



## **Explanatory Report to the Additional Protocol 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.

### **General comments**

1. The Additional Protocol to the European Convention on State Immunity establishes on two distinct levels particular European procedures for the settlement of disputes arising from the application of the Convention. First, Part I provides for the institution of international proceedings for the benefit of the party in whose favour judgment has been given against a Contracting State within the framework of the Convention. Secondly, Part II confers jurisdiction in relation to inter-State disputes on a European Tribunal instead of the International Court of justice as provided for in Article 34 of the Convention.

In order to ensure uniform decisions for all disputes relating to the interpretation and application of the Convention, both kinds of proceedings those instituted on the application of an individual and those relating to inter-State disputes will be heard by one and the same judicial organ, namely the European Tribunal set up under the Protocol and constituted as described in Part III thereof.

2. The Additional Protocol is optional in character ; it applies only to those States Parties to the Convention which have ratified, accepted or acceded to it. Furthermore, while the jurisdiction of the European Tribunal to determine inter-State disputes is compulsory for each Party to the Protocol and in relations between them, any Party to the Protocol has the option to exclude individual petitions from the jurisdiction of the Tribunal by notifying the Secretary General of the Council of Europe (Part IV).

## Comments on the Articles of the Protocol

### PART I

#### Article 1

3. This article, in providing for the institution of European proceedings by private persons against a State Party to the Convention, does not preclude the application of the provisions of Article 21 of the Convention whereby the party in whose favour a judgment has been given and the State against which the judgment has been given are entitled to have determined by the competent court in that State the question whether effect shall be given to the judgment. However, as a further measure of protection for the private individual opposing a State in civil proceedings, a concern which is a major feature of the Convention, Article 1, paragraph 1, gives the person seeking to invoke a judgment rendered against a State the choice between two procedures : proceedings pursuant to Article 21 of the Convention, or proceedings before the European Tribunal, whichever may appear most suitable. Cases may be submitted to the European Tribunal by any person upon whom the judgment confers rights.

Article 1, paragraph 3, of the Protocol does no more than restate a rule already contained, either explicitly or implicitly, in treaties relating to the recognition and enforcement of foreign judgments.

4. Paragraph 2 of Article 1 deals with the case where the State itself intends to institute proceedings before its own court in accordance with Article 21, paragraph 1, of the Convention. The obligation to give notice and the time-limit stipulated in this paragraph are designed to prevent a State, which has accepted generally the jurisdiction of the European Tribunal, from denying to the individual the opportunity of bringing the dispute before that Tribunal by initiating a kind of preemptive action before its own national courts.

5. Apart from the three months' time-limit specified in paragraph 2, within which the individual must act if he so wishes, no time-limit is set for the institution of proceedings before the competent national court or the European Tribunal. Under the terms of the Convention, the obligation to give effect to the judgment exists as soon as the latter becomes final and enforceable in the State of the forum, and there is no need for the party in whose favour judgment has been given to submit a request to an official authority of the defendant State.

6. It must be emphasised that the State against which judgment is given cannot bring proceedings against the individual before the European Tribunal. If it could, the State might exploit this possibility to exert pressure on the individual (bearing in mind the possible costs) to waive his claim or accept an unfavourable settlement.

7. Subject to the provisions of Article 10, paragraph 3, of the Protocol, concerning its entry into force, every Party to the Protocol which has not made the declaration provided for in Part IV accepts the jurisdiction of the Tribunal as described in Part I. Jurisdiction under Part 1 can be exercised even where only one Party to the Protocol has accepted it, since there is no provision for reciprocity in this respect.

Nothing in the Protocol prevents the parties making provision for a means of settlement other than recourse to the European Tribunal ; in the event of an objection being made against effect being given to the judgment, the dispute could, for example, be submitted to arbitration.

## **PART II**

### **Article 2**

8. This article establishes, in relations between the Parties to the Protocol, the jurisdiction of the European Tribunal to deal with inter-State disputes concerning the interpretation or application of the Convention. This jurisdiction is compulsory, since disputes may be submitted to the Tribunal not only by special agreement but also on the unilateral application of one of the Parties to the dispute.

9. The last sentence of paragraph 1 requires the Parties to the Protocol not to submit a dispute concerning the Convention to a mode of settlement other than the jurisdiction of the European Tribunal, which should ensure uniformity of decisions.

Its most important consequence, however, is that Article 34 of the Convention concerning the jurisdiction of the International Court of Justice, does not apply as between Parties to the Protocol.

10. Paragraph 2 makes it impossible to submit to the European Tribunal a dispute concerning a question pending before a national court, before a final decision has been rendered on that question (cf. Article 29 of the European Convention for the Peaceful Settlement of Disputes of 29 April 1957) whether the proceedings concern the merits of a case between a private individual and a State or have been instituted to establish an obligation to give effect to judgment.

Paragraph 3 ensures that the same case cannot be brought twice before the European Tribunal, first as a dispute between a private person and the State, and secondly as a dispute between two Contracting States. In any event, the decision of the European Tribunal is final : neither it nor any other international or national body can then be asked to determine the dispute.

### **Article 3**

11. Under general international law, any international court is deemed competent to decide disputes submitted by special agreement by States which have not previously recognised its jurisdiction, provided the case submitted lies within the general scope of the judicial functions entrusted to it, Article 3 confirms this rule in respect of disputes concerning the interpretation or application of the Convention which might arise between Contracting States not all of which are Parties to the Protocol.

## **PART III**

12. The rules governing the constitution and operation of the European Tribunal are designed to ensure the effectiveness of its jurisdiction, while at the same time keeping the procedure as simple and inexpensive as possible. It cannot be foreseen whether frequent recourse will be had to the Additional Protocol. On the other hand, it seemed advisable to link this new legal body fairly closely to the Council of Europe's judicial organ, the European Court of Human Rights, which has already proved its worth. But it was not possible simply to entrust that Court with the tasks which the European Tribunal will have to discharge, principally because the semi-open character of the Convention (cf. Article 37 of the Convention) may entail the participation of judges nominated by nonmember States of the Council of Europe.

13. The Protocol does not deal with the question of languages, nor with cases where more than two Contracting States are involved in proceedings. These and other matters will be dealt with by the Rules of Procedure mentioned in Article 7, paragraph 1, of the Protocol.

#### **PART IV**

14. Under Article 9, a Party to the Protocol may refuse to recognise the jurisdiction of the European Tribunal in respect of proceedings instituted by private persons in accordance with the provisions of Part 1. The notification to this effect must be communicated not later than the date of ratification or acceptance of the Protocol or accession thereto.

#### **PART V**

15. The final clauses contained in Articles 10 to 14 of the Protocol follow the pattern of final clauses, in conventions and agreements drawn up within the Council of Europe. Special mention should however be made of a basic underlying principle. The Protocol may not be signed by a State which has not signed the Convention nor may it be ratified or accepted by a State which has not already ratified or accepted the Convention ; again no State may accede to it unless it has acceded to the Convention in accordance with the provisions laid down in the final clauses of the latter.

The number of ratifications needed for the Protocol to enter into force has been set at five a higher number than that required for the entry into force of the Convention. There is of course no point in setting up a European Tribunal unless a sufficient number of cases can be expected to be brought before it.