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ADMINISTRATION OF MILITARY CLAIMS IN EUROPE

REPORT

OF

THE SUBCOMMITTEE ON CLAIMS AND GOVERNMENTAL RELATIONS

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

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MILITARY CLAIMS

In August 1973 the Subcommittee on Claims and Governmental Relations of the House Committee on the Judiciary visited five countries to familiarize the members with claims activites of the Armed Forces in Europe and the Mediterranean area. The visits were made to Belgium, the United Kingdom, Germany, Italy, and Spain. The members had the opportunity of observing and gathering information on claims activities there as representative of overseas military claims activity.

An important part of the claims jurisdiction of the subcommittee, involves legislation concerning the Armed Forces of the United States. In the 92d and 93d Congresses, important additions have been made to the claims settlement authority of the military which have the effect of improving the ability of the military to settle specific categories of claims arising from activities of the various services. The scope of claims settlement authority can be gained by the following tabulation of statutes authorizing settlement of claims:

5 U.S.C. 8171–8173	Nonappropriated fund compensation claims.
10 U.S.C. 939	Article 139, U.C.M.J., claims based on wrongful taking of property by military personnel.
31 U.S.C. 240–243	Military Personnel and Civilian Employees Claims Act.
10 U.S.C. 2733	Military Claims Act.
10 U.S.C. 2734	Foreign Claims Act.
10 U.S.C. 2734a–2734b	International Agreement Claims Act (NATO–SOFA).
10 U.S.C. 9441; 5 U.S.C. 8141	Civil Air Patrol claims (U.S.).
10 U.S.C. 4802, 7622, 9802	Admiralty Claims Act.
28 U.S.C. 2671–2680	Federal Tort Claims Act.
31 U.S.C. 236	Meritorious Claims Act.
32 U.S.C. 715	National Guard Claims Act.
39 U.S.C. 2601	Post Office reimbursement claims (involving military personnel who perform postal duties.
10 U.S.C. 2736	Emergency Payment Act.
10 U.S.C. 2737	Claims for property loss, personal injuries, or death (not cognizable under other law).

CLAIMS IN BEHALF OF THE UNITED STATES

While discussions concerning claims statutes usually concern claims against the United States, the subcommittee is also concerned with claims which may be asserted in behalf of the United States. The fol-

lowing statutes provide claims to be asserted in behalf of the United States:

31 U.S.C. 71; 951–953	Recovery claims on released valuation under Government contracts for storage, packing or transportation of household goods.
10 U.S.C. 4803, 4804, 7365, 7622, 9803, 9804	Admiralty claims, tort, salvage and towage claims).
31 U.S.C. 71, 951, 953	Property damage tort claims.
42 U.S.C. 2651–2653	Hospital recovery claims (P.L. 87–693).

Among the tabulation of claims statutes outlined above are the provisions of Public Law 87–693 providing for recoveries on behalf of the United States of the value of medical and hospital care provided an individual by the Government from the negligent third parties causing the injuries. This statute is now classified in the United States Code as sections 2651, 2652 and 2653 of title 42. The subject of recoveries under those provisions is of continuing interest to the members of the subcommittee since the law originated as a bill before the subcommittee in the 87th Congress.

CLAIMS ASSERTED AGAINST THE UNITED STATES BY FOREIGN NATIONALS

In its investigation of claims in Europe, the subcommittee was particularly interested in gaining information concerning the settlement of the personal injury and damage claims asserted by foreign nationals against the United States due to the action of the military. It is imperative that such claims be processed promply and fairly, for the expeditious handling of this type of claim is in the best interest of the United States. The prompt settlement of meritorious claims can provide redress which will serve to alleviate the loss or suffering due to the incident and mitigate any adverse feelings on the part of foreign nationals against the United States and its Armed Forces.

The settlement of claims by foreign nationals are made either by a U.S. Armed Force under the codified provisions of the Foreign Claims Act now set out as section 2734 of title 10, United States Code, or in the case of countries covered by a status of forces agreement, by the Foreign government with payment or reimbursement of the U.S. pro rata share as provided under section 2734a of the same title. Each of the five countries visited on the trip are covered by a Status of Forces Agreement. In each country visited the members were given information concerning settlements under the Agreements. The procedures and problems in each country are commented upon in this report.

BELGIUM—NATO CLAIMS

The initial stop for the subcommittee was at the headquarters of the North Atlantic Treaty Organization in Brussels, Belgium. There, in addition to a claims presentation by representatives of the Department of the Army, U.S. Claims Office Belgium, the members were given an excellent presentation on the North Atlantic Treaty Organization. This was very helpful to the members because, as will appear in this report, the NATO Status of Forces Agreement claims provisions form one of the principal basis for claims administration in the European area.

The nature and extent of the claims processed by the claims office are indicated by the following statistics presented to the subcommittee in the course of the claims presentation. One fact of interest to the members is that the Army is continuing to process claims from France, some of which antedate the move of the NATO headquarters from France to Belgium.

The tables below show the breakdown of claims statistics on the basis of the authority for settlement. That is, the table first shows the settlements under the NATO Status of Forces Agreement, next under the Foreign Claims Act provisions of section 2734 of title 10, United States Code.

Settlements by the United States Claims Office, Belgium

STATISTICS, PAYMENTS, AND RECOVERIES, 1970–1973

NATO CLAIMS

	Belgium			France		
	Number of claims	Payments	Recoveries	Number of claims	Payments	Recoveries
1970	192	$15,851.62	$209.00	511	$651,605.55	$2,224.95
1971	167	17,998.34	1,689.18	102	356,044.19	3,109.71
1972	163	10,597.10	2,108.90	98	116,131.46	6,492.20
Total	522	44,447.06	4,007.08	711	1,123,781.20	11,826.86

Foreign Claims Commission Settlement Under, 10 U.S.C. 2734

	Belgium			France		
	Number of claims	Number denied	Payments	Number of claims	Number denied	Payments
1970	10	1	$1,570.69	16	7	$16,104.16
1971	6	2	245.98	16	2	26,389.94
1972	8		1,147.21	2		183.76
1973	3		48,535.60	14		1,717.19
Total	27	3	51,499.48	48	9	44,395.05

The medical care program recoveries in behalf of the United States under sections 2651, 2652 and 2653 of title 42, United States Code are as follows:

MEDICAL CARE PROGRAM AR 27–38 BELGIUM AND FRANCE

	Number of claims	Recoveries
1970	15	$9,738.79
1971	15	51,202.72
1972	26	15,736.00
1973 to date	10	46,293.67
Totals	66	122,971.18

Claims Administration in the United Kingdom

The U.S. Air Force is the service branch assigned claims settlement responsibility for the United Kingdom. The Department of the Air Force has been assigned this responsibility by the Department of Defense under section 133(d) of title 10. It has similar responsibility for

claims against the United States in Denmark, Greece, Libya, Luxembourg, the Netherlands, Norway, Saudi Arabia, Spain and Turkey. These areas are under the general supervision of the Staff Judge Advocate, U.S. Air Force, Europe, in Germany. The single service claims responsibility of the Air Force extends the claims involving Army, Navy, Air Force and Defense activities and also the Coast Guard. The Office of the Staff Judge Advocate of the Third United States Air Force with headquarters at RAF Mildenhall, includes within its responsibilities the claims administration functions of that command. The headquarters functions as the NATO sending state office for claims under the NATO Status of Forces Agreement.[1] In addition to claims personnel at the Headquarters of the Third Air Force, major installations have a Claims Officer who is responsible for claims matters arising in this area.

The subcommittee was informed that there are approximately 550 to 600 accidents or incidents in the U.K., in the course of a year that may give rise to claims against the United States. Claims personnel have the responsibility of assuring that incidents of this type are reported so that adequate investigations and records of this type are retained for future utilization in connection with consideration of related claims. The information and evidence gained in this manner must be preserved for such possible use. If the claim is determined to be covered by the Status of Forces Agreement, the claims personnel of the Air Force assist the British authorities in processing the claim. The Air Force furnishes investigative and duty status reports when it receives notice that a claim has been filed.

If it is determined that the claim is not covered under the Agreement, settlement is made in accordance with applicable statutory authority. Thus it may be a claim under the Foreign Claims Act provisions of section 2734 of title 10, or the Military Claims Act provisions of section 2733 of title 10. A third authority for settlement is provided in section 2737 of title 10. In either case the full cost of the award is borne by the United States.

The subcommittee was advised that the Air Force works in close cooperation with the British Claims Commission in claims matters. When a claim is filed, that fact is reported to the Air Force Claims Office. The Air Force is therefore aware of that fact and the identity of the British claimant, and the Air Force remains informed of the progress of the matter through liaison between the base involved, the U.S. Claims Office, and the British Claims Commission. The actual adjudication of the claim is made by the British.

In the course of the discussions on claims in the United Kingdom, it was pointed out that where claims were processed by the British in behalf of the United States for damage it suffered, it was allowed as a set off against the billing for amounts due from the United States under NATO–SOFA. This billing is made at six month intervals, and it is sent to Headquarters, United States Air Force, Europe, in Germany, with a covering letter making any necessary amplifications or explanations concerning the claims included. Upon approval at that point, the payment is made. The billing is also forwarded to Headquarters, United States Air Force in Washington for its information and review.

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[1] Paragraph 5 of Article VIII, NATO–SOFA.

The procedures followed in the United Kingdom are representative of those followed in countries which are members of the North Atlantic Treaty Organization. Claims can be divided into two main categories depending upon whether the individual involved in the incident giving rise to the claim was engaged in an official duty or was not on official duty status. An example of a duty status claim would be one based upon an aircraft accident or motor vehicle accident which caused a British national to suffer personal injury or property damage when the aircraft or vehicle causing the damage was being used by the U.S. force for duty purposes. It is in these cases that the claims provisions of paragraph 5, of article VIII of the NATO Status of Forces Agreement, apply. The implementing statute is section 2734a of title 10 which outlines the procedure and authority for reimbursement when claims adjudication is performed by the host country. In the United Kingdom the claim is investigated and considered by the British Claims Commission in accordance with the laws and customs of the United Kingdom. This means the British Claims Commission will consider the claim on the same basis as it would if the damage had been caused by one of its own armed forces. Liability is determined under British law and the award, if any, is determined by customary awards in the United Kingdom for similar cases. Full particulars of every claim paid must be sent to the Air Force, together with a proposed pro rata distribution of the cost incurred in satisfying the claim. The United States has two months in which to take exception to the settlement action. Exceptions could refer to an excessive award or to a claim, such as one sounding contract, not covered by the agreement. In the absence of an exception, the adjudication is regarded as accepted. A detailed account of all awards made pursuant to article VIII of this agreement on behalf of the United States is rendered every 6 months to the headquarters of the 3d U.S. Air Force in the United Kingdom with a billing made on the Air Force on the basis of 75 percent as the U.S. share and 25 percent for the United Kingdom. In order to maintain a current status on claims, companion files of all claims are maintained by the claims office at Headquarters, 3d Air Force. U.S. claims personnel meet regularly with the British Claims Commission and discuss claims currently under consideration. As a result of this close working relationship between British and American claims personnel, when the semiannual billing is received, Air Force personnel have been advised as to the basis of liability in each instance, the amount of the award, and all pertinent details of the cost. Verification of the amounts due is, therefore, readily accomplished as a preliminary to sending the billing to Headquarters, U.S. Air Forces Europe for payment.

The subcommittee further was advised that the British assume all administrative expenses incident to the investigation and consideration of each claim and, where necessary, Crown Counsel is assigned to defend the United States interests and its personnel in any suit arising out of a claim for damage. Additionally, claims on behalf of the United States are asserted by the British Claims Commission and the full amount of moneys collected and credited to the amounts due from the United States with no deduction for administrative expenses. A further advantage inures to the United States in that the British Claims Commission, which consists of British Army personnel, civil service personnel, and a full-time legal staff assigned by the Treasury

Solicitor, is available to consider all claims, and this includes nonofficial duty claims which are discussed below.

Nonofficial duty claims are those claims which arise from the offduty activities of U.S. personnel and are considered under the authority of the Foreign Claims Commission Headquarters, U.S. Air Force Europe, at Ramstein, Germany. Such claims arise generally out of tortious acts or omissions of U.S. personnel. Examples are a vehicle accident where the U.S. driver was illegally operating his motor vehicle without insurance or when the vehicle involved was wrongfully appropriated. All settlements are made under the provisions of the Foreign Claims Act, 10 U.S.C. 2734, with approval up to $5,000 within the authority of the Foreign Claims Commission and settlements between $5,000 and $15,000 are made with the concurrence of Headquarters, U.S. Air Force Europe at Ramstein, Germany. Claims recommended for settlement in excess of $15,000 must be referred for action by the Secretary of the Air Force. If an award in excess to $15,000 is meritorious, he may pay the claimant $15,000, and certify the excess to the Congress for payment. The British Claims Commission, when requested by the Air Force will evaluate such claims under British law and render an opinion as to liability and an appropriate award.[2] The Foreign Claims Commission considers each claim, whether or not to grant an ex gratia award, and independently determines the amount awarded. A settlement is tendered and, upon execution of a settlement agreement by the injured party, the case is finalized and payment made.

The subcommittee also noted that there are several advantages to our position in the United Kingdom in respect to claims under the NATO Treaty. The most obvious are:

(*a*) Official duty claims arising out of damage to any property owned and used by the host government armed forces are waived by the host government under the treaty, as well as arrangements which predate the NATO Status of Forces Agreement.

(*b*) Claims do not include amounts for medical and hospital expenses for personal injuries since, with the application of local law, the claimant is provided free medical expenses under the national health program.

(*c*) The amount of award is consistent with awards for similar cases in England and is necessarily considerably reduced from the amount of award which would be rendered if U.S. standards in this area were followed.

(*d*) A close association and harmonious relationship with similar principles of claims law, as well as the close money management involved with the 25-percent share of all awards made by the host government, serve well to protect the interest of both governments.

In the United Kingdom during the first half of fiscal year 1973, 114 claims arising out of official duty were paid under the claims procedures of the NATO Status of Forces Agreement. The cost of the U.S. share was $44,604.44.

The numbers of claims and amounts paid in the various categories in the United Kingdom in fiscal years 1970, 1971, and 1972 are as follows:

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[2] This procedure is provided for in paragraph 6 of Article VIII of NATO–SOFA.

CLAIMS ACTIVITY FOR UNITED KINGDOM

	Fiscal year 1971		Fiscal year 1972		Fiscal year 1973	
	Number	Dollars	Number	Dollars	Number	Dollars
Article 139 collections (10 U.S.C. 939)						
Personnel payments (31 U.S.C. 240–243) (Personnel Claims & Recoveries)	1,152	221,258.07	1,143	225,365.64	1,162	249,323.62
Carrier recovery collections (31 U.S.C. 71, 951–953)	673	45,029.23	630	39,566.32	641	39,287.96
10 U.S.C. 2733 payments (Military Claims Act)			5	487.70	3	217.43
Foreign payments (10 U.S.C. 2734) (Foreign Claims Act)	8	31,216.10	8	1,527.10	3	449.47
International agreement payments (10 U.S.C. 2734 a and b) (SOFA)	277	36,023.37	249	32,474.99	[1] 144	44,604.44
International agreement collections (10 U.S.C. 2734 a and b) (SOFA)	74	6,854.08	69	6,843.57	[1] 31	3,817.42
10 U.S.C. 2737 payments (use of Government property claims)	2	322.39	2	332.74		
Government collections (31 U.S.C. 71, 951–953) (property damage tort claims in favor of the United States)	3	256.48	5	159.13	1	100.50
Road Traffic Act collections (42 U.S.C. 2651–3) (Hospital Recovery Claims)	5	1,331.00	8	1,255.88	1	492.00
NAF payments	2	541.56	3	1,250.00	2	218.25
NAF collections						
Total paid (all types)	1,441	289,361.49	1,410	261,438.17	1,284	294,813.21
Total collected (all types)	755	53,470.79	712	47,824.90	674	43,697.88

[1] (July–December 1972 only. Second half fiscal year 1973 statistics not yet available.)

As has been noted, there is a procedure for a British claimant who asserts a claim under the Status of Forces Agreement to seek judicial determination of his claim as an alternative to administrative settlement. The suit may be brought against the UK (Crown) or the U.S. serviceman or possibly the activity commander as a nominal defendant. However, since the Status of Forces Agreement governs the matter, any judgment is not enforceable against the serviceman in a case arising for the performance of his official duties. The British pay the amount of any such judgment under that Agreement which provides for reimbursement as in other claims settled under the Agreement. In such actions, the British provide legal counsel for the defense of the suit.

As will be subsequently discussed in this report, in Germany there was some discussion concerning the apparent inconsistency between the Status of Forces Agreement and the implementing statute, section 2734a of title 10, as to claims based upon "legal responsibility" as defined by the laws of the host country. In England it appears that a problem could arise concerning claims based upon inherently dangerous activities performed by contractors with the United States, or possibly tenant's liability for damage to adjacent landowners caused by waters flowing from runway areas on air fields. A claim could be asserted as the result of such incidents which would be of this category. A claim in this category could be paid by the UK under the Agreement, but would not be reimbursable under section 2734a of title 10. That section only provides for reimbursements when the damage is caused by U.S. personnel on a duty status.

While in the United Kingdom, the subcommittee visited the U.S. naval installation in Scotland. There the members were able to observe the claims program of a relatively small installation where claims settlement can have considerable importance in maintaining good relations between the Navy and the local population. The members had the opportunity of discussing the subjects of claims and claims administration with the naval judge advocate officer responsible for this work, and thereby gain a better knowledge of these subjects on the working level. This is a vital aspect of claims for it is the principal point of contact for the claimant with the armed services claims system.

As has been outlined above, the Air Force has the single service claims responsibility for the United Kingdom. The actual processing and settlement of claims is therefore an Air Force function. However the naval claims personnel cooperate with the Air Force in this work and assist in the work at the local command level.

Claims Administration in Germany

The United States Army has been assigned responsibility for military claims administration in Germany. Accordingly, the information concerning claims in that country was supplied by that service. The single service responsibility of the Army in Germany also extends to claims which may arise in France, Belgium, Iran, and Ethiopia. However, the vast majority of claims arise in Germany, and the discussion which follows concentrates on claims arising in that country and the procedures and problems relating to them.

The volume of claims is such that it has been estimated that every 15 minutes an incident occurs in Germany which may give rise to a

claim against the United States or may give rise to a claim on behalf of the United States. The average number of claims in a year is approximately 35,000. This volume of claims may involve the expenditure of more than $9,000,000 in appropriated funds. This figure varies from year to year, and in some years it can be less and in some years more.

Under applicable regulations, the Staff Judge Advocate of the United States Army, Europe, is responsible for the supervision and administration of claims activities assigned to the Army in that area. He exercises his responsibilities through the Command Claims Service of the United States Army, Europe. The operational agency of the Command is the United States Army Claims Service, Europe, which is located in Mannheim, Germany.

Tort claims, that is claims resulting from property damage, personal injury, or death caused by activities of the United States Armed Forces or their personnel, may be grouped into three major categories.

The categories are

(1) Claims against the United States under the North Atlantic Treaty Organization Status of Forces Agreement,

(2) Claims on behalf of the United States, and

(3) Claims by United States personnel under the Military Claims Act (10 U.S.C. 2733) and the Military Personnel and Civilian Employees' Claims Act (31 U.S.C. 240–243).

As was noted at the beginning of this report. The subcommittee in 1961 and 1962 considered legislation providing for recovery by the Government from negligent third parties of the cost of medical expenses borne by the United States for persons injured because of the negligent acts of the third parties. In 1962 the bill recommended by the subcommittee and reported by the full committee was enacted into law as Public Law 87–693. The provisions of that law are set out as chapter 32 of title 42 of the United States Code. Collection action for claims on behalf of the United States for recovery of hospitalization and medical expenses incurred by the Government in treating military and civilian personnel tortiously injured by third parties is centralized in the U.S. Army Claims Service, Europe. Collection action in behalf of the United States for property damage is also centralized in this manner. The Army is now collecting an average of approximately $400,000 to $500,000 a year from these two sources. The amounts collected in this manner are deposited to the general receipts of the Treasury.

The following table shows the recoveries under this law from the beginning of the program in 1963 through the year 1972:

RECOVERY MEDICAL CASE CLAIMS AR 27–40 (SII)

	Number of claims collected	Amount collected
Calendar year:		
1963	17	$5,611.02
1964	61	26,573.61
1965	99	67,594.70
1966	298	248,306.62
1967	330	221,696.21
1968	428	365,080.29
1969	428	300,046.45
1970	341	288,336.10
1971	453	343,210.82
1972	511	452,544.93

The Military Personnel and Civilian Employees' Claims Act originated as a bill before the subcommittee in the 88th Congress. It was enacted into law in 1964 as Public Law 88–558. The claims processed by the Army in Germany under this Act are primarily claims by U.S. personnel for damage to household goods in shipment pursuant to military orders and for damage to privately owned vehicles. These claims are processed by some thirty local judge advocate offices at various bases and also by the Army Claims Service. The larger claims are forwarded to the U.S. Army Claims Service, Office of the Judge Advocate General for Settlement. Personnel claims of this category settled by the Army on a world-wide basis number approximately 8,500 claims a year and involve an expenditure of about $2,000,000 a year.

The figures relating to the consideration and payment of claims by the U.S. Army in Europe in the years 1971, 1972, and 1973 are as follows:

PERSONNEL CLAIMS—MILITARY CLAIMS (USAREUR)

	Total claims	Amount claimed	Amount paid
Fiscal year:			
1971	799	$521,517.33	$399,564.03
1972	874	431,842.78	300,840.76
1973	938	413,337.76	283,657.63
Totals	2,611	1,366,697.87	984,062.42

If the Army makes the determination that the claim is in the non-scope category and therefore cognizable under section 2734 of title 10, it issues a non-scope certificate to the German authorities who in turn send the Army their report of investigation together with their recommendations as to liability and amount of damages. As provided in section 2734, the claim is settled by a foreign claims commission established by the Army. Under that section claims may be paid administratively up to $15,000. Payment of amounts in excess of that figure require Congressional Action. The law provides that the Secretary of the Army may certify meritorious claims to the Congress for payment from appropriations made for that purpose.

The Army averages about 1,500 non-scope claims settlements a year, and pay out an average of about $345,000 a year. While the total amount paid is much less than is paid under NATO–SOFA, this is the type of the claim which arise from incidents which may cause adverse or hostile feeling against the United States and its forces. The fair and efficient administration of claims matters under section 2734 of title 10 therefore is vital to the Services in the interest of maintaining good relations with the host country and its people.

The information submitted to the subcommittee discloses that there is a good working relationship between Army personnel and the German authorities in the claims area. There are some 32 German offices which serve as receiving state claims offices in that country. As the result of the good working relationships which exist, the Army is able to work out most problems at this level. If agreement is not reached at the claims office level, the matter may be taken to the Land or State Finance Ministries. The final level where overall policy is made and where major problems may be presented and usually resolved is the Federal Ministry of Finance in Bonn.

The Army states that most questions concerning implementation of NATO procedures have been resolved. One question which appears to remain relates to the fact that section 2734a of title 10, which implements the Status of Forces Agreement and provides authority to reimburse countries for claims under the Agreement, does not provide for reimbursement by the United States share of claims awards made under the agreement where the sending state is held to be "otherwise legally responsible" to pay. It was explained that the present statute does not incorporate this class of claims. It appears that the problem in Germany primarily relates to misappropriated vehicle cases. Under the "holder's theory" of German law, the owner or "holder" of a vehicle is liable for damage caused by the vehicle even if it has been misappropriated and there is no direct act or omission by the owner or by his employee acting within the scope of his employment.

However, the reimbursement statute only permits reimbursement for claims arising out of acts or omission of members and employees of the U.S. Forces done in the performance of duty. From time to time the German Government has raised questions concerning the failure of our law to fully implement the claims provisions of the Status of Forces Agreement. The problem of course is that the German authorities are settling and paying the claims on the basis of the Agreement and on the basis of German law. The question will arise when the United States is called upon to pay its 75 percent share of the award. Up to the present, the United States has to find a basis in negligence of its personnel to justify the reimbursement. Where this is not possible the United States could have regarded the claim as a non-scope claim and settled it under the provisions of section 2734 of title 10. However if the German authorities settle it on the basis that it is covered by NATO–SOFA this cannot be done. The subcommittee understands that the Army has been able to minimize the problem in Germany, but it has remained an irritant which could be removed by an amendment to section 2734a of title 10. Such an amendment could possibly save the United States money since settlement under NATO–SOFA requires our Government to pay 75 percent of the award, whereas the United States pays the full award under the provisions of section 2734 of title 10, the Foreign Claims Act.

The most important category of claims from the standpoint of number of claims and the amounts involved includes the claims covered by article VIII of the NATO Status of Forces Agreement. These are the claims generally referred to as NATO–SOFA claims and are claims by foreign nationals against the United States. Included in this group are claims arising out of maneuvers, truck-car collisions and other situations where the military or civilian personnel involved are acting within the scope of their employment. In Germany, Article VIII of NATO–SOFA is implemented by the supplemental agreement governing Germany's accession to NATO and by a special detailed bi-lateral administrative agreement between the United States and Germany.

Claims under the Status of Forces Agreement are processed jointly by receiving state claims offices established by Germany and by the U.S. Army Claims Service. Germany, as the host Government, has established some 32 claims offices to receive these claims. The foreign claimant files his claim with the German authorities who then send a notice of claim to the Army Claims Service. The Army Claims Service

then secures a copy of the United States report of the investigation concerning the incident out of which the claim arose, and makes a determination as to whether the claim arose out of activity within the scope of employment, or not within that scope, or as the result of an incident in which the United States was not involved at all. Up to this point the procedure is the same for non-scope claims as well as scope claims. If the claim is determined to have arisen out of activities of United States personnel not in connection with their official duties, it is covered by the provisions of the Foreign Claims Act as set forth in section 2734 of title 10, United States Code. If the determination is made that the claim is a scope claim and therefore covered by the Status of Forces Agreement, the Army sends its report of investigation to the German authorities, and in many cases it may also send its recommendations as to liability and quantum of damages. The German authorities then settle the case either administratively or by litigation in the German courts. Under the Agreement, the German Government bills the United States of 75 percent of the amounts paid in settlement of these claims.

The claims included under the Status of Forces Agreement are divided by the Army into two categories. The first group includes maneuver damage claims which relate to damage done to real estate in the course of maneuvers. The second category includes "tort" claims, or claims based upon personal injury, death, damage to personal property, and damage to real estate not the result of maneuvers. The following chart shows the reimbursements, that is payment of the U.S. share of settlements under NATO–SOFA, in the years 1964 through 1973:

MANEUVER REIMBURSEMENTS

	Claim approved	Amount paid
Fiscal year:		
1964	42,973	$3,913,850.68
1965	35,985	3,768,947.75
1966	32,955	3,278,138.50
1967	41,096	5,406,882.87
1968	29,252	7,844,144.39
1969	13,977	4,332,261.48
1970	6,133	1,991,182.59
1971	11,208	2,975,109.16
1972	10,591	2,381,557.16
1973	14,782	2,901,613.73

In a similar manner, the following chart shows reimbursements in accordance with the agreement in the tort category:

TORT REIMBURSEMENTS

	Claim approved	Amount paid
Fiscal year:		
1964	7,763	$1,174,085.27
1965	7,203	1,412,120.10
1966	7,687	1,361,189.87
1967	7,949	2,039,101.09
1968	11,088	2,604,790.41
1969	9,343	3,147,841.47
1970	6,612	2,254,849.17
1971	10,093	3,828,837.63
1972	5,966	2,401,642.82
1973	5,331	2,176,061.66

At the beginning of this report it was pointed out that claims per-

sonnel have the responsibility of collecting claims in behalf of the United States. Recoveries for medical expenses under Public Law 87–693 in Germany have already been discussed. In addition, claims are asserted for damage to property of the United States. The subcommittee was advised that this damage results primarily from motor vehicle accidents. The German law provides for compulsory motor vehicle liability insurance, and therefore claims in behalf of the United States are, in the majority of cases, asserted against insurance companies. In Germany, this collection action is centralized in Headquarters, U.S. Army, Europe. The U.S. Claims Office, Belgium, a branch of U.S. Army, Europe, handles collections in Belgium and France. Recoveries in Iran are handled by an Army judge advocate in that country. Recoveries in property damage cases in the years 1963 through 1972 are shown in the following table:

RECOVERY PROPERTY DAMAGE CLAIMS AR 27–40 (SI)

	Number of claims collected	Amount collected
Calendar year:		
1963	241	$77,798.23
1964	204	82,711.85
1965	159	56,731.97
1966	183	79,765.85
1967	295	105,969.56
1968	483	192,798.78
1969	455	113,903.06
1970	511	150,969.81
1971	420	134,758.87
1972	452	133,877.19

The table below shows the settlements under the Foreign Claims Act provisions of section 2734 of title 10 of the United States Code. That section provides for the administrative settlement of claims resulting from incidents caused by the noncombat activities of the Armed Forces or the Coast Guard when the claims arise in a foreign country and the claimant is a foreign national. Claims may be administratively settled and paid up to $15,000. Claims in excess of that amount may be considered and paid in that amount, and the balance found to be due the claimant is then certified to Congress for consideration. The practice is for the Congress to provide for payment out of supplemental appropriations. Payment is made under the authority of section 2734 for when the claim is found to have been the result of activities of U.S. personnel, but do not qualify for payment under the terms of the Status of Forces Agreement. The following table shows the numbers of claims received, the numbers of claims paid, and the total amount paid for each of the years from 1968 through 1973:

CLAIMS COMMISSIONS BRANCH—10 USC 2734

	Number of claims received	Number of claims paid	Amount paid
Fiscal year:			
1968	2,383	1,921	$412,066.49
1969	1,756	1,376	334,301.00
1970	1,471	1,179	338,881.28
1971	1,034	768	283,399.26
1972	1,238	896	354,151.29
1973	1,406	1,306	596,034.64

Pending Legislation

The experience of claims personnel in settling claims under the provisions of sections 2733 and 2734 of title 10 was of particular interest to the members of the subcommittee because there were bills proposing amendments to those sections under active consideration by the subcommittee. H.R. 5843 of the 93d Congress provided for amendments to those sections which would raise the limits for administrative settlement from $15,000 to $25,000. That bill was the subject of a subcommittee hearing on May 3, 1973. After subcommittee consideration of the legislation, a revised bill was introduced on August 2, 1973 as H.R. 9800 as a substitute measure to be considered by the subcommittee.

In Germany, the members were informed that the larger claims are generally those involving a death or serious and incapacitating injuries. The situation is even more pressing where the person involved was the head of a family and the death or incapacity has a very serious effect on his dependents. The two-step requirement of payment may cause resentment because of the delay. Thus it appears that an increase as proposed in these bills would be very helpful. Final payment could be effected in numbers of cases under the $25,000 limit, and a substantial payment could be made in the larger cases.

Navy Claims Activity

The members were given a further insight into claims activity as involving the Navy in connection with their visit to the U.S. Naval Headquarters at Naples, Italy. There they were briefed on the claims aspects of the Navy as related to its 6th Fleet operations in the Mediterranean Sea. Here again it was emphasized that the prompt settlement of valid claims is important in preserving friendly relationships with the peoples and countries who come into contact with the Navy. In this connection Navy claims personnel described the limits and nature of the claims authority delegated to claims officers with the fleet to enable them to make prompt settlement of smaller claims.

Claims Administration in Spain

The single service claims responsibility for Spain has been assigned to the Air Force. In discharging this responsibility the Air Force has the responsibility for processing and settling claims against and in favor of the United States under the following statutes and agreements: Military Claims Act, 10 U.S.C. 2733; Foreign Claims Act, 10 U.S.C. 2734; International Agreement Claims Act, 10 U.S.C. 2734a; Federal Medical Care Recovery Act, 42 U.S.C. 2651–2653; Use of Government Proper Claims Act, 10 U.S.C. 2737; Federal Claims Collection Act, 31 U.S.C. 71, 951–952 and Emergency Payment Act, 10 U.S.C. 2736.

The agreement of friendship and cooperation between the United States of America and Spain. As will be brought out in the discussion of settlement of claims under this agreement, claims settlement under this agreement similar to that under the NATO Status of Forces Agreement. The statutory authority for payments in accordance with the agreement is found in the International Claims Agreement provisions of section 2734a of title 10, United States Code.

The responsibility of handling claims has been assigned by the Air Force to the staff judge advocate of the 16th Air Force. That staff

judge advocate is also designated as the U.S. Sending State Officer for Claims covered by the Agreement of Friendship and Cooperation between the United States and Spain.

The three military personnel assigned to 16AF judge advocate all assist in fulfilling this claims responsibility. In addition, USAF has authorized a three-officer Foreign Claims Commission (FCC–16) for Spain.

The members of the subcommittee were advised that during fiscal year 1973 the judge advocate of the 16th Air Force processed and settled a total of 310 claims and paid claimants a total of $192,501.00. These were settlements under the Military Claims Act provisions of section 2733 of title 10, and the Foreign Claims Act provisions of section 2734 of the same title. The settlements under these two statutory provisions were as follows:

A. Twenty-five (25) of these were Military Claims Act claims. The claimants were paid $2,355.94. The majority were automobile accident cases in which private vehicles and other property of members of the U.S. Forces were damaged by Government vehicles.

B. Two hundred and thirty-four (234) were Foreign Claims Act claims. $188,187.41 was paid to claimants. Fifty-one (51) were International Agreement Claims Act claims. We paid claimants $5,957.65.

Fiscal year 1973 was an abnormally expensive year compared to fiscal year 1972 when the Air Force paid 112 claimants $36,492.28. There were two primary reasons for this. First, more than twice as many claims were paid as the previous year, and second, the Air Force cleared up a backlog of old claims, some of which dated as far back in 1967.

Another important basis for claims settlement in Spain is under the claims procedures established in articles XXV through XXXIII of the agreement in implementation of chapter VIII of the Agreement on Friendship and Cooperation Between the United States and Spain. Under this agreement, the Governments of the United States and Spain waive all claims against each other for damage, in Spanish territory, to properties owned or used by either Government, if the damage was caused by Armed Forces personnel of either country while in the performance of duty or was caused by a vehicle, ship or aircraft being used for official purposes. The agreement also provides for the settlement of claims arising out of rescue or salvage operations and for death or injury to military personnel or civilian employees, if death or injury occurred while they were engaged in the performance of official duties (article XXV).

It was explained to the subcommittee that military members of the U.S. forces and civilian employees are not subject to suit before Spanish courts or authorities for claims arising out of acts or omissions attributable to them while in the performance of official duties (article XXVI). All such claims and those arising out of any other act for which the U.S. forces are legally responsible which cause injury, death or damage in Spain to persons and property (these claims are generally known as duty claims) are processed and adjudicated solely by the applicable Spanish Armed Force. Following completion of their processing of the claim, they submit a bill to the Foreign Claims Commission through the Spanish side of the permanent secretariat for the U.S. share of the claim.

If U.S. activities are solely responsible for the claim, the agreement

specifies that the U.S. share will be 75 percent. If a claim arises from joint United States-Spanish activity, the expense of the claim is shared proportionately according to the relative involvement of the two countries, but in no case is either Government liable for less than 25 percent of the claim.

The one minor exception to this procedure is that of claims for death or injury arising out of U.S. Government vehicle accidents. Under the agreement, all U.S. Government vehicles must be insured with Fondo Nacional, which also insures all Spanish Government vehicles. All personal injury and death claims resulting from the operation of U.S. Government vehicles in Spain are paid by Fondo Nacional up to the limit of the policies which are: 300,000 pesetas in case of death or total disability and 200,000 pesetas or less in other injury cases. This insurance does not cover property damage.

Since the agreement, the scope of duty claims have not been large. We have had two aircraft accidents (one on June 3, 1971, giving rise to 12 claims at Guadalajara, Spain; little over $4,100—and two on March 14, 1972, giving rise to 39 claims; in Mountain near El Busto, Spain; about $1,750) which occurred in uninhabited areas resulting in minor property damage. There were 51 claims paid in the amount of $5,957.65. There have been no serious U.S. Government vehicle accidents.

In those cases where there is damage or injury caused in Spanish territory to persons or property by acts or omissions of U.S. military members in Spain or by U.S. civilian employees not done in the performance of official duties, the matter can be resolved by:

A. Prosecution of a suit before a Spanish civil court; or

B. A Claim against the U.S. Government under the claims statutes authorizing consideration of such claims—principally section 2734 of title 10.

In accordance with an understanding between the United States and Spanish permanent secretariats, foreign nonscope of duty claims are submitted by the claimants to the base claims officers in Spain. After the claims investigation is completed, the claims are forwared to the Foreign Claims Commission for adjudication. Again, according to an agreement with the Spanish, only those claims not satisfactorily settled with the claimants are forwarded to the Spanish side of the permanent secretariat for their comments and recommendations. The Foreign Claims Commission is not bound by their recommendations and the decision of the Foreign Claims Commission is final.

Jurisdiction With Reference to Criminal Offenses in Spain

As lawyers the members of the subcommittee were interested in the arrangements between the United States and the Government of Spain concerning criminal jurisdiction over U.S. military personnel. The provisions of section II of the Agreement of Friendship and Coopera-

As lawyers the members of the subcommitee were intersted in the tion between Spain and the United States cover this subject as well as the arrangements concerning claims.

Criminal jurisdiction is broken down into exclusive U.S. jurisdiction, exclusive Spanish jurisdiction, and concurrent jurisdiction, the last, of course, applying to the majority of cases.

Exclusive U.S. jurisdiction relates to offenses punishable by the

law of the United States but not by the law of Spain, such as absence without leave (AWOL).

Exclusive Spanish jurisdiction relates to offenses punishable by Spanish law but not by U.S. law, such as offenses against the Spanish state, sabotage, etc. Since dependents and oother civilians are not subject to the Uniform Code of Military Justice (10 U.S.C. §§ 801–940), Spain has the exclusive right to exercise jurisdiction in their cases.

And concurrent jurisdiction, of course, applies to offenses punishable under both United States and Spanish law.

If the case involves concurrent jurisdiction, the Agreement provides the circumstances under which either government has the primary right to exercise jurisdiction, and provides procedures for challenging either government's assertion of a primary right to jurisdiction.

Under the agreements, the United States has the primary right to exercise criminal jurisdiction when the offense is solely against U.S. property or involves solely U.S. personnel, and has the primary right to exercise jurisdiction when the incident arises out of the performance of official duty.

In all other cases, Spain has the primary right to exercise jurisdiction.

As to pretrial custody, the agreement gives to U.S. military authorities the right to retain custody of U.S. military personnel assigned to Spain, and of military tourists in cases involving Spanish military authorities. The granting of custody for military tourists in other cases is discretionary with Spanish authorities.

In the case of dependents and other civilians, Spanish authorities are advised that U.S. military authorities cannot guarantee their presence for trial.

When a military member is confined by the Spanish, a request for custody is made to the mixed commission, which in turn directs the court to transfer custody to U.S. military authorities.

After an incident occurs, an investigation, called a "'Sumario," is prepared by the local judge of instruction. He forwards this investigation to the mixed commission.

This Commission is mixed in the sense that it is comprised of Spanish civilian judges and Spanish Army, Navy and Air Force judge advocates.

This Commission sends the "sumarios" to JUSMG. Based on information obtained from the military bases, certificates are issued that the accused is or is not a member of the U.S. personnel stationed in Spain.

When indicated, an official duty certificate is sent, or a letter is sent pointing out that only U.S. property and personnel were involved, and the U.S. primary right to jurisdiction is asserted.

As has been indicated, the agreements provide procedures for either Government to challenge the assertion of a primary right to jurisdiction, and this occurred last year in a series of cases involving certificates of official duty where the member was traveling to or from work in his private vehicle.

Spanish authorities were unwilling to accept to and from work travel as official duty, and discussions of this point have lasted for over a year.

The present status of the problem involves an agreement by U.S.

authorities to handle the claims arising from such incidents in return for Spanish recognition of the official duty certificate for criminal jurisdiction.

The Air Force is attempting to develop this agreement on a case-by-case basis.

A request by the United States for waiver of jurisdiction always is made where the Spanish have the primary right to exercise jurisdiction.

The members were advised that all cases go to the Minister of Justice for decision based on a recommendation of the Commission. It was further stated that since the new agreement become effective in 1970, the Spanish authorities have waived jurisdiction in 80 percent of the cases. This percentage has remained constant through the period.

Other foreign criminal jurisdiction activities of the Air Force includes monitoring the required trial observer reports and reports of prison visits to military personnel confined in Spanish prisons. At the time of the trip there was one Navy and one Air Force member confined in Spanish prisons in Madrid.

The members were advised that experience indicates that the normal trial safeguards recited in the agreement are consistently complied with by Spanish courts.

It has been observed that delays of 1 to 2 years from the date of the incident are usually incurred prior to trial by Spanish courts, and this matter has been brought to the attention of Spanish authorities.

The following is a table which includes an analysis of pending criminal matters involving U.S. Naval and Marine Corps personnel. In the opinion of the subcommittee it serves as an indication of the nature of offenses encountered and the manner in which they are processed:

PENDING FOREIGN CRIMINAL JURISDICTION CASES INVOLVING NAVAL AND MARINE CORPS PERSONNEL IN SPAIN AS OF AUGUST 20, 1973

	Group				
	I [1]	II [2]	III [3]	IV [4]	Total
Assaults	3	6	5	1	15
Disturbing peace	1				1
Disobeying police	1				1
Drugs	21	7	23		51
Drunk/disorderly	1	7	6	2	16
DWI		1		1	2
Dog bites		2	2	6	10
Breaking and entering			1	1	2
Larceny			1		
Rape	1	1	1		1
Unlawful possession of firearms				1	1
Vehicle accidents	13	26	40	41	120
Property damage			3	2	5
Indecent exposure			1		1
Driving vehicle w/o registration or plates				1	1
Criminal fraud			1	1	1
Vandalism				1	3
Totals	41	5	84	58	233

[1] Cases in which Spain has retained jurisdiction and which are pending trail in Spanish courts.
[2] Cases in which the members' status has been certified but no jurisdictional decision has been received.
[3] Known incidents involving potential Spanish jurisdiction not yet forwarded by the court for a jurisdictional decision.
[4] Cases in which jurisdiction has been waived to U.S. authorities but final command action report has not been received.

Legislative Conclusions

In discharging its responsibilities in connection with its jurisdiction over claims legislation, the subcommittee has concluded that the

subject of claims administration requires continuing study. This is accomplished through oversight by the subcommittee, and through consideration of proposals for the improvement of the various statutory provisions relating to claims. This process has been of aid to the subcommittee in evaluating the need for changes, and also of determining the effects of amendments or new laws after they have been enacted. Legislation may provide for a new type of claims settlement authority or may take the form of an amendment to existing statutes. Examples of this legislation are to be found in the statutes cited at the beginning of this report as the basis of claims settlement authority administered by the Armed Forces. A new type of claims settlement authority was granted to the Armed Forces in 10 U.S.C. 2737 which was added to the United States Code in the 87th Congress by the enactment of Public Law 87–769. This law made it possible for the military services to pay claims not cognizable under other law up to a limit of $1,000 for property damage, injury, or death caused by a serviceman or military employee incident to the use of a U.S. vehicle at any place or incident to the use of other U.S. property on a Government installation. In a number of instances the limits on claims settlement authority in various statutes have been increased. Perhaps the best example of this trend in claims administration is found in the 1966 amendments to the administrative settlement provisions of the tort claims provisions of title 28 of the United States Code. Prior to those amendments the authority for administrative consideration and settlement was limited to claims which did not exceed $2,500. In 1966 with the enactment of a bill recommended by this subcommitee, that limit was removed so that now the head of each executive agency has the authority to settle tort claims arising as the result of the act or omission of any employee of that agency within the scope of his employment. The only limit imposed by the section governing administrative settlements, section 2672 of title 28, is that any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee. However, the tort claims provisions of title 28 do not apply to claims arising in foreign countries (28 U.S.C. 2680(k)).

One of the bills under subcommittee consideration in August of 1973, was H.R. 9800. This bill has already been referred to in this report and is the bill that provides for increases in the administrative settlement provisions of section 2733 and section 2734 of title 10, and similar provisions in section 715 of title 32 having to do with the settlement of certain claims arising from National Guard activity. The administrative settlement provisions of the Tort Claims Act as now codified in title 28 of the United States Code are found in section 2672 of that title. That section authorizes the head of a Federal agency to settle claims up to $25,000, and above that amount with the prior written approval of the Attorney General. As has been noted, these tort provisions do not apply to claims arising in a foreign country. In contrast to the administrative settlement provisions under the tort claims provisions of title 28, both the Military Claims Act (10 U.S.C. 2733) and the Foreign Claims Act (10 U.S.C. 2734) place a $15,000 limit on administrative payment. Claimants whose awards which exceed that amount must wait Congressional appropriation of the balance. As has been reflected in this report, the greater proportion of cases settled under these provisions of title 10 have resulted from inci-

dents which are similar to those giving rise to claims under the tort provisions of title 28. These facts indicate that the subcommittee should give consideration to this apparent inconsistency in the limits of authority for claims settlement.

A somewhat similar question exists in connection with the Military Personnel and Civilian Employees' Claims Act of 1964 (31 U.S.C. 240–243). Section 3(a)(1) of the act fixes the limit for military department and Coast Guard personnel who suffer personal property loss incident to their employment at $10,000. Section 3(b)(1) of the act provides a limit of $6,500 for claims for similar losses by the personnel of the other agencies of Government. Again it would appear that the subcommittee should consider legislation revising the law applicable to this category of claims. In this connection, it might also be considered that these limits were fixed some years ago, and increases in the cost of living have had an effect upon the value of the personal property of the type whose loss or damage may give rise to claims under the statute. In the course of this investigation it was suggested to the members that a $12,000 limit might be more in line with current values of this property.[1]

At several points in this report reference has been made to the fact that the Status of Forces Agreement provides that claims arising as the result of U.S. military activity in NATO countries may be settled under that agreement when the law of the country concerned provides "legal responsibility" to compensate for damage or injury. The implementing statute, section 2734a of title 10, does not make specific reference to this type of settlement in providing authority to reimburse the country concerned for claims settled under such agreements. Legislation has recently been proposed to remedy this situation in an executive communication from the Department of the Air Force in behalf of the Department of Defense. A bill, H.R. 8901, was introduced in accordance with that recommendation and is presently pending before the subcommittee.

Conclusion

On the basis of their observations the members of the subcommittee were impressed by the manner in which the members of the Armed Forces administer claims falling within their jurisdiction. While this report has pointed out some problems and areas of difficulty, it should be noted that the practical and professional approach taken by claims officers to deal with those problems reflects credit upon them and the services they represent. As has already been stated, the full evaluation of the general situation regarding claims and possible legislative action must, of course, be the subject of continuing study by the subcommitee. The information supplied to the members and the observations they made should prove very valuable to the subcommittee in connection with their work.

James R. Mann.
George E. Danielson.
Barbara Jordan.
Carlos J. Moorhead.

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[1] The bills H.R. 5840, H.R. 5842, H.R. 6895, and H.R. 7135 deal with the subject and are presently pending before the subcommittee.

APPENDIX A

SOVEREIGN IMMUNITY, CLAIMS AGAINST FOREIGN STATES

While in Europe the Members had the opportunity to discuss the legislative proposals embodied in the bill H.R. 3493, which was referred to the subcommittee on February 7, 1973. This is a bill which would define the circumstances in which foreign states are immune from the jurisdiction of United States Courts and in which execution may not be levied on their assets.

H.R. 3493 was introduced in accordance with the recommendations of a joint executive communication from the Department of State and the Department of Justice.

In connection with this legislation, it was noted that the policy of the Department of State, was set forth in a letter of May 19, 1952 from the Acting Legal Adviser of the Department of State to the Acting Attorney General.[1] The Department of the State asserted that its policy would be thereafter "to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity."

The letter stated:

"According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (jure imperii) of a state, but not with respect to private acts (jure gestionis). There is agreement by proponents of both theories [i.e. of absolute and of restrictive immunity], supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property (diplomatic and perhaps consular property excepted) or with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary."

In the Executive Communication, the intended effect of the legislation was stated to be to provide that:

1. The task of determining whether a foreign state is entitled to immunity would be transferred wholly to the courts, and the Department of State would no longer express itself on requests for immunity directed to it by the courts or by foreign states.
2. The restrictive theory of sovereign immunity would be further particularized in statutory form.
3. Foreign states would no longer be accorded absolute immunity from execution on judgments rendered against them, as is now the case, and their immunity from execution would conform more closely to the restrictive theory of immunity from jurisdiction.
4. The means whereby process may be served on foreign states would be specified.

The members were interested in any comparisons that might be drawn to European practice in these matters. On the basis of information supplied to the subcommittee, it appears that the development of the law of jurisdictional immunity of foreign states has been a matter for the courts. The State Department letter of May 19, 1952, which has been referred to in this discussion (the "Tate Letter") indicated this when it summarized the attitudes of foreign courts.

The Members of the Subcommittee were advised that the restrictive theory of sovereign immunity is followed by most European countries. Exceptions are found in Great Britain,[2] Turkey, and Eastern European countries which, in substance, still follow the absolute theory of immunity. Under the latter theory, a state would be accorded immunity without regard to the nature of the transaction involved. In contrast, under the restrictive theory of immunity, the other European countries follow the practice of granting a state immunity from suit

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[1] Letter from the State Department, Acting Legal Adviser, Jack B. Tate, to the Acting Attorney General, Philip B. Perlman, dated May 19, 1952, entitled "Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments."

[2] Commonwealth Countries, in substance, follow the practice of Great Britain.

only when the lawsuit involves governmental or public acts ("acts de jure imperii"). Conversely, immunity would be denied when the legal action relates to activity of a proprietary or commercial nature ("acts de jure gestionis").

The trend of the majority of European states is shown a decision of the Federal Constitutional Court of the Federal Republic of Germany (the "Bundesverfassungsgericht") on October 30, 1962 which was furnished to the Members in the course of the trip. The court held that the plaintiff (Vereinigte Kaliwerke Salzdefurth AG) had the right to have the land register corrected as against the Government of Yugoslavia which was the defendant in the action. This case involved a situation in which a sale of land to the Government of Yugoslavia was nullified. The plaintiff was granted relief by the court even though Yugoslavia had established a military mission on the land. Another decision of the same court which was brought to the attention of the subcommittee, involved the question of whether a Cologne firm could sue the State of Iran for the cost of repairs to the heating system of the Iranian Embassy Building when Iran had invoked the defense of soverign immunity. It should be noted that this general type of problem was discussed by Members of the Subcommittee at the hearing on the bill H.R. 3493 on June 7, 1973.[3] This decision, rendered April 30, 1963, indicates the practice in the Federal Republic, and outlines the practice in other countries. The Federal Constitutional Court outlined the history of the law of sovereign immunity as applied in Germany, and then reviewed the law of several other countries in connection with the absolute or restrictive theories of immunity. In this connection, the court discussed the law of Italy, Belgium, Switzerland, Austria, France, Greece, Jordan, the Netherlands, Sweden, England, the Commonwealth countries, the United States, the Philippines, Japan, Russia, Poland, Czechoslovakia, and Croatia. After this analysis, the court concluded that the test as to whether a foreign state enjoys immunity from suit depends upon whether the act involved can be characterized as an "act de jure imperii" or an "act de jure gestionis." In this connection the court stated:

"The fact that it is difficult to distinguish between sovereign and non-sovereign state activity does not constitute a valid reason to abandon this distinction. Difficulties of a similar nature appear elsewhere in the law of nations."

The court rejected the idea that the purpose of the transaction should be decisive. This same point was made at the Subcommittee hearing on June 7, 1973. There it was pointed out that a contract of the same character as that which might be made by private persons would ordinarily constitute a "particular commercial transaction or act" within the meaning of section 1603(b) of the bill H.R. 3493. It was stated at the hearing that "The fact that the goods or services to be procured through the contract are to be used for a public purpose is irrelevant." In this connection the German court took the position that the distinction should be based upon whether the state acts in the exercise of sovereign authority or like a private person. It was pointed out that this is distinction made in court decisions in Italy, Belgium, Switzerland, Austria, and Egypt. The court also noted that this distinction is also contained in the codification efforts of the International Law Association and the Institute de Droit International, and in the writings of prominent writers on international law.

In the course of their inquiry concerning European law and practice in connection with the immunity of foreign states, the Members were interested in the Convention on State Immunity of the Council of Europe which deals with this subject. The "European Convention on State Immunity and Additional Protocol" was adopted by the Council on May 16, 1972. As of May 24, 1972. The following countries had signed the Convention: Austria, Belgium, the Federal Republic of Germany, Luxembourg, The Netherlands, Switzerland, and the United Kingdom. Austria, Belgium, the Federal Republic of Germany, Luxembourg, The Netherlands, Switzerland have also signed the Additional Protocol.

The approach taken by the Convention in Article 15 is to provide that a Contracting State is to be entitled to immunity from the jurisdiction of the courts of another Contracting State if the proceedings do not fall within Articles 1 to 14 of the Convention. Thus, Articles 1 to 14 of the Convention provide for jurisdiction over foreign states.[4] Since Articles 1 through 14 are somewhat parallel to

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[3] Hearings, June 7, 1973 on H.R. 3493. A bill to define the circumstances in which foreign states are immune from the jurisdiction of the United States Courts and in which execution may not be levied on their assets and for other purposes, Pages 23 and 24.

[4] The Convention and its Protocol are set out as Appendix B of this report. The provisions are relevant to a further consideration of the legislation pending before the Committee on this subject.

provisions in H.R. 3493 in defining the areas where foreign states will be subject to suit, it would be helpful to outline them at this point. Articles 1 through 14, in substance, provide that the Contracting State cannot claim immunity from jurisdiction of the courts of another Contracting State when

(*a*) In case the Contracting State institutes or intervenes in proceedings before the court of another Contracting State;

(*b*) In case of a counterclaim of a certain nature;

(*c*) In case of waiver by international agreement or by express term of a contract in writing or by express consent given after a dispute between the parties has arisen;

(*d*) After it takes any step in the proceedings related to the merits;

(*e*) In case of a contract, the obligation falls to be discharged in the territory of the State of the forum (with certain exceptions);

(*f*) In case of contract of employment (with certain exceptions);

(*g*) In case of the State participates with one or more private persons in a company, association or other legal entity, etc.;

(*h*) In case the State has on the territory of the State of forum an office, agency or other establishment, etc.;

(*i*) If the proceedings relate to patent, industrial design, trademark, service mark or other similar right;

(*j*) With regard to immovable property;

(*k*) With regard to proceedings relating to a right in movable or immovable property, arising by way of succession, gift or bona vacantia (escheat);

(*l*) As a result of an arbitration agreement.

The European Convention also sets up procedural rules pertaining to service of process (Art. 16), posting of security (Art. 17), disclosure of documents (Art. 18), and the effect of pending procedures between the same parties involving the same subject (Art. 19). Finally the European Convention contains provisions on the enforcement of judgments (Articles 20, 21, and 22), optional provisions (Articles 24, 25, and 26), general provisions (Articles 27 through 35). Articles 36 through 41 contain the final clauses which are customary in conventions of a legal character concluded under the auspices of the Council of Europe. The Additional Protocol to the European Convention on State Immunity implements pertinent provisions of the Convention with regard to enforcement of judgments.

One matter raised in discussions in Europe relates to the approach taken in both H.R. 3493 and the European Convention on State Immunity in defining the limits of immunity. Both provide that states are immune from the jurisdiction of other states with certain stated exceptions. At the June 7, 1973 hearings on H.R. 3493, the Justice Department witness was asked why the decision had been made to adopt this approach rather than one which would have defined the extent of immunity.[5] At the hearing it was indicated that this was to large degree a matter of following historical patterns. Apparently, this was a reference to the fact that the restricted theory of immunity evolved from the previously generally accepted practice of following the absolute theory of immunity. At the hearing, concern was expressed that this approach might have the drawback that repeated amendments would have to be made to the statute to cover additional exceptions to the rule of immunity. Apparently the same question has been raised in the course of discussions in Europe. Perhaps the best answer is that made at the hearing, and that is that, conceivably, additional exceptions would have to be added as the law on the subject develops and as the practice of states indicates that there should be jurisdiction in the local courts. At the time of the hearing, the witness was also asked whether the approach was taken in H.R. 3493 was consistent with the practice followed in foreign states,[6] and it was indicated that it was. As has been indicated above, the information gained in the course of the trip supported this conclusion.

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[5] Hearing, June 7, 1973, pages 31 and 32. "Mr. Lott. 'One thing that worries me; will we be involved in the continued process of adding one more and then one more exception and so on down the line? I can certainly see problems.' "

[6] Hearing, supra, Page 32.

"Mr. Ristau. No. Forgive me; foreign states generally by now adhere to the restrictive theory of immunity. As I indicated before, I believe the United Kingdom adheres to some degree to the traditional absolute immunity doctrine but not so, however, on the continent of Europe; not so, however, in South America; and of recent years in Japan, the Philippines, Thailand. They have all gone over to the restrictive theory of immunity. I think by now it is safe to state that the majority of states adhere to the restrictive theory and have backed away from the absolute doctrine.

"Mr. Brower. And they also, I believe, follow our system, namely, that immunity exists unless there is an exception. However, it is incumbent upon the defendant to raise the defense of sovereign immunity rather than the plaintiff being required to establish lack of immunity."

APPENDIX B

COUNCIL OF EUROPE

European Convention on State Immunity and Additional Protocol

Done at Basle, May 16, 1972

The member States of the Council of Europe, signatory hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its Members;

Taking into account the fact that there is in international law a tendency to restrict the cases in which a State may claim immunity before foreign courts;

Desiring to establish in their mutual relations common rules relating to the scope of the immunity of one State from the jurisdiction of the courts of another State, and designed to ensure compliance with judgments given against another State;

Considering that the adoption of such rules will tend to advance the work of harmonisation undertaken by the member States of the Council of Europe in the legal field,

Have agreed as follows:

Chapter 1

IMMUNITY FROM JURISDICTION

Article 1

1. A Contracting State which institutes or intervenes in proceedings before a court of another Contracting State submits, for the purpose of those proceedings, to the jurisdiction of the courts of that State.

2. Such a Contracting State cannot claim immunity from the jurisdiction of the courts of the other Contracting State in respect of any counterclaim:

(*a*) arising out of the legal relationship or the facts on which the principal claim is based;

(*b*) if, according to the provisions of this Convention, it would not have been entitled to invoke immunity in respect of that counterclaim had separate proceedings been brought against it in those courts.

3. A Contracting State which makes a counterclaim in proceedings before a court of another Contracting State submits to the jurisdiction of the courts of that State with respect not only to the counterclaim but also to the principal claim.

Article 2

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it has undertaken to submit to the jurisdiction of that court either:

(*a*) by international agreement;

(*b*) by an express term contained in a contract in writing; or

(*c*) by an express consent given after a dispute between the parties has arisen.

Article 3

1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if, before claiming immunity, it takes any step in the proceedings relating to the merits. However, if the State satisfies the court that it could not have acquired knowledge of facts on which a claim to immunity can be based until after it has taken such a step, it can claim immunity based on these facts if it does so at the earliest possible moment.

2. A Contracting State is not deemed to have waived immunity if it appears before a court of another Contracting State in order to assert immunity.

Article 4

1. Subject to the provisions of Article 5, a Contracting State cannot claim immunity from the jurisdiction of the courts of another Contracting State if the proceedings relate to an obligation of the State, which, by virtue of a contract, fails to be discharged in the territory of the State of the forum.

2. Paragraph 1 shall not apply :

(*a*) in the case of a contract concluded between States ;

(*b*) if the parties to the contract have otherwise agreed in writing ;

(*c*) if the State is party to a contract concluded on its territory and the obligation of the State is governed by its administrative law.

Article 5

1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to a contract of employment between the State and an individual where the work has to be performed on the territory of the State of the forum.

2. Paragraph 1 shall not apply where :

(*a*) the individual is a national of the employing State at the time when the proceedings are brought ;

(*b*) at the time when the contract was entered into the individual was neither a national of the State of the forum nor habitually resident in that State ; or

(*c*) the parties to the contract have otherwise agreed in writing, unless, in accordance with the law of the State of the forum, the courts of that, State have exclusive jurisdiction by reason of the subject-matter.

3. Where the work is done for an office, agency or other establishment referred to in Article 7, paragraphs 2 (*a*) and (*b*) of the present Article apply only if, at the time the contract was entered into, the individual had his habitual residence in the Contracting State which employs him.

Article 6

1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it participates with one or more private persons in a company, association or other legal entity having it seat, registered office or principal place of business on the territory of the State of the forum, and the proceedings concern the relationship, in matters arising out of that participation, between the State on the one hand and the entity or any other participant on the other hand.

2. Paragraph 1 shall not apply if it is otherwise agreed in writing.

Article 7

1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it has on the territory of the State of the forum an office, agency or other establishment through which it engages, in the same manner as a private person, in an industrial, commercial or financial activity, and the proceedings relate to that activity of the office, agency or establishment.

2. Paragraph 1 shall not apply if all the parties to the dispute are States, or if the parties have otherwise agreed in writing.

Article 8

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate :

(*a*) to a patent, industrial design, trade-mark, service mark or other similar right which, in the State of the forum, has been applied for, registered or deposited or is otherwise protected, and in respect of which the State is the applicant or owner ;

(*b*) to an alleged infringement by it, in the territory of the State of the forum, of such a right belonging to a third person and protected in that State ;

(*c*) to an alleged infringement by it, in the territory of the State of the forum, of copyright belonging to a third person and protected in that State ;

(*d*) to the right to use a trade name in the State of the forum.

Article 9

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to :

(*a*) its rights or interests in, or its use or possession of, immovable property; or

(*b*) its obligations arising out of its rights or interest in, or use or possession of, immovable property

and the property is situated in the territory of the State of the forum.

Article 10

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to a right in movable or immovable property arising by way of succession, gift or *bona vacantia*.

Article 11

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred.

Article 12

1. Where a Contracting State has agreed in writing to submit to arbitration a dispute which has arisen or may arise out of a civil or commercial matter, that State may not claim immunity from the jurisdiction of a court of another Contracting State on the territory or according to the law of which the arbitration has taken or will take place in respect of any proceedings relating to:

(*a*) the validity or interpretation of the arbitration agreement;

(*b*) the arbitration procedure;

(*c*) the setting aside of the award,

unless the arbitration agreement otherwise provides.

2. Paragraph 1 shall not apply to an arbitration agreement between States.

Article 13

Paragraph 1 of Article 1 shall not apply where a Contracting State asserts, in proceedings pending before a court of another Contracting State to which it is not a party, that it has a right or interest in property which is the subject-matter of the proceedings, and the circumstances are such that it would have been entitled to immunity if the proceedings had been brought against it.

Article 14

Nothing in this Convention shall be interpreted as preventing a court of a Contracting State from administering or supervising or arranging for the administration of property, such as trust property or the estate of a bankrupt, solely on account of the fact that another Contracting State has a right or interest in the property.

Article 15

A Contracting State shall be entitled to immunity from the jurisdiction of the courts of another Contracting State if the proceedings do not fall within Articles 1 to 14; the court shall decline to entertain such proceedings even if the State does not appear.

Chapter II

Procedural rules

Article 16

1. In proceedings against a Contracting State in a court of another Contracting State, the following rules shall apply.

2. The competent authorities of the State of the forum shall transmit

—the original or a copy of the document by which the proceedings are instituted;

—a copy of any judgment given by default against a State which was defendant in the proceedings,

through the diplomatic channel to the Ministry of Foreign Affairs of the defendant State, for onward transmission, where appropriate, to the competent authority. These documents shall be accompanied, if necessary, by a translation

into the official language, or one of the official languages, of the defendant State.

3. Service of the documents referred to in paragraph 2 is deemed to have been effected by their receipt by the Ministry of Foreign Affairs.

4. The time-limits within which the State must enter an appearance or appeal against any judgment given by default shall begin to run two months after the date on which the document by which the proceedings were instituted or the copy of the judgment is received by the Ministry of Foreign Affairs.

5. If it rests with the court to prescribe the time-limits for entering an appearance or for appealing against a judgment given by default, the court shall allow the State not less than two months after the date on which the document by which the proceedings are instituted or the copy of the judgment is received by the Ministry of Foreign Affairs.

6. A Contracting State which appears in the proceedings is deemed to have waived any objection to the method of service.

7. If the Contracting State has not appeared, judgment by default may be given against it only if it is established that the document by which the proceedings were instituted has been transmitted in conformity with paragraph 2, and that the time-limits for entering an appearance provided for in paragraphs 4 and 5 have been observed.

Article 17

No security, bond or deposit, however described, which could not have been required in the State of the forum of a national of that State or a person domiciled or resident there, shall be required of a Contracting State to guarantee the payment of judicial costs or expenses. A State which is a claimant in the Courts of another Contracting State shall pay any judicial costs or expenses for which it may become liable.

Article 18

A Contracting State party to proceedings before a court of another Contracting State may not be subjected to any measure of coercion, or any penalty, by reason of its failure or refusal to disclose any documents or other evidence. However the court may draw any conclusion it thinks fit from such failure or refusal.

Article 19

1. A court before which proceedings to which a Contracting State is a party are instituted shall, at the request of one of the parties or, if its national law so permits, of its own motion, decline to proceed with the case or shall stay the proceedings if other proceedings between the same parties, based on the same facts and having the same purpose:

(*a*) are pending before a court of that Contracting State, and were the first to be instituted; or

(*b*) are pending before a court of any other Contracting State, were the first to be instituted and may result in a judgment to which the State party to the proceedings must give effect by virtue of Article 20 or Article 25.

2. Any Contracting State whose law gives the courts a discretion to decline to proceed with a case or to stay the proceedings in cases where proceedings between the same parties, based on the same facts and having the same purpose, are pending before a court of another Contracting State, may, by notification addressed to the Secretary General of the Council of Europe, declare that its courts shall not be bound by the provisions of paragraph 1.

Chapter III

Effect of judgment

Article 20

1. A Contracting State shall give effect to a judgment given against it by a court of another Contracting State:

(*a*) if, in accordance with the provisions of Articles 1 to 13, the State could not claim immunity from jurisdiction; and

(*b*) if the judgment cannot or can no longer be set aside if obtained by default, or if it is not or is no longer subject to appeal or any other form of ordinary review or to annulment.

2. Nevertheless, a Contracting State is not obliged to give effect to such a judgment in any case:

(*a*) where it would be manifestly contrary to public policy in that State to do so, or where, in the circumstances, either party had no adequate opportunity fairly to present his case;

(*b*) where proceedings between the same parties, based on the same facts and having the same purpose:

(*i*) are pending before a court of that State and were the first to be instituted;

(*ii*) are pending before a court of another Contracting State, were the first to be instituted and may result in a judgment to which the State party to the proceedings must give effect under the terms of this Convention;

(*c*) where the result of the judgment is inconsistent with the result of another judgment given between the same parties:

(*i*) by a court of the Contracting State, if the proceedings before that court were the first to be instituted or if the other judgment has been given before the judgment satisfied the conditions specified in paragraph 1(*b*); or

(*ii*) by a court of another Contracting State where the other judgment is the first to satisfy the requirements laid down in the present Convention;

(*d*) where the provisions of Article 16 have not been observed and the State has not entered an appearance or has not appealed against a judgment by default.

3. In addition, in the cases provided for in Article 10, a Contracting State is not obliged to give effect to the judgment:

(*a*) if the courts of the State of the forum would not have been entitled to assume jurisdiction had they applied, *Mutatis Mutandes*, the rules of jurisdiction (other than those mentioned in the Annex to the present Convention) which operate in the State against which judgment is given; or

(*b*) if the court, by applying a law other than that which would have been applied in accordance with the rules of private international law of that State, has reached a result different from that which would have been reached by applying the law determined by those rules.

However, a Contracting State may not rely upon the grounds of refusal specified in sub-paragraphs (*a*) and (*b*) above if it is bound by an agreement with the State of the forum on the recognition and enforcement of judgments and the judgment fulfills the requirement of that agreement as regards jurisdiction and, where appropriate, the law applied.

Article 21

1. Where a judgment has been given against a Contracting State and that State does not give effect thereto, the party which seeks to invoke the judgment shall be entitled to have determined by the competent court of that State the question whether effect should be given to the judgment in accordance with Article 20. Proceedings may also be brought before this court by the State against which judgment has been given, if its law so permits.

2. Save in so far as may be necessary for the application of Article 20, the competent court of the State in question may not review the merits of the judgment.

3. Where proceedings are instituted before a court of a State in accordance with paragraph 1:

(*a*) the parties shall be given an opportunity to be heard in the proceedings;

(*b*) documents produced by the party seeking to invoke the judgment shall not be subject to legislation or any other like formality;

(*c*) no security, bond or deposit, however described, shall be required of the party invoking the judgment by reason of his nationality, domicile or residence;

(*d*) the party invoking the judgment shall be entitled to legal aid under conditions no less favourable than those applicable to nationals of the State who are domiciled and resident therein.

4. Each Contracting State shall, when depositing its instrument of ratification, acceptance or accession. designate the court or courts referred to in paragraph 1, and inform the Secretary General Court of the Council of Europe thereof.

Article 22

1. A Contracting State shall give effect to a settlement to which it is a party and which has been made before a court of another Contracting State in the course of the proceedings; the provisions of Article 20 do not apply to such a settlement.

2. If the State does not give effect to the settlement, the procedure provided for in Article 21 may be used.

Article 23

No measures of execution or preventive measures against the property of a Contracting State may be taken in the territory of another Contracting State except where to the extent that the State has expressly consented thereto in writing in any particular case.

Chapter IV

OPTIONAL PROVISIONS

Article 24

1. Notwithstanding the provisions of Article 15, any State may, when signing this Convention or depositing its instrument of ratification, acceptance or accession, or at any later date, by notification addressed to the Secretary General of the Council of Europe, declare that, in cases not falling within Articles 1 to 13, its courts shall be entitled to entertain proceedings against another Contracting State to the extent that its courts are entitled to entertain proceedings against States not Party to the present Convention. Such a declaration shall be without prejudice to the immunity from jurisdiction which foreign States enjoy in respect of acts performed in the exercise of sovereign authority (*acta jure imperii*).

2. The courts of a State which has made the declaration provided for in paragraph 1 shall not however be entitled to entertain such proceedings against another Contracting State if their jurisdiction could have been based solely on one or more of the grounds mentioned in the Annex to the present Convention, unless that other Contracting State has taken a step in the proceedings relating to the merits without first challenging the jurisdiction of the court.

3. The provisions of Chapter II apply to proceedings instituted against a Contracting State in accordance with the present Article.

4. The declaration made under paragraph 1 may be withdrawn by notification addressed to the Secretary General of the Council of Europe. The withdrawal shall take effect three months after the date of its receipt, but this shall not affect proceedings instituted before the date on which the withdrawal becomes effective.

Article 25

1. Any Contracting State which has made a declaration under Article 24 shall, in cases not falling within Articles 1 to 13, give effect to a judgment given by a court of another Contracting State which has made a like declaration:

(*a*) if the conditions prescribed in paragraph 1 (b) of Article 20 have been fulfilled; and

(*b*) if the court is considered to have jurisdiction in accordance with the following paragraphs.

2. However, the Contracting State is not obliged to give effect to such a judgment:

(*a*) if there is a ground for refusal as provided for in paragraph 2 of Article 20; or

(*b*) if the provisions of paragraph 2 of Article 24 have not been observed.

3. Subject to the provisions of paragraph 4, a court of a Contracting State shall be considered to have jurisdiction for the purpose of paragraph 1(*b*):

(*a*) if its jurisdiction is recognized in accordance with the provisions of an agreement to which the State of the forum and the other Contracting State are Parties;

(*b*) where there is no agreement between the two States concerning the recognition and enforcement of judgments in civil matters, if the courts of the State of the forum would have been entitled to assume jurisdiction had they applied, *mutatis mutandis*, the rules of jurisdiction (other than those mentioned in the Annex to the present Convention) which operate in the State against which the judgment was given. This provision does not apply to questions arising out of contracts.

4. The Contracting States having made the declaration provided for in Article 24 may, by means of a supplementary agreement to this Convention, determine the circumstances in which their courts shall be considered to have jurisdiction for the purposes of paragraph 1(*b*) of this Article.

5. If the Contracting State does not give effect to the judgment, the procedure provided for in Article 21 may be used.

Article 26

Notwithstanding the provisions of Article 23, a judgment rendered against a Contracting State in proceedings relating to an individual or commercial activity, in which the State is engaged in the same manner as a private person, may be enforced in the State of the forum against property of the State against which judgment has been given, used exclusively in connection with such an activity. if:

(*a*) both the State of the forum and the State against which the judgment has been given have made declarations under Article 24;

(*b*) the proceedings which resulted in the judgment fell within Articles 1 to 13 or were instituted in accordance with paragraphs 1 and 2 of Article 24; and

(*c*) the judgment satisfies the requirements laid down in paragraph 1(*b*) of Article 20.

Chapter V

GENERAL PROVISIONS

Article 27

1. For the purposes of the present Convention, the expression "Contracting State" shall not include any legal entity of a Contracting State which is distinct therefrom and is capable of suing or being sued, even if that entity has been entrusted with public functions.

2. Proceedings may be instituted against any entity referred to in paragraph 1 before the courts of another Contracting State in the same manner as against a private person; however, the courts may not entertain proceedings in respect of acts performed by the entity in the exercise or sovereign authority (*acta jure imperii*).

3. Proceedings may in any event be instituted against any such entity before those courts if, in corresponding circumstances, the courts would have had jurisdiction if the proceedings had been instituted against a Contracting State.

Article 28

1. Without prejudice to the provisions of Article 27, the constituent States of a Federal State do not enjoy immunity.

2. However, a Federal State Party to the present Convention, may, by notification addressed to the Secretary General of the Council of Europe, declare that its constituent States may invoke the provisions of the Convention applicable to Contracting States, and have the same obligations.

3. Where a Federal State has made a declaration in accordance with paragraph 2, service of documents on a constituent State of a Federation shall be made on the Ministry of Foreign Affairs of the Federal State, in conformity with Article 16.

4. The Federal State alone is competent to make the declarations, notifications and communications provided for in the present Convention, and the Federal State alone may be party to proceedings pursuant to Article 34.

Article 29

The present Convention shall not apply to proceedings concerning:

(*a*) social security;

(*b*) damage or injury in nuclear matters;

(*c*) customs duties, taxes or penalties.

Article 30

The present Convention shall not apply to proceedings in respect of claims relating to the operation of seagoing vessels owned or operated by a Contracting State or to the carriage of cargoes and of passengers by such vessels or to the carriage of cargoes owned by a Contracting State and carried on board merchant vessels.

Article 31

Nothing in this Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State.

Article 32

Nothing in the present Convention shall affect privileges and immunities relating to the exercise of the functions of diplomatic missions and consular posts and of persons connected with them.

Article 33

Nothing in the present Convention shall affect existing or future international agreements in special fields which relate to matters dealt with in the present Convention.

Article 34

1. Any dispute which might arise between two or more Contracting States concerning the interpretation or application of the present Convention shall be submitted to the International Court of Justice on the application of one of the parties to the dispute or by special agreement unless the parties agree on a different method of peaceful settlement of the dispute.

2. However, proceedings may not be instituted before the International Court of Justice which relate to:

(*a*) a dispute concerning a question arising in proceedings instituted against a Contratcing State before a court of another Contracting State, before the court has given a judgment which fulfills the condition provided for in paragraph 1(*b*) of Article 20;

(*b*) a dispute concerning a question arising in proceedings instituted before a court of a Contracting State in accordance with paragraph 1 of Article 21, before the court has rendered a final decision in such proceedings.

Article 35

1. The present Convention shall apply only to proceedings introduced after its entry into force.

2. When a State has become Party to this Convention after it has entered into force, the Convention shall apply only to proceedings introduced after it has entered into force with respect to that State.

3. Nothing in this Convention shall apply to proceedings arising out of, or judgments based on, acts, omissions or facts prior to the date on which the present Convention is opened for signature.

Chapter VI

Final provisions

Article 36

1. The present Convention shall be open to signature by the member States of the Council of Europe. It shall be subject to ratification or acceptance. Instruments of ratification or acceptance shall be deposited with the Secretary General of the Council of Europe.

2. The Convention shall enter into force three months after the date of the deposit of the third instrument of ratification or acceptance.

3. In respect of a signatory State ratifying or accepting subsequently, the Convention shall enter into force three months after the date of the deposit of its instrument of ratification or acceptance.

Article 37

1. After the entry into force of the present Convention, the Committee of Ministers of the Council of Europe may, by a decision taken by a unanimous vote of the members casting a vote, invite any non-member State in accede thereto.

2. Such accession shall be effected by depositing with the Secretary General of the Council of Europe an instrument of accession which shall take effect three months after the date of its deposit.

3. However, if a State having already acceded to the Convention notifies the Secretary General of the Council of Europe of its objection to the accession of another non-member State, before the entry into force of this accession, the Convention shall not apply to the relations between these two States.

Article 38

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or accession. specify the territory or territories to which the present Convention shall apply.

2. Any State may, when depositing its instrument of ratification, acceptance or accession or at any later date, by declaration addressed to the Secretary General of the Council of Europe, extend this Convention to any other territory or territories specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorized to give undertakings.

3. Any declaration made in pursuance of the preceding paragraph may, in respect of any territory mentioned in such declaration, be withdrawn according to the procedure laid down in Article 40 of this Convention.

Article 39

No reservation is permitted to the present Convention.

Article 40

1. Any Contracting State may, in so far as it is concerned, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.

2. Such denunciation shall take effect six months after the date of receipt by the Secretary General of such notification. This Convention shall, however, continue to apply to proceedings introduced before the date on which the denunciation takes effect, and to judgments given in such proceedings.

Article 41

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe and any State which has acceded to this Convention of:

(*a*) any signature;

(*b*) any deposit of an instrument of ratification, acceptance or accession;

(*c*) any date of entry into force of this Convention in accordance with Articles 36 and 37 thereof;

(*d*) any notification received in pursuance of the provisions of paragraph 2 of Article 19;

(*e*) any communication received in pursuance of the provisions of paragraph 4 of Article 21;

(*f*) any notification received in pursuance of the provisions of paragraph 1 of Article 24;

(*g*) the withdrawal of any notification made in pursuance of the provisions of paragraph 4 of Article 24;

(*h*) any notification received in pursuance of the provisions of paragraph 2 of Article 28;

(*i*) any notification received in pursuance of the provisions of paragraph 3 of Article 37;

(*j*) any declaration received in pursuance of the provisions of Article 38;

(*k*) any notification received in pursuance of the provisions of Article 40 and the date on which denunciation takes effect.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at Basle, this 6th day of May 1972, in English and French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each of the signatory and acceding States.

ANNEX

The grounds of jurisdiction referred to in paragraph 3, sub-paragraph (*a*), of Article 20, paragraph 2 of Article 24 and paragraph 3, sub-paragraph (*b*), of Article 25 are the following:

(*a*) the presence in the territory of the State of the forum of property belonging to the defendant, or the seizure by the plaintiff of property situated there, unless

—the action is brought to assert proprietary or possessory rights in that property, or arises from another issue relating to such property; or

—the property constitutes the security for a debt which is the subject-matter of the action;

(*b*) the nationality of the plaintiff;

(*c*) the domicile, habitual residence or ordinary residence of the plaintiff within the territory of the State of the forum unless the assumption of jurisdiction on such a ground is permitted by way of an exception made on account of the particular subject-matter of a class of contracts;

(*d*) the fact that the defendant carried on business within the territory of the State of the forum, unless the action arises from that business;

(*e*) a unilateral specification of the forum by the plaintiff, particularly in an invoice.

A legal person shall be considered to have its domicile or habitual residence where it has its seat, registered office or principal place of business.

ADDITIONAL PROTOCOL TO THE EUROPEAN CONVENTION ON STATE IMMUNITY

The member States of the Council of Europe, signatory to the present Protocol,

Having taken note of the European Convention on State Immunity—hereinafter referred to as "the Convention"—and in particular Articles 21 and 34 thereof;

Desiring to develop the work of harmonisation in the field covered by the Convention by the addition of provisions concerning a European procedure for the settlement of disputes,

Have agreed as follows:

Part I

Article 1

1. Where a judgment has been given against a State Party to the Convention and that State does not give effect thereto, the party which seeks to invoke the judgment shall be entitled to have determined the question whether effect should be given to the judgment in conformity with Article 20 or Article 25 of the Convention, by instituting proceedings before either:

(*a*) the competent court of that State in application of Article 21 of the Convention; or

(*b*) the European Tribunal constituted in conformity with the provisions of Part III of the present Protocol, provided that that State is a Party to the present Protocol and has not made the declaration referred to in Part IV thereof.

The choice between these two possibilities shall be final.

2. If the State intends to institute proceedings before its court in accordance with the provisions of paragraph 1 of Article 21 of the Convention, it must give notice of its intention to do so to the party in whose favour the judgment has been given; the State may thereafter institute such proceedings only if the party has not, within three months of receiving notice, instituted proceedings before the European Tribunal. Once this period has elapsed, the party in whose favour the judgment has been given may no longer institute proceedings before the European Tribunal.

3. Save in so far as may be necessary for the application of Articles 20 and 25 of the Convention, the European Tribunal may not review the merits of the judgment.

Part II

Article 2

1. Any dispute which might arise between two or more States Parties to the present Protocol concerning the interpretation or application of the Convention shall be submitted, on the application of one of the parties to the dispute or by special agreement, to the European Tribunal constituted in conformity with the provisions of Part III of the present Protocol. The States Parties to the present Protocol undertake not to submit such a dispute to a different mode of settlement.

2. If the dispute concerns a question arising in proceedings instituted before a court of one State Party to the Convention against another State Party to the Convention, or a question arising in proceedings instituted before a court of a State Party to the Convention in accordance with Article 21 of the Convention, it may not be referred to the European Tribunal until the court has given a final decision in such proceedings.

3. Proceedings may not be instituted before the European Tribunal which relates to a dispute concerning a judgment which it has already determined or is required to determine by virtue of Part I of this Protocol.

Article 3

Nothing in the present Protocol shall be interpreted as preventing the European Tribunal from determining any dispute which might arise between two or more States Parties to the Convention concerning the interpretation or application thereof and which might be submitted to it by special agreement, even if these States, or any of them, are not Parties to the present Protocol.

PART III

Article 4

1. There shall be established a European Tribunal in matters of State Immunity to determine cases brought before it in conformity with the provisions of Parts I and II of the present Protocol.

2. The European Tribunal shall consist of the members of the European Court of Human Rights and, in respect of each non-member State of the Council of Europe which has acceded to the present Protocol, a person possessing the qualifications required of members of that Court designated, with the agreement of the Committee of Ministers of the Council of Europe, by the government of that State for a period of nine years.

3. The President of the European Tribunal shall be the President of the European Court of Human Rights.

Article 5

1. Where proceedings are instituted before the European Tribunal in accordance with the provisions of Part I of the present Protocol, the European Tribunal shall consist of a Chamber composed of seven members. There shall sit as *ex officio* members of the Chamber the member of the European Tribunal who is a national of the State against which the judgment has been given and the member of the European Tribunal who is a national of the State of the forum, or, should there be no such member in one or the other case, a person designated by the government of the State concerned to sit in the capacity of a member of the Chamber. The names of the other five members shall be chosen by lot by the President of the European Tribunal in the presence of the Registrar.

2. Where proceedings are instituted before the European Tribunal in accordance with the provisions of Part II of the present Protocol, the Chamber shall be constituted in the manner provided for in the preceding paragraph. However, there shall sit as *ex officio* members of the Chamber the members of the European Tribunal who are nationals of the States parties to the dispute or, should there be no such member, a person designated by the government of the State concerned to sit in the capacity of a member of the Chamber.

3. Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or of the present Protocol, the Chamber may, at any time, relinquish jurisdiction in favour of the European Tribunal meeting in plenary session. The relinquishment of jurisdiction shall be obligatory where the resolution of such question might have a result inconsistent with a judgment previously delivered by a Chamber or by the European Tribunal meeting in plenary session. The relinquishment of jurisdiction shall be final. Reasons need not be given for the decision to relinquish jurisdiction.

Article 6

1. The European Tribunal shall decide any disputes as to whether the Tribunal has jurisdiction.

2. The hearings of the European Tribunal shall be public unless the Tribunal in exceptional circumstances decides otherwise.

3. The judgments of the European Tribunal, taken by a majority of the members present, are to be delivered in public session. Reasons shall be given for the judgment of the European Tribunal. If the judgment does not represent in whole or in part the unanimous opinion of the European Tribunal, any member shall be entitled to deliver a separate opinion.

4. The judgments of the European Tribunal shall be final and binding upon the parties.

Article 7

1. The European Tribunal shall draw up its own rules and fix its own procedure.
2. The Registry of the European Tribunal shall be provided by the Registrar of the European Court of Human Rights.

Article 8

1. The operating costs of the European Tribunal shall be borne by the Council of Europe. States non-members of the Council of Europe having acceded to the present Protocol shall contribute thereto in a manner to be decided by the Committee of Ministers after agreement with these States.
2. The members of the European Tribunal shall receive for each day of duty a compensation to be determined by the Committee of Ministers.

PART IV

Article 9

1. Any State may, by notification addressed to the Secretary General of the Council of Europe at the moment of its signature of the present Protocol, or of the deposit of its instrument of ratification, acceptance or accession thereto, declare that it will only be bound by Parts II to V of the present Protocol.
2. Such a notification may be withdrawn at any time.

PART V

Article 10

1. The present Protocol shall be open to signature by the member States of the Council of Europe which have signed the Convention. It shall be subject to ratification or acceptance. Instruments of ratification or acceptance shall be deposited with the Secretary General of the Council of Europe.
2. The present Protocol shall enter into force three months after the date of the deposit of the fifth instrument of ratification or acceptance.
3. In respect of a signatory State ratifying or accepting subsequently, the Protocol shall enter into force three months after the date of the deposit of its instrument of ratification or acceptance.
4. A member State of the Council of Europe may not ratify or accept the present Protocol without having ratified or accepted the Convention.

Article 11

1. A State which has acceded to the Convention may accede to the present Protocol after the Protocol has entered into force.
2. Such accession shall be effected by depositing with the Secretary General of the Council of Europe an instrument of accession which shall take effect three months after the date of its deposit.

Article 12

No reservation is permitted to the present Protocol.

Article 13

1. Any Contracting State may, in so far as it is concerned, denounce the present Protocol by means of a notification addressed to the Secretary General of the Council of Europe.
2. Such denunciation shall take effect six months after the date of receipt by the Secretary General of such notification. The Protocol shall however, continue to apply to proceedings introduced in conformity with the provisions of the Protocol before the date on which such denunciation takes effect.
3. Denunciation of the Convention shall automatically entail denunciation of the present Protocol.

Article 14

The Secretary General of the Council of Europe shall notify the member States of the Council and any State which has acceded to the Convention of:
(*a*) any signature of the present Protocol;

(*b*) any deposit of an instrument of ratification, acceptance or accession;

(*c*) any date of entry into force of the present Protocol in accordance with Articles 10 and 11 thereof;

(*d*) any notification received in pursuance of the provisions of Part IV and any withdrawal of any such notification;

(*e*) any notification received in pursuance of the provisions of Article 13 and the date on which such denunciation takes effect.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Protocol.

Done at Basle, this 16th day of May 1972, in English and French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each of the signatory and acceding States.

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