

# JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

## I. INTRODUCTION

1. 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. 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.<sup>1</sup>

2. 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 1992<sup>2</sup> and 1993.<sup>3</sup> 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.<sup>4</sup> 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.

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

- (a) decided to establish at its 54<sup>th</sup> 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.

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

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<sup>1</sup> 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.

<sup>2</sup> Doc. A/C.6/47/L.10.

<sup>3</sup> Doc. A/C.6/48/L.4.

<sup>4</sup> For the Report of the Chairman of Informal Consultations, see Doc. A/C.6/49/L.2.

note of the suggestions made by the Working Group<sup>5</sup> and transmitted the same to the Sixth Committee of the UN General Assembly.

4. 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.<sup>6</sup>

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

6. At its 57<sup>th</sup> session (2002), the General Assembly noted the progress made in the Ad hoc Committee and by resolution 57/16 decided that the Ad Hoc Committee shall be reconvened from 24 to 28 February 2003 in order to make a final attempt at consolidating areas of agreement and resolving outstanding issues, with a view to elaborating a generally acceptable instrument based on the draft articles on jurisdictional immunities of States and their property adopted by the International Law Commission at its forty-third session, and also on the discussions of the open-ended working group of the Sixth Committee and the Ad Hoc Committee and their results, as well as to recommend a form for the instrument.

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<sup>5</sup> 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.

<sup>6</sup> A/C.6/54/L.12.

7. 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.<sup>7</sup> Since then the Secretariat has at successive sessions of AALCO presented reports on the developments within the UN Sixth Committee on this topic. At the 41<sup>st</sup> session of the AALCO held at Abuja (2002), the Organization took note of the fact that an Ad Hoc Committee on Jurisdictional Immunities would be convened within the framework of UN General Assembly's Sixth Committee in early 2003 and directed the Secretariat to monitor the developments in this regard and report to the next session.

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

## **II. MEETING OF THE AD HOC COMMITTEE ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY (24-28 February 2003)**

### **A. Organization of Work**

9. The Ad Hoc Committee on Jurisdictional Immunities of States and Their Property (hereinafter referred to as the 'Ad Hoc Committee') met at the UN Headquarters from 24 to 28 February 2003.

10. The Ad Hoc Committee was open to all States Members of the United Nations and to States Members of the specialized agencies. The elected members of its Bureau were:

Chairman:	Mr. Gerhard Hafner (Austria)
Vice-Chairpersons:	Mr. Karim Medrek (Morocco)
	Mr. Piotr Ogonowski (Poland)
	Mr. M. Gandhi (India)
Rapporteur:	Mr. Guillermo Rayes (Colombia)

11. The Ad Hoc Committee had before it its report on the 2002 session and for reference purposes, comments submitted by States in accordance with General Assembly resolution 49/61 of 9 December 1994 and on the reports of the open-ended working group of the Sixth Committee established under Assembly resolutions 53/98 of 8 December 1998 and 54/101 of 9 December 1999, as contained in the reports of the Secretary-General.<sup>8</sup> The Committee also had before it the 1999 and 2000 reports of the Chairman of the working group of the Sixth Committee,<sup>9</sup> the draft articles on jurisdictional immunities of States and their property adopted by the International Law Commission at its forty-third session in 1991,<sup>10</sup> and the comments and suggestions made

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<sup>7</sup> Res. No. 39/10.

<sup>8</sup> A/52/294, A/53/274 and Add.1, A/54/266, A/55/298 and A/56/292 and Add.1 and 2.

<sup>9</sup> A/C.6/54/L.12 and A/C.6/55/L/12/

<sup>10</sup> *Yearbook of the International Law Commission, 1991*, vol. II, Part Two (United Nations

by the Commission at its fifty-fourth session in 1999,<sup>11</sup> in accordance with General Assembly resolution 53/98.

12. The Working Group proceeded with the substantive discussion of the outstanding issues and established two informal consultative groups. The first group, coordinated by Amb. Chusei Yamada (Japan), dealt with the criteria for determining the commercial character of a contract or transaction under paragraph 2 of article 2. The second group, coordinated by Michael Bliss (Australia), considered outstanding issues relating to the concept of a State enterprise or other entity in relation to commercial transactions under paragraph 3 of article 10, contacts of employment under paragraph 2 of article 11, the question of non-applicability of the draft articles to criminal proceedings, and their relationship with other agreements. Pending issues concerning articles 13, 14, 17, 18 and the form of the future instrument were considered by the Working Group of the Whole.

13. The Working Group of the Whole discussed and resolved all the outstanding issues.

## **B. Outcome of the Meeting of the Ad hoc Committee**

14. At its 6<sup>th</sup> plenary meeting, on 28 February 2003, the Ad Hoc Committee adopted its report containing the text of the draft articles on jurisdictional immunities of States and their property, together with understandings with regard to some of the provisions of the draft articles.<sup>12</sup>

15. 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 saving provision concerning the relationship between the articles and other international agreements relating to the same subject.

## **III. OVERVIEW OF THE DRAFT ARTICLES ADOPTED BY THE AD HOC COMMITTEE**

16. The draft articles as amended and adopted by the Ad Hoc Committee retain the basic structure and contents of the set of draft articles as originally adopted by the International Law Commission in 1991. The changes effected by the Ad hoc Committee are largely related to the five outstanding substantive issues as identified in paragraph 4 of this document. Therefore, the following pages would be limited to examining the draft articles as amended by the Ad Hoc Committee. The purpose of this exercise is to enable Member States to identify the changes made to the original version as proposed by ILC and assesses the merits of the new formulations.

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publication, Sales No. E.93.V.9 (Part 2), document A/46/10, chap. II, para. 28.

<sup>11</sup> *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* and corrigenda (A/54/10 and Corr.1 and 2), annex.

<sup>12</sup> The Understandings as adopted by the Ad Hoc Committee is reproduced as annex to this report.

**(i) Definition of a State for purpose of immunity**

17. Article 2(b) of the ILC's draft articles on jurisdictional immunities defines State as:-

- (b) *"State" means*
  - (i) *the State and its various organs of government;*
  - (ii) *constituent units of a federal State;*
  - (iii) *political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State;*
  - (iv) *agencies or instrumentalities of the State and other entities, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State;*
  - (v) *representatives of the State acting in that capacity.*

18. The inclusion of "constituent units of a federal State" in the definition of a 'State' under Article 2(1)(b) has been contested within the Sixth Committee. The crux of the issue is whether a constituent unit of a federal State may be accorded the same immunity as the federal State, without the additional requirement that the constituent unit is performing acts in the exercise of the sovereign authority of the State. It may be recalled this difficulty arises as the constituent unit of a federal State could exercise governmental authority in a dual capacity - one, on behalf of the federal State and secondly, on its own behalf, pursuant to the division of public power under its national constitution between the federal State and the constituent units.

19. The Working Group of the ILC suggested the deletion of paragraph 1(b)(ii) of Article 2, and the element "Constituent units of a federal State" would join "political subdivisions of the State" in present paragraph 1(b)(iii). This formulation, while allowing for the immunity of constituent units, at the same time addresses the concern of States which found the difference in treatment between constituent units of federal States and political subdivisions of the State confusing.

20. In view of these concerns, the draft article as presently adopted by the Ad hoc Committee is as follows:

- (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 the 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 acts **and are actually performing acts** in the exercise of sovereign authority of the State;*

(iv) *Representatives of the State acting in that capacity.*

**(ii) Criteria for determining the commercial character of a contract or transaction**

21. Article 2, paragraph (2) of the ILC's draft articles states:

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, in the practice of the State which is a party to it, that purpose is relevant to determining the non-commercial character of the contract or transaction.*

22. While some States consider that only the nature of the activity should be taken into account in determining whether it is commercial or not, other States consider that the 'nature' criterion alone does not always permit a court to reach a conclusion. Therefore, recourse must sometimes be made to the 'purpose' criterion, which examines whether the act was undertaken with a commercial or a governmental purpose. Paragraph 2(2) of the ILC draft is a compromise test containing nature-cum-purpose test. But still, the attempt to provide an integration of the two criteria has met with resistance in the Sixth Committee.

23. Opinion on this issue has been quite divided within the Sixth Committee. The comments submitted by States since 1992 on the ILC draft articles could be classified into two groups; one group welcomed the draft articles including the purpose test, while the other insisted that the nature test should be the sole criterion.

24. The text as adopted by the Ad Hoc Committee this year seeks to resolve this difficulty by adopting the following formulation:

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.*

25. This new formulation, while retaining the primacy of the "nature" test, is permissive in character as regards the "purpose" test. Thus the purpose of the transaction shall be taken into account, if:

- (a) the parties to the contract or transaction have so agreed; or
- (b) in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.

While (b) is adopted from the ILC draft articles, formulation (a) is new. This new formulation seems to offer a reasonable compromise and a way out of the controversy that has so long afflicted this provision.

**(iii) Concept of a State enterprise or other entity in relation to commercial transactions**

26. Article 10, paragraph 3 of the ILC's draft articles provides that: -

*"3. The immunity from jurisdiction enjoyed by a State shall not be affected with regard to a proceeding which relates to a commercial transaction engaged in by a State enterprise or other entity established by the State which has an independent legal personality and is capable of:*

*(a) suing or being sued; and*

*(b) acquiring, owning or possessing and disposing of property, including property which the State has authorized it to operate or manage.*

27. Whereas the State as defined in Article 2 would normally include various entities. Article 10, paragraph 3 (as reproduced above), recognizes, in the specific context of commercial transactions, a legal distinction between a State and certain entities in the matter of State immunity. In the economic system of some States, more particularly developing countries, commercial transactions are normally conducted by State enterprises or other entities established by a state, which have independent legal personality. As a rule, they engage in commercial transactions on their own behalf as separate entities, and not on behalf of the State. Thus, when a dispute arises from a commercial transaction engaged in by a State enterprise, it may be sued before the courts of another State. In such a case, the immunity of the parent State will not be affected as it is not a party to the transaction. Interestingly, paragraph 3 of Article 10 was not originally present in the ILC draft, but was later incorporated in response to demands that the distinction between such enterprises and the parent State should be clarified so as to avoid abuse of judicial process against the State.

28. Some States had objected to the provision on the ground that it did not expressly state that the State enterprise or other entity was acting as an agent of the State, or that the State was acting as a guarantor of a liability assumed by that State enterprise or other entity.

29. During the informal consultations held in the year 1994, pursuant to General Assembly decision 48/413, the following was suggested as a basis for a compromise:

"The scope of the provision of article 10, paragraph 3, could be clarified by indicating that the question of the liability of a State could arise in relation to a commercial transaction engaged in by a State enterprise or other entity established by that State where:

- (a) the State enterprise or other entity engages in a commercial transaction as an authorized agent of the State;
- (b) the State acts as a guarantor of a liability of the entity; or
- (c) the State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim".

30. The ILC's Working Group in 1999 offered the following suggestion :-

"Paragraph 3 of article 10 could be clarified by indicating that the immunity of a State would not apply to liability claims in relation to a commercial transaction engaged 'in by a State enterprise or other entity established by that State where:

- (a) the State enterprise or other entity engages in a commercial transaction as an authorized agent of the State;
- (b) the State acts as a guarantor of a liability of the State enterprise or other entity.

31. Taking into account the above-said positions, the Ad Hoc Committee's formulation of article 10. paragraph 3 is as follows:

**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 the 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.**

32. This formulation is aimed at clarifying the distinction between the parent State and a State enterprise for purposes of "immunity". While the new formulation essentially retains the core elements of the original ILC draft, the language is direct and forthright thus providing the necessary clarity.

33. This new formulation has to be read along with the "Understandings" reached by the Ad Hoc Committee. With respect to Article 10, the Ad hoc Committee appends the following understanding.

*Article 10, paragraph 3, does not pre-judge the question of "piercing the corporate veil", the 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.*

34. It is clear that this understanding is intended to accommodate the concerns expressed in paragraphs 29 and 30 above.

**(iv). Contracts of employment:-**

35. Article 11 of the ILC's article on "Contracts of Employment" as adopted in 1991 read as follows:-

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 functions closely related to the exercise of governmental authority;*
- (b) the subject of the proceeding is the recruitment, renewal of employment or reinstatement of an individual;*
- (c) the employee was neither a national nor a habitual resident of the State of the forum at the time when the contract of employment was concluded;*
- (d) the employee is a national of the employer State at the time when the proceeding is instituted; or*
- (e) the employer State and the employee have otherwise agreed in writing, subject to any consideration of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.*

36. Article 11 seeks to maintain a delicate balance between the competing interests of the employer State with regard to the application of its laws, and the overriding interests of the State of the forum for the application of its labour laws, in particular the need to protect the employee by offering him access to legal proceedings.

37. Divergent views exist on subparagraphs (a) and (c) of paragraph 2. As regards subparagraph (a), there was some question as to whether the phrase "closely connected to the exercise of the governmental authority" was sufficiently clear to facilitate its application by courts. With regard to (c) it was suggested that this provision could not be reconciled with the principle of non-discrimination based on nationality.

38. Accordingly, in 1994, the Chairman of the Informal Consultations proposed that:

"Further consideration could be given to the possibility of clarifying the phrase contained in subparagraph (a) and to the deletion of subparagraph (c) in the light of the principle of non-discrimination".

39. The ILC's Working Group agreed that, in subparagraph (a) of Article 11(2), the words "closely related to" found in the expression "perform functions closely related to the exercise of governmental authority", could be deleted. Consequently, the scope of the subparagraphs could be restricted to "persons performing functions in the exercise of governmental authority".

40. The Working Group also agreed that the subparagraph could be further clarified by stating clearly that paragraph 1 of article 11 would not apply if the employee has been recruited to perform functions in the exercise of governmental authority", in particular:

- Diplomatic staff and consular officers, as defined in the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, respectively;
- Diplomatic staff of permanent missions to international organizations and of special missions;

41. The issue was the subject of substantive discussions and further refinements to the language of this provision was attempted within the Sixth Committee's Working Group on Jurisdictional Immunities and at the Ad Hoc Committee's meeting last year. On the basis of these deliberations, the text as adopted by the Ad hoc Committee this year is as follows:

2. *Paragraph 1 does not apply if:*

*(a) The employee has been recruited to perform particular functions in the exercise of governmental authority;*

*(a bis) The employee is:*

- (i) A diplomatic agent, as defined in the Vienna Convention on Diplomatic Relations of 1961;*
- (ii) A consular officer, as defined by the Vienna Convention on Consular Relations of 1963;*
- (iii) A member of diplomatic staff of permanent missions to international organizations, of special missions, or is recruited to represent a State at international conferences; or*
- (iv) Any other person enjoying diplomatic immunity.*

(b) *The subject of the proceeding is the recruitment, renewal of employment or reinstatement of an individual;*

(c) *The subject 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;*

(d) *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 State of the forum; or*

(e) *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.*

42. It may be noted that the new formulation deletes clause (c) of article 11(2) of the ILC draft version for the reasons discussed above. Instead a new clause is inserted providing immunity for proceedings relating to the dismissal or termination of employment, if such a proceeding would interfere with the security interests of that State. This clause is to be read with the following understanding as provided by the Ad hoc Committee:

*The Ad hoc Committee noted that the reference in article 11(2) (c) to the “security interests” of the employer State was intended primarily to address matters of national security and the security of diplomatic missions and consular posts.*

43. The new clause (*a bis*) is adopted from the alternatives suggested by the Ad hoc Committee during its last year session (2002).

44. The new formulation of clause (d) is similar to the original ILC draft, except for the introduction of an additional element, namely the phrase “unless this person has the permanent residence in State of the forum”. This addition constitutes a fine balanced approach aimed at protecting the interests of different parties: the State of the employee’s nationality, the employee and the sanctity of the laws of the forum State.

45. Issues relating to employment are by nature complex and have the potential to create friction between the foreign State and the forum State. Recognizing this practical aspects of the issue, the Ad hoc Committee appends the following understanding to article 11:

*The Ad Hoc Committee noted that 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 the respect of labour laws, of the host country. At the same time the Ad Hoc Committee also noted that 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.*

**(v) Measures of constraint against State property:**

46. Part IV of the ILC's original draft titled "State Immunity from Measures of Constraint in connection with Proceedings before a Court" contains two provisions: Articles 18 and 19.

47. Article 18 is titled "State immunity from measures of constraint" and reads as follows:-

1. *No measures of constraint, such as attachment, arrest and 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;*
  - (b) *the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or*
  - (c) *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 and has a connection with the claim which is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed.*
2. *Consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint under paragraph 1, for which separate consent shall be necessary.*

48. Article 19 titled "Specific categories of property" reads as follows:

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 paragraph 1(c) of article 18:*
  - (a) *property, including any bank account, which is used or intended for use for the purposes 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 for military purposes;*
- (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 paragraph 1(a) and (b) of article 18.*

49. Written comments, by several states made after the ILC's adoption of its draft articles, insisted on a further examination of article 18. Some comments mentioned the importance of the distinction between "prejudgment or interim measures" and "measures of execution"; other comments were related to the possibility of the enforcement of a judgment in a third State; still other comments suggested the need for the provision to establish the obligation of a State to satisfy a judgment rendered against it.

50. These two provisions have been the subject of intense consideration within the Sixth Committee's Working Group and also the Ad hoc Committee on Jurisdictional Immunities. Based on the views expressed in these meetings, the Ad hoc Committee has presently adopted the following provisions.

51. A new provision (Article XY) is introduced to deal with pre-judgment measures of constraint.

**Article XY**  
**State immunity from pre-judgement measures of constraint**

*No pre-judgement 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.*

52. As regards Article 18, the following is the adopted text:

## **Article 18**

### **State immunity from post-judgement measures of constraint**

1. No **post-judgement** measures of constraint, such as attachment, arrest and 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-judgement measures of constraint may only be taken against property that** has a connection with **the entity** against which the proceeding was directed.

## **Article 18 bis**

### **Effect of consent to jurisdiction to measures of constraint**

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

53. The new formulations adopted by the Ad hoc Committee is in line with the views expressed by many States in the Sixth Committee who argued for explicitly setting out the rule of immunity as regards pre-judgement and post-judgement measures of constraint.

54. The formulation “It has been established that” as added to the opening phrase of Article 18(c) leads to the inference that a higher degree of burden of proof is on the party seeking measures of constraint to adduce the relevant evidence in this regard. Secondly, the reformulated phrase “provided that post-judgement measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed” is a welcome improvement over the ILC’s version, in terms of the simple and direct language employed by the Ad hoc Committee.

55. These provisions are to be read in conjunction with the following “understandings” as set out by the Ad hoc Committee:

*The expression “entity” in paragraph (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 paragraph (c) are to be understood as broader than ownership or possession.*

*Article 18 does not pre-judge 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.*

56. The reformulated text of Article 19 as adopted by the Ad hoc Committee is as follows:

## **Article 19**

### **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 paragraph 1(c) of article 18:*

- (f) *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;*
- (g) *Property of a military character or used or intended for **use in the performance of** military functions;*
- (h) *Property of the central bank or other monetary authority of the State;*
- (i) *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;*
- (j) *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 XY and article 18, subparagraphs (a) and (b).***

### **(vi) Miscellaneous**

57. A few minor issues which arose in connection with Article 13 Article 14(a), and Article 17 were dealt by the Ad Hoc Committee in the form of “understandings”. The texts of the understandings are reproduced as annex to this document.

#### IV. CONCLUDING OBSERVATIONS

58. In the view of the AALCO Secretariat, the outcome of the recent meeting of the Ad hoc Committee could hopefully signal the culmination of the work that began within the Sixth Committee of the UN General Assembly in 1992. The draft articles as amended and adopted by the Ad hoc Committee, along with the understandings thereto is a consolidated text incorporating the comments and observations of States as expressed over the past 10 years on the original version of the ILC draft articles on this topic. In the assessment of the AALCO Secretariat, the adopted text offers promising compromises on outstanding substantive issues and simplifies the language of some provisions, thus enhancing its acceptability among States.

59. As regards specific aspects of the draft articles, the Secretariat offers the following comments: -

(a) The formulation of article 2(2) is a reasonable compromise that would perhaps resolve the debate over nature –vs- purpose criteria for determining the commercial character of a transaction. While the “nature” test is still the predominant factor the requirement that “purpose should also be taken into account if the parties to the contract or transaction have so agreed” introduces party autonomy as to the choice of the relevant criteria. In the view of the Secretariat, this formulation serves a functional purpose. Party autonomy over choice of relevant criteria, in a sense, could well provide an element of dynamism. In a progressively liberalizing economy, party autonomy would possibly influence public policy in the long run. It could result in the assimilation of State practice reflective of the restrictive immunity doctrine.

(b) As regards “State enterprises”, the language of article 10, paragraph 3 as adopted is more direct and simple. The “understanding” appended to this provision seeks to accommodate concerns raised by some countries, yet the legal status of the understanding is not clear. As the Report of the Ad hoc Committee makes no explicit reference, a clarification would be useful if understandings would form part of the draft articles or is a mere restatement of issues that are left out for future negotiations.

(c) Article 11, paragraph 2 on “Contracts of Employment” is a welcome improvement in terms of the specificity of the language employed and the delicate balance it seeks to establish in protecting the interests of the employee, the State of the forum and the employer State. In addition to the problems explained in the previous paragraph, it is not clear as to how far the “understanding” appended to this provision would find substantive application in resolving disputes falling within the scope of this provision.

(d) Part –IV of the draft articles titled “State Immunity from measures of constraint in connection with proceedings before a court” contains helpful reformulations that distinguish pre- judgment and post - judgment measures of constraint. The changes effected to Article 18 (c) make for better reading and easy comprehension.

60. As stated in the earlier part of this document, the Ad hoc Committee has recommended that the UN General Assembly take a decision on the form of the draft articles. Given the advanced stage the work on this topic has reached, it is suggested that the Member States at the 42<sup>nd</sup> session of AALCO would seek to exchange views on the adopted text of draft articles as well as its final form.

61. It may be recalled that the thirty-ninth session of the AALCO (Cairo, 2000) directed the AALCO Secretariat to consider the feasibility of compiling national legislation, jurisprudence and practice of the AALCO Member States on this item. Accordingly the Secretary General of the AALCO, by a letter dated 3 July 2000 and in subsequent communications, drew the attention of the Member States to the above resolution and invited them to forward materials relating to national legislation, court decisions and any other relevant materials indicative of the jurisprudence and State practice on jurisdictional immunities. In response to the request, as of April 1, 2003 the Secretariat has received responses from Bangladesh, Botswana, Cyprus, Japan, Mauritius, Malaysia, Myanmar and Turkey<sup>13</sup>.

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<sup>13</sup> The responses of these Member States are on the record of the AALCO Secretariat.

## **ANNEX-I**

### **UNDERSTANDINGS WITH RESPECT TO CERTAIN PROVISIONS OF THE DRAFT ARTICLES (As adopted by the Ad Hoc Committee)**

#### **With respect to Article 10**

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

Article 10, paragraph 3, does not pre-judge 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 Ad Hoc Committee noted that the reference in article 11 (2) (c) to the “security interests” of the employer States was intended primarily to address matters of national security and the security of diplomatic missions and consular posts.

The Ad Hoc Committee noted that 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 the respect of labour laws, of the host country. At the same time the Ad Hoc Committee also noted that 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 18**

The expression “entity” in paragraph (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 paragraph (c) are to be understood as broader than ownership or possession.

Article 18 does not pre-judge 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 criminal proceedings**

The Ad Hoc Committee noted the general understanding that the draft articles do not cover criminal proceedings.

## ANNEX –II

### SUMMARY OF THE DELIBERATIONS ON THE AGENDA ITEM DURING THE 41<sup>ST</sup> SESSION, ABUJA, NIGERIA (2002)

The **Delegate of Republic of Korea** expressed appreciation for the comprehensive report prepared by the Secretariat on this subject. Highlighting the practicality of this topic for States, the delegate complimented the Ad Hoc Committee for its achievements in narrowing down the differences on the outstanding issues. The delegate noted with satisfaction that representatives within the Ad Hoc Committee preferred the restrict approach to immunity and combined views of ‘nature test’ as the primary standard and ‘purpose test’ under certain circumstances, as the criteria for determining what amounts to commercial transactions.

The **Delegate of the People’s Republic of China** considered that the 1991 ILC’s draft articles on jurisdictional immunities as a good foundation for discussion in the Ad Hoc Committee. Following were the observations of the delegations on the outstanding issues:-

- (a) On the question of criteria of commercial transactions, the delegation believed that judicial practice of some States, which take into consideration, the ‘purpose’ of a transaction, as a complementary criterion to the ‘nature’ of such a transaction should be retained in the draft articles in determining whether a transaction is commercial.
- (a) On the issue of state enterprises, the delegation was of the view that the retention of the relationship between state enterprises and the state vis-à-vis the system of immunity would clarify the text and guide judicial practice of States.
- (b) As regards post-judgment measures of constraint, the linkage:- between the property against which execution was to be levied and the claim; and the linkage between the said property and the agency or instrumentality against which the proceeding was directed should be retained to avoid abusive execution.

The **Delegate of the Arab Republic of Egypt** outlined the evolution and progress of work on this subject within the ILC and the Sixth Committee of the General Assembly. Drawing attention to the implication of unilateral determination of State immunity by courts in developed countries adversely impacting on developing States, he stressed the importance of the work on this topic to harmonize and streamline the practice of States.

He commended the work of the Ad Hoc Committee in narrowing down the differences on outstanding issues. Noting the divergence of views in the Ad Hoc

Committee on the appropriate criteria to determine commercial transactions, the delegation warned that widening the scope of commercial transactions would hamper the social and economic interests of developing countries.

As regards the question of State enterprises the delegate stressed the need to distinguish the distinct legal personality of State enterprises from that of the parent State, so as to avoid the potential of abuse of judicial process.

The **Delegate of Japan** offered an overview of the work of the Ad Hoc Committee and its outcome. The Ad Hoc Committee emphasized the importance of elaborating in a timely manner a generally acceptable instrument based on the ILC's draft articles and recommended to the Sixth Committee of UN General Assembly to provide appropriate opportunity to resolve outstanding issues at the 57<sup>th</sup> Session of the General Assembly in 2002. The delegate informed that the Sixth Committee would consider the topic on 24 and 25 October 2002. In this context, he urged AALCO Member States to actively participate in the work of Sixth Committee with a view to adopting an international instrument at an early opportunity.

The **Delegate of India** said that the ILC's draft articles adopted in 1991 made a marked contribution in clarifying the scope and nature of immunities of States and their property in legal proceedings concerning commercial activities. The draft articles represented a delicate balance between the interest of developed and developing countries and hence further negotiations to resolve the outstanding issues should give primacy to these draft articles.

Welcoming the progress made by the Ad Hoc Committee, he hoped that agreement could be reached during the 57<sup>th</sup> Session of UN General Assembly, with a view to adopting an international convention on the subject. Any agreement reached on the outstanding issues, should recognize that State immunity must not be affected by legal proceedings against a State enterprise, which has a distinct legal personality of its own and its own assets. Further, the delegate stated, that any legal proceedings or enforcement of a judgment against a State enterprise should be confined to the State enterprise that was a party to the proceeding and its assets. It should not affect the functioning of other State enterprises operating in the Forum State.

**Following is the text of communication from Malaysia on this topic:**

1. Malaysia continues its support of the work of the Ad Hoc Committee and the proposal for the AALCO Secretariat to collate the information disseminated during the 41<sup>st</sup> Session to formulate its position on the outstanding issues for the purpose of the 57<sup>th</sup> Session of the General Assembly.  
It is proposed that, depending on the views expressed by other AALCO Member States, Malaysia may consider supporting a further resolution that the Secretariat monitor the developments in this matter.