Appendix 1

Comments of the Governments of Denmark, Finland, Iceland, Norway and Sweden on draft Articles on Jurisdictional Immunities of States and their Property in accordance with Articles 16 and 21 of the Statute of the International Law Commission

The following is the comments and observations of the Governments of Denmark, Finland, Iceland, Norway and Sweden on the draft Articles on "Jurisdictional Immunities of States and their Property" as adopted by the International Law Commission at its 1972nd meeting in June 1986 (A/41/498).

1. The Governments of the Nordic Countries are in favour of the concept of restrictive State immunity and support the Special Rapporteur's endeavours to draw workable lines of distinction between activities of States performed in the exercise of sovereign authority, acta jure imperii, which are covered by immunity, and other State activities, acta jure gestionis, which should not be covered by immunity due to their commercial character or other adherence to the province of private law. The draft Articles on immunity from lawsuit and execution are in

general harmony with this restrictive view which more or less corresponds to the trend in current international law on State immunity.

2. As regards draft Article 3, paragraph 2, it is therefore the view of the Governments of Denmark, Finland, Iceland, Norway and Sweden that in determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should only be made to the nature of the contract and not to the purpose of the contract. By taking into account the purpose of the contract and the practice of a State, the general distinction between acta jure imperii and acta jure gestionis - the central idea of the restrictive theory - is in jeopardy. It is a necessity to develop a uniform practice of this concept. Hence, in determining whether a contract is commercial, weight should only be attached to an objective criterion, i.e. the nature of the contract.

3. With regard to the fundamental Article 6 in the draft a formula should be chosen that takes into account the future development of international law through the practice of States, national legislation and judicial proceedings of national courts. The law in this field is not advanced or ripe enough to warrant a final codification, or a legal "freeze", covering all situations. The Governments of the Nordic Countries consequently support the inclusion of the bracketed language at the end of draft Article 6, namely the words "and the relevant rules of general international law".

4. The heading of Part III should read "Limitations on State Immunity" (and not "Exceptions to State Immunity") in order to

reflect a less static approach to the subject. Cf. the argumentation in para. 3 above.

5. Article 11 on commercial contracts is carefully formulated to present accurately this the most important of limitations to State immunity. The Governments of Denmark, Finland, Iceland, Norway and Sweden agree with the supporters of the current wording that the application of the rules of private international law is probably a more suitable criterion for giving effect to this limitation than the possible existence in the State of the forum of, e.g., an office or bureau. On another point, however, difficulties in the application of this Article might arise. In recent years, State activity in the private sector has taken on diverse and complex forms for which reason the question of when a State can be said to have entered into a commercial contract will often be difficult to decide in concrete cases. The said Governments expect that it might at some stage during the codification process be beneficial to the solution of such difficulties to introduce and include in Article 11 a criterion concerning the structural relationship between the State and the commercial contract in question.

6. With regard to draft Article 18 on State-owned and State-operated ships, the Governments of the Nordic Countries are of the firm opinion that the concepts of "commercial service" and "commercial purposes" should not be confused by the added qualification of "non-governmental". The bracketed phrase should be deleted so as not bo blur the distinction between acta jure gestionis and acta jure imperii.

7. Regarding Article 19 on "Effect of an arbitration agreement", the Governments of the

Nordic Countries are of the view that it would not be in line with existing customary law to restrict the scope of non-immunity in arbitration matters to disputes over commercial contracts. Consequently, with regard to the two bracketed alternatives, "commercial contract" contra "civil or commercial matter", the latter should be chosen.

8. With regard to Part IV of the draft Articles, the Governments of Denmark, Finland, Iceland, Norway and Sweden are of the opinion that in general the right balance has been struck between the interests of the acting State, the territorial State and the private claimant. The principles laid down in Articles 21 - 23 furthermore seem to reflect a major trend in current State practice.

9. As to draft Article 21, the bracketed sentence "or property in which it has a legally protected interest" might permit a widening of the present scope of State immunity from execution which has little to say for it since the preceding words "on the use of its property or property in its possession or control" must be regarded as covering all State interest in property that is neither marginal nor, by its very nature, unaffected by the various measures of constraint. Hence, the identical bracketed sentence in Article 22 should also be deleted.

Furthermore, the Governments of the Nordic Countries agree that it was rightly pointed out in the debate in the Sixth Committee that the current doctrine of restrictive immunity rests on the assumption that once a foreign State has entered the market place it should be treated in the same way as others in the market place.

Hence, with reference to sub-paragraphs (a) and (b) of Article 21, the right to execute should not be limited to property that "has a connection with the object of the claim" or property that "has been allocated or earmarked by the State for the satisfaction of the claim"; the right to execute should apply to all property specifically in use for commercial purposes or intended for such use.

10. With regard to draft Article 23 on categories of property that shall not be considered in use for commercial purposes the Governments of the Nordic Countries have the following comment. In paragraph 1 (c) property of central banks in the territory of other States is unconditionally excluded from execution. This rule seems to be based on the view that because central banks are instruments of sovereign authority any activity they undertake must be covered by immunity from execution. However, if the foreign property of a central bank is used or intended for use by the State for commercial purposes it might be logic not to treat it differently from other State property that fulfils this condition.

11. Finally, the Governments of Denmark, Finland, Iceland, Norway and Sweden should like to make a comment as regards draft Article 24 on "Service of process". Paragraph 1 (a) provides for the possibility of special arrangements for service of process between the claimant and the State concerned. In many national legal systems special arrangements of this kind between the parties can not be taken into account. Article 24 therefore seems to be drafted on the assumption that States would be willing to modify their domestic rules of civil procedures if a national ratification or accession would

require that. In that sense, draft Article 24 seems to be overambitious.

Copenhagen, Helsinki, Reykjavik, Oslo and Stockholm, 21 December 1987.