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The Commercial Exception to Foreign Sovereign Immunity: To Be Immune or Not to Be Immune? That Is the Question

A Look at the International Law Commission’s Draft Articles on Jurisdictional Immunities of States and Their Property

GARY JAY GREENER*

I. INTRODUCTION

The concept of foreign sovereign immunity allows a State to escape the jurisdiction of the courts of another State. However, immunity is usually only granted for those acts that are sovereign or governmental in nature (jure imperii). In the United States, there is no immunity for acts that are private or commercial (jure gestionis). Applying the doctrine of foreign sovereign immunity, however, can result in denying a party a forum in which to resolve a dispute against a foreign sovereign. Therefore, in today’s global economy, parties to commercial contracts must take note of the applicable foreign sovereign immunity laws.

Most of the world’s industrialized countries have attempted to codify the doctrine of foreign sovereign immunity. These countries include the United States, Canada, Australia, Pakistan, Singapore, the United Kingdom, and South Africa. Nonetheless, a universal decla-

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1. See GARY B. BORN AND DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 335 (1990).
2. Id. at 337-38.
3. Id. See generally infra notes 8-34 and accompanying text.
5. Report of the International Law Commission on the Work of its Forty-Third Session,
ration on the subject has not emerged, because despite similarities in these countries' treatment of the doctrine of foreign sovereign immunity there exist also important differences.

Due to this lack of uniformity among countries, the International Law Commission of the United Nations ("ILC") sought to codify a universal declaration on the subject. The product of their efforts is the Draft Articles on the Jurisdictional Immunities of States and their Property ("Draft Articles"). The Articles have been debated and formulated over the past 15 years, and are now ready to be finalized as a Convention.

The most important aspect of the Draft Articles arises in the exception to immunity for commercial activities. This Article will examine the Draft Articles' exception for commercial activities in light of the applicable United States law, the Foreign Sovereign Immunities Act of 1976 ("FSIA"). This Article asserts that while a codified set of laws on foreign sovereign immunity is desirable, the United States should not accept the Draft Articles as presently formulated.

Part II of this Article examines the history of the doctrine of foreign sovereign immunity in the United States. Part III analyzes the FSIA, and Part IV explores its commercial activities exception. As it is important to understand that many parties shape the work of the ILC, Part V provides a brief introduction to the ILC. Part VI consists of a general overview of the Draft Articles.

Parts VII and VIII set out the Draft Articles' commercial transaction exception to immunity and compares it to current United States law. Part IX then proceeds to examine the critical difference between the proposed Draft Articles and the FSIA, namely, the "purpose" versus the "nature" of the activity distinction. Finally, Part X focuses on whether a Convention on this subject should even be concluded in light of the changes that this Article proposes.

This Article concludes that the United States should not become a member to a Convention which adopts the Draft Articles as presently formulated. The United States must advocate several changes in the Draft Articles before signing on to them. The changes which the United States should request are discussed throughout this Article.


6. See id.

II. THE HISTORY OF THE DOCTRINE OF FOREIGN SOVEREIGN IMMUNITY IN THE UNITED STATES

The doctrine of foreign sovereign immunity is well rooted in United States jurisprudence, tracing back to an 1812 decision, *The Schooner Exchange v. McFaddon.* In that case, the United States Supreme Court held that a French naval vessel was immune from the jurisdiction of the United States courts. Although no law existed which described this immunity, Chief Justice Marshall reasoned that a United States court possessed no jurisdiction over the case.

In molding a common law doctrine of sovereign immunity, the court relied on the notions of "perfect equality and absolute independence of sovereigns," principles of public international law, and suggestions from the executive branch that immunity would be appropriate. The Court stated that:

One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest compelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to wave [sic] the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

This doctrine of sovereign immunity was later followed in *Berizzi Brothers Co. v. The Steamship Pesaro.* Although over a century passed between the decisions in *The Schooner Exchange* and *Berizzi Brothers,* this inactivity can be explained by the fact that government

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8. 11 U.S. (7 Cranch) 116 (1812).
9. Id. at 147.
10. Id. at 135.
11. Id. at 137.
12. Id. at 136-37.
14. Id. at 137.
15. 271 U.S. 562 (1926).
owned merchant fleets developed only at the beginning of the twentieth century.\(^{16}\) When the Court in *Berizzi Brothers* confronted the issue of jurisdiction over merchant ships owned by sovereigns, the only existing precedent was *The Schooner Exchange*.\(^ {17}\)

Initially, United States courts applied the "absolute theory" of foreign sovereign immunity\(^ {18}\) which granted immunity to foreign sovereigns for all of their acts.\(^ {19}\) Additionally, the United States State Department's role in applying the doctrine became more prominent.\(^ {20}\) The State Department made findings based on foreign countries' claims of immunity from the jurisdiction of the United States' courts. If the State Department determined that a nation deserved immunity, it would communicate this finding to the court. The courts, although technically not bound by these suggestions, generally regarded the State Department's decisions as binding and implemented them.\(^ {21}\)

Gradually, a number of nations abandoned the doctrine of "absolute immunity" and embraced the notion of "restrictive immunity."\(^ {22}\) Under the restrictive theory of foreign sovereign immunity, no blanket immunity exists for a foreign sovereign. Instead, there is immunity for sovereign or public acts (juri imperii), but not for a foreign sovereign's commercial or private activities (juri gestionis).\(^ {23}\) In 1952, the United States State Department formally acknowledged and embraced the restrictive theory of foreign sovereign immunity. The State Department's "Tate Letter" stated that its immunity "suggestions" would rest on the restrictive theory of sovereign immunity.\(^ {24}\) However, the State Department's involvement in the determination of immunity proved problematic.

In evaluating immunity, the State Department, an executive of—

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17. *Id.* at 775.
19. *Id.*
20. See generally Theodore R. Guittari, *The American Law of Sovereign Immunity* 111-62 (1970) (discussing the emerging role of the State Department in immunity claims). See also *Ex parte Peru*, 318 U.S. 578, 581 (1943) (noting that the accepted procedure was to seek immunity from the State Department).
21. *Id.*
22. See *Restatement (Third) of the Foreign Relations Law of the United States* § 451 cmt. a (1986). The Restatement adopts the restrictive theory of immunity, which is now accepted by nearly all non-communist states. *Id.*
23. *Id.* See also *The Tate Letter, reprinted in 26 Dep't St. Bull.* 984 (1952).
fice, was nevertheless performing a function of the judicial branch. As the number of requests for immunity from foreign owned enterprises increased, so did this involvement of the executive branch in the affairs of the judicial branch. Furthermore, the State Department's "suggestions" were more often based on political and diplomatic concerns than on a legal and factual basis.25

From this conflict emerged a call for statutory law on this subject. In 1976, the United States became the first country to formalize its sovereign immunity law in a statute,26 through Congress' enactment of the FSIA.27 The FSIA adopts the restrictive theory of foreign sovereign immunity,28 and more importantly, transfers the power to determine the existence of immunity to the courts rather than the State Department.29

The FSIA represents a comprehensive legal scheme in which Congress intended to provide the "sole and exclusive standards to be used in resolving questions of sovereign immunity . . . ."30 The statute delineates the bases and the process for the exercise of subject matter jurisdiction over foreign states and their entities.31 It also provides for venue in the federal district courts,32 for the right of removal from state to federal court,33 and, under certain circumstances, for the execution of judgments against certain categories of foreign states' com-


27. The legislative history of the Foreign Sovereign Immunities Act reveals that Congress intended the Act to eliminate the practice of judicial deference to "suggestions of immunity" from the State Department, and thus to leave such sovereign immunity decisions exclusively to the courts. H.R. REP. NO. 1487, 94th Cong., 2nd Sess., at 12 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6610.


29. See H.R. REP. NO. 1487, supra note 27, at 12, reprinted in 1976 U.S.C.C.A.N. at 6610 for the proposition that the courts shall have the power to determine sovereign immunity issues. See also 28 U.S.C. § 1602 (stating that "Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts").


32. Id. § 1391(f).

33. Id. § 1441(d).
mercional assets.34

III. UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT ONLY CERTAIN ENTITIES ARE ENTITLED TO IMMUNITY

Section 1604 of the FSIA provides that a foreign state is entitled to immunity from the jurisdiction of United States courts unless an exception exists under sections 1605 through 1607.35 In other words, a blanket grant of immunity to foreign states exists unless an exception strips that immunity away.

Section 1603(a) of the FSIA defines "foreign state" to include a "political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)."36 Subsection (b) states that:

An "agency or instrumentality of a foreign state" means any entity (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.37

The following subsections of this Article discuss the definitions of the terms "foreign state" and "agencies and instrumentalities of a foreign state" according to the FSIA.

A. The Definition of the Term "Foreign State"

The definition of "foreign state" is not controversial.38 As long as the United States' government recognizes a state as an independent sovereign, it qualifies for immunity under the proper circumstances.39 Using this analysis, courts have even extended immunity to nations with whom the United States' relations were not strong, such as Libya40 and the former Soviet Union.41

Section 1603(a) of the FSIA also includes "political subdivi-
sions” under the definition of “foreign states.” The FSIA’s legislative history provides insight into the definition of “political subdivisions,” stating that “[t]he term ‘political subdivisions’ includes all governmental units beneath the central government, including local governments.” Under this definition, a country’s states, cantons, provinces, or regions qualify for immunity.

**B. The Definition of “Agencies And Instrumentalities of a Foreign State”**

If the entity seeking immunity fails to satisfy the section 1603(a) requirements, it may otherwise qualify under section 1603(b) if it represents an “agency or instrumentality of a foreign state.” Several cases have held that a corporation that is incorporated in and wholly owned by a foreign state, and does business in that foreign state can be considered an “agency or instrumentality” of that foreign state. In fact, as long as a foreign state simply maintains a majority of the entity’s ownership interest, immunity would be proper. This result follows from the premise that majority ownership reflects a majority of control over that “agency or instrumentality.” Conversely, if a foreign state’s ownership interest in the entity is less than fifty percent,

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41. See Frolova v. U.S.S.R., 761 F.2d 370 (7th Cir. 1985) (finding the U.S.S.R. entitled to sovereign immunity under the FSIA).
42. 28 U.S.C. § 1603(a).
44. See Alberti v. Empresa Nicaraguense de la Carne, 705 F.2d 250, 253 (7th Cir. 1983) (finding a Nicaraguan corporation, which the Nicaraguan government nationalized and operated through an agent, an “agency or instrumentality” of a foreign sovereign under the FISA); Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1378 (5th Cir. 1980) (finding the national airline of the Dominican Republic, which was wholly owned by the government, a “foreign state” for FSIA purposes); Herman v. El Al Israel Airline, 502 F. Supp. 277, 278 (S.D.N.Y. 1980) (finding El Al Israel Airlines a foreign state under the FSIA as the state of Israel owned more than ninety-nine percent of the outstanding shares of stock). It appears that Congress intended that the definition of “agency or instrumentality of a foreign state” be read broadly to encompass a variety of forms, “including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency, or a department or ministry which acts and is suable in its own name.” H.R. REP. No. 1487, supra note 27, at 15-16, reprinted in 1976 U.S.C.C.A.N. at 6614.
45. 28 U.S.C. § 1603(b)(2). See also H.R. REP. No. 1487, supra note 27, at 15-16, reprinted in 1976 U.S.C.C.A.N. at 6614. The House Report explains that “where ownership is divided between a foreign state and private interests, the entity will be deemed to be an agency or instrumentality of a foreign state only if a majority of the ownership interests (shares of stock or otherwise) is owned by a foreign state . . . .” Id.
then it will be denied immunity.\textsuperscript{46} This result originates in the notion that if the foreign sovereign lacks majority ownership, then it lacks control. Finally, no immunity exists for an entity which is incorporated in a state different from that which owns it.\textsuperscript{47}

Difficulties arise when the entity seeking immunity is not organized as a corporation with stock ownership. The FSIA uses terms such as “shares” and “other ownership interest”\textsuperscript{48} which describe corporate entities. For example, in cases involving socialist or communist governments, questions arise as to whether the government actually “owned” the entity.\textsuperscript{49}

IV. THE FOREIGN SOVEREIGN IMMUNITIES ACT PROVIDES EXCEPTIONS TO THE GRANT OF IMMUNITY FOR FOREIGN SOVEREIGNS

Sections 1605 through 1607 of the FSIA delineate several exceptions to the blanket grant of immunity. As previously stated, these exceptions originate in the “restrictive theory” of foreign sovereign immunity, which grants immunity for “sovereign” and “public” acts yet denies immunity for “private” and “commercial” acts.\textsuperscript{50} The most notable exception to the presumptive grant of immunity is the commercial activity exception.\textsuperscript{51}

Section 1605(a)(2) states:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state else-

\textsuperscript{47} See 28 U.S.C. § 1603(b)(3).
\textsuperscript{48} Id. § 1603(b)(2).
\textsuperscript{49} See Edlow Int’l Co. v. Nuklearna Elektrarna Krsko, 441 F. Supp. 827 (D.D.C. 1977). In Edlow, the court found that the defendant, a “workers organization” founded under the constitution and laws of the Socialist Federal Republic of Yugoslavia for the purpose of constructing and operating a nuclear power generating facility, was not an “agency or instrumentality of a foreign state” for FSIA purposes. Id. at 832. In making its findings, the court rejected the proposition that all property under a socialist system is subject to the ultimate ownership and authority of the state. Id. at 831.
\textsuperscript{50} See supra notes 22-23 and accompanying text.
where and that act causes a direct effect in the United States.52

In order to properly analyze section 1605(a)(2), a few issues must be addressed. First, the governmental conduct that comprises "commercial activity" must be defined. Second, precisely when an action is "based upon a commercial activity" must be established. Finally, the connection or "nexus" between a foreign state's "commercial activity" and the United States must be defined.53 This Article addresses each issue in turn.

A. Types of Governmental Conduct that Comprise Commercial Activity

The general principle behind the commercial activity exception to immunity is that when a sovereign nation acts like a commercial entity, it should not be entitled to claim immunity since a non-sovereign entity in the same situation would not be allowed to claim immunity. Section 1603(d) of the FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act."54 Moreover, section 1603(d) states that "the commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."55 The FSIA emphasizes the "nature" of the activity, while the ILC Draft Articles use a "two-pronged approach" focusing on both the nature and the purpose of a commercial contract or transaction.56 This represents an important difference between the FSIA and the Draft Articles, which will be discussed in detail in another part of this Article.57

The legislative history of the FSIA explains that "the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of the activity or transaction that is critical."58 The legislative history clearly defines the term "commercial activity." It states that commercial activity can be a single contract or a regular course of business.59

52. Id.
53. BORN AND WESTIN, supra note 1, at 362.
54. 28 U.S.C. § 1603(d).
55. Id.
56. Id.
57. See infra notes 105-11 and accompanying text.
For instance, the legislative history provides illustrations of entities engaged in "commercial activity," such as a mineral extraction company, an airline, and a state trading corporation. Congress also addressed for-profit activities, stating that "if an activity is customarily carried on for profit, its commercial nature could readily be assumed." Additionally, contracts of the same character as those a private individual could make may constitute "commercial activity."

Although the legislative history provides clear guidelines, Congress intended the Judiciary to refine a definition of "commercial activity" through a case by case analysis, stating, "[t]he courts would have a great deal of latitude in determining what is a 'commercial activity' for purposes of this bill. It has seemed unwise to attempt an excessively precise definition of this term, even if that were practicable." Nevertheless, other portions of the legislative history provide additional examples of "commercial activity." The legislative history reads:

[A] contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity. The same would be true of a contract to make repairs on an embassy building. Such contracts should be considered to be commercial contracts, even if their ultimate object is to further a public function . . . . Activities such as a foreign government's sale of a service or a product, its leasing of property, its borrowing money, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation, would be among those included within the definition.

B. The Loss of Immunity When the Action is "Based Upon" a Commercial Activity

The FSIA disallows immunity when actions are "based upon" commercial activity having a relationship to the United States. However, the FSIA and its legislative history fail to clarify this requirement. The cases apparently employ a "centrality test" or

60. Id.
62. Id.
63. Id.
64. Id.
65. See 28 U.S.C. § 1605(a)(2). See also supra notes 51-64 and accompanying text.
“causal connection test.” This signifies that some significant relationship must exist between the case’s factual basis and the cause of action.66

For example, in Callejo v. Bancomer, S.A.,67 the court focused on “the elements of the cause of action itself: Is the gravamen of the complaint a sovereign activity by the defendant?”68 The court held that the disputed act was commercial, and thus, immunity could not be conferred.69 In Callejo, the defendant-sovereign, a Mexican bank, breached an obligation under a certificate of deposit. The court determined this to be the action on which the plaintiff was suing.70 The defendant argued that the cause of action was based on Mexico’s promulgation of exchange control regulations, a purely sovereign act, but the court disagreed.71 Since the basis of the plaintiff’s complaint was not a sovereign act, but rather a commercial activity, there was no immunity under the FSIA.

C. The Nexus Requirement

Even if the other elements of section 1605(a)(2) are fulfilled, the sovereign may still enjoy immunity if there exists no connection or “nexus” to the United States. The FSIA allows a plaintiff three opportunities to establish the “nexus.” Section 1605(a)(2) disallows immunity if the plaintiff’s action is based upon: (1) a commercial activity carried on in the United States; (2) an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or (3) an act outside the United States in connection with the foreign state is commercial activity which causes a direct effect in the United States.72

Section 1603(e) defines the first clause, “commercial activity carried on in the United States by a foreign state,” as “commercial activity carried on by such state and having substantial contact with the United States.”73 The legislative history of this clause states that the definition includes: (1) cases based on commercial transactions performed in whole or in part in the United States; (2) import and export

66. The “centrality test” and the “causal connection test” are the author’s terms.
67. 764 F.2d 1101 (5th Cir. 1985).
68. Id. at 1109.
69. Id. at 1107.
70. Id.
71. Id. at 1109.
73. Id. § 1603(e).
transactions that involve sales to or purchases from concerns in the United States; (3) business torts occurring in the United States; (4) an indebtedness incurred by a foreign state which executes or negotiates a loan agreement in the United States; and (5) a foreign state receiving financing from a private or public lending institution located in the United States.  

Further, the legislative history clarifies the scope of the second clause of section 1605(a)(2). The second clause "looks to conduct of the foreign state in the United States which relates either to a regular course of commercial conduct elsewhere or to a particular commercial transaction concluded or carried out in part elsewhere." Specific examples from the legislative history include:

(1) a representation by an agent of the foreign sovereign in the United States that leads to an action for restitution based on unjust enrichment, (2) an act in the United States that violates United States securities laws or regulations, and (3) the wrongful discharge in the United States of an employee of the foreign sovereign who has been employed in connection with a commercial activity carried on in some third country.

The last clause of section 1605(a)(2) states that immunity will be stripped away for acts occurring entirely outside of the United States which produce "direct effects" within the United States. The problem with this clause is apparent; as one court has stated, "[d]etermining whether a commercial activity abroad has a direct effect in the United States is an enterprise fraught with artifice."

When interpreting the "direct effects" clause, the legislative history directs attention to the Restatement (Second) of Foreign Relations Law of the United States, section 18. Section 18 governs the extent to which United States law applies to conduct abroad. Among other things, in order for United States law to apply, the conduct must produce a "substantial" effect within the United States, and that effect must be a direct and foreseeable result of the conduct outside the United States. For example, consider the nonpayment of a note

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75. Id. at 19, reprinted in 1976 U.S.C.C.A.N. at 6617.
77. Callejo v. Bancomer, S.A., 764 F.2d 1101, 1111 (5th Cir. 1985) (citing Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 312 (2d Cir. 1981)).
78. Id.
79. RESTATAMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 18(b)(ii)-(iii) (1965). See also Callejo, 764 F.2d at 1111.
owed to a United States company in the United States. Courts have found that nonpayment causes a direct effect in the United States under the FSIA.80 Additionally, a demand for payment on a letter of credit issued by a United States bank has been held to produce a direct effect in the United States, as it causes a depletion of funds in that bank.81

V. INTRODUCTION TO THE INTERNATIONAL LAW COMMISSION

In order to compare the FSIA to the International Law Commission's Draft Articles, one must understand the dynamics of the ILC itself. The International Law Commission is the only permanent body within the United Nations that develops and codifies international law.82 The ILC has drafted many of the world’s basic international law documents.83 Article 1, paragraph 1, of the Statute of the ILC provides that the ILC “shall have for its object the promotion of the progressive development of international law and its codification.”84 The ILC’s success is illustrated by the fact that States frequently accept its codified conventions as evidence of existing law.85 States often cite to the ILC’s work as evidence of the law long before the formal conventions come into force.86

The ILC’s members sit in an individual capacity and not as representatives of their governments.87 Although election to the ILC is not restricted to nationals of the United Nations member states, there has never been a member elected to the ILC from a non-member country.88 The ILC membership, initially only fifteen members, pres-

81. Harris Corp. v. National Iranian Radio & Television, 691 F.2d 1344, 1351 (11th Cir. 1982).
83. Id. For example, the ILC was responsible for first drafting conventions on diplomatic and consular relations, the law of treaties and the law of the sea. Id.
85. Graefrath, supra note 82, at 595.
86. Id.
87. WORK OF THE INTERNATIONAL LAW COMMISSION, supra note 84, at 6.
88. Id. at 7.
ently totals thirty four.\textsuperscript{89}

The ILC possesses the authority to select its own topics for codification in addition to those referred by the United Nations General Assembly ("General Assembly").\textsuperscript{90} However, the ILC must first consider those topics that the General Assembly asks it to consider.\textsuperscript{91}

The ILC appoints a "Special Rapporteur" for each topic.\textsuperscript{92} The Special Rapporteur analyzes the topic and submits a report to the ILC.\textsuperscript{93} The ILC then debates the topic, and approves a provisional draft, usually in the form of articles of a draft convention with commentary.\textsuperscript{94} This draft convention circulates to the General Assembly and to individual governments for their written observations.\textsuperscript{95}

The Special Rapporteur studies the written observations together with comments from the debates of the General Assembly's Sixth Committee, and then compiles a revised report.\textsuperscript{96} After considering these comments and suggestions, the ILC approves a final draft, which it submits to the General Assembly with recommendations regarding action.\textsuperscript{97}

The ILC may recommend four possible courses of action to the General Assembly. First, it can recommend that no action be taken because the report was published.\textsuperscript{98} Second, the ILC can ask the General Assembly to acknowledge or adopt the report by resolution.\textsuperscript{99} Third, the ILC can ask the General Assembly to recommend the draft to member states with a view to concluding a convention.\textsuperscript{100} Last, the ILC can recommend holding a conference in order to conclude a formal convention on the matter.\textsuperscript{101} Regarding the Draft Articles on Jurisdictional Immunities of States and their Property, the ILC recommended in its 1991 report that the General Assembly convene an international conference of plenipotentiaries to examine the

\begin{itemize}
\item \textsuperscript{89} Id.
\item \textsuperscript{90} Id. at 11.
\item \textsuperscript{91} Id.
\item \textsuperscript{92} Robert W. Schaaf, The United Nations International Law Commission, 18 INT'L J. LEGAL INFO. 122, 124 (1990).
\item \textsuperscript{93} Id.
\item \textsuperscript{94} Id.
\item \textsuperscript{95} Id.
\item \textsuperscript{96} Id.
\item \textsuperscript{97} Id. at 124.
\item \textsuperscript{98} Id.
\item \textsuperscript{99} Id.
\item \textsuperscript{100} Id.
\item \textsuperscript{101} Id.
\end{itemize}
VI. THE INTERNATIONAL LAW COMMISSION'S DRAFT ARTICLES ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

In 1977, the United Nations invited the ILC to consider the question of jurisdictional immunities of States and their property. The ILC began its work on the topic in the following year. That same year, Mr. Sompong Sucharitkul of Thailand was appointed the first Special Rapporteur for the project.

The ILC adopted an entire set of Draft Articles on jurisdictional immunity in 1986. Five years later, the ILC developed a final set of these Draft Articles, and recommended the conclusion of these Draft Articles in the form of a Convention.

The cornerstone of the Draft Articles, as they appear now, is the statement of "State Immunity." Article 5 pronounces that "a State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present articles." The Draft Articles establish the basic premise that a State is a sovereign and, as such, should be immune from the jurisdiction of another State's courts. The remainder of the Draft Articles explain the circumstances under which this immunity exists.

A. The Evolutionary History of the Draft Articles

The evolutionary history of the Draft Articles is very important because it demonstrates that the parties held no unifying view on jurisdictional immunities. Instead, the ILC members proposed numerous changes to the Draft Articles. There was much debate, some political wrangling, and several attempts to appease the con-

105. Id.
106. Id.
107. Id. at 10.
108. Id.
110. See generally Report of the International Law Commission, supra note 5.
111. See WORK OF THE INTERNATIONAL LAW COMMISSION, supra note 84, at 113-17.
112. Id.
cerns of all involved. As a result, the formulation of the Draft Articles was anything but a simple, coherent process.

At its thirty-second session in 1980, the ILC attempted to consider the preliminary report of the Special Rapporteur, but it lacked sufficient time to fully consider the proposed articles. However, it adopted one article defining the scope of the articles. The current formulation of the articles' scope exists today as Article 1. At its next session, the ILC reviewed five more articles that were proposed by the Special Rapporteur. Nonetheless, the ILC had yet to address the most important issues, namely those dealing with the exceptions to immunity.

At its thirty-fourth session in 1982, the ILC discussed the jurisdictional immunities issue. At this point, the topic was still in the preliminary stages of development. The ILC reformulated the previously adopted Article 1 and provisionally adopted four more articles. However, the ILC was not able to agree on two of the most important articles of the set.

In particular, the ILC experienced difficulty in stating the principle of state immunity and the major exception to immunity, the trading or commercial activity exception. The biggest debate concerning Article 12 was whether to follow the "nature" of the activity test that was consistent with the FSIA or to adopt the "purpose" of the transaction test which enjoyed the support of many ILC members. Failing to resolve this issue, the ILC left it for its 1983

113. Id.
115. Id.
118. Id.
120. Id. It was noted that the slow rate of progress regarding the issue of jurisdictional immunities was due to the "sensitivity of the topic and the inability of the members of the commission to agree on points as fundamental as whether the draft articles should follow the 'absolute' or the 'restrictive' theory of state immunity." Id.
121. Id.
122. Id.
123. Id. It must be noted that the principle of state immunity was originally codified in Article 6, now renumbered as Article 5. Likewise, the commercial activity exception was codified in Article 12, now Article 10.
At the 1983 session, the ILC provisionally adopted three more articles. The Special Rapporteur proposed Article 13 (exception for Contracts for Employment) and Article 14 (exception for Personal Injuries and Damage to Property), but the ILC resolved to review these articles in the future. In 1985, the Commission provisionally adopted the final exceptions to immunity, Article 19 (State-Owned or State-Operated Ships Engaged in Commercial Service) and Article 20 (Effect of an Arbitration Agreement). The ILC also began to discuss the subjects of attachment and execution.

A set of Draft Articles was adopted on the first reading in 1986. However, these Draft Articles did not represent a complete set as the cornerstone, Article 6, had not been agreed upon. As originally agreed upon, Article 6 was to state the primary rule of immunity. However, two competing choices existed for the formulation of Article 6. The first option dictated that Article 6 state the general rule of immunity and the existence of the exceptions. Meanwhile, the other option avoided a general statement of immunity and instead provided that certain circumstances create immunity. Ultimately, the first option was chosen and adopted in what is now Article 5.

In 1988, the ILC received comments from twenty-eight governments. The new Special Rapporteur, Mr. Motoo Ogiso, submitted a report analyzing these comments. However, due to a shortage of time, the ILC postponed any in-depth discussion of jurisdictional immunity until 1989. At that time, the ILC decided to concentrate its efforts in 1990 on the Draft Articles. It was believed that the sec-

125. Id.
127. Id.
128. Id. at 466-67.
131. Id. at 670.
132. Id.
133. Id.
136. Id. at 169.
137. Id.
138. Id.
ond reading of the Draft Articles could be completed by then.139

At the forty-second session of the ILC in 1990, the ILC undertook the second reading of the Draft Articles.140 The Drafting Committee completed work on sixteen of the Articles, but the Commission took no action, electing instead to await the completion of the entire set of articles.141 Twelve articles remained for consideration at the 1991 session,142 at which time the ILC intended to complete its work and submit a report to the General Assembly.143

In 1991, at its forty-third session, the Commission finally completed its second reading, or final adoption, of the Draft Articles on Jurisdictional Immunities of States and their Property.144 The fundamental approach of the articles as adopted did not change between the two readings.145 However, some significant changes were made in individual articles.146

Most notably, Article 10, the commercial transaction exception to jurisdictional immunity, was amended.147 The narrower term "commercial contract" was eliminated in favor of the broader term "commercial transaction" while the accompanying definition in Article 2(1)(c) was also broadened.148 This change is important because the more expansive definition exempts more activities from immunity. However, a third paragraph was added to Article 10 which placed a limitation on the rest of that article.149

VII. ARTICLE 2(1)(C) OF THE DRAFT ARTICLES DEFINES THE MEANING OF "COMMERCIAL TRANSACTIONS"

Article 2(1)(c) of the Draft Articles defines a "commercial transaction" as:

139. Id.
141. Id.
142. Id.
143. Id.
145. Id. "The final adoption continues to recognize several cases in which a state cannot invoke immunity from the jurisdiction of the courts of another state." Id.
146. Id.
147. Id. at 704.
148. Id. at 703.
149. Id. at 704. See infra notes 179-187 and accompanying text for a discussion of the Article 10(3) limitation.
(i) any commercial contract or transaction for the sale of goods or supply of services; (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction; (iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons. 150

The Draft Articles’ definition of “commercial transaction” resembles the language of the FSIA referring to “commercial activity.” 151 FSIA defines a “commercial activity” as “either a regular course of commercial conduct or a particular transaction or act.” 152 Thus, the definition of a “commercial activity” under the FSIA and the Draft Articles is similar.

VIII. Article 10 of the Draft Articles Calls for an Exception to Immunity for “Commercial Transactions”

Article 10 calls for the denial of immunity under circumstances which involve a commercial transaction. 153 Article 10 contains three subsections, each of which will be addressed in turn.

A. Article 10(1)

Article 10(1) reads:

If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction. 154

This rule applies to commercial transactions between a State and a foreign natural or juridical person when another State’s court could exercise its jurisdiction by virtue of private international laws. 155 The ILC intended that each State be considered “eminently sovereign in matters of jurisdiction,” 156 and that each State should decide the

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151. See supra notes 54-64 and accompanying text.
152. 28 U.S.C. § 1603(d).
154. Id.
155. Id. at 71.
156. Id.
scope of its own jurisdiction.\textsuperscript{157}

When a State possesses the authority to assert jurisdiction under its own rules of private international law, then another State engaging in a commercial transaction with a person, natural or juridical, other than its own national, cannot invoke immunity. This basic rule is no different than that stated in the FSIA. Simply stated, if a foreign State conducts a commercial transaction, no immunity exists.

B. Article 10(2)

Article 10(2) states several exceptions to the first subsection. It provides that "paragraph 1 does not apply: (a) in the case of a commercial transaction between States; or (b) if the parties to the commercial transaction have expressly agreed otherwise."\textsuperscript{158} The Commentary to Article 10(2) suggests that it was designed to provide "the necessary safeguards and protection of the interests of all States."\textsuperscript{159} The Article 10(2) exception represents an attempt to appease the diverse interests of the affected States and to encourage developing nations to participate in the Convention.\textsuperscript{160} For example, the Commentary notes that:

\begin{quote}
    it is a well known fact that developing countries often conclude trading contracts with other States, . . . both in the developing world and with the highly industrialized countries. Such State contracts, concluded between States, are excluded . . . from the operation of the rule stated in paragraph 1. Thus State immunity continues to be the applicable rule in such cases.\textsuperscript{161}
\end{quote}

Article 10 differs from the FSIA in this respect.

The commercial activity exception to immunity embodied in section 1605 of the FSIA makes no distinction for commercial activity between two governments.\textsuperscript{162} Rather, the FSIA focuses on whether the activity, transaction, or contract at issue was commercial.\textsuperscript{163}

In \textit{Castro v. Saudi Arabia},\textsuperscript{164} the court considered an agreement

\begin{footnotes}
\item[157.] Id.
\item[158.] Report of the International Law Commission, supra note 5, at 69.
\item[159.] Id. at 72.
\item[160.] See id.
\item[161.] Id.
\item[163.] See H.R. REP. No. 1487, supra note 27, at 16, reprinted in 1976 U.S.C.C.A.N. at 6615 (emphasizing the "essentially commercial nature of an activity or transaction that is critical").
\item[164.] 510 F. Supp. 309 (W.D. Tex. 1980).
\end{footnotes}
between the United States and the defendant foreign government of Saudi Arabia for the training of military personnel. The court held that immunity existed on the grounds that the agreement fell outside the scope of the commercial activity exception under Section 1605 of the FSIA.\textsuperscript{165} The court relied on the for profit nature of the contract, rather than the fact that there was an agreement between two governments.\textsuperscript{166} The analysis in Castro illustrates that the Draft Articles' distinction for contracts between States is a distinction that the FSIA does not recognize.

Additionally, in Rush-Presbyterian-St. Lukes Medical Center v. The Hellenic Republic,\textsuperscript{167} the court's inquiry focused on the nature of the activity and not the status of the parties.\textsuperscript{168} The court stated that when determining whether the commercial activity exception applies, an important inquiry is whether a private person could have engaged in similar conduct.\textsuperscript{169} "If a private person could have engaged in the same type of activity, then the sovereign has presumptively engaged in 'commercial activity' within the meaning of the Foreign Sovereign Immunities Act."\textsuperscript{170}

Under the Draft Articles, contracts between States retain their immunity, despite their commercial character.\textsuperscript{171} However, the FSIA inquires whether the activity of the contract was commercial.\textsuperscript{172} The FSIA is not concerned with whether both parties are governments.\textsuperscript{173} Consequently, if the United States signed the Draft Articles as presently configured, United States law would experience change for the worse.

The United States should not surrender jurisdiction over suits involving commercial contracts and agreements with foreign sover-

\textsuperscript{165} Id. at 312.
\textsuperscript{166} Id.
\textsuperscript{167} 877 F.2d 574 (7th Cir. 1989). In Rush, physicians and hospitals brought suit against the Greek government seeking payment of medical bills for kidney transplants provided in the United States to Greek nationals. The Greek government had contracted with the plaintiffs to perform the kidney transplants, as kidney transplants are not widely performed in Greece. The court held that the Greek government's execution of the contract to reimburse the plaintiffs for the transplants fit the "commercial activity" exception to the FSIA. Id. at 581.
\textsuperscript{168} Id. at 577 (emphasizing the nature rather than the purpose of the activity).
\textsuperscript{169} Id. at 578.
\textsuperscript{170} Id.
\textsuperscript{171} Report of the International Law Commission, supra note 5, at 69. Article 10(2) provides that the exception to immunity does not apply to commercial transactions between States.
\textsuperscript{172} See 28 U.S.C. § 1605(a)(2) and supra notes 50-71, 150-157 and accompanying text.
\textsuperscript{173} Id.
eigns. For example, assume the United States entered into a joint venture agreement with the government of Brazil, under which Brazil would manufacture a product in the United States. If Brazil breached the agreement, it would be immune from a lawsuit under the Draft Articles, even though the activity forming the basis of the lawsuit was commercial. Article 10(2) allows such State contracts, even commercial ones, unlike the FSIA which would allow a suit against Brazil.

The United States should debate this portion of Article 10 and urge its redrafting. Article 10(2) should be changed so that commercial transactions between the United States government and foreign sovereigns will not automatically receive immunity in the event of a dispute. It must be acknowledged that if Article 10 is altered, some developing countries may refuse to sign the Convention. However, if the Article remains unchanged, the United States should refuse to sign. Having the United States as a signatory lends credibility to the Draft Articles and is much more important than persuading some of the developing nations to become members.

For example, the United States did not sign the Convention on the Law of the Sea, and without its participation, it has been impossible to implement a coherent system of laws in that area. In reference to this Convention, one commentator wrote, "[B]ecause of the overwhelming economic and political power of the United States, the key to universal participation in the Convention is American approval ...." This is one example of a Convention that all but failed because of the United States' non-participation. Similarly, without the United States as a signatory, any Convention on jurisdictional immunities will likely fail.

C. Article 10(3)

Article 10(3) of the Draft Articles states:

The immunity from jurisdiction enjoyed by a State shall not be affected with regard to a proceeding which relates to a commercial

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177. Id.
178. It should be noted, however, that neither the United Kingdom nor Germany signed the Convention and almost all industrialized states have not ratified it. Id.
transaction engaged in by a State enterprise or other entity established by the State which has an independent legal personality and is capable of: (a) suing or being sued; and (b) acquiring, owning or possessing and disposing of property, including property which the State has authorized it to operate or manage.\textsuperscript{179}

The Commentary to Article 10(3) states that this aspect of the commercial transaction exception is specifically designed for those States whose systems of government include State-owned enterprises.\textsuperscript{180} This aspect of the commercial transaction exception would come into play when the defendant was a State-owned airline or State-owned manufacturing corporation, for example. As long as the two subsections are fulfilled, then Article 10(3) shields the State, but not the State's enterprise with immunity.

The practical application of Article 10 is consistent with United States law. The key to the denial of immunity is whether the transaction at issue involves a commercial activity. It is irrelevant whether the enterprise is State owned or not. As long as the entity is taking part in "private acts," those which a private person could perform, there would be no immunity. The defendant would be the State-owned enterprise and not the sovereign State.

As the United States Supreme Court held in \textit{First National City Bank v. Banco Para El Comercio Exterior De Cuba},\textsuperscript{181} "[G]overnment instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such."\textsuperscript{182} The Court reasoned that freely ignoring the separate status of governmental instrumentalities would result in uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign.\textsuperscript{183} Thus, third parties might hesitate before extending credit to a government instrumentality without that government's guarantee.\textsuperscript{184}

The notion that duly created instrumentalities of a foreign state are to be accorded a presumption of independent status also finds support in the FSIA legislative history. During debate, Congress clearly expressed its intention that duly created instrumentalities of a foreign state

\begin{flushleft}{\footnotesize\textsuperscript{179} \textit{Report of the International Law Commission}, \textit{supra} note 5, at 69.}\textsuperscript{180} \textit{Id.} at 73-74.\textsuperscript{181} 462 U.S. 611 (1983).\textsuperscript{182} \textit{Id.} at 626-27.\textsuperscript{183} \textit{Id.} at 626.\textsuperscript{184} \textit{Id.} (citing Richard A. Posner, \textit{The Rights of Creditors of Affiliated Corporations}, 43 U. CHI. L. REV. 499, 516-17 (1976) (discussing private corporations)).\end{flushleft}
State are to be accorded a presumption of independent status. However, United States case law suggests that, at times, the actions of the government-owned entity or instrumentality can be imputed to the government itself. For example, immunity would not be proper if there existed an agency relationship between the government and the government-owned enterprise or instrumentality.

D. Stripping Away Immunity Under The Principles Of Agency Law

Under general principles of agency law, a foreign sovereign may be subject to United States jurisdiction if the actions of its State-owned entity can be attributed to the government. In the case of United Euram Corp. v. Union of Soviet Socialist Republics, the court stated that there were facts suggesting that the government-owned corporation at issue was “acting on behalf of” the government in the transaction in question. These facts were found sufficient to withstand a motion to dismiss based on sovereign immunity grounds. Therefore, if acts of the State-owned entity can be attributed to the State itself, then the commercial activities exception to immunity would not apply, and the State would not enjoy immunity.

In conclusion, Article 10(3) posits that a State should be treated as separate from entities that it has created; this is consistent with the FSIA and the case law. However, no provision exists in the Draft Articles for any exception to this immunity. According to United States law, the State will not enjoy immunity if there is an agency relationship between itself and its State-created or State-owned

Section 1610(b) will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another, unrelated agency or instrumentality. There are compelling reasons for this. If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary. However, a court might find that property held by one agency is really the property of another (citation omitted).

186. See infra notes 195-98 and accompanying text.
187. Id.
190. Id. at 612.
191. Id.
192. See supra notes 179-81 and accompanying text.
entities.\textsuperscript{193}

When the final debate on these articles occurs, the United States should urge that the absolute language of this Article be altered to permit some instances in which the State itself can be sued for its entities' actions. This would be akin to the agency relationship theory of stripping away immunity. If the actual language of the Article is not changed, then the Commentary to Article 10 should mention the agency law principles of the United States. A reference to agency law would be helpful to the United States since the Commentary is used to interpret the Draft Articles.

\section*{IX. The Nature of the "Commercial Activity" Versus the Purpose of the "Commercial Transaction"}

Section 1603(d) of the FSIA states that "the commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."\textsuperscript{194} However, Article 2(2) of the Draft Articles states:

\begin{quote}
In determining whether a contract or transaction is a "commercial transaction"... reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if, in the practice of the State which is a party to it, that purpose is relevant to determining the non-commercial character of the contract or transaction (emphasis added).\textsuperscript{195}
\end{quote}

This is a potentially significant difference between the FSIA and the Draft Articles.

According to the FSIA, the sole focus is on the nature of the commercial activity.\textsuperscript{196} The Commentary to Draft Article 2(2), on the other hand, states that two tests, the nature and the purpose of the commercial transaction, apply.\textsuperscript{197} First, reference should be made to the nature of the contract or transaction. If that inquiry establishes that it is non-commercial in nature, no further analysis is required and immunity exists.

However, another provision exists that allows a defendant a "second bite at the apple," so to speak. If, after examining the nature of

\begin{footnotes}
\footnote{193. See \textit{supra} notes 181-84 and accompanying text.}
\footnote{194. 28 U.S.C. § 1603(d) (emphasis added).}
\footnote{195. \textit{Report of the International Law Commission, supra} note 5, at 12-13.}
\footnote{196. See 28 U.S.C. § 1603(d).}
\footnote{197. \textit{Report of the International Law Commission, supra} note 5, at 29-30.}
\end{footnotes}
the contract or transaction, it appears to be commercial, then the defendant sovereign can contest this finding by reference to the purpose of the contract or transaction. The sovereign must establish that, in its practice, the purpose is relevant to determining the non-commercial character of the contract or transaction.\footnote{198} The Commentary describes this as a “two-pronged approach” to determining the commercial character of a contract or transaction.\footnote{199}

The purpose of this approach was to allow developing countries to protect themselves when they entered into contracts.\footnote{200} For example, suppose the sovereign State of Kenya entered into a contract with a United States company to purchase wheat, and Kenya breached the contract by failing to pay. Under the FSIA, the United States corporation could sue Kenya under the commercial activity section of section 1605. Since the character of the contract was commercial in nature, there would be no immunity.

However, under the Draft Articles, Kenya could claim that, regardless of the contract’s nature, the purpose was a non-commercial, governmental act, and Kenya’s practice is to treat such contracts as non-commercial, governmental acts. Kenya could argue that the contract for wheat was formed in order to feed Kenya’s people, which is a sovereign act deserving immunity. This argument would succeed under the Draft Articles, and therefore, Kenya would be immune from a lawsuit. The Commentary to Article 2 supports an inquiry into the purpose, explaining:

Defendant States should be given an opportunity to prove that, in their practice, a given contract or transaction should be treated as non-commercial because its purpose is clearly public and supported by raison d’Etat, such as the procurement of food supplies to feed a population . . . provided that it is the practice of that state to conclude such contracts for such public ends.\footnote{201}

Many problems arise when the courts attempt to decide what is the “practice” of a particular sovereign in regards to the purpose of a contract or transaction. Under the less stringent test of the Draft Articles, there exists an increased potential for abuse and subjective interpretation. The defendant would ultimately ascertain the meaning

\footnotesize\footnote{198. Id. at 30.}\footnotesize\footnote{199. Id.}\footnotesize\footnote{200. Id.}\footnotesize\footnote{201. Id.}
of "practice," no doubt resulting in a finding of non-commerciality and, thus, immunity.

Additionally, the "two-pronged approach" offers little protection for plaintiffs. This would produce a "chilling" effect on the formation of contracts between sellers and sovereign buyers. Very few sellers will contract with sovereign buyers if there exists a high probability that the sovereign buyer will be immune from a lawsuit should a dispute arise over the performance of the contract. In the words of one scholar, "[c]ontracts designed to further the economic development of Third World countries are not going to be promoted by a treaty providing for their unenforceability."\textsuperscript{202}

The test of the FSIA makes more sense. The FSIA test is less subjective than the standard under the Draft Articles. As long as the nature of the activity is commercial, there is no immunity.\textsuperscript{203} When determining the "nature" of the activity, the inquiry centers on whether a private person could have engaged in similar conduct. If a private person could have engaged in similar conduct, then the sovereign has presumptively engaged in commercial activity.\textsuperscript{204} Thus, no immunity arises from that activity.

The fact that goods or services are to be used for a public purpose is irrelevant. For example, a country's military activities would normally be considered a sovereign act. Under the FSIA, however, military commercial activity does not merit automatic immunity. For example, authority exists for the proposition that a contract by a foreign government to buy equipment for its armed forces constitutes a commercial activity to which sovereign immunity does not apply.\textsuperscript{205} In a recent United States case, the court held that "the intent of the purchasing sovereign to use the goods for military purposes does not take the transaction outside of the 'commercial' exception to sovereign immunity."\textsuperscript{206}

\textsuperscript{202} Christoph H. Schreuer, State Immunity: Some Recent Developments 17 (1988).

\textsuperscript{203} 28 U.S.C. § 1603(d).

\textsuperscript{204} Rush-Presbyterian-St. Lukes Medical Ctr. v. Hellenic Republic, 877 F.2d 574, 578 (7th Cir. 1989).


\textsuperscript{206} McDonnell Douglas Corp. v. Islamic Republic of Iran, 758 F.2d 341, 349 (8th Cir. 1985).
While the aims of the "two-pronged" nature and purpose test of Article 2 are noble, namely protecting developing nations,\textsuperscript{207} the United States should not accept this approach. The United States should urge that only the "nature" of the commercial activity be examined and not the purpose. The United States must debate in favor of changing Article 2. Only if Article 2 is changed to resemble the FSIA should the United States sign on to the Draft Articles. Without the United States as a signatory, the Draft Articles will most likely remain a powerless document.

X. \textbf{SHOULD THERE EVEN BE A CONVENTION ON THE SUBJECT OF JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY?}

While the language of the commercial transaction exception in Article 10 must change, that does not mean that the Draft Articles serve no worthwhile purpose. The Draft Articles represent an important effort and should be codified in the form of a Convention.

There is a need for international uniformity in the doctrine of sovereign immunity. While some countries have similar laws,\textsuperscript{208} other countries have different laws or lack laws entirely.\textsuperscript{209} This lack of uniformity creates a lack of certainty among commercial trading partners. One international set of laws on foreign sovereign immunity would provide nations engaging in commercial transactions with greater certainty.

Additionally, the Draft Articles attempt to address a wide range of topics. The Draft Articles deal with immunity for employment contracts (Article 11), personal injuries and damage to property (Article 12), intellectual and industrial property (Article 14), and the effects of an arbitration agreement (Article 17). These subjects should be examined in light of the concept of sovereign immunity, and the Draft Articles accomplish that task.

Therefore, a Convention should be concluded on the topic of jurisdictional immunities of states and their property. Although the Draft Articles are not perfect, they are not useless. While changes

\textsuperscript{207} In fact, the goals of Article 2, protecting developing nations, would be thwarted under the "two-pronged" test. Developed countries will be hesitant to enter into commercial transactions with developing countries if a possible "out" exists.


\textsuperscript{209} \textit{Id.}
need to be made, the Draft Articles should be concluded in the form of a Convention.

XI. CONCLUSION

While some nations' laws address sovereign immunity, there is a lack of uniformity among these laws. A need exists for a uniform set of laws on sovereign immunity. Since the International Law Commission is a truly international group and considers the comments of many nations, the ILC would be the best vehicle to draft such a set of uniform laws.

This is exactly what the ILC has done in the form of the Draft Articles on Jurisdictional Immunities of States and their Property. While these Draft Articles are a good beginning, they should be modified. The United States should not become a signatory to any Convention which contains the Draft Articles as presently formulated. In particular, those Articles dealing with exceptions to immunity for commercial transactions and activities must be amended.

Specifically, Article 10 and Article 2 should be revised. Article 10 states the commercial transaction exception to sovereign immunity. Article 10(2) must be changed to provide no immunity for commercial transactions between governments. The character of the transaction, whether commercial or not, should control and not the parties to the transaction.

Additionally, Article 10 must be altered to dictate a lack of immunity when there is an agency relationship between a government and a government-owned enterprise that is a party to a commercial transaction. If the Article itself does not contain this language, then the Commentary to Article 10 should include this principle.

Most importantly, Article 2 must be changed so that both the "nature" and the "purpose" tests are not used. The only test that should be used is whether the "nature" of the transaction or activity in question is commercial. If Article 2 as presently drafted became part of a formal Convention, it would do more harm than good. The "purpose" test contained in Article 2 must be deleted.

In conclusion, the United States should not become a party to any Convention containing these Draft Articles as presently written. Without the United States as a member, any Convention concluded would lack credibility and strength. Therefore, the international com-

210. See supra notes 208-09 and accompanying text.
munity should be willing to negotiate as to the contents of the Draft Articles. A Convention on Jurisdictional Immunities of States and their Property could become a reality if a few changes are made to the Draft Articles. Hopefully, the United States will argue for these changes. Only then should the United States become a member to such a Convention. At that point, the global community would possess a much needed uniform set of laws on foreign sovereign immunity, which is in every country’s best interest.