GERMANY

1. Delegations are invited to provide information on any domestic legislation existing on this particular issue.

1.1 The Federal Constitutional Court has held that immunity suspends German jurisdiction and is an impediment to proceedings (see Reports of Cases before the Federal Constitutional Court [*Entscheidungen des Bundesverfassungsgerichts*; BVerfGE], Volume 46. at pages 342 and 359, in its decision dated 12 December 1977 in case no. 2 BvM 1/76). It is a basic principle in German law that, in a given case, national courts verify if they have jurisdiction. As a consequence it is up to the competent court to decide whether state immunity or the immunity of an international organization applies.

1.2 With regard to state immunity and the immunity of international organizations, Section 20 of the Courts Constitution Act (*Gerichtsverfassungsgesetz*) incorporates public international law and provides that—

"(1) German jurisdiction also shall not apply to representatives of other States and persons accompanying them who are staying in the territory of application of this Act at the official invitation of the Federal Republic of Germany.

(2) Moreover, German jurisdiction also shall not apply to persons other than those designated in (1) and in Sections 18 and 19 insofar as they are exempt therefrom pursuant to the general rules of international law or on the basis of international agreements or other legislation."

1.3 Article 25 of the Basic Law (*Grundgesetz*) stipulates that—

"[t]he general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory."

1.4 Since State immunity is based on customary international law, it is, accordingly, also part of German national law. In this context the Federal Constitutional Court (*Bundesverfassungsgericht*) held that State immunity is a norm of international customary law. However, according to its jurisprudence, immunity exists in international customary law only in cases of *actae iure imperii*, i.e. when a State acts officially. See BVerfGE—

(i) Volume 16, at pages 27 and 34 *& seq*., in its decision dated 30 April 1963, in case no. 2 BvM 1/62;

(ii) Volume 46, at pages 342, 343, and 350, in its decision dated 12 December 1977, in case no. 2 BvM 1/76;

iii) Volume 117, at pages 141 and 153, in its decision dated 6 December 2006, in case no. 2 BvM 9/03.

As international law does not provide criteria to distinguish official acts from unofficial acts, this must be determined in accordance with national law (see BVerfGE, Volume 16, at pages 27, 61, and 62, in its decision dated 30 April 1963. in case no. 2 BvM 1/62).

1.5 Customary international law also contains rules on the immunity of international organizations. As a general rule, however, immunity is granted by international treaties, which form part of German law pursuant to Section 20 of the Courts Constitution Act (see § 1.02 *supra*), provided Germany has ratified the treaty in question.

1.6 If a court is in doubt as to whether a provision of public international law is part of German national law, it is obliged under Article 100(2) of the Basic Law to submit the issue to the Federal Constitutional Court. This provision reads as follows:

> "If, in the course of litigation, doubt exists whether a rule of international law is an integral part of federal law and whether it directly creates rights and duties for the individual (Ar¬ticle 25), the court shall obtain a decision from the Federal Constitutional Court."

1.7 The provision of information by the Federal Foreign Office or the Federal Government in cases pending before national courts on public international law issues relating to immunities of States or of international organizations, is permissible within narrow limits only. In this regard, a distinction has to be made between information about facts and information about legal issues. The provision of information about facts by the Federal Foreign Office would generally be accepted, since this does not infringe upon the independence of the judiciary as guaranteed by Article 97(1) of the Basic Law.

1.8 In proceedings before German civil courts. German law refers to the general principle that it is for the parties to produce the facts and evidence. This is known in German as the *Beibringungsgrundsatz*. According to this principle, the court takes into consideration only facts that are submitted by the parties. Therefore, general information provided by the Federal Foreign Office can only be considered by the court if submitted by a party.

1.9 As an exception to this principle, the second clause in Section 273(2) of the Code of Civil Procedure (*Zivilprozessordnung*) provides a possibility for courts to request information *proprio motu* from administrative bodies. However, such requests can only be directed to matters of fact. A court is entitled to ask, for example, if a Head of State or Government was officially invited by the Federal Republic of Germany, a fact of relevance to Section 20(1) of the Courts Constitution Act (see § 1.02 *supra*).

1.10 Furthermore, Section 293 of the Code of Civil Procedure provides that evidence has to be produced to substantiate foreign law and customary law (meaning national customary law only) if the law as contended is unfamiliar to the court. This provision is generally understood as prohibiting the civil courts from asking for an expert opinion on all other subjects.

1.11 As a rule, the Federal Government—when not a party—is not entitled to provide legal assessments, nor does German law know of *amid curiae*. Generally, any influencing, annotating, or advising on pending proceedings before national courts by the Federal Government is prohibited for reasons of judicial independence and the separation of powers. Commenting on legal issues is admissible only when explicitly authorized by law.

1.12 In cases in which Section 100(2) of the Basic Law (see § 1.06 *supra*) is invoked, the *Bundestag*, the Federal Council (*Bundesrat*) and the Federal Government are entitled, pursuant to Section 83(2) of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*), to express their opinion on legal issues relating to a rule of international law. They may likewise join the proceedings before the Federal Constitutional Court in which these issues have been raised as a party.

1.13 The obligation of the parties to produce the facts (see § 1.08 *supra*) does not apply to the proceedings of criminal courts, administrative courts, tax courts, social courts, and in matters of non-contentious jurisdiction. With regard to the need of the court to be informed

about foreign law and customary law, Section 202 of the Social Courts Act (*Soziatgerichtsgesetz*) and Section 155 of the Code of Procedure for Fiscal Courts (*Finanzgerichtsordnung*) refer to Section 293 of the Code of Civil Procedure (see § 1.10 *supra*): cf. the rulings of the Federal Social Court in its judgment dated 29 April 1997, in case no. 8 Rkn 6/96, and of the Federal Fiscal Court in its judgment dated 19 December 2007, in case no. I R 46/07.

1.14 Section 35 of the Code of Administrative Court Procedure (*Venwaltungsgerichtsordnung*) envisages a "Representative of the Interests of the Federation," who is entitled to represent the interests of the Federal Government in any proceedings at the Federal Administrative Court:

> "(1) The Federal Government shall appoint a Representative of the Interests of the Federation at the Federal Administrative Court and shall establish him within the Federal Ministry of the Interior. The Representative of the Interests of the Federation at the Federal Administrative Court may attend any proceedings before the Federal Administrative Court: this shall not apply to proceedings before the armed forces senates. The Representative shall be bound by the instructions of the Federal Government.
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> (2) The Federal Administrative Court shall provide the Representative of the Interests of the Federation at the Federal Administrative Court with the opportunity to intervene."
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> As a consequence, the Representative of the Interests of the Federation could raise the question of immunity in a case pending before the Federal Administrative Court and submit the legal opinion of the Federal Government.

2. Delegations are invited to inform the Committee as to whether there are any other means for the Ministry of Foreign Affairs of communicating information to national courts and how the Ministry of Foreign Affairs perceives the scope of international legal obligations in [this] field. For example:

- **Are there any information related to international legal obligations contained in the legislative preparatory' works of domestic laws on immunities?**
- **Are there any directives, guidelines or circulars that have been issued on this subject?**

2.1 The rules of international law are part of German national law. Therefore, courts are expected to be competent to ascertain the legal effect and scope of rules of international law. If a court has doubts in this regard, it is obliged to ask the Federal Constitutional Court pursuant to Article 100(2) of the Basic Law (see § 1.06 *supra*). According to the principle of separation of powers, the legal judgment on the issue of whether immunity exists in a given case lies within the competence of the judicial power. The Federal Foreign Office, however, is not part of the judicial power.

2.2 As general rules of international law are an integral part of federal law pursuant to Article 25 of the Basic Law (see § 1.03 *supra*), ascertained amendments to these general rules ought to be taken into account by national courts in hearing cases pending before them.

3. Delegations are invited to precise whether there are any prohibitions or stated limits in domestic law, which would prevent the transmission of information to national courts by the Ministry of Foreign Affairs. In this regard, are there, in your domestic legal order, any relevant legislation or national practices (any reference of case-law would be appreciated)?

3.1 As explained in § 1.07 *supra*, German law contains limits on the transmission of information to national courts by the Federal Foreign Office. Article 97 of the Basic Law provides that—

"judges shall be independent and subject only to the law."

3.2 In addition, Section 1 of the Courts Constitution Act stipulates that—

"judicial power shall be exercised by independent courts which are subject only to the law."

3.3 On this basis, the Federal Constitutional Court has emphasized that any "avoidable influence" is prohibited: cf. BVerfGE, Volume 26. at page 79, in its decision dated 4 June 1969, in the joint cases no. 2 BvR 33, 387/66. and Volume 38. at page 1, in its decision dated 27 June 1974, in the joint cases no. 2 BvR 429, 641,700, 813/72. Therefore, any kind of advising on legal issues by the Federal Government is prohibited, unless it is explicitly permitted by law (see §§ 1.11,1.12, and 1.14 *supra*).

3.4 Further, it would possibly entail a violation of Article 6(1) of the European Convention on Human Rights, granting the right to trial before an independent and impartial tribunal, if a court based its judgment on a legal interpretation provided by the Ministry of Foreign Affairs (see Donna Gomien, David Harris, Leo Zwaak: Law and Practice of the European Convention on Human Rights and the European Social Charter. Strasbourg 1996; at page 196). The European Court of Human Rights, in the Beaumartin judgment dated 24 November 1994 (Series A no. 296-B [38]), underlined in this context that—

> "only an institution that has full jurisdiction and satisfies a number of requirements, such as independence of the executive and also of the parties, merits the designation 'tribunal' within the meaning of Article 6 para. 1."

4. From a broader perspective, delegations are called upon to express their views as to whether the Ministry of Foreign Affairs can communicate with the Parties engaged in procedures before national courts and, if so, as to how it can proceed. In particular with regard to:

- the principle of equality of arms (*e.g.* does the communication with one Party imply informing the others about the content of that communication ?).

- the scope of the communication (*e.g.* communication of possible factual elements or communication restricted to a single point of law).

- the principle of independence of the Judiciary.

- any other related issue.

4.1 There are no specific provisions concerning communication by the Federal Foreign Office with the parties to proceedings before national courts. The Federal Foreign Office may thus communicate information as far as legal principles are not affected. Most important in this respect are the principles of judicial independence pursuant to Article 97(1) of the Basic Law (see § 1.07 *supra*) and of separation of powers pursuant to Article 20 of the Basic Law. Also, the principle of equality of arms sets limits in this context.