

# 20 Intellectual Property Litigation and Foreign Sovereign Immunity: International Law Limit to the Jurisdiction over the Infringement of Intellectual Property

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*Foreign sovereign immunity is the international law rule that foreign states are entitled to immunity from the jurisdiction of municipal courts. Entities other than foreign states, such as state enterprises, are also entitled to immunity. The majority view now seems to be that immunity need not extend to "commercial" transactions, but it is not clear whether immunity extends to infringements of intellectual property. Infringements of intellectual property are not always caused by breaches of contract, although breaches of license agreement may be regarded as commercial.*

*This report reviews court decisions in several states and points out that immunity may extend to an infringement of intellectual property where immunity is determined based on whether the infringing act is commercial. And, this report analyses the provisions of treaties and municipal laws which deny immunity in intellectual property litigation. In addition, this report examines how foreign sovereign immunity is related to the issue of jurisdiction over international infringements of intellectual property.*

## What Is Foreign Sovereign Immunity?

This report empirically examines the relationship between intellectual property litigation and foreign sovereign immunity from the perspective of international law, in connection with conventions, draft articles for conventions, domestic laws and domestic judicial precedents.

"Foreign Sovereign immunity" means that a State itself and its property shall be immune from the jurisdiction of another State. More specifically, it refers to "immunity from jurisdiction", which means that a State shall not stand as defendant in the courts of another State, and "immunity from execution", which means that a State property shall not be subject to the compulsory execution of judgments or pre-judgment preservative measures rendered by the courts of another State<sup>(\*)</sup>. Foreign sovereign immunity is a rule concerning the jurisdiction of the domestic courts of a State. Indeed, it does not directly solve the issue of international jurisdiction over cross-border infringements against intellectual property rights, which has been discussed at WIPO and the Hague Conference on Private International Law. On the other hand, foreign sovereign immunity prevents domestic courts from exercising their exclusive

jurisdiction, and in this respect, it is similar to "forum non convenience," which is a legal theory established in judicial precedents under Anglo-American law. However, foreign sovereign immunity is recognized as a rule under international law.<sup>(\*)</sup> Furthermore, foreign sovereign immunity becomes a problem in lawsuits in which a foreign State is concerned in the domestic court of another State. In this regard, it is similar to "Act of State Doctrine." However, what matters under the Act of State Doctrine is the "nature of the act that is a cause of right or fact which is the subject matter of the lawsuit," whereas what matters in respect to foreign sovereign immunity is the "nature of the party to the lawsuit."<sup>(\*)</sup> Among the issues concerning foreign sovereign immunity, this report particularly addresses the issue of immunity from jurisdiction in intellectual property litigation.

## Interface between Intellectual Property Infringement Litigation and Foreign Sovereign Immunity

### 1 Arguments on Foreign Sovereign Immunity

This section considers what problems would arise if immunity from jurisdiction is claimed in

(\*)1 Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law* (9th ed.), pp. 341-365 (1992); Helmut Steinberger, "State Immunity", in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, pp. 615-638 (1992). See Matsui Akihiro, *Kokusaihōjō no kokkazaisan no kyouseishikkō karano menjo* (Immunity from Execution against State Property under International Law), *Ritumeikan Hōgaku [Ritsumeikan Law Review (Japanese edition)]*, vol. 290 (2003).

(\*)2 Hazel Fox, *The Law of State Immunity*, p.1 (2002).

(\*)3 Matsui Yoshiro, "Kokusaihō ni okeru kokka kōi ron (The act of state doctrine under international law)", *Hōsei ronshō* (Nagoya University), vol. 44, p.39 (1968).

intellectual property infringement litigation from a theoretical perspective. First of all, when outlining the history of the development of arguments on foreign sovereign immunity, we find the shift from the “Doctrine of Absolute Immunity” to the “Doctrine of Restrictive Immunity.” According to the traditional concept which was established in the middle of 19th century when the practice of sovereign immunity became popular, a State may stand as plaintiff but not as defendant in the domestic courts of another State. Such a concept is called “Doctrine of Absolute Immunity.” However, since the beginning of the 20th century, States have come to be engaged in economic activities and involved in more transactions with private persons accordingly. If States were granted absolute immunity even in such a situation, private persons who have dealings with States would suffer significant disadvantage. In light of this, the “Doctrine of Restrictive Immunity” has gained ground that a State’s acts shall be divided into acts by sovereign authority (*acta jure imperii*) and acts by management authority (*acta jure gestionis*) and the State may only be immune from suits due to the former acts. Indeed, the Doctrine of Absolute Immunity had been dominant in U.K. and U.S. precedents until domestic laws were enacted, and it was also claimed in the Soviet Union and other socialist states as well as in developing States even after the end of World War II. In current times, the Doctrine of Restrictive Immunity is broadly accepted, but complicated issues remain concerning foreign sovereign immunity. The first such issue is about the entities eligible to enjoy sovereign immunity. While “States and various organs of their governments” are indisputably eligible to enjoy sovereign immunity, discussions have been held about the eligibility of other entities to enjoy immunity. In connection with intellectual property infringement litigation, the question is whether “State enterprises” and “central banks” are eligible to enjoy immunity. Though there is not complete convergence in current national practices including domestic laws and academics’ views in individual states, entities that have an independent status of legal person such as central banks and State enterprises may enjoy immunity, provided that they conduct acts by sovereign authority of States. The second issue is that there is no clear criterion for distinguishing *acta jure imperii* and *acta jure gestionis*.

## 2 Can Immunity from Jurisdiction Be Limited in Intellectual Property Infringement Litigation?

In intellectual property infringement lawsuits, can a State or State enterprise standing as

defendant claim immunity from the jurisdiction of another State? Typical litigation in which immunity from jurisdiction will be denied is litigation concerning “commercial activities” conducted by a State. There are two types of criteria for determining what acts are deemed to be “commercial activities”, one focusing on the nature of the State’s act (“Nature of Act Theory”) and the other focusing on the purpose (“Purpose of Act Theory”). Take, for example, a case where a company owned by State A manufactures and sells products that are indispensable to the daily life of the citizens of State A, by working a patent owned by X, who is a citizen of State B. State A concludes a contract with X and agrees to pay money to X. However, State A fails to pay any money, and furthermore, the products are imported from State A to State B. In this case, if X files a lawsuit against State A and the company owned by State A with a court of State B, can the company owned by State A claim immunity? According to the Purpose of Act Theory, the company’s act of manufacturing, selling and importing the products is deemed to be conducted in the same position as a private person, and therefore exactly falls under “commercial activity” or *acta jure gestionis*. However, according to the Nature of Act Theory, it may become possible to claim immunity. For instance, State A might argue that the company owned by State A had manufactured the products indispensable to the daily lives of the citizens of State A in order to secure an acceptable living environment for its citizens and perform the sovereign functions of State A. In response to the counterargument that the company owned by State A imports the products to State B, State A might also argue that its economic situation is becoming significantly worse and therefore it is essential for State A to earn foreign currency to guarantee its existence. Indeed, where a State is sued for infringing an intellectual property right owned by a third party, it does not seem too unreasonable to presume such an act as a commercial activity, but this does not deny the possibility of immunity from jurisdiction being granted.

There is another possibility that intellectual property infringement litigation may be deemed as a litigation concerning “property” situated in the State of the forum. However, following the judgment rendered by the Exchequer Court of Canada in *Chateau-Gai Wines Ltd. v. Le Gouvernement de la République Française*, in which an opposition was filed against a trademark registration owned by a foreign State, it is difficult to deem intellectual property infringement litigation as such.<sup>(\*)</sup> The third possibility is that intellectual property infringement litigation may be deemed as litigation concerning “tort” by a State.

(\*) *Chateau-Gai Wines, Ltd. v. Le Gouvernement de la République Française*, 1967, Canada, Exchequer Court, *International Law Reports* (hereinafter cited as *ILR*), vol. 53, p. 284 (1979).

Indeed, in national practices, immunity from jurisdiction is often denied in cases for compensation for damage to property due to a “tort” by a State. However, damage to property due to a “tort”, which is referred to as an exception to immunity from jurisdiction, is limited to damage to tangible property. The main objective for denying immunity from jurisdiction is to ensure that victims of traffic accidents will not be deprived of opportunities to file lawsuits. Consequently, an act of infringing an intellectual property right is unlikely to be deemed to be a tort, which is an exception to immunity from jurisdiction. Considering all these possibilities, intellectual property infringement litigation can be deemed to be litigation concerning “commercial activities” conducted by a State. However, in light of the fact that immunity from jurisdiction is denied in litigation concerning employment contracts in particular in national practices, it may be possible to provide that intellectual property infringement litigation is also included in special types of litigation for which immunity from jurisdiction shall be denied.

## **Criterion for Determining Immunity regarding Intellectual Property Infringement**

### **1 Determination of Immunity under a Special Criterion**

This section addresses national practices and academic views. First, analysis is made on the “European Convention on State Immunity,” which provides for a specific criterion for determining immunity.<sup>(\*)5</sup> Next, domestic laws concerning sovereign immunity are analyzed. Such provisions are not found in the Foreign Sovereign Immunity Act of the U.S.<sup>(\*)6</sup> and the State Immunity Act of Canada<sup>(\*)7</sup> whereas they are present in the State Immunity Act of the U.K. (Article 7),<sup>(\*)8</sup> the State Immunity Act of Singapore (Article 9),<sup>(\*)9</sup> the State Immunity Ordinance of Pakistan (Article 8),<sup>(\*)10</sup> the Foreign Sovereign Immunity Act of the Republic of South Africa (Article 8)<sup>(\*)11</sup> and the Foreign States Immunities Act of Australia (Article 15).<sup>(\*)12</sup> These domestic Acts have

provisions similar to those of the European Convention on State Immunity, but there are also difference with respect to which intellectual property rights are included in the scope of application of the special provisions, and particularly whether a plant breeder’s right is included in the scope (See Appendix 1). Furthermore, foreign sovereign immunity was a subject in the process of codifying international law. The “U.N. International Law Commission (hereinafter referred to as “ILC”)), which is engaged in realizing one of the missions of the U.N. General Assembly, “encouraging the progressive development of international law and its codification” (Article 13(1)(a) of the Charter of the United Nations), carried out codification and adopted the second draft articles for the “Convention on the Jurisdictional Immunities of States and Their Property” (hereinafter referred to as the “second ILC draft”) in 1991.<sup>(\*)13</sup> The provisions concerning intellectual property infringement litigation are also found in the second ILC draft (Article 14).

Article 14 of the second ILC draft [Intellectual and industrial property]

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

(a) the determination of any right of the State in a patent, industrial design, trade name or business name, trade mark, copyright or any other form of intellectual or industrial property, which enjoys a measure of legal protection, even if provisional, in the State of the forum; or

(b) an alleged infringement by the State, in the territory of the State of the forum, of a right of the nature mentioned in subparagraph (a) which belongs to a third person and is protected in the State of the forum.

Similar provisions are also found in Article 3 of the “Draft Article for a Convention on State Immunity”<sup>(\*)14</sup> adopted in 1994 by the International Law Association, which is a global international law association, and in the Resolution on “Contemporary Problems Concerning the

(\*)5 European Convention on State Immunity 1972, reprinted in *International Legal Materials* (hereinafter cited as *ILM*), vol.11, p.470 (1972).

(\*)6 Foreign Sovereign Immunity Act, 1976, reprinted in *ILM*, vol. 15, p. 1393 (1976).

(\*)7 State Immunity Act, 1982, reprinted in *ILM*, vol.21, p. 798 (1982).

(\*)8 State Immunity Act, 1978, reprinted in *ILM*, vol. 17, p. 1123 (1978).

(\*)9 State Immunity Act, 1979, reprinted in *Materials on Jurisdictional Immunities of States and Their Property* (United Nations Legislative Series), U.N. Doc. ST/LEG/SER.B/20, p. 32 (1982).

(\*)10 State Immunity Ordinance, 1981, *id.*, p.25.

(\*)11 Foreign Sovereign Immunity Act, 1981, *id.*, p. 39.

(\*)12 Foreign State Immunities Act, 1985, Section 32(1), reprinted in *ILM*, vol. 25, p. 715 (1986).

(\*)13 Draft Articles on Jurisdictional Immunities of States and Their Property, reprinted in *ILM*, vol. 30, pp. 1565-1574 (1991).

(\*)14 Revised Draft Article for a Convention on State Immunity, *International Law Association Report of the 66th Conference* (held at Buenos Aires, 1994), pp. 22-28 (1994).

Immunity of States in Relation to Questions of Jurisdiction and Enforcement”<sup>(\*)15</sup> adopted in 1991 by the Institut de Droit International, which consists of world-famous scholars of international law.

Why shall immunity from jurisdiction be denied in intellectual property infringement lawsuits? In the discussion at the ILC, it was considered that the best forum for settling a dispute over an intellectual property right (*forum convenience*) was “a forum where a system for registering and protecting intellectual property rights is applied and rules for protecting intellectual property rights are recognized.” It was also considered that immunity shall be denied in intellectual property infringement lawsuits “for the purpose of protecting interests pertaining to intangible property and encouraging fair transactions.”<sup>(\*)16</sup> On the other hand, such a denial “does not always arise from a motivation for commercial or economic interests,” it was considered necessary to insert a special provision in the convention.<sup>(\*)17</sup> The relation with a lawsuit concerning a “tort” by a State may be pointed to as another reason that the special provision was inserted in the domestic Acts.<sup>(\*)18</sup> In the codification process of international law, several problems were actually pointed out with respect to establishing such a special provision. First, when inserting a special provision on not only intellectual property infringement lawsuits but also all types of lawsuits concerning intellectual property rights, it would be necessary to define the scope of intellectual property right, in particular a plant breeder’s right, to be subject to the special provision.<sup>(\*)19</sup> The second argument was that insertion of such a special provision would expand the North-South economic gap. Some members of the ILC argued that developing States would be prevented from misappropriating developed States’ technology or that, ultimately, intellectual property rights were no

more than a system for protecting developed States that were far more advanced than developing States in respect of science and technology.<sup>(\*)20</sup> Third, there was concern that, if a special provision was inserted in respect to intellectual property infringement lawsuits, nationalization or expropriation by a State would be judged by a court of another State.<sup>(\*)21</sup> However, these problems did not become obstacles against inserting a special provision on intellectual property infringement lawsuits in the draft convention.<sup>(\*)22</sup>

## 2 Determination of Immunity under a Comprehensive Criterion

### (1) Problems caused by applying a comprehensive criterion

This section examines the possibility for a State to be granted immunity from jurisdiction by regarding an intellectual property infringement lawsuit as a lawsuit concerning “commercial activity” by a State, through analysis of judicial precedents in States that do not have a special provision. Whether the act of infringing an intellectual property would fall under “commercial activity” was rarely disputed in the following cases: *Dralle v. The Republic of Czechoslovakia* (Austria), which is a leading case on this issue;<sup>(\*)23</sup> *James K. Gilson v. the Republic of Ireland and Gaeltarra Eireann* (U.S.), in which the Irish State enterprise was sued for illegal use of the patent relating to quartz crystal, which was owned by a U.S. engineer;<sup>(\*)24</sup> and *BP Chemicals Ltd. v. Jiangsu Sopo Corporation Ltd. and SPECO* (U.S.), in which the point of issue was illegal acquisition and illegal dissemination of trade secrets by the Chinese State enterprises.<sup>(\*)25</sup> On the other hand, in lawsuits concerning infringement of copyright, whether the act of infringing a copyright fell under a “commercial activity” was a significant point of dispute. In the following cases, the act of infringing

(\*)15) Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement, Resolution adopted at Basel, 1991, *Annuaire de l’Institut de Droit International*, vol. 64-I, pp. 84-89 (1991).

(\*)16) Sucharitkul, *Yearbook of International Law Commission* (hereinafter cited as *YbILC*), 1984-I, p. 113, para. 14; *YbILC*, 1984-II, Part 2, p. 68.

(\*)17) *YbILC*, 1984-II, Part 2, p.68; *YbILC*, 1988-II, Part 2, p. 102, para.517; Commentary to Article 14, *YbILC*, 1991-II, Part 2, p.47.

(\*)18) Australian Law Reform Commission, Foreign State Immunity (Report No. 24), pp.67-68, para. 115; Council of Europe, Explanatory Reports on European Convention on State Immunity, para. 41 (1972).

(\*)19) Comments from United Kingdom of Great Britain and Northern Ireland, U.N. Cod. A/CN.4/410, pp. 54-55 (1988); Ogiso, 3rd Report, U.N. Doc. A/NC.4/431, p.27 (1990).

(\*)20) Akinjide, *YbILC*, 1984-I, pp. 116-117, paras. 11-12; Sinclair, *id.*, p. 120, para. 29; McCaffrey, *id.*, p. 137, para. 10.

(\*)21) *YbILC*, 1984-II, Part 2, pp.59, 69; Jagota, *id.*, p. 130, paras. 9-10.

(\*)22) Virginia Morris, Sovereign Immunity: the Exception for Intellectual or Industrial Property, *Vanderbilt Journal of Transnational Law*, vol. 19, p. 100 (1986).

(\*)23) *Dralle v. Republic of Czechoslovakia*, 1950, Austria, Supreme Court, *ILR*, vol.17, p. 155 (1956).

(\*)24) *James K. Gilson v. Republic of Ireland and Gaeltarra Eireann*, 1982, United States, Court of Appeals for the District of Columbia Circuit, 682 F.2d 1022, pp. 1026-1027.

(\*)25) *BP Chemicals Ltd. v. Jiangsu Sopo Corporation Ltd. et al*, 2002, United States, Court of Appeals for the Eighth Circuit, 285 F.3d 677, p. 682.

the copyright was judged as falling under “commercial activity” and immunity was denied: *X v. Spanish Government Tourist Bureau* (Germany), in which the lawsuit was filed based on the allegation that the Spanish Government Tourist Bureau’s act of lending video films that showed scenic spots in Spain, which were used for public relations by travel agencies, infringed the copyright owned by the plaintiff who composed the background music for the films;<sup>(\*)26</sup> *Los Angeles News Service (LANS) v. Canadian Broadcasting Corporation (CBC)* (U.S.), in which the lawsuit was filed based on the allegation that CBC broadcasted, in its news program, a video showing the civil unrest that had occurred in Los Angeles, which was taken by LANS, and the video broadcasted in Canada was also able to be received and viewed in the United States, which resulted in an infringement of the LANS’s copyright;<sup>(\*)27</sup> and *Henry Leutwyler v. Office of Her Majesty Queen Rania Al Abdullah*, in which the lawsuit was filed based on the allegation that an employee of the Office of the Queen of the Hashimite Kingdom of Jordan provided photographic portraits of the Queen of Jordan, beyond the use conditions permitted by the U.S. photographer who took the portraits, to the publisher of “The 2000 Jordan Diary”, which was sold in various States across the world including the United States, and thereby infringed the photographer’s copyright.<sup>(\*)28</sup> However, in *International Dictionary Series v. The Australian National University* (U.S.), in which the Australian National University was sued for infringing the copyright by compiling a language dictionary, the university was granted immunity on the ground that its act of compiling a dictionary was “academic” (See Appendix 2).<sup>(\*)29</sup> In summary, the outcome would be different between the case where a special provision on intellectual property infringement lawsuits is established and the case where immunity is determined by including the infringing act in the scope of “commercial activity.” In this respect, let us take, for example, a case concerning a patent related to a medical drug. A drug manufacturer X owns a patent necessary for manufacturing a medical drug in a developed State A. Though X has licensed a company Y, which is owned by a developing State B, to manufacture and sell the drug by working the patent only in the territory of State B, the drug manufactured in State B is found to be imported to another developing State C to which X also exports the drug. When X

files a lawsuit against State B and the company Y with the court of State C, if State C has provisions similar to those of the U.K. Act or precedents that denied immunity from jurisdiction in intellectual property infringement lawsuits, State B and the company Y shall not be granted immunity from jurisdiction. However, if State C determines immunity on the basis of whether the act relating to the lawsuit is a commercial activity, diverse outcomes would become possible. The act of manufacturing and exporting the drug is an act that is also carried out by a private person and therefore may be deemed to be a commercial activity and be denied immunity from jurisdiction. On the other hand, in light of the fact that, but for the drug, many people would die in State B and this would threaten the existence of these States, if the State B argues that the act of manufacturing the drug may be carried in the exercise of the sovereign authority, immunity from jurisdiction may be granted for the reason of the purpose of the act. State B may be granted immunity from jurisdiction with respect to its act of exporting the drug to State C. State B can argue that there is the diplomatic necessity to emergency assistance because many people would die in State B without the drug. State B may also argue that many people in State B would face a serious crisis if State C runs out of the drug the disease is passed from State C to State B, because of the frequent transfer of people between State B and State C. Thus, problems would arise on the ground that the criteria for determining immunity are not completely unified. Due to the possibility that domestic courts would render different determinations on immunity in accordance with different criteria, it cannot be denied that forum shopping would occur. It would be difficult to define the “nature of the lawsuit” in the determination of immunity even in accordance with a special criterion.

## **(2) Connection between the infringement against intellectual property rights and the State of the forum, as a criterion for determining immunity**

Another issue remains to be considered: the State of the forum shall never exercise its jurisdiction unless the act of infringing the intellectual property right is caused in the State of the forum. Sovereign immunity is a ground for a domestic court not to exercise its inherent jurisdiction. More logically, under international law, whether the State of the forum actually has

(\*)26) *X v. Spanish Government Tourist Bureau*, 1977, Germany, Superior Provincial Court (Oberlandesgericht) of Frankfurt, *ILR*, vol. 65, pp. 141-143 (1984).

(\*)27) *Los Angeles News Service v. Canadian Broadcasting Corporation*, 1997, United States, District Court for the Central District of California, 969 F. Supp. 579, pp. 585-586.

(\*)28) *Henry Leutwyler v. Office of Her Majesty Queen Rania Al Abdullah*, 2001, United States, District Court for the Southern District of New York, 184 F. Supp. 2d 277, p. 280.

(\*)29) *Intercontinental Dictionary Series v. The Australian National University et al.*, 1993, United States, District Court for the Central District of California, 822 F. Supp. 622, pp. 672-674.

jurisdiction over the lawsuit shall be considered before determining sovereign immunity.<sup>(\*30)</sup> However, in actual State practices, whether the State of the forum has jurisdiction over the lawsuit is considered at the stage of determining immunity from jurisdiction. Although the issue of whether the State of the forum has jurisdiction over the lawsuit shall logically precede the determination in respect of immunity from jurisdiction, this issue is treated as a criterion for determining immunity from jurisdiction as far as intellectual property infringement lawsuits are concerned. However, no consensus has been established concerning in what cases an infringing act would be deemed to have occurred in the State of the forum. Consequently, it is necessary to consider how the issue of jurisdiction over an intellectual property infringement is judged in lawsuits between private persons. Since the rules on jurisdiction are included in the rules on immunity, courts may at least make different decisions in regard to the jurisdiction of a foreign State from those in lawsuits between private persons.

## Suggestions for Japan

In conclusion, brief consideration is given to what determination will be rendered when immunity from jurisdiction is claimed in an intellectual property infringement lawsuit in Japan. Since Japan has no domestic Act that provides for sovereign immunity, determination would be dependent on judicial precedents. The former Supreme Court decision adopted the Doctrine of Absolute Immunity in 1928,<sup>(\*31)</sup> and this principle seems to have remained unchanged since then.<sup>(\*32)</sup> Recently, in the decision on the *Yokota Air Base* case, though it cannot be quite said that the Supreme Court of Japan has shifted to the Doctrine of Restrictive Immunity, this decision implies that immunity may not be granted depending on the nature of the act.<sup>(\*33)</sup> In addition, when the second ILC draft becomes a treaty and Japan ratifies this treaty, immunity will be denied in intellectual property infringement lawsuits in Japan. The draft is currently being discussed, and in the near future, a treaty on sovereign immunity may come into

existence.<sup>(\*34)</sup> Accordingly, immunity is also likely to be denied in intellectual property infringement lawsuits in Japan, and therefore further consideration should be given in this respect. It is necessary to consider the issue of the limit to the exercise of the jurisdiction by the State of the forum over the infringing act, in respect to intellectual property infringement lawsuits between private persons. Furthermore, in order to examine judicial precedents rendered by States in which immunity is determined on the basis of whether the infringing act is a “commercial activity” by a State, such as the United States, it will also be necessary to examine lawsuits that relate to all sorts of “commercial activities” in addition to intellectual property infringement lawsuits.

(\*30) *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 2002, International Court of Justice, reprinted in *ILM*, vol. 141, p. 548, para. 46 (2002).

(\*31) *Matsuyama v. Republic of China*, Great Court of Judicature (former supreme court of Japan), December 28, 1928, 7 Taihan Minshū 1228, translated in *Annual Digest*, vol. 4, p. 168.

(\*32) Iwasawa Yuji, Japan's Interactions with International Law: The Case of State Immunity, in Ando Nisuke ed., *Japan and International Law*, p. 126 (1999); Taijudo Kanae, “Kokusai hō ni okeru kokka no saibanken menjo (State's jurisdictional immunity under international law)”, *Hōgaku ronsō [Kyoto Law Review]*, vol. 68, no. 5/6, pp. 118-122 (1961).

(\*33) *Yamaguchi v. United States (Judgment upon the case concerning sovereign acts of a foreign state and exemption from civil jurisdiction of the court)*, April 12, 2002, Supreme Court of Japan, 56 Minshū 729. Mizushima Tomonori, *Yamaguchi v. United States*, *American Journal of International Law*, vol. 97, pp. 406-411 (2003).

(\*34) Report of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property, U.N. Doc. A/58/22, p. 2, para. 12 (2003).

**Appendix 1: Comparison in the Convention and Domestic Acts Having a Special Criterion  
(Determination of Immunity under a Special Criterion)**

		European Convention on State Community Article 8	United Kingdom State Immunity Act Article 7	Singapore State Immunity Act Article 9	Pakistan State Immunity Ordinance Article 8	Republic of South Africa Foreign Sovereign Immunity Act Article 8	Australia Foreign States Immunities Act Article 15
<b>Patent</b>	Determination of right						
	Infringement						
<b>Trademark</b>	Determination of right						
	Infringement						
<b>Design</b>	Determination of right						
	Infringement						
<b>Service mark</b>	Determination of right		×	×	×	×	×
	Infringement		×	×	×	×	×
<b>Plant breeder's right</b>	Determination of right			×			×
	Infringement			×			×
<b>Copyright</b>	Determination of right	×	×	×	×	×	
	Infringement						
<b>Trade name</b>							

- : There is a special criterion.
- × : There is no special criterion.
- : May be included in “other similar rights.”

**Appendix 2: Intellectual Property Infringement Lawsuit in Which Immunity from Jurisdiction Was Determined under a Comprehensive Criterion  
(Determination of Immunity under a Comprehensive Criterion)**

Case	Year	State of the forum	Court	Defendant	Allegedly infringed right	Was the infringement deemed to have occurred in the state of the forum?	Was immunity granted?
Dralle v. Republic of Czechoslovakia	1950	Austria	Supreme Court	Czechoslovakia	Trademark		×
X v. Spanish Government Tourist Bureau	1977	Germany	Superior Provincial Court of Frankfurt	State agency	Copyright		×
James K. Gilson v. the Republic of Ireland and Gaeltharra Eireann	1982	United States	Court of Appeals for the District of Columbia Circuit	State enterprise	Patent	×	×
Intercontinental Dictionary Series v. The Australian National University et al	1993	United States	District Court for the Central District of California	State agency	Copyright	×	
Los Angeles News Service v. Canadian Broadcasting Corporation	1997	United States	District Court for the Central District of California	State agency	Copyright		×
Henry Leutwyler v. Office of Her Majesty Queen Rania Al Abdullah	2001	United States	District Court for the Southern District of New York	State agency	Copyright		×
BP Chemicals Ltd. v. Jiangsu Sopo Corporation Ltd. et al	2002	United States	District Court for the Eastern District of Missouri	State enterprise	Trade secrets	×	
BP Chemicals Ltd. v. Jiangsu Sopo Corporation Ltd. et al	2002	United States	Court of Appeals for the Eighth Circuit	State enterprise	Trade secrets		×