the judgment should have been given between the same parties and that its effect (and not its *ratio decidendi*) is inconsistent with those of the other judgment. It is not necessary for the purposes of paragraph 2 (c) (i) that the judgment should have become final.

It has not been possible to specify in sub-paragraph (c) (i) conditions as to the sequence of events which will completely exclude the possibility that a foreign defendant State may subsequently bring proceedings before its own courts in order to obtain an "inconsistent" judgment. The respect due to the judgment of a national court requires that it should be maintained at least where it had already been given at the time when the foreign judgment became final, even if the proceedings were instituted after those which resulted in the foreign judgment. On this point it is Article 19 which is designed to forestall abuses by preventing a judgment being given by a court of the State which is a party to the earlier proceedings.

82. The reason for refusal given in sub-paragraph (d) is common form in enforcement treaties: due rights to establish a defence must have been accorded in the State of origin. The sub-paragraph is worded in such a way that it does not require a State which has not entered an appearance or appealed against a judgment by default to offer any explanations. It is sufficient to establish that the provisions of Article 16 have not been observed.

83. Brief reference has already been made, in the comments on Article 10 (succession, *bona vacantia*, gifts) to the need to specify special grounds for refusing to give effect to judgments relating to the matters referred to in that article (see paragraph 45 above). In addition to the grounds of refusal set out in paragraphs 1 and 2, two extra grounds have been added for these cases by paragraph 3 : one relating to the jurisdiction of the court, and the other the applicable law.

Under sub-paragraph (a), a State is not required to give effect to a judgment where the courts of the State of the forum would not have had jurisdiction if (hypothetically) they had applied the jurisdictional rules in force in the State against which judgment has been given. The expression *mutatis mutandis* serves to underline that, in the hypothesis that the courts of the State of the forum would have applied the jurisdictional rules of the State against which judgment has been given, the assumption must equally be made that these rules are applied not to the State against which judgment has been given but to the State of the forum. An exception is made for the case where, in the circumstances jurisdiction could only have been based on an "exorbitant" ground. Rules of jurisdiction based on "exorbitant" grounds are excepted from the jurisdictional rules so to be applied.

The rule in sub-paragraph (b) is taken from the Hague Convention of 1 February 1971 (see Article 7, paragraph 2). A "different result" is meant to be one which is different in substance from that which would have been reached by the courts of the State which is called upon to give effect to the judgment.

The final sub-paragraph of paragraph 3 provides for the eventuality of the State of the forum and the State against which the judgment has been given being parties to a treaty on the recognition and enforcement of judgments. In that event a State must give effect to the judgment if it conforms with the treaty's requirements both as to jurisdiction and as to applicable law.

Article 21

84. It is to be assumed that Contracting States will fulfil the obligations which they have undertaken by virtue of Article 20 (see also Article 25) without any need for a control procedure. But as one of the major objects of the Convention is to protect the position of a private person who is engaged in litigation against a State, it was thought unavoidable to have some such procedure.

Paragraph 1 of Article 21 gives anyone who wishes to enforce a judgment given in his favour against a State a possibility of instituting proceedings before a court of that State. This procedure derives from the classical concept of the *exequatur* granted to a foreign judgment by the courts of the State in which execution is sought.

85. The competent national court of the defendant State before which proceedings have been instituted pursuant to paragraph 1 must decide whether the State is obliged to give effect to the foreign judgment. The issue may be brought before the court by any person on whom the judgment confers rights. Whether the State may also institute proceedings before this court to obtain a decision declaring that it is not bound to give effect to a foreign judgment, is left to be determined by the law of that State.

No time-limit has been laid down within which proceedings must be instituted before the competent national court. Under the Convention the duty to give effect to a judgment arises as soon as it is final and capable of execution in the State of the forum, there being no need for the successful party to institute any proceedings for its enforcement before an authority of the defendant State. At this stage, therefore, no special means of communication are provided for between the successful party and the defendant State.

Paragraph 2 simply states a rule which is to be found expressly or impliedly – in treaties concerning the recognition and enforcement of foreign judgments.

86. Paragraph 3 is designed to grant the best possible facilities to parties who, in accordance with paragraph 1, institute proceedings before the competent court of the State against which a judgment has been given.

87. The Convention does not specify which documents have to be produced by an applicant, for this depends on the relevant rules of procedure. The same is true of the need to provide translations. In any event, any documents which have to be produced are exempt from legalisation (paragraph 3 (b)). "Any other like formality" refers particularly to the certification provided for by the Hague Convention of 5 October 1961

Abolishing the Requirement of Legalisation for Foreign Public Documents.

88. Paragraph 3 (c) is worded in terms similar to those of the first sentence of Article 17.

89. Some conventions provide that a party who has received free legal aid before the court which gave the judgment is also entitled to it as of right for any, enforcement proceedings. However, the circumstances in which legal aid is granted depend on the standard of living and average income in each State, as well as on the expense of litigation. The automatic grant of legal aid would, therefore, in some circumstances have had the effect that persons seeking to enforce a foreign judgment would have received aid under more favourable conditions than those applicable to any other persons. It thus seemed preferable, in sub-

paragraph (d). to treat foreign applicants in the same way as nationals. The wording takes account of the fact that in some member States of the Council of Europe entitlement to legal aid depends on nationality and in others on domicile or residence.

90. Paragraph 4 (which should be read with Article 41 (e)) is designed to assist persons who decide to institute proceedings before the competent court of the defendant State.

Article 22

91. In some member States of the Council of Europe, proceedings frequently end in a judicial settlement which can be enforced like judgments. Article 22 requires Contracting States to give effect to judicial settlements even where, according to the applicable rules of procedure, such a settlement would not be enforceable. The conditions laid down in Article 20, whether positive or negative, do not apply to judicial settlements. A party, which has entered into a settlement with a foreign State, should be entitled to establish his rights in the same way as a party which has obtained a judgment (Article 21). Similarly, the rule prohibiting measures of execution applies to judicial settlements (Article 23 ; see however Article 26).

Article 23

92. In some States the rule which prohibits execution against the property of a foreign State is regarded as a rule of international law ; in other States, execution against the property of a foreign State is considered permissible under strictly defined conditions. As already explained it is one of the objectives of the present Convention to protect the rights of individuals. The Convention system therefore represents a compromise in that it combines an obligation on States to give effect to judgments (the obligation being controlled by judicial safeguards) with a rule permitting no execution. For States having made the declaration referred to in Article 24, see paragraph 100 below.

93. The term "preventive measures" in Article 23 extends only to such measures as may be taken with a view to eventual execution.

94. The last part of the sentence enables a State to waive immunity from execution. Waivers of this kind, subject to specified limits, are frequently found in the lease of State loans.

95. Article 23 applies only to execution of judgments given in pursuance of the Convention ; arbitral awards do not, for example, fall within the scope of the article.

CHAPTER IV

Article 24

96. Certain States which at present apply rules of qualified State immunity considered that Article 15, which provides that immunity must be accorded to States in all cases other than those falling within Articles 1 to 13, was too rigid either because some acts *iure gestionis* fall outside the cases covered by these articles, or because the connecting links prescribed in these articles do not correspond, with rules of jurisdictional competence applied in those States. Article 24 permits States to derogate from the provisions of Article 15.

Pursuant to paragraph 1, Contracting States have the option of declaring, by notification to the Secretary General of the Council of Europe, that their courts are to be entitled to entertain proceedings against other Contracting States to the extent that they may entertain such proceedings against third States ; for this purpose, treaties concluded with third States which relate to problems of immunity, should not be taken into account. In other words, the regime applied by the courts of a State which has made the declaration will not be affected by the Convention, and can even continue to develop along its own lines.

The declaration addressed to the Secretary General of the Council of Europe will not affect the immunity from jurisdiction enjoyed by foreign States in respect of acts done in the exercise of sovereign authority (*acta iure imperii*).

The consequences of the declaration are set out in Articles 25 and 26.

97. However, the courts may not entertain proceedings within the "grey zone" (i.e. the matters not covered by Articles 1 to 13 which are subjected to jurisdiction in relations with non Contracting States) if their jurisdiction can be based solely on an "exorbitant" ground of jurisdiction (paragraph 2; for further details, see the Annex).

98. Paragraph 1 does not refer to Article 14, which provides that nothing in the Convention is to prevent a court from administering property solely on account of the fact that a foreign State has a right or interest in the property. It is never necessary to apply Article 24 to reach results which Article 14 enables one to achieve. In similar fashion, Articles 25 and 26 do not apply to judgments concerning the administration of such property.

Article 25

99. A State which makes a declaration under Article 24 opts for a system according to which its courts may exercise jurisdiction, even as against Contracting States, in cases other than those provided in Articles 1 to 13, that is to say in the "grey zone" (cf. paragraphs 96 and 97 above). Article 25 sets out the conditions under which States which have made the declaration must give effect to "grey zone" judgments given against them.

100. Apart from Article 10, for which special rules are laid down in paragraph 3 of Article 20, and Article 13 which is merely an exception to Article 1, Articles 1 to 13 all contain territorial connecting links. It was not possible to provide such connecting links in Article 25 since disputes falling within the "grey zone" are too diverse to admit of classification.

101. It would not, however, be appropriate to require States to give effect to judgments irrespective of any justification for the assumption of jurisdiction by the State of the forum.

Paragraph 3, sub-paragraphs (a) and (b) set out the circumstances in which this jurisdiction must be considered as sufficiently well-founded to justify acceptance of the obligation to give effect to the judgment.

Sub-paragraph (a) deals with the case where there is a treaty between the State of the forum and the defendant State which provides for the mutual recognition of certain grounds of jurisdiction. This might involve either express treaty provisions conferring jurisdiction either with a view to recognition and execution of the resulting judgments ("double treaty", "direct jurisdiction") or for other purposes; or it might involve simply certain jurisdictional conditions which must be fulfilled before there is any obligation to recognise or execute the judgment ("simply treaty", "indirect jurisdiction"). It is only fair that any ground of jurisdiction which States have undertaken mutually to recognise, irrespective of who is the defendant, should also be recognised for the purposes of Article 25.

Sub-paragraph (b) applies where there is no agreement on recognition and enforcement between the State of the forum and the defendant State which covers the whole civil and commercial field or at least a large part of it.

It is narrower in scope than sub-paragraph (a) because it applies irrespective of treaties which establish jurisdiction for purposes other than recognition and enforcement of judgments; in fact such agreements always relate to a limited field and should not therefore adversely affect the operation of this supplementary rule. Where there is no relevant agreement, the Convention provides that the jurisdiction of the courts of the State of the forum must be recognised whenever those courts would have had jurisdiction over the dispute which was the

subject of the judgment had they applied *mutatis mutandis* the jurisdictional rules of the defendant State. There is, however, a further condition that in applying this test, the court of the defendant State need not take into account any rules of jurisdiction set out in the Annex. This exception seems all the more justified in that these rules are not in any event accepted as a basis of jurisdiction under Article 24, paragraph 2.

For the meaning of the term *mutatis mutandis*, which in this context might give rise to difficulty, the reader is referred to the explanation given in paragraph 83 above.

102. Moreover, always given the assurance of a general agreement on recognition and execution, it was decided, in view of the fact that in relation to contracts no satisfactory connecting link could be found, to exempt in paragraph 3 (b) *in fine*, States from the obligation to give effect to judgments in cases relating to a contract. Naturally, this does not apply where the contract is to be discharged in the State of the forum, in which case Article 4 applies.

103. Paragraph 4 draws attention to a possibility which is also covered more generally by Article 33. This may be of assistance to States which are authorised under their constitution to conclude an agreement of this kind without submitting it for parliamentary approval.

Article 26

104. This article introduces for the purposes of the optional regime provided for in Article 24, an exception to the rule in Article 23 (which forbids the levying of execution against the property of a foreign State) : execution may be levied in the State of the forum against any property of a foreign State used exclusively in connection with an industrial or commercial activity, provided that the proceedings relate exclusively to such an activity of the State, and that both the States have made the declaration provided for in Article 24.

105. Article 26 only applies to proceedings concerning industrial or commercial activities in which the State engages "in the same manner as a private person". This expression has the same meaning here as in Article 7 (see commentary under paragraph 37 above). The article is based on the principle that a State should, in respect of its activities *iure gestionis* in the industrial and commercial field, be placed so far as possible on the same footing as a private person.

106. Where Article 26 permits execution against the property of a foreign State in the State of the forum conservatory measures may also be taken against such property with a view to ensuring eventual execution of the judgment (see paragraph 93 above).

CHAPTER V

Article 27

107. In practice, proceedings are frequently brought by an individual, not, strictly speaking, against a State itself, but against a legal entity established under the authority of the State and exercising public functions. As an important consequence of paragraph 1 provisions of the Convention which lay down special rules for proceedings to which one of the parties is a State (Articles 16-19), those dealing with the obligation to comply with a judgment or a settlement (Articles 20-22), and those prohibiting execution in the territory of the State of the forum (Article 23), do not apply to such entities.

108. For the purpose of defining these entities, the criterion of legal personality alone is not adequate, for even a State authority may have legal personality without constituting an entity distinct from the State. On the other hand, it was considered that a dual test comprising (1) distinct existence separate and apart from the executive organs of the State and (2) capacity to sue or be sued, i.e. the ability to assume the role of either plaintiff or defendant in court

proceedings, could provide a satisfactory means of identifying those legal entities in Contracting States which should not be treated as the State.

109. The entities referred to in Article 27 may be, *inter alia*, political subdivisions (subject to the federal clause in Article 28) or State agencies, such as national banks or railway administrations.

Paragraph 2 is worded in such a way that where an entity is authorised to exercise public functions in the State of the forum an action may be brought against it provided the proceedings do not relate to acts performed by the entity in the exercise of sovereign authority (*acta iure imperii*). Paragraph 3 provides that an entity may not enjoy more favourable treatment than a Contracting State.

The overall effect of Article 27 is to deny to entities, when they are not exercising public functions, any right to treatment different from that accorded to a private person.

Article 28

110. The constituent States of a federal State exercise in their own right a large number of functions which in unitary States are performed either by the central authority itself or by authorities answerable to it. This being so, the question arises whether these constituent States should be able to claim immunity *ratione personae*, or at least *ratione materiae*, when proceedings are brought against them in a foreign court.

Paragraph 1 lays down the principle that a federal State may not enjoy immunity *ratione personae*.

However, for the reasons stated, a federal State may make a declaration to the effect that for the purposes of the Convention, a constituent State of the federation is to have the same rights and to be subject to the same Obligations as a Contracting State.

The declaration must be notified by the federal State to the Secretary General of the Council of Europe. The effect of the declaration is that the provisions of the Convention on immunity and non-immunity from jurisdiction, on immunity from execution and on the effects of judgments given against a State, become applicable in proceedings instituted against a constituent State of the federation before the courts of a foreign State.

111. For the sake of simplicity and to avoid uncertainty, the Ministry of Foreign Affairs of the federal State is empowered to receive the documents mentioned in Article 16, even in the case of proceedings brought against its constituent States.

All declarations, notifications and communications which Contracting States may make or are required to make under the terms of the Convention will be made by the federal State.

112. Where a federal State does not make the declaration provided for in Article 28, paragraph 2, its constituent States are considered as being entities in the sense of Article 27.

Article 29

113. This article excludes certain matters from the field of application of the Convention. The Convention is essentially concerned with "private law" disputes between individuals and States.

In some countries social security forms part of public law, in others part of private law, in still others it falls somewhere between the two ; and finally, there are States in which no distinction is made between public and private law. In the absence of an express exclusion a question might have arisen whether or not disputes concerning social security would fall within Articles 4 and 7.

Damage and injury in nuclear matters have been excluded so as to render Article 11 inapplicable. Other conventions deal with nuclear damage.

Customs duties, taxes, penalties and fines have been excluded because in some countries they do not fall exclusively under public law or because the dividing line between public and private law is ill-defined or non-existent. Article 9 in particular might otherwise have been applicable.

114. It should be stressed that these same matters are also excluded from the field of application of the Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign judgments in Civil and Commercial Matters (Article 1, paragraph 2 nos. 6 and 7, and paragraph 3).

The exclusion of these matters from the field of application of the present Convention does not by any means imply that, by an argument *a contrario* based on Article 15, the courts of Contracting States are to have jurisdiction to deal with disputes which might arise in these fields or that judgments given in these fields can be enforced in the State of the forum against property of a foreign State. It means only that, since the provisions of the Convention may not be invoked, recourse must be had to general rules of law.

Article 30

115. The purpose of this article is to exclude matters covered by the Brussels Convention of 10 April 1926 for the Unification of certain Rules concerning the Immunity of State-owned Vessels, and the Protocol of 24 May 1934. These instruments are in force between a fairly large number of member States of the Council of Europe. The expressions used in Article 30 should be interpreted in accordance with the interpretation generally given to them in these two instruments,

Article 31

116. The Convention is not intended to govern situations which may arise in the event of armed conflict ; nor can it be invoked to resolve problems which may arise between allied States as a result of the stationing of forces. These problems are generally dealt with by special agreements (cf. Article 33).

Article 31 likewise excludes any questions of immunity from jurisdiction which may arise as a result of visits by the naval forces of a foreign State.

It prevents the Convention being interpreted as having any influence upon these matters.

Article 32

117. Diplomatic and consular immunities and privileges are already governed by rules of international law, notably those contained in the Vienna Conventions of 18 April 1961 and 24 April 1963, and in bilateral agreements. The considerations which underlie these privileges and immunities are different from those underlying the present Convention. The Convention cannot prejudice diplomatic and consular immunities, directly or indirectly. It is clear from Article 32 - and this is confirmed by Article 33 - that in the event of conflict between the present Convention and the instruments mentioned above, the provisions of the latter shall prevail.

Article 33

118. The authors of the Convention considered in detail the relationship between the Convention and the bilateral or multilateral treaties on the jurisdiction of courts, and the recognition and enforcement of judgments. There is one point to be made at the outset : in the event of proceedings instituted by a State against a private person or of a judgment given in favour of a State against such a person, it is these treaties which will apply and the Convention in no way derogates from them.

As regards proceedings instituted or judgments given against a State, the position becomes more difficult. In some treaties the rules relating to jurisdiction differ from the connecting links set out in the present Convention : the conditions for the recognition and enforcement of judgments contained in these treaties may be different from those laid down in Articles 20 and 25 (for example, as regards the finality of the foreign judgment) ; and, lastly, according to these treaties, judgments may be recognised and enforced without regard to the nationality or other personal characteristics of the defendant.

The authors of the Convention take the view that, as between the Contracting Parties, the Convention prevails over enforcement treaties, by virtue of the rule *lex specialis derogat generali*.

119. By virtue of the same principle, Article 16 of the Convention derogates from the provisions of other treaties on the service of judicial documents. But two or more Contracting States may adopt a different scheme from that laid down in Article 16.

120. Among the international agreements which remain unaffected by the Convention by virtue of Article 33 are agreements dealing specifically (i.e. otherwise than in a general manner) with State immunity as well as the rules to be applied where a State is party to proceedings and enforcement of judgments by States (cf. Article 7 of the European Convention on Compulsory Insurance against Civil Liability of Motor Vehicles of 20 April 1959). Similarly unaffected are agreements which, whether on a temporary or a permanent basis, remove from the jurisdiction of the courts particular claims against certain States or groups of States (e.g. Article 5 of the London Agreement on German External Debts of 27 February 1953 and Article 3 of Chapter 6 and Article 1 of Chapter 9 of the Convention on the Settlement of Matters arising out of the War and the Occupation, amended text of 23 October 1954).

Article 34

121. Under this article, the International Court of Justice has jurisdiction in respect of disputes between Contracting States on the interpretation or application of the Convention.

122. By virtue of paragraph 2 no dispute pending before a national court, whether relating to proceedings on the merits of the case between a private individual and a State (sub-paragraph (a)), or proceedings to establish the obligation to give effect to a judgment (sub-paragraph (b)), may be submitted to the ICJ before the national court has given its final decision (cf. Article 29 of the European Convention for the Peaceful Settlement of Disputes, of 29 April 1957).

Article 35

123. The application of the Convention to proceedings already instituted at the time of its entry into force would have necessitated complex transitional arrangements, and might have given rise to difficulties for any parties who had acted on the basis of the situation existing in the State of the forum at the time when the proceedings were instituted. Paragraph 3 excludes from the field of application of the Convention disputes relating to events in the too distant past.

CHAPTER VI

Articles 36-41

124. These articles contain the final clauses which are customary in conventions of a legal character concluded under the auspices of the Council of Europe. The Convention is semi-open in character. The clause on the accession of non-member States of the Council of Europe follows a number of precedents. Paragraph 3 of Article 37 seeks to safeguard the rights of acceding States by allowing them not to apply the provisions of the Convention in their relations with a State which subsequently accedes.

ANNEX

125. This Annex to which reference is made in Article 20, paragraph 3, sub-paragraph (a), Article 24, paragraph 2 and Article 25, paragraph 3, sub-paragraph (b) (see above), is based largely on points 4 and 5 of the Additional Protocol to The Hague Convention on the Recognition and Enforcement of Foreign judgments in Civil and Commercial Matters of the same date.

However, the Annex does not contain a provision equivalent to point 4 (e) of that Protocol (service of a writ on the defendant during his temporary presence in the State of the forum) since these cases are of no practical interest for the purposes of the Convention.

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126. A unification of the procedure which is to be followed in cases to which Article 21 applies would have gone beyond the aims of the present Convention. Even the elaboration of very general rules would have encountered, great difficulty due to the diversity in the systems of legal organisation of the member States.

What is indispensable, in the interest of the party who seeks to invoke the judgment, is that the proceedings be as simple and expeditious as possible.

It will be for each State Party to the Convention to determine the best means for it to implement the recommendation contained in the resolution.