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THE CZECHOSLOVAK APPROACH TO THE DRAFT CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

Vladimir Balaš* & Monika Pauknerová**

I. INTRODUCTION

The jurisdictional immunity of the State and its property, that is, the exemption of a State from the jurisdiction of other States, is not now regulated by a universal international treaty. The scope of international jurisdictional immunity has been at issue since at least the fourteenth century.¹ Today we face two basic approaches toward the institution of jurisdictional immunity, both of which have inherent practical consequences. Briefly speaking, partisans of the absolute immunity concept presume that immunity will be applied to the acts of a State in all cases except those in which a State expressly waives it.² On the other side, partisans of the restrictive, or functional, immunity concept differentiate between *jure imperii* (sovereign) acts and *jure gestionis* (non-sovereign, and especially commercial) acts of a particular State, asserting basically that immunity from jurisdiction applies to *juri imperii* acts only.³ The question then arises as to where to draw the borderline between *juri imperii* and *juri gestionis* acts, and which criteria are useful to judge the activity of the State.⁴

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1. Cf. BARTOLUS DE SASSOFERRATO (Postglossators School), TRACTATUS REPRESSALIUM, Questio 1/3, para. 10 (1354), where one finds the origin of the now famous phrase, which in its entirety reads: "Non enim una civitas potest facere legem super alteram, quia par in parem non habet imperium" (There is no polity which should have power over another, because one equal has no power over another).

2. See, e.g., L. OPPENHEIM, INTERNATIONAL LAW 239-241 (6th ed. 1947); Anzilotti, *L'Esenzione degli stati stranieri dalla giurisdizione*, 5 RIVISTA DI DIRITTO INTERNAZIONALE 477 (1910); Usenko, *Immunitet gosudarstva ot innostrannoj yurisdikcii i ispolnitelnykh mer* (Immunity of a State from Foreign Jurisdiction and Measures of Constraint), 13 SBORNIK INFORMACIONNYKH MATERIALOV 10, 11 (1962).

3. See, e.g., I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (3d ed. 1979); G. BADR, STATE IMMUNITY, AN ANALYTICAL AND PROGNOSTIC VIEW (1984); S. SUCHARITKUL, STATE IMMUNITIES AND TRADING ACTIVITIES (1959).

4. For greater detail, see Balaš, *Jurisdikční imunita státu, hledání kritérií zuzujících její rozsah* (Jurisdictional Immunity of the State, in Search of Criteria Restricting its Scope), 129 PRÁVNÍK

The prevailing opinion is that immunity exists as a customary rule of international law. However, diverging opinions of scholars on particular aspects of this rule and international practice clearly indicate that its content is not quite crystallized and unambiguous.⁵ It has also been argued that it is not possible to talk about such a rule at present and that there is in fact a *vacuum juris* in this field, *i.e.*, that this issue is in fact not regulated by international law.⁶

Sovereign immunity is in many States regulated by internal legal norms.⁷ Some laws on jurisdictional immunities of States were adopted in the 1970s and 1980s.⁸ As far as Czechoslovakia is concerned, the exemption of a State from the jurisdiction of another State is regulated in general by the provision of article 47, Law number 97/1963, Collection of Laws, on international private law and the corresponding procedure.⁹ For a long time, this law has failed to comply with the requirements of contemporary international relations. In the face of heterogeneity in international theory and practice, it is desirable to agree upon a regulation of this topic in international law as soon as possible.

This article deals with four issues:

1. The effort of the International Law Commission of the United Nations to codify jurisdictional immunity.
2. The theoretical and practical Czechoslovak approach toward the institution of jurisdictional immunity of States and the Draft Convention, and a prediction of possible change of the Czechoslovak view.
3. The changing views of East European scholars.

348-364 (1990). See also Balaš, Pauknerová & Zemánek, *Jurisdikční imunita státu v mezinárodním právu* (Jurisdictional Immunity of the State in International Law), 127 PRÁVNÍK 451-466 (1988) and sources quoted therein.

5. Cf., e.g., the views held by Anzilotti, *supra* note 2, at 477; L. OPPENHEIM, *supra* note 2, at 239-241; Weiss, *La compétence ou l'incompétence des tribunaux à l'égard des états étrangers*, 1 HAGUE ACADEMIE DE DROIT INTERNATIONAL RECUEIL DES COURS (1923); I. BROWNLIE, *supra* note 3, at 320-44; M. BOGUSLAVSKIJ, IMMUNITET GOSUDARSTVA (Immunity of the State) 8-9 (1962).

6. This view was voiced by Č. Čepelka during V. Balaš's defense of "Jurisdikční imunita státu" (Jurisdictional Immunity of the State) (unpublished doctoral dissertation), which took place in Prague in June 1990.

7. See generally MATERIALS ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY, U.N. Doc. ST/LEG/SER. B/20, (1982) (collection of national laws and international agreements on immunity from jurisdiction).

8. For example, in the United States, The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (1988), State Immunity Act of 1978 (United Kingdom), laws on immunity of State in Singapore (1979), Canada (1981), South Africa (1981) *etc.*, reprinted in MATERIALS ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY, *supra* note 7, at 1-70.

9. See Z. KUČERA & L. TICHÝ, ZÁKON O MEZINÁRODNÍM PRÁVU SOUKROMÉM A PROCESNÍM — KOMENTÁŘ (The Law on International Private Law and the Corresponding Procedure—Commentary) 259-268 (1989).

4. An analysis of particular provisions of the Draft Convention with respect to their acceptability by States with different socioeconomic systems and especially by Czechoslovakia.

The article concludes that even if codification of jurisdictional immunity is initially unsuccessful because of the international disparity of views on the subject, it may ultimately be vindicated if the codification helps promote a change and convergence of views in the long run.

II. ORIGINS OF THE DRAFT CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

After many more or less successful attempts to regulate jurisdictional immunities on the international level,¹⁰ the codification effort was concentrated finally in the International Law Commission of the United Nations (ILC). A Draft Convention was elaborated based on the U.N. General Assembly Resolution No. 6/151 of December 18, 1977. The whole set of draft articles was adopted by the ILC at the first reading in 1986, and substantial progress has been achieved by the ILC in its work on the second reading of the articles. Final preparations should be followed by a diplomatic conference which would subsequently adopt the Convention.¹¹

The aim of this Draft Convention is to unify the diverging opinions of particular States about international customary law and do away

10. For greater detail see Balaš, Pauknerová & Zemánek, *supra* note 4. Among the attempts to regulate the issue of jurisdictional immunities of States see, e.g., The Brussels Convention on the Unification of Certain Rules Relating to Immunity of State-Owned Vessels, April 10, 1926, and Supplementary Protocol, May 24, 1934, reprinted in G. HACKWORTH, 2 DIGEST OF INTERNATIONAL LAW 463; The European Convention on State Immunity, May 16, 1972, Europ. T.S. No. 74; *Projet de règlement international sur la compétence des tribunaux dans les procès contre les Etats, Souverains ou Chefs d'Etats*, Institut de Droit International, 1892. For the more recent attempts to deal with this topic within the Institut de Droit International see 45 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, TOME II 293-295 (1954); 62 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, TOME I (1987); International Law Association, draft of *Réforme et codification du droit international, projet d'une convention sur l'immunité en droit international*, submitted by Professor K. Strupp in REPORT OF THE THIRTY-FOURTH CONFERENCE, VIENNA 426-440 (1926). For more recent attempts to deal with this topic within the International Law Association see REPORT OF THE FORTY-FOURTH CONFERENCE, COPENHAGEN 204-217 (1950); REPORT OF THE FORTY-FIFTH CONFERENCE, LUCERNE V-VIII (1952); REPORT OF THE SIXTIETH CONFERENCE, MONTREAL, 5-10, 325-348 (1982); Report of the Subcommittee of the League of Nations Committee for the Progressive Codification of International Law, 22 AM. J. INT'L L. 118 (Special Supp. 1928) (Conclusions of M. Matsuda, Rapporteur for the Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law, October 11, 1926); *Draft Convention on Competence of Courts in Regard to Foreign States* in HARVARD LAW SCHOOL, RESEARCH IN INTERNATIONAL LAW 451 (1932).

11. Tomuschat, *Jurisdictional Immunities of States and Their Property—The Draft Convention of the International Law Commission*, in LAW OF NATIONS, LAW OF INTERNATIONAL ORGANIZATIONS, WORLD'S ECONOMIC LAW (LIBER AMICORUM HONOURING IGNAZ SEIDL-HOHENVELDERN) 603 (1988).

with variances which, as far as its interpretation is concerned, remain among States.¹² The Draft is the result of many years of work to get the partisans of absolute and restrictive immunity to compromise. The Draft should then be a good starting point for the further development of mutual relations, especially economic ones, between States with different systems of proprietary relations, economic and political orders, and different levels of economic development. When elaborating the Draft, the ILC began with the presumption that the formulation of individual rules will provide an opportunity for their further progressive development and accelerate the adoption of new rules regulating related questions.¹³

The Draft of the international codification on the jurisdictional immunity of States has been accepted rather positively by the States themselves.¹⁴ Generally speaking, the spirit of compromise in the Draft raises hope that it will be accepted by States, which take different positions as far as the question of immunity in the sphere of non-sovereign activity of a State and its agencies and instrumentalities is concerned. The proposed regulation attempts to find the most precise rules, which should envisage some level of legal certainty on the question of how a particular case will be reviewed; the regulation's approach is pragmatic. From the point of view of the effectiveness of the regulation of relations within the international community, the most perfect internal legal regulation should compete only slightly with rules adopted at the international level within the framework of the United Nations.¹⁵

Existing municipal internal legislation on the jurisdictional immunity of a State is one of the points of departure as well as an inspiration for the international rules which are being prepared by the ILC. But it is difficult to unify municipal law through international conventions and treaties. It is complex to harmonize proposed provisions emanating from different legal cultures, various systems of proprietary relations, and differing ideas about the role of legal codification.

Another important source of legal inspiration of the ILC Draft Convention is the European Convention on State Immunity of 1972,

12. Cf. sources cited *supra* note 5.

13. Cf. *Report of the Commission to the General Assembly on the Work of its 31st Session* 2(2) Y.B. INT'L L. COMM'N 185-186 (1979), U.N. Doc. A/CN.4/SER.A/1979/Add. 1 (Part 2) [hereinafter *Report of the Commission*].

14. See *Jurisdictional Immunities of States and Their Property, Comments and Observations Received from Governments*, U.N. Doc. A/CN.4/410 (1988) [hereinafter *Comments*].

15. For examples of international regulations see MATERIALS ON THE JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY, *supra* note 7.

which is binding on several West European States.¹⁶ The European Convention is itself also a compromise, although it significantly favors the restrictive approach to State immunity. Different legal standpoints are very often accompanied by distinct political views and economic interests that are hidden behind the elaboration of the Draft. Unlike the situation in the past, this is especially relevant to developing countries with a strong public sector in industry. Indebted States can invoke immunity against countries who press international claims to recover their loans.¹⁷

III. THE CZECHOSLOVAK POSITION ON THE IMMUNITY OF STATES FROM JURISDICTION

In principle, Czechoslovakia now supports the Draft Convention on Jurisdictional Immunities of States, although it did not push the more progressive approach at the very outset of the codificational work. This was especially true with respect to the exceptions to immunity, or the cases to which immunity does not apply. The Czechoslovak standpoint was determined to a considerable extent by the position of the East European countries as a whole and it was quite obvious that the "common" approach of these States was derived from their vassalage to the USSR, its foreign policy, and its political supremacy in economic relations. The USSR still bases its position on the concept of absolute immunity.¹⁸ Besides the official position of the USSR, the concept of absolute immunity was also for years handed down by the vast majority of Soviet international law scholars, who it seems were more apologetic than was really necessary.¹⁹ However, Soviet commercial practice took a different and more realistic step: that of not claiming the immunity of the State while engaged in commercial transactions, at least with commercial partners from the West. This more realistic approach is to be traced also in Soviet civil law.²⁰

The practice of Czechoslovak foreign trade was analogous to the USSR's in this respect. On the other hand, the official Czechoslovak

16. The European Convention on State Immunity, May 16, 1972, Europ. T.S. No. 74. See, e.g., Sinclair, *The European Convention on State Immunity*, 22 INT'L & COMP. L.Q. (1973); C. SCHREUER, *STATE IMMUNITY: SOME RECENT DEVELOPMENTS* (1988). See also MATERIALS ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY, *supra* note 7, at 156.

17. Although such a tactic to avoid repayment of debt is largely hypothetical at present, one should not exclude the possibility of its use.

18. See especially *Yurisdiktsionnye immunitety gosudarstv i ikh sobstvennosti* (Jurisdictional Immunities of States and Their Property), U.N. Doc. A/CN.4/371 (1983) (Memorandum by N. A. Ushakov) [hereinafter Memorandum].

19. Cf. M. BOGUSLAVSKII, *supra* note 5.

20. See sources in Balaš, Pauknerová & Zemánek, *supra* note 4, at 461-62.

position derives from the principle of the absolute immunity of a State, which, as was mentioned by the press spokesperson of the Czechoslovak ministry of foreign affairs in 1988, is allegedly based on international customary law.²¹

This opinion was announced in connection with the decision of the Austrian Supreme Court concerning the construction of nuclear power stations in Czechoslovakia.²² In the case of *Georg Maier v CSSR*,²³ the court considered the question of whether Austrian courts were competent to enjoin the construction on Czechoslovak territory of the nuclear power station Mochovce, whose effects, according to the Austrian plaintiff's argument, would endanger his land located in Austria only 115 kilometers away. The Supreme Court held that the court in Korneuburg was locally competent.

According to the official Czechoslovak view, the Austrian judiciary has no authority to entertain actions of this character, and therefore does not respect the principle of absolute immunity of States as sovereign members of the international community.²⁴ The Czechoslovak ministry of foreign affairs mentioned expressly that the decision of the Supreme Court of Justice was inconsistent with international law. If we put aside the rather complicated question of Czechoslovakia's standing as a defendant in this case, the question of the immunity of a State and its agencies and instrumentalities in cases of non-sovereign activity clearly appears. It is necessary to point out that the Supreme Court concluded that the *Maier* case dealt with *jure gestionis* actions, and that such actions have not been excluded from the jurisdiction of Austrian courts since the early fifties.²⁵

I share the opinion that the concept of absolute immunity of States and their property is untenable today. The practice of distinguishing between *jure imperii* and *jure gestionis* acts, which has been respected by international commercial practice with greater or smaller vicissitudes for many years, has started to gain ground in the last couple of years, even among East European scholars, albeit slowly and rather sporadically. To illustrate this process, let us survey briefly the development of the jurisdictional immunity doctrine in the East European

21. Bezpříkladný akt vměšování do naší svrchovanosti (An unprecedented act of interference into our sovereignty), *Rudé Právo* (Czechoslovakia), Apr. 23, 1988, at 2 [hereinafter *Bezpříkladný akt*].

22. *Id.*

23. Austrian Supreme Court, exhibit number 5 Nd 509/87

24. *Bezpříkladný akt*, *supra* note 21, at 2.

25. See the decision of the Austrian Supreme Court in the *Dralle* case, 17 INT'L L. REP. 155 (1950), reprinted in Seidl-Hohenveldern, *State Immunity: Austria*, NETHERLANDS Y.B. INT'L L. 97, 101-102 (1979).

view of international law.²⁶

East European scholars also uphold the opinion shared by the majority of distinguished international legal scholars that State immunity is a rule derived directly from the principles of the mutual independence of States, their sovereign equality, and their dignity.

Boguslavskij provides one of the most comprehensive surveys of issues having a bearing on the jurisdictional immunity of the States presented by Socialist legal science. He holds the view that in economy, science, and culture, every State enters into legal relations of ambiguous character: first, legal relations arising between States, and second, legal relations in which the State acts only as one of the parties. Then he accentuates that the State does not act as two legal persons—for example as Public Treasury and as the subject of sovereign authority—but rather that the State is unique even though the manifestations of its activity can vary.²⁷ Boguslavskij, Usenko, Ushakov, and many others argue that the State does not proceed in civil law relations as an ordinary civil law entity and that in foreign trade relations it does not deal as a subject of international law: in the latter case, the State acts as a subject of civil law "*sui generis*."²⁸ However, in my opinion this assertion is not a satisfying answer to the question of why the State should be granted immunity as a participant in legal relations which are substantially different from those administered by public international law in the framework of which State immunity applies.

The views of Soviet legal science on the position of the State participating in civil (commercial) law relations with foreign private parties are changing. In their work, Luntz and Braginski focus on the delimitation of State property funds acting in internal and external relations.²⁹

As for the proper law governing the acts of the State, Boguslavskij argues that they are determined by the municipal law of the respective State and by international law, but they are never regulated by the laws of another State. It follows from this in principle that in the civil law relations of the State it is necessary to apply its municipal law.³⁰

I find this opinion correct as far as the relations within the limits of

26. For a more extensive review see V. Balaš, *Jurisdikční imunita státu* (Jurisdictional Immunity of the State) (unpublished doctoral thesis, Prague, April 1989) 40-44, 85-162.

27. M. BOGUSLAVSKIJ, *supra* note 5, at 8-9.

28. *Id.* at 14.

29. Luntz & Braginski, *Gosudarstvo kak subyekt grazhdanskogo prava*, in *SUBYEKTY GRAZHDANSKOGO PRAVA* (Subjects in Civil Law) 268 (S. Bratus ed. 1984).

30. M. BOGUSLAVSKIJ, *supra* note 5, at 14.

the State's territorial jurisdiction are concerned or in the cases in which the use of its municipal law is required by the appropriate conflict of laws rule. Otherwise it could be considered an unauthorized extension of the jurisdiction of the State beyond the frontiers of its territorial sovereignty. If we accepted Boguslavskij's concept in this respect, we should also accept the concept that the State acts in a privileged way, which would not correspond with the opinion that these particular relations are comparable to civil law relations which are characterized by the equality of its subjects. Boguslavskij shares the view that a contract in which one of the parties is the State has a civil law character and is regulated by the municipal legislation of the respective State, and not by the laws of the other contracting party or by international law, unless agreed otherwise.³¹ The law to be used (the proper law) can be determined by agreement of the contracting parties and can be based on the principle of choice of law generally accepted by the private international law of contracts.³² If the parties have not agreed on the proper law, it is necessary to use the municipal law of the State-contracting party. The civil law obligations of the sovereign State can in no case, unless the State gives its explicit consent, be subjected to the operation of foreign law.³³ However, this interesting proposal, which reflects a standpoint opposite to that of the ILC Draft, has not been generally accepted.

The fact that many States have enacted the laws providing that immunity will be granted to the State only in cases in which the State acts in its sovereign capacity is, as stressed by Ushakov, due to the dispositive character of the State immunity rule.³⁴ As concerns the critical review of restrictive immunity, the advocates of absolute immunity in socialist States have drawn attention to the untenability of splitting the State as a legal entity.³⁵

Remarkable opinions appeared in this respect in Hungary in the eighties. Mádl and Vékás drew the conclusion that Hungary may accept the action of a foreign forum in a legal dispute otherwise subject to exclusive Hungarian jurisdiction, and considering that this is based on reciprocity, a Hungarian court may also adjudicate a similar civil or commercial law dispute of another State. Thus, conclude Mádl and

31. *Id.* at 14-15.

32. *Id.*

33. *Id.*

34. Memorandum, *supra* note 18, at 5.

35. See Žourek, *Some Comments on the Difficulties Encountered in the Judicial Settlement of Disputes Arising from Trade Between Countries with Different Economic and Social Structures*, 86 JOURNAL DU DROIT INTERNATIONAL 639, 641 (1959) (on the concept of absolute immunity).

Vékás, in addition to waiver of immunity and the relevant international treaty, reciprocity represents the acceptance of functional or relative immunity.³⁶ Another Hungarian author, Bragyova, shares the opinion that there is undoubtedly a trend towards the restriction of State immunity to *jure imperii* acts of State, in contradiction to *jure gestionis* acts which are supposed to fall outside the operation of the rule of immunity.³⁷

According to Enderlein, the unity of policy and economy, on which the rejection of the restrictive theory was based, excludes neither the differentiation of various functions of the socialist State, nor the division of labor among State instrumentalities.³⁸ He states expressly that the theory of absolute immunity did not correspond with the interests of the German Democratic Republic and its practice.³⁹

In principle, some Czechoslovak authors admitted the possibility of distinguishing between *jure imperii* and *jure gestionis* acts of the State, although in another connection than that of State immunity, namely that of taking natural resources from the high seas and using outer space.⁴⁰

On the other hand, Ushakov states that the theory of restrictive immunity is untenable, because it is aimed at the subjection of one State to the jurisdiction of another State, which in its substance is contrary to the principles of sovereignty, sovereign equality of the States and non-interference in their internal affairs.⁴¹ However, even the Declaration on the Principles of International Law of 1970 does not include immunity among the elements of sovereignty.⁴²

36. See F. MÁDL & L. VÉKÁS, *THE LAW OF CONFLICTS AND FOREIGN TRADE* 118 (1987).

37. Bragyova, *Reflections on Immunity of States from the Point of View of International Law*, in *QUESTIONS OF INTERNATIONAL LAW* 44 (1986).

38. F. ENDERLEIN, *DIE IMMUNITÄT DER STAATEN IM GEGENWÄRTIGEN VÖLKERRECHT: ZUM AUSSCHLUSS KOMMERZIELLER AKTIVITÄTEN IM ENTWURF DER VÖLKERRECHTSKOMMISSION DER VEREINTEN NATIONEN, PROBLEME DES VÖLKERRECHTS* 41-42 (1987):

"Die Ablehnung der Theorie der funktionellen Immunität des Staates stützte sich u.a. darauf, daß für den sozialistischen Staat die Einheit von Politik und Ökonomie, die Einheit von politischer Macht und sozialistischem Eigentum an den Produktionsmitteln als der ökonomischen Grundlage der Gesellschaft und des Staates charakteristisch ist. Diese Einheit schließt aber weder eine Unterscheidung verschiedener Funktionen des sozialistischen Staates - wie z.B. die Schutzfunktion, die wirtschaftlich-organisatorische Funktion, die kulturell-erzieherische Funktion u.a. - noch eine Arbeitsteilung zwischen verschiedenen Organen des Staates aus. Auch hinsichtlich des Handelns einzelner staatlicher Organe und Einrichtungen kann zwischen der Ausübung staatlicher Tätigkeit und der Teilnahme am Zivilrechtsverkehr unterschieden werden."

39. *Id.* at 53.

40. Č. ČEPELKA & V. DAVID, *ÚVOD DO TEORIE MEZINÁRODNÍHO PRÁVA* (Introduction to the Theory of International Law) 180 (1983).

41. Memorandum, *supra* note 18, at 5.

42. *Declaration on the Principles of International Law Concerning Friendly Relations and*

The aim of the restrictive theory is to secure the legal protection of the State's subjects. The consequence of such protection can doubtless cause the subjection of a State to the jurisdiction of another State. If the question is put as it was done above by Ushakov, the means seem to have changed place with the purpose.⁴³ This critical view of the restrictive immunity was reflected also in Ushakov's evaluation of the Draft Convention on the Jurisdictional Immunities of States and their Property as elaborated by the ILC.⁴⁴ Ushakov submitted his own contribution on how to solve the questions of immunity at the same time the Special Rapporteur's efforts were criticized. In Ushakov's view, first, the State can prevent its physical and juridical persons from making contracts with foreign States. Second, the State, by way of agreement, can receive the consent of another State to its subjection to the local courts of the first State for certain categories of acts. Third, the State can ensure that its physical and juridical persons conclude contracts only on condition that they include clauses on the settlement of disputes by the appropriate court or by arbitral clauses. In addition, every State has the right to diplomatic protection of its natural and legal entities.⁴⁵

The question arises whether this proposal, apart from not harmonizing the existing legal disparities, takes into account in all respects the necessity of avoiding illogical hindrances to the course of further development of economic cooperation among States. Moreover, the proposal contrasts with the recent opinions of other scholars in East European States.⁴⁶ Especially in light of the current fundamental changes in Central and Eastern Europe, one can expect States will shift considerably towards restrictive immunity. We can trace this shift in most of the Western countries (with some exceptions) to the fifties.⁴⁷

In this context, one can appreciate the position of Czechoslovak

Cooperation among States in Accordance with the Charter of the United Nations, 24 October 1970, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28), U.N. Doc. A/25 (1970).

43. Memorandum, *supra* note 18, at 5.

44. *Id.*

45. *Id.* at 7.

46. See, e.g., Lopuski, *Imunitet obcego panstwa w sprawach zwiazanych z handlem zagranicznym*, in *PROBLEMY PRAWNE HANDLU ZAGRANICZNEGO* 45 (1982); F. MÁDL & L. VÉKÁS, *supra* note 36; Bragyova, *supra* note 37; F. ENDERLEIN, *supra* note 38.

47. See, e.g., practice in the United States (The "Tate Letter," 26 DEP'T ST. BULL. 985 (1952): "For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity."), in *Austria (Dralle v. Republic of Czechoslovakia*, Supreme Court, 17 INT'L L. REP. 155, Official Collection SZ XXIII, No. 143 (1950)), and in the Federal Republic of Germany (*Claim against the Empire of Iran*, Federal Constitutional Court, BVerfGE 16, 27, 45 INT'L L. REP. 57 (1972) (the *Charkiv, Iranian Embassy* case)).

experts, which was addressed in the Commission for Legal Questions of the Council of Mutual Economical Assistance (CMEA) within the framework of the 1988 discussion of the report on legal questions concerning the conclusion of diagonal contracts (treaties) in the field of economic and scientific-technical cooperation. The Czechoslovak delegation held the view that in these relations persisting in absolute immunity is only a serious obstacle to the further normal development of economic and scientific-technical relations between interested States. Irrespective of this view, which did not obtain any support in the CMEA, this sphere of legal relations was ruled by the principle of absolute immunity until now. The practice is such that States must always waive their immunity in each particular contract.⁴⁸

The conception of the jurisdictional immunity of States should be reevaluated in Czechoslovakia in accordance with current trends in the development of jurisdictional immunity. This reflects requirements of international economic cooperation and also practical concerns of unilateral bestowing of privileges on other States. Even before the relevant internal legislation is adopted,⁴⁹ a broad field of opportunity is opening for Czechoslovak diplomats and experts to help prepare and support the future international Convention on State Immunities within the United Nations.

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

The Draft Convention⁵⁰ is structured as follows:

Part I. Introduction

Part II. General Principles

Part III. [Limitations on] [Exceptions to] State Immunity

Part IV. State Immunity in Respect of Property from Measures of
Constraint

Part V. Miscellaneous Provisions⁵¹

48. Regarding the discussion of the Report, see Kohout, *Právní povaha a režim diagonálních smluv v oblasti hospodářské a vědeckotechnické spolupráce* (Legal Nature and Regime of Diagonal Contracts in the Sphere of Economic and Scientifico-technical Cooperation), *ARBITRÁŽNÍ PRAXE* No. 3, 80 (1989).

49. Admittedly, this topic cannot claim a priority in the fray of today's revolutionary legislative changes.

50. Ogiso, *Third Report on Jurisdictional Immunities of States and Their Property* at 1-2, U.N. Doc. A/CN.4/431 (1990).

51. Part VI, on the settlement of disputes, was not subject to discussion in the Commission, or was not included in the Draft approved by the Commission on its first reading. See Ogiso, *Preliminary Report on Jurisdictional Immunities of States and Their Property* 136, U.N. Doc. A/CN.4/415 (1988), in which the provisional text of this part is published.

The fundamental assumption of the Draft is that in general a State is immune from jurisdiction. The Draft then enumerates the cases in which it is not possible to claim immunity.⁵² These cases, which are enumerated exclusively in Part III, are not considered imperative norms and are supposed to be in force only if the States do not agree otherwise. In my view, this pragmatic approach of the Draft should be stressed.

A. *An Overview*

Part I consists of five articles and concerns mainly the extent of the application of the Draft, defining terms and interpretation.

Article 1 lays down that the provisions of the present convention relate to the immunity of a State and its property from the jurisdiction of the courts of another State. The scope of application should include, then, not only exceptions to the jurisdiction of another State, as concerns State property, but everything else which is connected with this question. One can just add that the ILC probably shared the opinion that it is relatively more advantageous to adopt an incomplete treaty regulation based on compromise, rather than continue a disagreement.⁵³

Articles 2 (use of terms) and 3 (interpretative provisions) share the same purpose, *i.e.*, to define and specify the meaning of the terms "court," "commercial contract," and "State."

"The court" means an organ of a State, however named, entitled to exercise judicial functions.⁵⁴ It is left to the internal laws of States to define judicial functions. Such functions differ with particular constitutional and legal systems; they can be performed together with the legal steps at different levels, before or in the course of a proceeding, or at the final phase of execution. These functions can include, according to the commentaries used hitherto, the court's decision on cause or dispute settlement, decisions on legal and factual matters, preliminary and enforcement measures in all stages of legal proceeding and further administrative and executive functions which are currently exercised by the adjudicative bodies of a State in the course of proceedings and regulated by procedural and administrative rules.

"Commercial contract" includes any commercial contract or transaction for the sale or purchase of goods or the supply of services

52. These are provisionally called, in the alternative, "limitations on" or "exceptions to" immunity.

53. *Cf. Report of the Commission, supra* note 13.

54. *Cf. Ogiso, supra* note 50, art. 2, para. 1(a), at 6.

and any contract for a loan or other transaction of a commercial, industrial, or professional nature, but not including a contract of employment of persons.⁵⁵ In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, references should be made primarily to the nature of the contract, but the purpose of the contract should also be taken into account if, in the practice of that State, that purpose is relevant to determining the non-commercial character of the contract.⁵⁶

This is one of the key provisions of the whole proposed regulation. Therefore this provision, as well as the process of defining basic terms, attracts great interest from States. A fundamental question is the criteria for determining the commercial contract: both the nature and the purpose criteria are closely related in the present formulations. At the same time, purpose as a criterion for determining the commercial or non-commercial nature of a contract appears neither in the European Convention on State Immunity and Additional Protocol⁵⁷ nor in particular internal regulations.⁵⁸ Its incorporation into the relevant provision was requested earlier by other States, especially by socialist States, including Czechoslovakia. The Czechoslovak proposal was to take into account the purpose of a contract if in the practice of the respective State this purpose is relevant for the determination of the non-commercial nature of a contract.⁵⁹ The newly proposed formulation concerning the purpose of the contract⁶⁰ corresponds with this request more or less; it raises certain doubts, mainly as concerns the procedure of the forum when examining the practice of the State to which the immunity should be granted. Therefore, it would be more convenient to delete the criterion of the purpose of a contract. This would also contribute to strengthening legal certainty, because it

55. *Id.*, art. 2, para. 1(b).

56. *Id.*, art. 3, para. 2. For the second reading, the Special Rapporteur M. Ogiso proposed the formulation *in fine* (i.e., concerning the purpose of a contract), that the courts of the State of the forum are not precluded from taking into account the governmental purpose of a transaction. See Ogiso, *supra* note 50, at 9, 11. A question remains about the acceptance of this compromise solution, which gives priority to evaluation on the internal State level before the general definition. The solution should perhaps be acceptable in those States where a similar *lex fori* already exists; the majority of States would consider that the purpose criterion does not provide legal certainty.

57. See MATERIALS ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY, *supra* note 7, at 156.

58. See generally *id.*

59. Regarding the Czechoslovak position, see *Jurisdictional Immunities of States and Their Property, Comments and Observations Received from Governments* 3, U.N. Doc. A/CN.4/410/Add.5 (1988).

60. Ogiso, *supra* note 50, at 9.

would not depend upon necessarily subjective considerations on the side of the decision-making forum.

The expression "State" includes a State and its various organs of government, political subdivisions of a State which are entitled to perform acts in the exercise of sovereign authority of a State, agencies or instrumentalities of a State to the extent that they are entitled to perform acts in the exercise of State sovereignty, and representatives of a State acting in that capacity.⁶¹ This interpretative provision could strictly delimit those entities and persons entitled to invoke immunity in cases in which a State can claim it and determine at the same time those organs and political subdivisions which are entitled to invoke immunity, as far as they perform acts connected with the exercise of sovereign authority. It is less important what we call them (agency, instrumentality, and so on), than that we ascertain the kind of activity that each respective entity performs. Such entities can successfully invoke immunity while exercising acts of sovereign authority.

The definition of the term "State" was found to be unsatisfactory, mainly by socialist States, due to the insufficient distinction drawn between a State and its legal entities (juridical persons) as provided in the present Draft.⁶² Although these juridical persons administer State property, they have a legal personality distinct and independent from that of a State; they are separate legal subjects. These persons act on their own behalf having their own proprietary liability, they are not liable for State obligations, and the State is not liable for these juridical persons' obligations. Therefore, some States expressly request to exclude State enterprises or entities established by a State from the definition of "State." The new article 11 bis has been proposed to regulate this issue in particular. There is, however, the formulation in the most recent report, concerning the definition of the term "agencies" and "instrumentalities" itself, which proposes that the entities set up by a State for the purpose of performing commercial transactions and which have a distinct legal personality as well as a procedural capability not be included.⁶³ Since it remains possible to invoke State immunity in the performance of official functions, from the Czechoslovak point of view, it is possible to accept this supplementary provision not only with respect to the Czechoslovak legal order, but also to Czechoslovak interests abroad.

The immunity of particular constituent states of the federal State is

61. *Id.*, art. 3, para. 1., at 6.

62. *Id.*

63. *See id.* at 8.

also mentioned in the last proposal. This question likewise could eventually be important for Czechoslovakia, with a view to the further clarification of the conception of a Czech and Slovak federation in foreign relations.⁶⁴

The structure of articles 2 and 3 was changed significantly in the course of preparatory work. It would be worthwhile to join these articles and define the terms, except for those already mentioned, as "judicial functions" and "State property." Unification of the text was also proposed by the Special Rapporteur.⁶⁵

The two final articles of Part I are not as controversial. Article 4 (privileges and immunities not affected by the present articles) aims to prevent possible overlap with the international conventions which regulate the status, privileges, immunities, and material conditions of individual representatives of States.⁶⁶ The proposed regulation does not deal with the privileges and immunities attributable, according to international law, to the heads of States *ratione personae*. Article 5 deals with the non-retroactivity of the present convention, which is already regulated by the international law in force.⁶⁷

B. General Principles

Article 6 (State immunity) was one of the most controversial provisions from the very beginning. In its present form it sets forth that a State is immune from the jurisdiction of the court of another State with respect to itself and its property, in accordance with the provisions of the Draft and the relevant rules of international law. Long discussions concentrated on this provision mainly because it deals with the basic rule of State immunity.⁶⁸ Some States proposed to follow the example of the European Convention on State Immunity and Additional Protocol of 1972, in which article 15 provides that contracting

64. *Id.* at 7 (newly proposed art. 2, para. 2(b)).

65. *Id.* at 9.

66. Mainly the following Conventions: Vienna Convention on Diplomatic Relations, *opened for signature* Apr. 18, 1961, 500 U.N.T.S. 95, *entered into force* Apr. 24, 1964; Vienna Convention on Consular Relations, *opened for signature* Apr. 24, 1963, 596 U.N.T.S. 261, *entered into force* Mar. 1967; The Convention on Special Missions, *opened for signature* Dec. 16, 1969, G.A. Res. 2530, 24 U.N. GAOR Supp. (No.30), at 99, U.N. Doc. A/7630 (1969), *entered into force* June 21, 1985; Vienna Convention on the Representation of States in Their Relations with International Organisations of a Universal Character, *opened for signature* Mar. 14, 1975, U.N. Doc. A/Conf.67/16 (1975); Convention on Privileges and Immunities of the U.N., 1 U.N.T.S. 15, 90 U.N.T.S. 327 (adopted by the General Assembly Feb. 13, 1946); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, *opened for signature* Dec. 14, 1973, 1035 U.N.T.S. 167, *entered into force* Feb. 20, 1977.

67. *See* art. 28 of the Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, *entered into force* Jan. 27, 1980, U.N. Doc. A/CONF.39/27 (1969).

68. *Cf.* discussions in the ILC Yearbooks since 1978.

States may invoke immunity from the jurisdiction of the courts of another contracting State, unless the proceedings fall under articles 1 to 14 and the court declines to entertain such proceedings even if the State whose act is to be sued upon does not appear before the court.⁶⁹ Of course, this proposal met with strong opposition from partisans of the absolute immunity principle.⁷⁰ Finding the point of departure for setting down the general principle was complicated not only with respect to the different approaches of legal theories when determining the nature of immunity, but also with respect to the basis of immunity.⁷¹

The Draft of this article embodies the presumption which is in fact shared by the advocates of both theories, that is that acts performed while exercising sovereign authority are undoubtedly entitled to immunity.⁷² Further on, the views differ. One side asserts that immunity is the exception to the principle of territorial sovereignty of the State of the forum and that it could be proved as such in every particular case.⁷³ The other side considers State immunity as a rule derived directly from the general principle of international law, *i.e.*, the principle of State sovereignty.⁷⁴ Irrespective of how substantial the divergences between these approaches are, it is possible to reach the conclusion that both granting and refusing to grant immunity are parts of the same rule of international law.

It follows unambiguously from the commentary to article 6 that this Draft of the regulation as a whole is a typical example of the attempt to reach a compromise. States agreed tacitly that they will not slip into theoretical discussions during the second reading and that taking up the formulation of this provision will be restricted to that part of the proposed text which is laid down in square brackets, *i.e.*, that which refers to the relevant rules of general international law.⁷⁵ Since 1978, this issue has been discussed widely within the ILC as well as in the Sixth Committee. States inclined to keep this part of the text argue above all that State practice is in *statu nascendi* and that the codifi-

69. MATERIALS ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY, *supra* note 7, at 160.

70. *Cf.* discussions in the ILC Yearbooks since 1978.

71. *Id.*

72. *Cf.* sources cited *supra* notes 2, 3.

73. For an examination of the theory underlying this view, see T. GIUTTARI, THE AMERICAN LAW OF SOVEREIGN IMMUNITY 6 (1970).

74. For an examination of the theory underlying this view, see L. OPPENHEIM, *supra* note 2; Žourek, *supra* note 35, at 641. *But cf.* G. BADR, *supra* note 3; Chief Justice Marshall's opinion in *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 135-147 (1812).

75. See Ogiso, *supra* notes 50, 51.

cation could not obstruct the further development of this topic.⁷⁶ Other States, including Czechoslovakia, propose to delete the above-mentioned part, arguing mainly that keeping it in the text would allow for different interpretations. Considering the requirement of legal certainty, I share the opinion that it would be more convenient indeed to delete the part laid down in the square brackets; contingent controversies about the question of what is to be considered as "relevant rules of general international law" would seriously endanger the success of the whole compromise.⁷⁷

Article 7 (modalities for giving effect to State immunity) says that a State shall give effect to State immunity under article 6 by refraining from exercising jurisdiction in a proceeding before its courts against another State.⁷⁸ This means that the obligation of the State of the adjudicating forum to grant immunity to a foreign State is limited to situations in which the State claiming immunity is entitled thereto under the express provisions of the Draft Convention.

The last articles of Part II, *i.e.*, article 8 (express consent to the exercise of jurisdiction), article 9 (effect of participation in a proceeding before a court), and article 10 (counter-claims), are to be considered as classical provisions which necessarily follow a legal regulation of this kind. I share the view that they do not contradict Czechoslovak practice and therefore do not cause any difficulty from the Czechoslovak point of view.⁷⁹

C. *Limitations on and Exceptions to State Immunity*

The alternative title of Part III of the Draft Convention indicates that until now there has been no accord reached among the States as to how to call the cases when it is not possible to claim immunity. The advocates of the restrictive concept prefer the term "limitation on" the immunity of a State,⁸⁰ since according to this conception, international law does not grant immunity for certain fields of activity. On the other hand, those States that still consider State immunity to be absolute,⁸¹ prefer the term "exceptions to" immunity.

This question should probably be solved in a neutral compromise,

76. Cf. Ogiso, *supra* note 50, at 13.

77. See, e.g., Greig, *Specific Exceptions to Immunity under the International Law Commission's Draft Articles*, (pt. 2), 38 INT'L & COMP. L.Q. 560, 587 (1989).

78. Ogiso, *supra* note 50, art. 7, para. 1, at 14.

79. Cf. Greig, *Forum State Jurisdiction and Sovereign Immunity under the International Law Commission's Draft Articles*, (pt. 1), 38 INT'L & COMP. L.Q. 243, 252 (1989).

80. The United Kingdom deserves particular mention here. See Ogiso, *supra* note 51, at 66.

81. This is in substance the Brazilian position. See *id.*

since one cannot realistically expect the most resolute partisans of one or the other opinion to budge in favor of the opposite conception. One proposed solution is a neutral formulation, such as "activities to which immunity does not apply."⁸²

The question of the title is purely a formal one. Part III as a whole includes the enumeration of cases in which immunity cannot be invoked, whatever the title will be. The provisions of Part III are of a very practical nature; they are, as concerns their content, the most important provisions of the whole Draft Convention: this very enumeration is the Draft's focus, the very purpose of the whole codification of the rules on State immunity.

The detailed regulation of Part III intends to regulate those cases in which it is not possible to claim immunity: commercial contracts (art. 11); State enterprises (art. 11 bis); contracts of employment (art. 12); personal injuries and damage to property (art. 13); ownership, possession, and use of property (art. 14); patents, trademarks, and intellectual or industrial property (art. 15); fiscal matters (art. 16); participation in companies or other collective bodies (art. 17); State-owned or State-operated ships engaged in commercial service (art. 18). These cases are further supplemented by the rules concerning the effects of an arbitration agreement (art. 19) and by the relatively isolated provision on cases of nationalization (art. 20).

As for the given examples (arts. 11-18), it can be generally pointed out that except for the provisions on "commercial contracts" and "State enterprises" the possibility is, at the very outset of every case, given to the States concerned to agree otherwise.⁸³ That is, this regulation is only of a dispositive and not compulsory nature and it does not prevent States from agreeing to a different solution of a case.

A survey of cases in which, according to the consensus reached by the States, it will not be possible to claim immunity highlights the boundaries of *jure imperii* acts. We shall now turn our attention to the cases which are the most important and the most interesting from the Czechoslovak point of view.

1. Commercial Contracts

The first and probably most important exception to the general rule on immunity is found in article 11. According to this article, if a State enters into a commercial contract with a foreign natural or juridical person, and, by virtue of the applicable rules of private interna-

82. Cf. Ogiso, *supra* note 50, at 20.

83. See Ogiso, *supra* note 50, arts. 12-18.

tional law, differences relating to the commercial contract fall within the jurisdiction of a court of another State, the State is considered to have consented to the exercise of that jurisdiction in a proceeding arising out of that commercial contract, and accordingly cannot invoke immunity from jurisdiction in that proceeding. This does not apply if a commercial contract was concluded between States or on a government-to-government level, or if the parties to the commercial contract have otherwise expressly agreed.

This article is among the most debated,⁸⁴ which is understandable, since in practice it probably will be one of the most common cases in which a State is not able to invoke immunity. The formulations of article 11 presented now are considered in a very critical way. We can mention the criticism of the superfluous accumulation of criteria, according to which immunity is granted or refused. Besides the criterion of a commercial contract itself,⁸⁵ there is the criterion of implied waiver of immunity, which is redundant not only from the point of view of the partisans of the conception of restrictive immunity (since the immunity is not granted with respect to commercial contracts), but also from the point of view of the Draft as well. It is therefore possible to assume that they were deleted by the Special Rapporteur in the most recent versions of the Draft.⁸⁶ The third criterion is the exception in a case, when a commercial contract is concluded between States or at the government-to-government level, which is also redundant with respect to the wording in paragraph 1. Criticism is often provoked by reference to the rules of private international law, which in this case has procedural significance, especially due to the lack of an explicit provision on the territorial link, on the legal relation between the commercial contract and the State of the forum.⁸⁷ This reference is effective enough in determining the competent court and neutral in such a degree to become acceptable for all States.⁸⁸

At the end of the proposed article 11, the opportunity is given to the parties to the commercial contract to regulate the method of eventual dispute settlements by express agreement. This means that it can be agreed in an arbitration clause that the court in any State, or that the jurisdiction of regular national courts, can be excluded and re-

84. See, e.g., *Comments, supra* note 14.

85. Cf. Ogiso, *supra* note 50, art. 2, at 6.

86. See Ogiso, *supra* note 51, at 69; Ogiso, *supra* note 50, at 20.

87. Such misgivings were expressed by the governments of Denmark, Finland, Iceland, the German Democratic Republic, Norway, and Sweden. See *Comments, supra* note 14.

88. See *Comments, supra* note 14, at 51 (the position of Great Britain); Ogiso, *supra* note 50, at 21 (the Special Rapporteur's most recent view).

placed by some forms of arbitration. In contrast to following articles, article 11 does not expressly provide the possibility for a State of the forum and a State whose immunity is at issue to agree to a different regulation.⁸⁹

2. State Enterprises

Article 11 bis did not appear in the original proposal. It has been included recently by the Special Rapporteur, M. Ogiso, and was submitted in the version changed on the basis of remarks received from the ILC.⁹⁰ According to the new proposal, if a State enterprise engages in a commercial transaction with a foreign natural or juridical person, the State enterprise is subject, with respect to differences relating to the commercial transaction, to the same rules and liabilities as applicable to a natural or juridical person. The State may invoke immunity from jurisdiction of the court of the forum State with respect to that commercial transaction. However, if a State enterprise engages in the commercial transaction on behalf of a State, article 11 shall apply.⁹¹ According to the commentary, this means that a State, in contrast to a State enterprise, can in such cases invoke immunity, if this is not a case of commercial contract (or transaction) as intended by article 11, in which case a State cannot invoke immunity. State enterprises are excluded from the term "agencies and instrumentalities of the State,"⁹² and that should be appreciated.

The significance of this provision is to be seen in its differentiation between State property and the property of a State enterprise. It should be clear from this provision that the State is not liable for the obligation of a State enterprise and vice versa. Because of the above-mentioned requirement, article 11 would then protect both the State and its property and the State enterprise more effectively from attempts to satisfy claims against the State or State enterprise from any other property belonging to the State or State enterprise, though it could seem that these two types of property are indistinguishable.

As currently submitted, the formulation of article 11 bis would probably not be accepted by States because it is insufficiently meticulous and intelligible. The intent of the legislator is not seen until we

89. See Ogiso, *supra* note 50, at 20-21.

90. *Id.* at 21.

91. See *id.* at 21. The term "commercial transaction" is the term proposed by the Special Rapporteur in all cases as the alternative to the term "commercial contract." I do not share the view that this new terminology would change anything. In addition, the term "commercial contract" is quite deep-rooted and as such is also used in other international instruments.

92. *Cf. id.*, art. 3, at 6.

read the commentary.⁹³ I find it worthwhile to include this case expressly among those in which it is not possible to invoke immunity.

3. Personal Injuries and Damage to Property

Another provision that attracted criticism was article 13, as recommended by M. Ogiso in the *Preliminary Report on Jurisdictional Immunities of States and Their Property* (May 20, 1988).⁹⁴ This article provided that, unless otherwise agreed between the States concerned, the jurisdictional immunity of a State cannot be invoked in a proceeding which relates to compensation for death or injury to a person or damage to or loss of tangible property if the act or omission which is alleged to be attributable to the State and which caused the death, injury or damage occurred in whole or in part in the territory of the State of the forum (unlike the original, the recommended article did not require that the author of the act or omission be present in that territory at the time of the act or omission).

The first objection here is that this issue should be covered partly by international State responsibility, or possibly by the liability of States. The codification of both topics is being prepared within the framework of the ILC at the present time.⁹⁵ On account of this fact, a special second paragraph was proposed, according to which paragraph 1 of the above mentioned provision would not apply to rules of international law on State responsibility (liability was not mentioned).⁹⁶ Another opinion calls for the complete deletion of this article, because the illegality of an act or omission attributable to the State should be determined by international law and because such proceedings do not fall within the competence of national courts.⁹⁷

The passage including the condition that the author of an act or omission was present in the territory of the State of the forum at the decisive time was rightfully kept in the recent version of the Draft, in

93. *Id.* at 22.

94. Ogiso, *supra* note 51 (art. 13, as recommended by the Special Rapporteur).

95. Cf. *Report of the International Law Commission on the Work of its Forty-First Session* (1989), U.N. Doc. A/CN.4/L.443 (1990), at 41-50 (State Responsibility), 50-63 (International Liability for Consequences Arising out of Acts not Prohibited by International Law).

96. See Ogiso, *supra* note 51, at 82. The proposed paragraph 2 deals only with "State responsibility" and does not take into account "international liability." It would perhaps be better if article 13, paragraph 2 read as follows: "Paragraph 1 does not affect rules concerning State responsibility and liability under international law." Article 13 deals with insurance contracts. The proposed amendment of article 13, paragraph 2 is only illustrative, since the Special Rapporteur has withdrawn his alternative version of this article and returned to the text adopted on first reading.

97. Cf. *Comments*, *supra* note 14; Ogiso, *supra* note 51, at 83-84.

spite of pleas that the damage should not be limited to that territory.⁹⁸

This provision has its practical significance and should be preserved in the intended convention. The language of the provision as recommended by the Special Rapporteur would probably cover the cases of requests for damages arising under conditions indicated in the case of *Georg Maier v. ČSSR*,⁹⁹ assuming that the damage was caused and that both respective States are parties to the Convention. The Draft Convention on "international liability," however, deals with similar cases. As was already mentioned above,¹⁰⁰ this Convention likewise is elaborated within the ILC.

Let us now turn back to the arguments of the former press spokesman to the Federal Ministry of Foreign Affairs of the Czechoslovak Republic.¹⁰¹ Among other arguments, the Czechoslovak official release asserts that the Czechoslovak State does not act abroad (in this case) as a business actor and that it does not engage in commercial contracts with foreign companies. In the practice of Czechoslovak foreign trade, foreign trade relations are entered into exclusively by the Czechoslovak juridical subjects, established under article 13 of Law number 42/1980, Collection of laws, on economic relations abroad. These juridical persons dispose of their own property and are liable for their own obligation up to the value of their property. Therefore, the Austrian organs of justice do not have jurisdiction stemming from the so-called concept of functional immunity to take up actions concerning the enjoining of the construction of nuclear power stations on Czechoslovak territory.¹⁰²

This argumentation was not quite correct. There are several questions here that should not be mixed. From the point of view of the redrafted and then withdrawn article 13, there was no damage caused up to now; this is the official Czechoslovak argument in favor of the assumption that the Austrian courts have no legal authority to entertain the legal proceeding concerned.¹⁰³ It is worthwhile to add that rather than damages, the enjoining of construction was sought; this action is not by itself excluded *a priori*¹⁰⁴ and it is not possible to ap-

98. See, e.g., Delaume, *Sovereign Immunity and Public Debt*, 23 INT'L LAW. 811, 815-819 (1989).

99. Cf. Austrian Supreme Court, *supra* note 23.

100. See sources cited *supra* note 95.

101. Bezpříkladný akt, *supra* note 21.

102. See *id.*

103. See *id.*

104. Provided the Austrian Court has subject matter jurisdiction, it is obliged to take up an action filed by an Austrian citizen. The fact is that a Court in one State cannot order that the other State or its juridical or natural persons refrain from some activity which is not to be per-

peal to the circumstance that no damage was caused up to now. The second question, however, is alleged damage itself. If real damages were sought, the Czechoslovak reasoning would not stand the interpretation of proposed article 13 of the Convention, since article 13 does not require the condition, for the jurisdiction of the courts of another State, that a foreign State should act as a merchant or business actor. The version of article 13, as proposed by Special Rapporteur M. Ogiso, which was withdrawn at the end, did not even require that the author of the act or omission be present in the territory of the State of the forum at the time of causing the damage, and according to article 13, it would be necessary to allow for a case of this kind to be taken up before the foreign courts.

Unfortunately, the Czechoslovak official position has other weak spots. Arguments connected with the foreign trade activity of Czechoslovak foreign trade enterprises are already completely beyond the realm of the dispute. In the given case, neither the question of the foreign trade activity, nor the subject of foreign trade relations is addressed. What is sought here is the stopping of construction, and the action should probably be brought against the investor, *i.e.*, against the Slovak power supply enterprise. The action brought against the ČSSR would then be dismissed by the Austrian court due to the lack of Czechoslovakia's standing as a defendant. The plaintiff G. Maier would subsequently bring another action, aimed directly against the above-mentioned enterprise, and, assuming the Court has jurisdiction, it would apparently be impossible to avoid taking up the action on the merits. The plea of immunity can in no case hold out whether the action is brought against the Czechoslovak State or against the Czechoslovak State enterprise. Our last observation concerns a purely formal aspect: submitting the protest to the Austrian Government through the mediation of the Federal Ministry of Foreign Affairs cannot affect the decision-making of the court since the courts in Austria are quite independent and they are, moreover, obliged to take up the action.¹⁰⁵

In the future, it will therefore be necessary to accept bitter reality and admit that in this field, invoking immunity will be irrelevant.

Other cases in which it is not possible to invoke immunity, included in the Draft Convention, can be considered satisfactory from

formed within the territorial jurisdiction of that Court and which, moreover, is not illegal *per se* and does not cause any harm. Even if such a decision were adopted, which is very improbable, it would be very difficult to enforce it and it would be, in the words of Gabba, a real "monstruosité juridique."

105. See Bezpříkladný akt, *supra* note 21.

the Czechoslovak point of view, and it is not necessary, with respect to the limited range of this article, to deal with them in detail.¹⁰⁶

Article 19 (effect of an arbitration agreement) provides that if a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial contract or a civil or commercial matter, that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the validity or interpretation of the arbitration agreement or the arbitration procedure or the setting aside of the award, unless the arbitration agreement otherwise provides. As is seen in this provision, the principle of implied waiver of immunity is used.

Entering into an arbitration agreement between a State and a foreign person does not mean that the State would by this act waive immunity with regard to the basis of the legal relationship, which is the subject matter of eventual dispute. In another view, the existence of an arbitration agreement means that the State does not wish to waive its immunity in some disputes, and therefore accepts arbitration as a means of out-of-court dispute settlement procedure.¹⁰⁷ A State can avoid the eventual court review and conclude an agreement concerning the settlement of a dispute before the independent, autonomous arbitration, which is not subject to court review. The arbitration that takes place under the auspices of the International Chamber of Commerce (ICC) or the International Centre for the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) can serve as an example. The court can play some role even in these cases, in respect to the measures of coercion.

Substantially heterogeneous opinions exist regarding the alternative texts in square brackets of article 19, *i.e.*, "commercial contract" and "civil or commercial matter." Czechoslovakia¹⁰⁸ is convinced that it is more precise to use the term "civil or commercial matter" in article 19, as the term "commercial contract" has too narrow a meaning. I share this opinion.

Article 20 (cases of nationalization) has not been very well received.¹⁰⁹ It states that the provisions of the present articles shall not prejudice any question that may arise in regard to extraterritorial effects of measures of nationalization taken by a State with regard to

106. For example, see the cases arising under articles 14-18.

107. This is the Bulgarian position. See Ogiso, *supra* note 51, at 105; *Comments, supra* note 14.

108. *Comments, supra* note 14, at 3.

109. See *id.*

property, movable or immovable, industrial or intellectual. A number of States commented that the meaning and the proper scope of this article are far from clear. Some States assert that the measures of nationalization, as the acts of sovereign authority, are not subject to the jurisdiction of a court of another State; I can agree with this assumption. Many standpoints, including the position of the Special Rapporteur M. Ogiso,¹¹⁰ therefore favor deleting this article. Article 20 presents the clause containing the general reservation to the cases in which it is not possible to invoke immunity: in such situations, it would be possible simply to refer to this reservation and it would not be necessary to prove an act *jure imperii* in a complicated way.

D. *State Immunity with Respect to Property from Measures of Constraint*

This part of the Draft does not deal only with immunity from execution, but also with immunity in the sphere of various preliminary and temporary measures of constraint which can occur in judicial practice (e.g., arrest and the preliminary attachment of property). Among other things, such measures of constraint make it possible to attach property of those States against which unrecoverable claims exist and which guaranteed such claims. Provisions of Part IV can thus be of considerable importance in practice.

In its original version, adopted at the first reading, the Draft derives from the general principle of immunity with respect to measures of constraint, to which are then foreseen exceptions.

According to article 21 (State immunity from measures of constraint), in connection with a proceeding before a court of another State, a State enjoys immunity from measures of constraint on the use of its property or property in its possession or control, unless the property is specifically in use or intended for use by the State for commercial—non-governmental—purposes¹¹¹ and has a link with the object of the claim, with the agency or instrumentality against which the proceeding was directed, or has been allocated or earmarked by the State for the satisfaction of the claim which is the object of that proceeding. Article 22 (consent to measures of constraint) lays down that a State cannot invoke immunity from measures of constraint in connection with a proceeding before a court of another State if and to the extent that it has expressly consented to the taking of such measures with

110. See Ogiso, *supra* note 50, at 34.

111. The term "non-governmental" has until now been used as an alternative or complement to the term "commercial." I am of the opinion that the term "commercial" is sufficient; it is also used in the Draft more often.

respect to that property by international agreement, in a written contract or by a declaration before the court in a specific case. Consent to the exercise of jurisdiction under article 8 shall not be held to imply consent under Part IV of the present articles, which require special, separate consent. Article 23 enumerates specific categories of property of a State that are not to be considered as property specifically in use or intended for use by the State for commercial—non-governmental—purposes. In particular, this includes property that is in the territory of another State and is used or intended for use for the purposes of the diplomatic and other missions (special missions, missions to international organizations, consular posts) or delegations to organs of international organizations; property of military character; property of the central bank or other monetary authority of the State which is in the territory of another State; property forming part of the cultural heritage and property forming part of an exhibition of objects of scientific or historical interest which is in the territory of another State, and that is not placed or intended to be placed there on sale.¹¹²

As a second alternative, M. Ogiso submits the proposal in which articles 21 and 22 are combined into one provision; this alternative, like the original one, is based on the principle of immunity, followed by a more precise formulation of exceptions.¹¹³ The provision enumerating specific categories of property is proposed as article 22. A new article 23 is proposed which provides that if State property, including segregated State property, is entrusted by the State to a State enterprise for commercial purposes, the State cannot invoke immunity from a measure of constraint before the court of the forum State with respect to that property.¹¹⁴ This new proposal is understood as a logical consequence of the newly included article 11 bis, dealing with property of State enterprises.¹¹⁵ It is possible to consider this rule as a broadly used and established custom by now; because it increases legal certainty, it is not necessary to object to it. As submitted by the Special Rapporteur, both alternatives are acceptable from the Czechoslovak point of view.

E. *Miscellaneous Provisions*

These are above all the provisions of a technical legal nature, which relate to procedural questions. Because in a concrete case the

112. See Ogiso, *supra* note 50, at 35-40.

113. See *id.* at 36-37.

114. *Id.* at 38.

115. *Id.* at 21.

solution of these questions can have an impact on decision-making on the merits, one cannot overlook them.

In these provisions the Draft seeks a certain unification of procedural rules of different legal systems. The provisions of Part V should prevent the application of the procedural norms of the law of the forum, which should probably, according to some of the legal orders, be applied against a foreign State as a party to a proceeding, and the use of which does not seem to be convenient, with regard to the participation of a State.¹¹⁶ Both the content and form of the provisions of Part V are in principle acceptable to Czechoslovakia.

Article 24 (service of process) regulates in detail the means of service of documents instituting a proceeding to a foreign State: common means are foreseen in international practice.¹¹⁷ A State that appears before the court on the merits in a proceeding instituted against it may not thereafter assert that service of process did not comply with the provisions of previous paragraphs.¹¹⁸

Article 25 (default judgment) provides that no default judgment shall be rendered against a State except on proof of compliance with paragraphs 1 and 3 of article 24 and the expiration of a period of time of not less than three months from the date of such service. A copy of a default judgment is transmitted with a special three-month time limit for a contingent measure of State challenging the judgment (an appeal, for example).

According to article 26 (immunity from measures of coercion) in connection with a proceeding before a court of another State, a State enjoys immunity from any measure of coercion requiring it to perform or to refrain from performing a specific act on pain of suffering a monetary penalty. This provision is closely followed by article 27 (procedural immunities) which provides that any failure or refusal by a State to produce any document or disclose any other information for the purpose of a judicial proceeding should entail no consequences other than those which relate to the merits of the case. In particular, no fine or penalty shall be imposed on the State for this reason. Similarly, a State is not required to provide any security, bond, or deposit to guarantee the payment of judicial costs or expenses.

The final provision of Part V, article 28 (non-discrimination), is of a slightly different character. It provides that provisions of the present articles shall be applied on a non-discriminatory basis as between the

116. *See id.* at 42.

117. In detail *id.*, paras. 1-3, at 41.

118. *Id.*, para. 4.

States that are Parties thereto. However, discrimination shall not be regarded as taking place where the State of the forum applies any of the provisions of the present articles restrictively because of a restrictive application of that provision by the other State concerned and where States agree to extend to each other treatment different from that which is required by the provisions of the present articles. This provision generally follows article 47 of the Vienna Convention on Diplomatic Relations.¹¹⁹ It is worthwhile to include it in the Convention on Immunities and it is also acceptable from the point of view of Czechoslovak law.¹²⁰ On the other hand, one must admit that the proposed provision still has not earned its place in the Convention and some States propose to delete it.¹²¹ Therefore, discussion on this topic is for the time being postponed to such time as general consensus is reached on the preceding articles.

Similarly, the discussion on Part VI (settlement of disputes) was temporarily put aside.¹²²

IV. CONCLUSION

Analysis of the Draft Convention on Jurisdictional Immunities of States and their Property shows that the codification of this field of law is necessary and fruitful not only on a global scale, but also from the point of view of particular Czechoslovak interests. Even though it is not yet certain whether the Draft will be accepted by a sufficient number of States,¹²³ its actual impact on the development of international customary law in this field is of such importance that it could lead to the gradual overcoming of the current differences. This will probably be the greatest importance of the Draft Convention. The

119. In relevant part, the Vienna Convention on Diplomatic Relations, *supra* note 66, states:
Article 47

1. In the application of the provisions of the present Convention, the receiving State shall not discriminate as between States.

2. However, discrimination shall not be regarded as taking place:

(a) where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provisions to its mission in the sending State;

(b) where by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present Convention.

120. Article 47, Law number 97/1963 Collection of Laws, does not provide, in connection with jurisdictional immunity, a condition of reciprocity: The legal position, as provided with the provision of article 28 of the Draft consequently sets a more advantageous position for Czechoslovakia than the position provided by Czechoslovak national (internal) law.

121. *Cf. Comments, supra* note 14.

122. *Cf. Ogiso, supra* note 51.

123. States which strongly adhere to the doctrine of absolute immunity and some States whose internal legal regulation of this topic goes far beyond the compromise regulation proposed by the ILC will probably not accept the Draft.

concern and the initiative of many Member States of the United Nations justifies the prospects that the Draft Convention will be formally accepted.

Regarding international trade, relations between States are developing all the time. Realistically, one must admit that until now no unambiguous rules of international customary law were created in this field and that not all legal arguments in favor of the rule of absolute immunity of States and their property have been overcome. It is therefore necessary to codify the field of international legal relations on the international level and proceed as pragmatically as possible, irrespective of the fact that some views of partisans of one or the other conception of State immunity will prevail in the final codification.