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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION



**JURISDICTIONAL IMMUNITIES OF STATES
AND THEIR PROPERTY**

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JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

I. INTRODUCTION

1. The topic "Jurisdictional Immunities of States and Their Property" was included to the agenda of the AALCO's work programme following a proposal from the Government of Japan at the Thirty-ninth Session held in Cairo in February 2000.¹ Since then the Secretariat has at successive sessions of AALCO presented reports on the developments on this topic. At the 43rd session of the AALCO held at Bali (2004), the Organization took note of the adoption of the draft United Nations Convention on Jurisdictional Immunities of States and Their Property and directed the Secretariat to continue following up the developments in this regard.

2. It is in compliance with this mandate that the Secretariat presents this report.

3. In accordance with the General Assembly resolution 32/151 of December 1977, the topic "Jurisdictional Immunities of States and Their Property" was included in the programme of work of the International Law Commission (ILC) in 1978.² At the forty-third Session (1991), the Commission adopted the final text of a set of 22 draft articles on the subject, and recommended that the General Assembly convene an international conference of plenipotentiaries to examine the draft articles and conclude a convention on the subject.³

4. Subsequently, the ILC's draft articles were the subject of examination of a Working Group established within the framework of the Sixth Committee of the General Assembly during the years 1992⁴ and 1993.⁵ The Working Group was mandated to "examine the issues of substance arising out of the draft articles, in order to facilitate a successful conclusion of a Convention through the production of general agreement". In furtherance of this process, informal consultations were held in September-October 1994 within the Sixth Committee to identify and alienate differences on substantive issues.⁶ In the same year, by resolution 49/61, the General Assembly invited Member States to submit to the UN Secretary General their comments on results of the working group and the informal consultations. The deliberations were then suspended to give more time for States to reflect on the issues involved. In 1997, the General Assembly decided to resume consideration of this item at its fifty-second session.

¹. Res. No. 39/10.

². An item entitled "Jurisdictional Immunities of States and Their Property" was included in the provisional list of 14 topics selected for codification by the International Law Commission at its first session in 1949. For details see *Yearbook of ILC* (1979), vol. II, Part. 2, pp. 185.

³. For full text of the draft articles and commentaries thereto, see Report of the International Law Commission on the work of its forty-third session, 29 April - 19 July 1991, Doc. A/46/10 at pp. 8-151.

⁴. Doc. A/C.6/47/L.10.

⁵. Doc. A/C.6/48/L.4.

⁶. For the Report of the Chairman of Informal Consultations, see Doc. A/C.6/49/L.2.

5. The General Assembly resumed consideration of this topic in 1997 (52nd session) and at its 53rd session in 1998 adopted resolution 53/98 whereby it:-

- (a) decided to establish at its 54th session an open-ended working group of the Sixth Committee to consider the outstanding substantive issues related to the draft articles; and
- (b) invited the International Law Commission to present any preliminary comments it may have regarding the outstanding substantive issues related to the draft articles.

6. Accordingly, at its fifty-first session (1999), the ILC established a Working Group on Jurisdictional Immunities of States and their property and entrusted it with the task of preparing preliminary comments as requested by the General Assembly. The ILC took note of the suggestions made by the Working Group⁷ and transmitted the same to the Sixth Committee of the UN General Assembly.

7. In line with the decision contained in UN General Assembly resolution 53/98, the fifty-fourth session of the General Assembly established a Working Group within the Sixth Committee and elected Mr. Gerhard Hafner as its Chairman. The discussion of the Working Group focused on five outstanding substantive issues identified in the report of the Working Group of the ILC, namely:

- (i) Concept of a State for purposes of immunity;
- (ii) Criteria for determining the commercial character of a contract or transaction;
- (iii) Concept of a State enterprise or other entity in relation to commercial transactions;
- (iv) Contracts of employment; and
- (v) Measures of constraint against State property.

Following its deliberations, the Chairman of the Working Group Mr. Hafner presented a Report to the Sixth Committee.⁸

8. The Working Group continued its work during the 56th session of the General Assembly. At that session, the General Assembly decided to establish an Ad hoc Committee on Jurisdictional Immunities of States and their Property, open also to participation by States Members of the specialized agencies to further the work done, consolidate areas of agreement and resolve outstanding issues. In line with this mandate, the Ad Hoc Committee met at the UN Headquarters from 4 to 13 February 2002. The work of the Ad hoc Committee saw significant progress in the attenuation of the outstanding substantive issues. More specifically, out of the five issues, two issues – one

⁷. These suggestions are contained in paragraphs 24-30; 56-60; 78-83; 103-107 and 125-129 of the Working Group's report which is annexed to the *Report of the ILC on its work of its fifty-first session*, A/54/10 at pp. 360-419.

⁸. A/C.6/54/L.12.

relating to the concept of a State for purposes of immunity and the other, on measures of constraint against State property seemed to be satisfactorily resolved.

9. In accordance with the General Assembly resolution 57/16, the Ad Hoc Committee was reconvened from 24 to 28 February 2003 in order to make a final attempt at consolidating areas of agreement and resolving outstanding issues. At the 6th plenary meeting, on 28 February 2003, the Ad Hoc Committee adopted its report containing the text of the draft articles together with understandings with regard to some of the provisions of the draft articles.⁹ At the same meeting, the Ad Hoc Committee decided to recommend that the General Assembly take a decision on the form of the draft articles. If and when the General Assembly decided to adopt the draft articles as a Convention, the draft articles would need a preamble and final clauses, including a general savings clause concerning the relationship between the articles and other international agreements relating to the same subject.

10. In accordance with the General Assembly resolution 58/74 the Ad Hoc Committee was reconvened from 1 to 5 March 2004, with the mandate to formulate a preamble and final clauses, with a view to completing a convention on jurisdictional immunities of States and their property, which would contain the results already adopted by the Ad Hoc Committee.¹⁰ The Ad Hoc Committee agreed on a preamble and final clauses for a draft Convention on Jurisdictional Immunities of States and Their Property, as well as the chapeau for the understandings with respect to certain provisions of the draft Convention. It was also agreed that the draft Convention should be entitled “United Nations Convention on Jurisdictional Immunities of States and Their Property”.

11. At its 8th plenary meeting, on 5 March 2004, the Ad Hoc Committee adopted its report containing the text of the draft United Nations Convention on Jurisdictional Immunities of States and Their Property, together with understandings with Respect to Certain Provisions of the Convention.¹¹ Further, at the same meeting the Ad Hoc Committee decided to recommend to the General Assembly the adoption of the draft United Nations Convention on Jurisdictional Immunities of States and Their Property. It was also decided that the General Assembly includes in its resolution adopting the draft United Nations Convention on Jurisdictional Immunities of States and Their Property the general understanding that the Convention does not cover criminal proceedings.

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

12. The General Assembly of the United Nations adopted the Convention on Jurisdictional Immunities of States and Their Property in its resolution 59/38 on 2 December 2004 and invited States to become parties to the Convention. Its adoption was the culmination of 35 years of work by the International Law Commission, the Sixth

⁹ General Assembly Official Records, Fifty-eighth Session, Supplement No. 22 (A/58/22).

¹⁰ A/RES/58/74

¹¹ A/AC.262/L.6.

Committee of the UN General Assembly and the Ad Hoc Committee. The Convention is open for signature by all States from 17 January 2005 until 17 January 2007.

III. SALIENT FEATURES OF THE CONVENTION

1. Immunity from the jurisdiction of the courts of another State.

13. The existence of two independent sovereign States is a prerequisite to the question of jurisdictional immunities, namely, a foreign State and a State of forum.¹² For the purpose of the present Convention the jurisdictional immunity applies not only in relation to the right of sovereign State to exemption from the exercise of the power to adjudicate, normally assumed by the judiciary or magistrate within a legal system of the territorial State, but also in relation to the non-exercise of all other administrative and executive powers, by whatever measures or procedures and by whatever authorities of the territorial State in relation to a judicial proceeding. The concept therefore covers the entire judicial process, from the initiation or institution of proceedings, service of writs, investigation, examination, trial, orders which can constitute provisional or interim measures, to decisions rendering various instances of judgments and execution of the judgments thus rendered or their suspension and further exemption. It should be stated further that the scope of the articles covers not only the question of immunities of a State from adjudication before the court of another State but also that of immunity of a State in respect of property from measures of constraint such as attachment and execution in connection with a proceeding before a court of another State.

2. Circumstances in which immunity cannot be invoked

14. The obligation to refrain from exercising jurisdiction against another State or from impleading another sovereign Government is based on the assertion or presumption that such exercise is without consent. State immunity applies on the understanding that the State against which jurisdiction is to be exercised does not consent, or is not willing to submit to the jurisdiction. This unwillingness or absence of consent is generally assumed, unless the contrary is indicated. This express consent may be given by a State for the exercise of jurisdiction by another State in the form of an international agreement, a written contract or by way of declaration before the court or a written communication in a specific proceeding.

15. However, as provided under paragraph 2 of article 7 consent by a State to the application of the law of another State shall not be construed as its consent to the exercise of jurisdiction by a court of that other State. Questions of consent to the exercise of jurisdiction and of applicable law to the case must be treated separately.

¹². The International Court of Justice in the *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)* observed that in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal. *International Court of Justice Yearbook, 2001-2002*, p. 270.

16. Another situation wherein a State cannot invoke immunity is that when its conduct, by way of certain acts, denotes that it accepts the jurisdiction of another State. As provided under article 8 (1)(a), by choosing to become a party to a litigation before the court of another State, a State clearly consents to the exercise of such jurisdiction, regardless of whether it is a plaintiff or a defendant. Similarly, a State, which participates in an interpleader proceeding voluntarily submits to the jurisdiction of that court. However, there is an exception to this situation. That is when a State institutes proceedings or intervenes in a case before it acquires knowledge of certain facts on the basis of which it could invoke immunity. In such circumstances a State can invoke immunity on the condition that it must satisfy the court that it could only have acquired knowledge of the facts justifying a claim of immunity after it had intervened in the proceeding and also it must furnish such proof at the earliest possible moment.

17. Similarly, a State does not consent to the exercise of jurisdiction of another State by entering a conditional appearance or by appearing expressly to contest or challenge jurisdiction on the ground of sovereign immunity or State immunity. Furthermore, a State may assert a right or interest in property by presenting prima facie evidence on its title at issue in a proceeding to which the State is not a party, without being submitted to the jurisdiction of another State.

18. Another form of conduct, which does not amount to waiving the immunity, is the appearance of a State, or its representatives in their official capacity in a proceeding before a court of another State, for example, to affirm that a particular person is a national of the State. In contrast to this situation, failure on the part of a State to enter an appearance in a legal proceeding is not to be construed as passive submission to the jurisdiction.

3. Counter Claims

19. A State which has instituted a proceeding before a court of another State may be said to have consented to the jurisdiction of the court in respect of counter claims against it. That State is amenable to the court's jurisdiction in respect of counter claims arising out of the same legal relationship or facts as the principal claim, or the same transaction or occurrence that is the subject matter of the principal claim. Likewise, once a State has intervened in a proceeding to make or present a claim, it is amenable to any counter claim against it which arise out of the same legal relationship or facts as the claim presented by the State.

20. Furthermore, where a State itself makes a counter claim in a proceeding instituted against it before a court of another State, it is taking a step relating to the merits of the proceeding. In such a case, the State is deemed to have consented to the exercise of jurisdiction by that court with respect not only to the counter claim brought by the State itself, but also to the principal claim against it.

4. Commercial transactions

21. The State engaging in a commercial transaction with a foreign natural or juridical person cannot invoke immunity from the exercise of jurisdiction by the judicial authority of another State where that judicial authority is competent to exercise its jurisdiction by virtue of its applicable rule of private international law. However, this rule applies only to those transactions which are entered into with natural or juridical persons only. In case of commercial transaction between States, the application of immunity from jurisdiction is valid. Thus in the case of commercial transaction between States interests of all States are protected by applying immunity to such transactions.

5. Commercial transaction by a State enterprise or other entity

22. A legal distinction is made between a State and certain of its entities in the matter of State immunity from foreign jurisdiction. In some States commercial transactions are conducted by State enterprises or other entities established by a State, which have independent legal personality. They engage in commercial transactions on their own behalf as separate entities from the parent State, and not on behalf of that State. Thus, in the event of a difference arising from a commercial transaction engaged in by a State entity, it may be sued before the court of another State and may be held liable for any consequences of the claim by the other party. In such a case, the immunity of the parent State itself is not affected, since it is not a party to the transaction.

6. Exception in cases of contracts of employment¹³

23. Another exception the Convention provides is in respect of contracts of employment. The exception under this concerns a contract of employment or service between a State and a natural person or individual for work performed or to be performed in whole or in part in the territory of another State. Therefore two sovereign States are involved in this regard, i.e., the employer State and the State of the forum. The exception

¹³. Some of the cases relevant to this issue are: Ireland, High Court, 14 March 1991, Supreme Court, 12 March 1992, *The Government of Canada v. The Employment Appeals Tribunal and Burke* (ILR 95, p. 467); Canada, Supreme Court, 21 May 1992, *United States of America v. The Public Service Alliance of Canada and Others* (ILR 94, p. 264); Belgium, Court of Appeal of Brussels, 10 March 1993, *Rafidain Bank and Iraqi Ministry for Industry v. Consarc Corporation* (ILR 106, p. 274); United States, Supreme Court, 23 March 1993, *Saudi Arabia and Others v. Nelson* (ILR 100, p. 545); Netherlands, District Court of Amsterdam, 26 May 1993, *Republic of Italy v. B.V (NYIL 1995, p. 338)*; New Zealand, Court of Appeal, 30 November 1994, *Governor of Pitcairn and Associated Islands v. Sutton* (ILR 104, p. 508); United Kingdom, Employment Appeal Tribunal, 14 December 1994 *Jayetilleke v. High Commission of the Bahamas* (ILR 107, p. 622); United Kingdom, Court of Appeal, 3 March 1995, *Employment Appeal Tribunal*, 10 July 1995, *United Arab Emirates v. Abdelghafar and Another* (ILR 104, p. 647); United Kingdom, Employment Appeal Tribunal, 6 June 1995, *Arab Republic of Egypt v. Gamal/Eldin* (ILR 104, p. 673); United Kingdom, Employment Appeal Tribunal, 8 October 1993, *Court of Appeal Civil Division*, 6 July 1995, *Government of the Kingdom of Saudi Arabia v. Ahmed* (ILR 104, p. 629); United States, Court of Appeals, 16 May 1995, *Gates and Others v. Victor Fine Foods and others* (ILR 107, p. 371); and United States, Court of Appeals, Fifth Circuit, 18 March 1996, *Brown v. Valmet-Appleton* (Lexis 4875).

to State immunity applies to matters arising out of the terms and conditions contained in the contract of employment. However, article 11, dealing with the exception of contracts of employment maintains an appropriate balance by introducing important limitations on the application for the rule of non-immunity by enumerating the circumstances where the rule of immunity still prevails.

7. Exception to immunity in cases of personal injuries and damage to property

24. This exception to the general rule of immunity is in the field of tort or civil liability resulting from an act of omission, which has caused personal injury to a natural person or damage to or loss of tangible property. Thus it is designed to provide relief or possibility of recourse to justice for individuals who suffer personal injury, death or physical damage to or loss of property caused by act or omission which might be intentional, accidental or caused by negligence attributable to a foreign State. For the purpose of application of this exception, the act of omission must occur in whole or in part in the territory of the State of the forum. Further, the author of such act or omission must also be present in that State at the time of the act or omission. The exception provided under this provision does not make any distinction between acts *jure imperii* and acts *jure gestionis*.

8. Exception in cases of ownership, possession and use of property

25. Article 13 deals with an exception to the rule of immunity from the jurisdiction of a court of another State in respect of certain categories of property situated in another State.

9. Exception in cases of intellectual and industrial property

26. Article 14 provides for the exception to the rule of immunity in respect of intellectual and industrial property.

10. Exception in cases of participation in companies or other collective bodies

27. This exception to the rule of immunity is applied in cases of participation by the State in a company or other collective body, which has been established or has its seat or principal place of business in the State of the forum. There are two conditions for the application of exception in this regard. They are, first, the body must have participants other than States or international organizations i.e., it must be a body with participation from the private sector. Secondly, the body in question must be incorporated or constituted under the law of the State of the forum., or have its seat or principal place of business in that State.

11. Exceptions in cases of ships owned and operated by a State for certain purposes

28. This exception to the immunity deals with the maritime law and relates to the conduct of external trade. Under this exception a State cannot invoke immunity from jurisdiction in respect of a ship owned and operated by it, when it is used for purposes other than government non-commercial in nature.

12. State immunity from measures of constraint¹⁴

29. Immunity from measures of constraint is separate from jurisdictional immunity, and the consent of a State to the exercise of jurisdiction of the court of another State should not imply its consent to the taking of measures of constraint, for which separate consent should be necessary. A clear distinction is drawn between jurisdictional immunity and immunity against enforcement i.e., against measures of constraint. Therefore immunity from measures of constraint is separate from jurisdictional immunity of the State. Jurisdictional immunity of the State refers exclusively to immunity from the adjudication of litigation. Thus, articles 18 and 19 deal with the rules of State immunity in its second phase i.e., measures of constraint, as a separate procedure. Therefore no measures of constraint may be taken against the property of a State except in situations provided under articles 18 and 19. It should also be mentioned here that consent to the exercise of jurisdiction under article 7 shall not be considered as consent to the taking of measures of constraint.

13. Classification of transactions¹⁵

¹⁴. The following cases are relevant to this issue: United States, Court of Appeals, Fifth Circuit, 11 February 1991, *Stena Rederi AB v. Comision de Contratos del Comit  Ejecutivo General del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana SC*; Italy, Constitutional Court, 15 July 1992, *Condor and Filvem v. Minister of Justice* (ILR 101, p. 394); United States, District Court, Southern District of New York, 6 July 1992, *Foxworth v. Permanent Mission of the Republic of Uganda to the United Nations* (ILR 99, p. 138); United States, Court of Appeals, Second Circuit, 4 March 1993, *767 Third Avenue Associates and Another v. Permanent Mission of the Republic of Zaire to the United Nations* (ILR 99, p. 195); Netherlands, Supreme Court, 28 May 1993, *The Russian Federation v. Pied-Rich B.V* (NYIL 1994, p. 512); Belgium, Civil Court of Brussels, 27 February 1995, *Iraq v. Dumez* (ILR 106, p. 284); Belgium, Civil Court of Brussels, 9 March 1995, *Zaire v. D'Hoop and Another* (ILR 106, p. 294); and Netherlands, Rotterdam District Court, 18 April 1996, *P.C. van der Linden v. The Government of the United States of America (Dept. of the Navy)* (NYIL 1997, p. 344).

¹⁵. Some of the cases relevant to this issue are: United States, Court of Appeals, Second Circuit, 21 July 1993, *Antares Aircraft LP v. Federal Republic of Nigeria and Nigerian Airport Authority* (ILR 107, p. 225); Australia, Supreme Court of Victoria, 17 February 1992, *Reid v. Republic of Nauru* (ILR 101, p. 193); Canada, Supreme Court, 21 May 1992, *United States, Court of Appeals, Seventh Circuit, 14 December 1992, Richard A. Week v. Cayman Islands*; United States, Court of Appeals, District of Columbia Circuit, 19 July 1994, *Cicippio and Others v. Islamic Republic of Iran* (ILR 107, p. 297); Ireland, High Court, 22 November 1994, *Schmidt v. Home Secretary of the Government of the UK, The Commissioner of the Metropolitan Police and Jones* (ILR 103, p. 322); New Zealand, Court of Appeal, 30 November 1994, *Governor of Pitcairn and Associated Islands v. Sutton* (ILR 104, p. 508); United States, Court of Appeals, District of Columbia Circuit, 20 January 1995, *Janini v. Kuwait University* (ILR 107, p. 367); New Zealand, Court of Appeal, 16 February 1996, *KPMG Peat Marwick and Others v. Davison/Controller and Auditor-General v. Davison Brannigan and Others v. Davison* (ILR 104, p. 526); United States, Court of Appeals, Fifth Circuit, 18 March 1996, *Brown v. Valmet-Appleton* (Lexis 4875); United Kingdom, Court of Appeal, 31 July 1996, *A Limited v. B Bank and Bank of X* (ILR 111, p. 590); and United States,

30. Article 2(2) provides the mechanism for the classification of contracts or transactions as ‘commercial’ and ‘non commercial’. This provision provides that for the purpose of determination whether a contact or transaction is a ‘commercial transaction’, reference should be primarily made to the nature test i.e., the nature of the contract. However, it also provides that reference should be made to the purpose test, i.e., purpose of the contract should also be taken into account provided that parties to the contract have agreed to that effect or if it is considered as relevant in the practice of the State of the forum.¹⁶

14. Non-applicability to criminal proceedings

31. As stated in the General Assembly resolution adopting the Convention, this Convention does not cover the criminal proceedings.

15. Non-retroactivity of the Convention

32. This Convention is applicable only in respect of those proceedings that are instituted before a court after its entry into force. Article 4 does not purport to touch upon the question of non-retroactivity in other contexts, such as diplomatic negotiations concerning the question of whether a State has violated its obligations under international law to accord jurisdictional immunity to another State in accordance with the rules of international law. Though it specifically provides for non-retroactivity in respect of a proceeding before a court, it does not in any way affect the general rule of non-retroactivity under article 28 of the Vienna Convention on the Law of Treaties.

VI. COMMENTS

33. In the view of the AALCO Secretariat, the adoption of the Convention on Jurisdictional Immunities of States and Their Property along with the understandings thereto by the UN General Assembly is a consolidated text incorporating the comments and observations of States as expressed over the past 35 years on this topic. In the assessment of the AALCO Secretariat, the adopted Convention offers promising compromises on substantive issues and simplifies the language of provisions, thus enhancing its acceptability among States.

34. The adoption of the Convention also marks as a culmination to the process of various national and international developments in the field of State immunity that started in 1970s in the form of various national legislations¹⁷ and others like the European

Court of Appeals, District of Columbia Circuit, 28 October 1998, *Atkinson v. Inter American Dev. Bank* (Lexis 24915).

¹⁶. This provision is the modified version of the 1991 ILC draft article where in it was stated that the purpose test was to be applied only when in the practice of the State, which was a party to it, that purpose was relevant to determining the non-commercial character of the contract or transaction.

¹⁷. Some of the examples for national legislation are: USA, Foreign Sovereign Immunities Act; 1976; United Kingdom, State Immunity Act, 1978; Canada, State Immunity Act 1982, and Australia, Foreign States Immunities Act 1985.

Convention on State Immunity, 1972. As the Convention reflects various views it is expected that many States would become parties with a view to bringing in uniformity of practice.

35. The peculiar feature of the issue of State immunity is that it is at the point of intersection of international law and national procedural law. Till now it has been validated on the principles of customary international law as it is recognized in the preamble of the Convention. As it is the domestic courts that determine the claims for State immunity there has not been much unanimity despite some consensus among States on certain issues. Thus, the Convention would mark an important event, which would lead to harmonization of State practice.

36. Though the exercise took long time it is certainly a timely achievement, particularly in the context of globalization of economies. When there has been a large-scale movement of investments, disputes arising out of such ventures need a legal mechanism. Therefore, the Convention would facilitate the smooth flow of investments, as it would bring in legal clarity in such transactions.

Annex

United Nations Convention on Jurisdictional Immunities of States and Their Property

The States Parties to the present Convention,

Considering that the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law,

Having in mind the principles of international law embodied in the Charter of the United Nations,

Believing that an international convention on the jurisdictional immunities of States and their property would enhance the rule of law and legal certainty, particularly in dealings of States with natural or juridical persons, and would contribute to the codification and development of international law and the harmonization of practice in this area,

Taking into account developments in State practice with regard to the jurisdictional immunities of States and their property,

Affirming that the rules of customary international law continue to govern matters not regulated by the provisions of the present Convention,

Have agreed as follows:

Part I

Introduction

Article 1

Scope of the present Convention

The present Convention applies to the immunity of a State and its property from the jurisdiction of the courts of another State.

Article 2

Use of terms

1. For the purposes of the present Convention:

(a) “court” means any organ of a State, however named, entitled to exercise judicial functions;

(b) “State” means:

(i) the State and its various organs of government;

(ii) constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity;

(iii) agencies or instrumentalities of the State or other entities, to the extent

that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State;

(iv) representatives of the State acting in that capacity;

(c) “commercial transaction” means:

(i) any commercial contract or transaction for the sale of goods or supply of services;

(ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction;

(iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

2. In determining whether a contract or transaction is a “commercial transaction” under paragraph 1 (c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.

3. The provisions of paragraphs 1 and 2 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or in the internal law of any, State.

Article 3

Privileges and immunities not affected by the present Convention

1. The present Convention is without prejudice to the privileges and immunities enjoyed by a State under international law in relation to the exercise of the functions of:

(a) its diplomatic missions, consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences; and

(b) persons connected with them.

2. The present Convention is without prejudice to privileges and immunities accorded under international law to heads of State *ratione personae*.

3. The present Convention is without prejudice to the immunities enjoyed by a State under international law with respect to aircraft or space objects owned or operated by a State.

Article 4

Non-retroactivity of the present Convention

Without prejudice to the application of any rules set forth in the present Convention to which jurisdictional immunities of States and their property are subject under international law independently of the present Convention, the present Convention shall not apply to any question of jurisdictional immunities of States or their property arising in a proceeding instituted against a State before a court of another State prior to the entry into force of the present Convention for the States concerned.

Part II

General principles

Article 5

State immunity

A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention.

Article 6

Modalities for giving effect to State immunity

1. A State shall give effect to State immunity under article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another State and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected.

2. A proceeding before a court of a State shall be considered to have been instituted against another State if that other State:

(a) is named as a party to that proceeding; or

(b) is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State.

Article 7

Express consent to exercise of jurisdiction

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case:

(a) by international agreement;

(b) in a written contract; or

(c) by a declaration before the court or by a written communication in a specific proceeding.

2. Agreement by a State for the application of the law of another State shall not be interpreted as consent to the exercise of jurisdiction by the courts of that other State.

Article 8

Effect of participation in a proceeding before a court

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has:

(a) itself instituted the proceeding; or

(b) intervened in the proceeding or taken any other step 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 took such a step, it can claim immunity based on those facts, provided it does so at the earliest possible moment.

2. A State shall not be considered to have consented to the exercise of jurisdiction by a court of another State if it intervenes in a proceeding or takes any other step for the sole purpose of:

(a) invoking immunity; or

(b) asserting a right or interest in property at issue in the proceeding.

3. The appearance of a representative of a State before a court of another State as a witness shall not be interpreted as consent by the former State to the exercise of jurisdiction by the court.

4. Failure on the part of a State to enter an appearance in a proceeding before a court of another State shall not be interpreted as consent by the former State to the exercise of jurisdiction by the court.

Article 9

Counterclaims

1. A State instituting a proceeding before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of any counterclaim arising out of the same legal relationship or facts as the principal claim.
2. A State intervening to present a claim in a proceeding before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of any counterclaim arising out of the same legal relationship or facts as the claim presented by the State.
3. A State making a counterclaim in a proceeding instituted against it before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of the principal claim.

Part III

Proceedings in which State immunity cannot be invoked

Article 10

Commercial transactions

1. If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.
2. Paragraph 1 does not apply:
 - (a) in the case of a commercial transaction between States; or
 - (b) if the parties to the commercial transaction have expressly agreed otherwise.
3. Where a State enterprise or other entity established by a State which has an independent legal personality and is capable of:
 - (a) suing or being sued; and
 - (b) acquiring, owning or possessing and disposing of property, including property which that State has authorized it to operate or manage, is involved in a proceeding which relates to a commercial transaction in which that entity is engaged, the immunity from jurisdiction enjoyed by that State shall not be affected.

Article 11

Contracts of employment

1. 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 contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State.
2. Paragraph 1 does not apply if:
 - (a) the employee has been recruited to perform particular functions in the exercise of governmental authority;
 - (b) the employee is:
 - (i) a diplomatic agent, as defined in the Vienna Convention on Diplomatic Relations of 1961;
 - (ii) a consular officer, as defined in the Vienna Convention on Consular Relations of 1963;
 - (iii) a member of the diplomatic staff of a permanent mission to an international organization or of a special mission, or is recruited to represent a State at an international conference; or
 - (iv) any other person enjoying diplomatic immunity;
 - (c) the subject matter of the proceeding is the recruitment, renewal of employment or reinstatement of an individual;
 - (d) the subject matter of the proceeding is the dismissal or termination of employment of an individual and, as determined by the head of State, the head of Government or the Minister for Foreign Affairs of the employer State, such a proceeding would interfere with the security interests of that State;
 - (e) the employee is a national of the employer State at the time when the proceeding is instituted, unless this person has the permanent residence in the State of the forum; or
 - (f) the employer State and the employee have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject matter of the proceeding.

Article 12

Personal injuries and damage to 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 pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in

part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.

Article 13

Ownership, possession and use of 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 the determination of:

- (a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum;
- (b) any right or interest of the State in movable or immovable property arising by way of succession, gift or *bona vacantia*; or
- (c) any right or interest of the State in the administration of property, such as trust property, the estate of a bankrupt or the property of a company in the event of its winding up.

Article 14

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, trademark, 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.

Article 15

Participation in companies or other collective bodies

1. A State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to its participation in a company or other collective body, whether incorporated or unincorporated, being a proceeding concerning the relationship between the State and the body or the other participants therein, provided that the body:

- (a) has participants other than States or international organizations; and
- (b) is incorporated or constituted under the law of the State of the forum or has its seat or principal place of business in that State.

2. A State can, however, invoke immunity from jurisdiction in such a proceeding if the States concerned have so agreed or if the parties to the dispute have so provided by an agreement in writing or if the instrument establishing or regulating the body in question contains provisions to that effect.

Article 16

Ships owned or operated by a State

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the operation of that ship if, at the time the cause of action arose, the ship was used for other than government non-commercial purposes.

2. Paragraph 1 does not apply to warships, or naval auxiliaries, nor does it apply to other vessels owned or operated by a State and used, for the time being, only on government non-commercial service.

3. 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 the carriage of cargo on board a ship owned or operated by that State if, at the time the cause of action arose, the ship was used for other than government non-commercial purposes.

4. Paragraph 3 does not apply to any cargo carried on board the ships referred to in paragraph 2, nor does it apply to any cargo owned by a State and used or intended for use exclusively for government non-commercial purposes.

5. States may plead all measures of defence, prescription and limitation of liability which are available to private ships and cargoes and their owners.

6. If in a proceeding there arises a question relating to the government and noncommercial character of a ship owned or operated by a State or cargo owned by a State, a certificate signed by a diplomatic representative or other competent authority of that State and communicated to the court shall serve as evidence of the character of that ship or cargo.

Article 17

Effect of an arbitration agreement

If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

- (a) the validity, interpretation or application of the arbitration agreement;
- (b) the arbitration procedure; or
- (c) the confirmation or the setting aside of the award, unless the arbitration agreement otherwise provides.

Part IV

State immunity from measures of constraint in connection with proceedings before a court

Article 18

State immunity from pre-judgment measures of constraint

No pre-judgment measures of constraint, such as attachment or arrest, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

- (a) the State has expressly consented to the taking of such measures as indicated:
 - (i) by international agreement;
 - (ii) by an arbitration agreement or in a written contract; or
 - (iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or
- (b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding.

Article 19

State immunity from post-judgment measures of constraint

No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

- (a) the State has expressly consented to the taking of such measures as indicated:
 - (i) by international agreement;
 - (ii) by an arbitration agreement or in a written contract; or
 - (iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or
- (b) the State has allocated or earmarked property for the satisfaction of the, claim which is the object of that proceeding; or
- (c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.

Article 20

Effect of consent to jurisdiction to measures of constraint

Where consent to the measures of constraint is required under articles 18 and 19, consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint.

Article 21

Specific categories of property

1. The following categories, in particular, of property of a State shall not be, considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under article 19, subparagraph (c):

- (a) property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences;
- (b) property of a military character or used or intended for use in the performance of military functions;
- (c) property of the central bank or other monetary authority of the State;
- (d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale;
- (e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.

2. Paragraph 1 is without prejudice to article 18 and article 19, subparagraphs (a) and (b).

Part V

Miscellaneous provisions

Article 22

Service of process

1. Service of process by writ or other document instituting a proceeding against a State shall be effected:

(a) in accordance with any applicable international convention binding on the State of the forum and the State concerned; or

(b) in accordance with any special arrangement for service between the claimant and the State concerned, if not precluded by the law of the State of the forum; or

(c) in the absence of such a convention or special arrangement:

(i) by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned; or

(ii) by any other means accepted by the State concerned, if not precluded by the law of the State of the forum.

2. Service of process referred to in paragraph 1 (c) (i) is deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs.

3. These documents shall be accompanied, if necessary, by a translation into the official language, or one of the official languages, of the State concerned.

4. Any State that enters an appearance on the merits in a proceeding instituted against it may not thereafter assert that service of process did not comply with the provisions of paragraphs 1 and 3.

Article 23

Default judgment

1. A default judgment shall not be rendered against a State unless the court has found that:

(a) the requirements laid down in article 22, paragraphs 1 and 3, have been complied with;

(b) a period of not less than four months has expired from the date on which the service of the writ or other documents instituting a proceeding has been effected or deemed to have been effected in accordance with article 22, paragraphs 1 and 2; and

(c) the present Convention does not preclude it from exercising jurisdiction.

2. A copy of any default judgment rendered against a State, accompanied if necessary by a translation into the official language or one of the official languages of the State concerned, shall be transmitted to it through one of the means specified in article 22, paragraph 1, and in accordance with the provisions of that paragraph.

3. The time limit for applying to have a default judgment set aside shall not be less than four months and shall begin to run from the date on which the copy of the judgment is received or is deemed to have been received by the State concerned.

Article 24

Privileges and immunities during court proceedings

1. Any failure or refusal by a State to comply with an order of a court of another State enjoining it to perform or refrain from performing a specific act or to produce any document or disclose any other information for the purposes of a proceeding shall entail no consequences other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal.

2. A State shall not be required to provide any security, bond or deposit, however described, to guarantee the payment of judicial costs or expenses in any proceeding to which it is a respondent party before a court of another State.

Part VI

Final clauses

Article 25

Annex

The annex to the present Convention forms an integral part of the Convention.

Article 26

Other international agreements

Nothing in the present Convention shall affect the rights and obligations of States Parties under existing international agreements which relate to matters dealt with in the present Convention as between the parties to those agreements.

Article 27

Settlement of disputes

1. States Parties shall endeavour to settle disputes concerning the interpretation or application of the present Convention through negotiation.
2. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which cannot be settled through negotiation within six months shall, at the request of any of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.
3. Each State Party may, at the time of signature, ratification, acceptance or approval of, or accession to, the present Convention, declare that it does not consider itself bound by paragraph 2. The other States Parties shall not be bound by paragraph 2 with respect to any State Party which has made such a declaration.
4. Any State Party that has made a declaration in accordance with paragraph 3 may at any time withdraw that declaration by notification to the Secretary-General of the United Nations.

Article 28

Signature

The present Convention shall be open for signature by all States until 17 January 2007 at the United Nations Headquarters, New York.

Article 29

Ratification, acceptance, approval or accession

1. The present Convention shall be subject to ratification, acceptance or approval.
2. The present Convention shall remain open for accession by any State.
3. The instruments of ratification, acceptance, approval or accession shall be deposited with the Secretary-General of the United Nations.

Article 30

Entry into force

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.
2. For each State ratifying, accepting, approving or acceding to the present Convention after the deposit of the thirtieth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 31

Denunciation

1. Any State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations.
2. Denunciation shall take effect one year following the date on which notification is received by the Secretary-General of the United Nations. The present Convention shall, however, continue to apply to any question of jurisdictional immunities of States or their property arising in a proceeding instituted against a State before a court of another State prior to the date on which the denunciation takes effect for any of the States concerned.
3. The denunciation shall not in any way affect the duty of any State Party to fulfil any obligation embodied in the present Convention to which it would be subject under international law independently of the present Convention.

Article 32

Depositary and notifications

1. The Secretary-General of the United Nations is designated the depositary of the present Convention.
2. As depositary of the present Convention, the Secretary-General of the United Nations shall inform all States of the following:
 - (a) signatures of the present Convention and the deposit of instruments of ratification, acceptance, approval or accession or notifications of denunciation, in accordance with articles 29 and 31;
 - (b) the date on which the present Convention will enter into force, in accordance with article 30;
 - (c) any acts, notifications or communications relating to the present Convention.

Article 33

Authentic texts

The Arabic, Chinese, English, French, Russian and Spanish texts of the present Convention are equally authentic.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Convention opened for signature at United Nations Headquarters in New York on 17 January 2005.

Annex to the Convention

Understandings with respect to certain provisions of the Convention

The present annex is for the purpose of setting out understandings relating to the provisions concerned.

With respect to article 10

The term “immunity” in article 10 is to be understood in the context of the present Convention as a whole.

Article 10, paragraph 3, does not prejudice the question of “piercing the corporate veil”, questions relating to a situation where a State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim, or other related issues.

With respect to article 11

The reference in article 11, paragraph 2 (d), to the “security interests” of the employer State is intended primarily to address matters of national security and the security of diplomatic missions and consular posts.

Under article 41 of the 1961 Vienna Convention on Diplomatic Relations and article 55 of the 1963 Vienna Convention on Consular Relations, all persons referred to in those articles have the duty to respect the laws and regulations, including labour laws, of the host country. At the same time, under article 38 of the 1961 Vienna Convention on Diplomatic Relations and article 71 of the 1963 Vienna Convention on Consular Relations, the receiving State has a duty to exercise its jurisdiction in such a manner as not to interfere unduly with the performance of the functions of the mission or the consular post.

With respect to articles 13 and 14

The expression “determination” is used to refer not only to the ascertainment or verification of the existence of the rights protected, but also to the evaluation or assessment of the substance, including content, scope and extent, of such rights.

With respect to article 17

The expression “commercial transaction” includes investment matters.

With respect to article 19

The expression “entity” in subparagraph (c) means the State as an independent legal personality, a constituent unit of a federal State, a subdivision of a State, agency or instrumentality of a State or other entity, which enjoys independent legal personality. The words “property that has a connection with the entity” in subparagraph (c) are to be understood as broader than ownership or possession. Article 19 does not prejudice the question of “piercing the corporate veil”, questions relating to a situation where a State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim, or other related issues.