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REPORT OF THE WORKING GROUP ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

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I. INTRODUCTION

1. At its 2569th meeting, on 7 May 1999, the Commission decided to establish a Working Group on Jurisdictional immunities of States and their property, which would be entrusted with the task of preparing preliminary comments as requested by operative paragraph 2 of General Assembly resolution 53/98 of 8 December 1998. It also decided to appoint Mr. G. Hafner as Chairman of the Working Group.

2. The Working Group was composed as follows: Mr. G. Hafner (Chairman), Mr. C. Yamada (Rapporteur), Mr. H. Al-Baharna, Mr. I. Brownlie, Mr. E. Candioti, Mr. J. Crawford, Mr. C. Dugard, Mr. G. Gaja, Mr. N. Elaraby, Mr. Q. He, Mr. M. Kamto, Mr. I. Lukashuk, Mr. T. Melescanu, Mr. P. Rao, Mr. B. Sepulveda, Mr. P. Tomka and Mr. R. Rosenstock (ex officio).

3. The Working Group held 10 meetings between 1 June and 5 July 1999.

4. It had before it General Assembly resolution 53/98 of 8 December 1999, operative paragraphs 1 and 2 of which read as follows:

> "The General Assembly
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> 1. Decides to establish at its fifty-fourth session an open-ended working group of the Sixth Committee open also to participation by States members of the specialized agencies, to consider outstanding substantive issues related to the draft articles on Jurisdictional immunities of States and their property adopted by the International Law Commission, taking into account the recent developments of State practice and legislation and any other factors related to this issue since the adoption of the draft articles, as well as the comments submitted by States in accordance with paragraph 2 of resolution 48/61 and paragraph 2 of resolution 25/151, and to consider whether there are any issues identified by the working group upon which it would be useful to seek further comments and recommendations of the Commission;
>
> 2. Invites the International Law Commission to present any preliminary comments it may have regarding outstanding substantive issues related to the draft articles by 31 August 1999, in the light of the results of the informal consultations held pursuant to General Assembly decision 48/413 of 9 December and taking into account the recent developments of State practice and other factors related to this issue since the adoption of the draft articles, in order to facilitate the task of the working group."

5. The Working Group also had before it the draft articles on the topic, submitted by the Commission to the General Assembly in 1991; document A/C.6/40/L.2, containing the conclusions of the Chairman of the informal consultations held in 1994 in the Sixth Committee of the General Assembly pursuant to the latter's decision 48/413; comments submitted by Governments, at the invitation of the General Assembly, on different occasions since 1991 (documents A/53/274 and Add.1; A/52/294; A/47/326 and Add.1 to 5; A/48/313; A/48/464 and A/C.6/48/3); the reports of two Working Groups established by the Sixth Committee of the General Assembly at its 47th (1992) and 48th (1993) sessions (documents A/C.6/47/L.10 and A/C.6/48/L.4, respectively); an informal document prepared by the Codification Division of the Office of Legal Affairs containing a summary of cases on jurisdictional immunities of States and their property occurring between 1991 and 1999 as well as a number of conclusions regarding those cases; an informal background paper as well as a number of memoranda prepared by the Working Group's Rapporteur, Mr. C. Yamada, on various issues related to the topic; the text of the 1972 European Convention on State Immunity; the resolution of “Contemporary problems concerning the immunity of States in relation to questions of jurisdiction and enforcement” adopted by the Institute of International Law at its 1991 Basel session; and the report of the International Committee on State Immunity of the International Law Association session held in Buenos Aires in 1994.

6. When considering possible approaches as to how to organize its work, the Working Group took particularly into account the wording of paragraph 2 of General Assembly resolution 53/98 which invited the Commission to present any preliminary comments it may have “regarding outstanding substantive issues related to the draft articles ... in the light of the results of the informal consultations held pursuant to General Assembly decision 48/413 of 9 December 1993”.

7. It therefore decided to concentrate its work on the five main issues identified in the conclusions of the Chairman of the above-mentioned informal consultations, as reflected in document A/C.6/49/L.2, namely: (1) Concept of a State for purposes of immunity; (2) Criteria for determining the commercial character of a contract or transaction; (3) Concept of a State enterprise or other entity in relation to commercial transactions; (4) Contracts of employment and (5) Measures of constraint against State property.

8. The paragraphs below contain the comments of the Working Group with regard to each of the above-mentioned issues. They include the provisions of the ILC draft relevant to each issue, an examination of how the issue has evolved, a summary of recent relevant case law, as well as the preliminary comments in the form of suggestions of the Working Group regarding possible ways of solving each issue and as a basis for further consideration. The suggestions often contain various possible technical alternatives, a final selection among which requires a decision by the General Assembly.

9. In addition, the report contains, as an annex, a short background paper on another possible issue which may be relevant for the topic of jurisdictional immunities, which was identified within the Working Group, stemming from recent practice. It concerns the question of the existence or non-existence of jurisdictional immunity in actions arising, inter alia, out of violations of jus cogens norms. Rather than taking up this question directly, the Working Group decided to bring it to the attention of the Sixth Committee.

II. COMMENTS AND SUGGESTIONS BY THE WORKING GROUP

A. CONCEPT OF STATE FOR PURPOSE OF IMMUNITY

1. Relevant provision of the ILC draft

10. The draft recommended by the Commission to the General Assembly in 1991 contains the following provision:

Article 2. Use of terms

1. For the purposes of the present articles:

...

(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:

...

3. The provisions of paragraphs 1 and 2 regarding the use of terms in the present articles 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.

2. How the issue has evolved

11. As may be seen from the above, paragraph 1 (b) (ii) of article 2 determines that "constituent units of federal States" fall within the definition of a "State" for the purposes of the draft articles. This provision has been the subject of controversy between federal States and non-federal States, particularly as regards the problem resulting from the potential dual capacity of constituent units to exercise governmental authority on behalf of the State or on their own behalf, pursuant to the distribution of public power between the State and its constituent units according to the relevant constitution. The discussions focused on the issue whether constituent units of federal States, through their inclusion in the notion of "State", should participate in the immunity of the State without any additional requirement, when they are acting on their own behalf and in their own name.

12. This provision did not exist in the draft articles adopted after the first reading in 1986. In 1986 and 1987 the General Assembly requested Governments to submit their comments on those draft articles. In 1988, one State commented that constituent units of federal States should be granted the same immunities as those of a central government, without any additional requirement to establish sovereign authority. 1/ Another State commented that the whole draft did not contain any special provisions for federal States, unlike the European Convention on State Immunity of 1972. 2/

13. The Special Rapporteur, Motoo Ogiso, prepared his "Preliminary report on jurisdictional immunities of States and their property", 3/ which formed the basis for discussion on the topic during the fortieth session of the Commission in 1988. In response to comments on this issue, the

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1/ Yearbook of the International Law Commission, 1988, vol. II, Part one, p. 51; comments by Australia.

2/ Ibid., p. 70; comments by Federal Republic of Germany, then West Germany.

3/ For specific comments made by various Governments, ibid., p. 102.

Special Rapporteur stated during the session that he had no objection to including in the future convention a provision of that kind, but would like to have the Commission's opinion on the matter. 4/ During the forty-first session of the ILC in 1989, some members expressed the view that the constituent units of federal States should be included in the definition of the term "State". 5/ Draft article 2 (1) (b) (ii) as adopted on second reading, appeared for the first time in the Third Report as article 2 (1) (b) (i bis) which was related to the particular emphasis that the 1972 European Convention places on the constituent units of federal States. It was a proposal by the Special Rapporteur for consideration by the ILC. 6/ The Commission, taking into account the views expressed by some of its members as well as by Governments, agreed to introduce this provision on second reading. 7/

14. In 1992, when various States submitted written comments on this draft article in response to a General Assembly resolution, the substance of this provision was not criticized. 8/ The Working Group established by the General Assembly within the framework of the Sixth Committee considered the written comments of Governments as well as views expressed in the debate at the forty-sixth session of the Assembly. Some Governments expressed the view that the provision was too sweeping and expressed sympathy with a proposal

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4/ Yearbook of the International Law Commission, 1988, vol. I, p. 261. The same view was expressed in the ILC Report to the General Assembly (Yearbook of the International Law Commission, 1988, vol. II., p. 100).

5/ Mr. Tomuschat, Yearbook of the International Law Commission, 1989, vol. I, p. 142, para. 54, Mr. Barsegov, ibid., p. 148, para. 52, Mr. Al-Baharna, ibid., p. 166, para. 73. For the relevant section of the ILC Report on this issue, see Yearbook of the International Law Commission, 1989, vol. II, Part two, p. 100, para. 426.

6/ Yearbook of the International Law Commission, 1990, vol. I, p. 65, para. 4; vol. II, Part one, p. 8.

7/ Yearbook of the International Law Commission, 1991, vol. II, Part II, p. 16, Mr. Ogiso's Commentary to the article noted that constituent units of some federal systems, for historical or other reasons, enjoyed sovereign immunity without the additional requirement that it be performing sovereign authority of the State.

8/ See comments by the Governments of Australia, Switzerland and the United States, A/47/326, pp. 3, 20 and 28 respectively.

suggesting that a declaration by the central government be made a condition for granting sovereign immunity to constituent units of federal States. 9/ Taking into consideration the discussions in the Working Group and government comments, Mr. Carlos Calero-Rodrigues, the Chairman of the Working Group, suggested to insert the following words after "constituent units of a federal State":

> "... not covered by subparagraph (iii), provided that the federal State submit to the depositary of the present instrument a declaration signifying that they shall be entitled to invoke the immunity of the State".

This proposal, based on article 28 of the 1972 European Convention, sought to reconcile two different views on the provision. There were those in favour of maintaining an express reference to constituent units of federal States and those who thought that the wording adopted in the second reading was too sweeping and a potential source of uncertainty. 10/

15. The Working Group again considered this issue in 1993. The report of the Working Group noted that some national laws distributed public powers between the national Government and the constituent units. However, there remained a question as to whether constituent units enjoyed sovereign immunity to the same extent as a State in international law. 11/ Some thought that constituent units of federal States should be covered by article 2-1 (b) (iii) because in most cases they performed acts in the exercise of the governmental authority of the State. Therefore, article 2-1 (b) (ii) would only cover limited cases. In light of these views, the Chairman reformulated the proposal as follows:

> "constituent units of a federal State <u>in cases</u> not covered by subparagraph (iii), provided that the federal State <u>has submitted</u> to the depositary of the present instrument a declaration signifying that they <u>are</u> entitled to invoke the immunity of the State". 12/

9/ <u>Outline of issues and comment</u>, Working Group on the Convention on Jurisdictional Immunities of States and Their Property, 2nd meeting, 29 September 1992, p. 1; proposal by Switzerland.

10/ A/C.6/47/L.10, paras. 9 and 10.

11/ A/C.6/48/L.4, para. 17.

12/ Ibid., paras. 18 and 19.

16. In 1994, informal consultations were held. The issue whether constituent units of federal States should enjoy sovereign immunity without any additional requirement remained. The Chairman of the informal consultations, Mr. Calero-Rodrigues, thought that providing for the possible recognition of immunity for such units would promote broader participation in a convention. The Chairman proposed the following as a basis for a compromise on this issue:

> "The immunity of a constituent unit could be recognized on the basis of a declaration made by a federal State, as provided in article 28 of the European Convention on State Immunity. This approach would allow greater flexibility in light of the differences in the national laws of federal States while at the same time facilitating the application of the provisions by national courts by reducing uncertainties with respect to constituent units of federal States." 13/

17. The General Assembly again invited States to submit their comments on the conclusions of the Chairman of the informal consultations in 1994. 14/ In the view of one State, "constituent units of a federal State" and "political subdivisions of the State" did not appear to be clearly differentiated. According to that State "constituent units of a State" means those units which constitute an independent State and not federated States. It proposed that the phrase "constituent units" could be replaced by "autonomous territorial governmental entities", terminology used in the draft articles on State responsibility. 15/ Some States supported the compromise proposed by the Chairman. 16/ Another State commented that subparagraphs (ii) and (iii) were ambiguous. 17/

13/ A/C.6/49/L.2, paras. 3 and 4.

14/ General Assembly resolution 49/61. The Secretary-General reiterated this invitation for comments in 1997.

15/ A/52/294, paras. 5-9; comment by Argentina.

16/ A/53/274, p. 2; A/52/274/Add.1, p. 2, para. 4; comments by Austria and Germany.

17/ Ibid., p. 4, para. 4.

3. A summary of recent relevant case law

18. The following paragraph draws on a number of conclusions included in a summary of cases prepared by the Secretariat of the Commission, covering the period 1991-1999. 18/

18/ The following cases relevant to this issue were examined by the Secretariat in its summary: United Kingdom, House of Lords, 21 February 1991, Arab Monetary Fund v. Hashim and Others; United States, Court of Appeals, Ninth Circuit, 5 June 1991, Risk v. Halvorsen and Others (ILR 98, p. 125); United States, Court of Appeals, Second Circuit, 21 June 1991, Klinghoffer and Others v. SNC Achille Lauro and Others (ILR 96, p. 68); United States, Court of Appeals, Fifth Circuit, 11 June 1992, Arriba Limited v. Petroleos Mexicanos (ILR 103, p. 490); United States, Court of Appeals, Fifth Circuit, 8 July 1992, Walter Fuller Aircraft Sales Inc. v. Republic of the Philippines (ILR 103, p. 503); United States, Court of Appeals, 7th Circuit, 14 December 1992, Richard A. Week v. Cayman Islands (Lexis 32985); United States, District Court, Southern District of NY, 14 January 1993, Drexel Burnham Lambert Group Inc. v. Committee of Receivers for Galadari et al. Refco Inc. v. Galadari et al. (ILR 103, p. 532); United States, Court of Appeals, Second Circuit, 16 March 1993, Seetransport Wiking Trader Schiffahrtsgesellschaft MBH and Co., Kommanditgesellschaft v. Navimpex Centralia Navala (ILR 103, p. 559); United States, Court of Appeals, Second Circuit, 19 April 1993, Cargill International SA v. M/T Pavel Dybenko; Canada, Ontario Court of Appeal, 17 June 1993, Jaffe v. Miller and Others (ILR 95, p. 446); United States, Court of Appeals, Ninth Circuit, 16 June 1994, In re Estate of Ferdinand Marcos Human Rights Litigation Hilao and Others v. Estate of Marcos (ILR 103, p. 52; ILR 104, p. 119); United States, Court of Appeals, District of Columbia Circuit, 19 July 1994, Transaero Inc. v. La Fuerza Aerea Boliviana (ILR 107, p. 308); United States, Court of Appeals, Fifth Circuit, 19 July 1994, Moran v. Kingdom of Saudi Arabia (ILR 107, p. 303); United States, District Court of Delaware, 3 August 1994, EAL (Delaware) Corp., Electra Aviation Inc. et al. v. European Organization for the safety of Air Navigation and English Civil Aviation Authority (ILR 107, p. 318); United States, Court of Appeals, Fifth Circuit, 17 October 1994, Gopalakrishnan N. Mangattu, Derryl F. Remedioa and Thaluthara K. Francis v. M/V IBN Hayyan, et al., United Arab Shipping Co.; 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); United States, Court of Appeals, 16 May 1995, Gates and Others v. Victor Fine Foods and others (ILR 107, p. 371); United States, Court of Appeals, Ninth Circuit, 22 May 1995, Export Group and Others v. Reef Industries Inc. and Mexican Coffee Institute (ILR 107, p. 393); United Kingdom, Employment Appeal Tribunal, 6 June 1995, Arab Republic of Egypt v. Gamal/Eldin (ILR 104, p. 673); United Kingdom, High Court, Chancery Division, 5 November 1996, Bank of Credit and Commerce International Ltd. v. Price Waterhouse and Others (ILR 111, p. 604); United Kingdom, Court of Appeal, 17 April 1997, Propend Finance PTY Limited and Others v. Sing and Others (ILR 111, p. 611); and United States Court of Appeals, Ninth Circuit, 23 April 1997, Nordmann v. Thai Airways Int'lL Ltd. (Lexis 8646).

19. Court decisions at the national level on this topic have emphasized the following indicators of a State: defined territory, permanent population, being under the control of its own government, and having the capacity to engage in formal relations with other States and to implement the obligations that normally accompany formal participation in the international community.

20. The characteristics of State instrumentalities and agencies that have been emphasized include: presumed independence from its sovereign and yet a linkage in the form of being an organ of a State or a political subdivision of a State or having a majority of its shares owned by the State or a political subdivision thereof, and the performance of functions traditionally performed by individual governmental agencies operating within their own national boundaries. In addition, it has been held that an instrumentality has a separate legal status, while there seems to be a difference of opinion as to whether an agent necessarily must have a separate legal personality. In determining whether an entity is a separate legal person, reference has been made to the need for an assessment of the core function of the entity and whether or not it is an integral part of a State's political structure or whether its structure and function was predominantly commercial. Entities closely bound up with the structure of the State, such as armed forces, tend to be regarded as the State itself rather than as a separate agency or instrumentality of the State. 19/ An entity created by a number of States to perform certain international functions has been held to have the same status as an agency or instrumentality of a foreign State performing the same functions. 20/

21. In terms of the burden of establishing or refuting immunity, the cases have found that an entity bears the onus of establishing that it falls within the definition of “State”. If an entity establishes that it falls within the definition of State, then the burden is on the other party to show that an exemption to immunity might apply. If that burden is discharged, the burden then shifts to the entity to establish that the exceptions raised do not

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19/ United States, Court of Appeals, District of Columbia Circuit, 19 July 1994, Transaero Inc. v. La Fuerza Aerea Boliviana (ILR 107, p. 308).

20/ United States, District Court of Delaware, 3 August 1994, EAL (Delaware) Corp., Electra Aviation Inc. et al. v. European Organization for the safety of Air Navigation and English Civil Aviation Authority (ILR 107, p. 318).

apply. 21/ The extent of the burden may differ across jurisdictions. For example, it may be, at least in some jurisdictions, that a plaintiff need only point to facts suggesting that an exception to immunity applies while the defendant bears the ultimate burden of proof of immunity. Alternatively, and this is the more likely scenario, the difference may be illusory and result from a difference of expression.

4. Suggestions of the Working Group

22. When examining this issue, the Working Group of the Commission also considered its possible relationship with the question, under State responsibility, of the attribution to the State of the conduct of other entities empowered to exercise elements of governmental authority. 22/

21/ United States, District Court, Southern District of NY, 14 January 1993, Drexel Burnham Lambert Group Inc. v. Committee of Receivers for Galadari et al. Refco. Inc. v. Galadari et al. (ILR 103, p. 532).

22/ In 1971, when Special Rapporteur Ago presented his third report, he proposed an article on this issue, which read as follows: Article 7. Attribution to the State, as a subject of international law, of the acts of organs of public institutions separate from the State. The conduct of a person or group of persons having, under the internal legal order of a State, the status of an organ of a public corporation or other autonomous public institution or of a territorial public entity (municipality, province, region, canton, member state of a federal State, autonomous administration of a dependent territory, etc.), and acting in that capacity in the case in question, is also considered to be an act of the State in international law. (Yearbook of the International Law Commission, 1971, vol. II, Part one, p. 262.) In 1974, the International Law Commission discussed that article in several meetings [Yearbook of the International Law Commission, 1974, vol. I, pp. 5-16, 21-31 (1251st–1253rd meetings, 1255th–1257th meetings)]. As a result, the Commission adopted draft article 7 with commentaries. The text of the draft article reads as follows: Article 7. Attribution to the State of the conduct of other entities empowered to exercise elements of the governmental authority 1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question. 2. The conduct of an organ of an entity which is not a part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question. [Yearbook of the International Law Commission, 1974, vol. II, Part one, pp. 277-283.] The commentary states that if an act of an organ is to be regarded as an act of the State for purposes of international responsibility, the conduct of the organ of an entity of this kind must relate to a sector of activity in which the entity in question is entrusted with the exercise of the elements of governmental authority

23. While some members of the Working Group felt that there should be a parallelism between the provision concerning the “concept of State for purpose of immunity” in the State immunity draft and the provision on “attribution to the State of the conduct of entities exercising elements of the governmental authority” in the State responsibility draft, other members felt that this was not necessarily the case. Although some members felt that it was not necessary to establish a full consistency between the two sets of draft articles, it was considered desirable to bring this draft article into line with the draft on State responsibility.

24. Furthermore, taking into account all the elements under the foregoing subsections, the Working Group agreed that the following suggestions could be forwarded to the General Assembly.

25. Paragraph 1 (b) (ii) of article 2 of the draft could be deleted and the element, “constituent units of a federal State” would join “political subdivisions of the State” in present paragraph 1 (b) (iii).

26. The qualifier “which are entitled to perform acts in the exercise of the sovereign authority of the State” could apply both to “constituent units of a federal State” and “political subdivisions of the State”.

27. It was further suggested that the phrase “provided that it was established that that entity was acting in that capacity” could be added to the paragraph, for the time being, between brackets.

28. The Working Group also suggested that the expression “sovereign authority” in the qualifier should be replaced by the expression “governmental authority”, to align it with the contemporary usage and the terminology used in the State responsibility draft.

29. The above suggestions seek to assuage the particular concern expressed by some States. It allows for the immunity of constituent units but, at the

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concerned. [Ibid., p. 282, para. (18)]. In 1998, the Drafting Committee of the Commission on State responsibility provisionally adopted another text for draft article 7, pursuant to the discussions in second reading. The text of the draft article reads as follows: Article 7. Attribution to the State of the conduct of entities exercising elements of the governmental authority. The conduct of an entity which is not an organ of the State under article 5 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the entity was acting in that capacity in the case in question [A/CN.4/L.569].

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.

30. A reformulation of subparagraph (b) of paragraph 1 of article 2, for suggestion to the General Assembly, could thus read as follows:

1. For the purposes of the present articles:

...

(b) “State” means:

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

(ii) constituent units of a federal State and political subdivisions of the State, which are entitled to perform acts in the exercise of the governmental authority of the State, [provided that it was established that such entities were acting in that capacity];

(iii) agencies or instrumentalities of the State and other entities, to the extent that they are entitled to perform acts in the exercise of the governmental authority of the State;

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

B. CRITERIA FOR DETERMINING THE COMMERCIAL CHARACTER OF A CONTRACT OR TRANSACTION

1. Relevant provisions of the ILC draft

31. The draft recommended by the Commission to the General Assembly in 1991 contains the following provision:

Article 2. Use of terms

1. For the purposes of the present articles:

...

(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, 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.

3. The provisions of paragraphs 1 and 2 regarding the use of terms in the present articles 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.

2. How the issue has evolved

32. The 1991 Commission’s draft proceeded from the view that a State enjoys restrictive immunity, namely that jurisdictional immunity should not be available when a State undertakes a commercial activity. Although agreement on this may, in principle, be reached, the restrictive approach raises as one of the main issues that of the definition of “commercial transactions” for the purpose of State immunity, and this has been a matter of controversy as well as disagreement. In this respect, 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 on whether an activity is commercial or not. Therefore, recourse must sometimes be made to the purpose criterion, which examines whether the act was undertaken with a commercial or a governmental purpose. Although several different proposals have been made as to how to integrate the two tests, no common solution has emerged from that practice. Paragraph 1 (c) and paragraph 2 of article 2 constitute an attempt to provide an integration of the two criteria but it has met so far with resistance in the Sixth Committee.

33. At the early stage of the Commission’s work in this field, an increasing number of States was moving towards the restrictive theory while there was still a certain number of States which gave absolute immunity to foreign States. Therefore, the Commission had difficulties in finding a compromise

between these two approaches. However, the Commission finally decided to draft the articles in accordance with the restrictive approach and completed its first reading in 1986. 23/

34. The comments submitted by Governments after the first reading could be categorized into three different attitudes towards the draft articles. 24/ One State supported the concept of absolute immunity. 25/ Another State took a positive view of the draft articles. 26/ One group of States objected to the inclusion of the purpose test in the definition of the commercial transactions. 27/

35. The second Special Rapporteur, Mr. Ogiso summarized the written comments and oral observations in the Sixth Committee and expressed his view in his preliminary report as follows: "With regard to paragraph 2, in the light of the fact that many countries support the nature criterion in determining whether a contract is commercial or not and criticize the purpose criterion, which in their view is less objective and more one-sided, the Special Rapporteur has no objection to deleting the purpose criterion. At the same time, it should be recalled that several Governments, both in their written comments and in their oral observations in the Sixth Committee, have supported the inclusion of the purpose criterion." 28/ In the same report, accepting the proposal made by some Governments to combine articles 2 and 3 of the first

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23/ Article 3 (2) of the 1986 draft read as follows: "In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made primarily to the nature of the contract, but the purpose of the contract should also be taken into account if, in the practice of that State, that purpose is relevant to determining the non-commercial character of the contract."

24/ Document A/CN.4/410 and Add.1-5, Yearbook of the ILC, 1988, vol. II, Part 1, pp. 51 et seq.

25/ Brazil.

26/ Yugoslavia.

27/ Canada, Mexico, the five Nordic countries, Qatar, Spain and the United Kingdom.

28/ Paragraph 39, Preliminary report on jurisdictional immunities of States and their property by Mr. Motoo Ogiso, Document A/CN.4/415, Yearbook of the ILC, 1988, vol. II, Part 1, p. 102.

reading, he proposed a new text. 29/ The Special Rapporteur explained his view with regard to this reformulation as follows: "while he had no difficulty in eliminating the purpose test from the provision, leaving only the nature test, he was not sure whether such a course of action, though legally tenable, would not raise further difficulties in the Sixth Committee of the General Assembly. In his view, the best solution would be to reformulate the purpose test, as he had done in paragraph 3 of the new article 2." 30/

36. The Special Rapporteur's new proposal, which had been reflected in the Commission report, was discussed in the Sixth Committee. Some representatives expressed the view that in determining whether a contract was commercial, equal weight should be given to the nature of the contract and to its purpose. They stressed the importance of current international practice of the developing countries in particular, and the fact that they engaged in contractual transactions which were vital to the national economy or to disaster prevention and relief. If the purpose test was excluded and solely the nature test was applied, they added, such States would not be able to enjoy immunity even with regard to the activities in the exercise of their governmental functions. 31/ On the other hand, one of the representatives who insisted on the deletion of the purpose test expressed the view that the Commission should refrain from introducing subjective elements such as the "purpose" of a transaction in determining whether immunity might be claimed. He also suggested a compromise whereby, while the criterion for determining

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29/ Ibid., p. 101. The text read as follows: "In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made primarily to the nature of the contract, but if an international agreement between the States concerned or a written contract between the parties stipulates that the contract is for the public governmental purpose, that purpose should be taken into account in determining the non-commercial character of the contract."

30/ Report of the Commission to the General Assembly on the work of its fortieth session, para. 510, Yearbook of the ILC, 1988, vol. II, Part 2, p. 100.

31/ Para. 227, Topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-fourth session, A/CN.4/L.443, p. 67.

immunity should be the nature of the contract, the court of the forum State should be free to take a governmental purpose into account also, in the case of a commercial contract. 32/

37. After these discussions, although some of the representatives appreciated the proposal of the Special Rapporteur as a possible compromise, the view of the majority was that it was too rigid and should be improved on. 33/

38. The Special Rapporteur, taking into account a proposal made by one representative in the Sixth Committee, submitted another compromise in his third report in 1990. 34/ In this proposal, he intended to formulate the provision to the effect that, while the primary criterion for determining immunity should be the nature of the transaction, the court of a forum State should also be free to take a governmental purpose into account. He suggested that the necessity to take into account the public purpose of the transaction arose from the consideration to provide for the cases of famine or similar foreseen situations. He explained that it might be more advantageous, for purposes of flexibility, to give the power of discretion to the court of the forum State rather than to specify circumstances involved. 35/

39. In 1991, the Commission completed the second reading. As far as the definition and criteria of commercial transactions is concerned, the Commission adopted the provision on the basis of the basic approach proposed by the Special Rapporteur in his third report. 36/

40. After the text of the second reading by the Commission was sent to the Sixth Committee, the definition and criteria of commercial transactions

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32/ Para. 228, ibid., p. 68.

33/ Para. 229, ibid.

34/ The text read as follows: “In determining whether a transaction coming under paragraph 1 (c) of this article is commercial, reference should be made primarily to the nature of the transaction, but the courts of the forum State are not precluded from taking into account the governmental purpose of the transaction.”

35/ Third report on jurisdictional immunities of States and their property, Yearbook of the ILC, 1990, vol. II, Part 1, pp. 7-8.

36/ Report of the Commission to the General Assembly on the work of its forty-third session, Yearbook of the ILC, 1991, vol. II, Part 2, p. 14 and pp. 19-21.

continued to be one of the most controversial issues of these draft articles as is reflected in the comments submitted by Governments pursuant to resolutions 46/55, 49/61, and 52/151, respectively. The arguments were again raised in the Sixth Committee.

41. The comments submitted by Governments since 1992 37/ could be classified into two groups; one group welcomed the draft articles including the purpose test, 38/ and the other insisted that the nature test should be the sole criterion. For the States in the latter group, the purpose test could introduce subjective elements in the determination of commercial transactions broadening the sphere of the jure imperii in an unpredictable way. 39/

42. The Working Group established in 1992 in the Sixth Committee fully noted these comments of Governments and tried to find the way for a compromise. In the discussion of the Working Group, the Chairman proposed a reformulation combining subparagraphs (i) and (iii). 40/ It aimed at removing, at least in part, the element of circularity in the present definition of the expression "commercial transaction" and providing a non-exhaustive list of such transactions. He also suggested two alternatives of the paragraph 2 of article 2 in order to reconcile the concerns about the preference for the determination on the sole basis of nature and about the needs for predictability, on the one hand, and, on the other, the developing countries'

37/ A/47/32 and Add.1-5, A/48/313, A/48/464, A/C.6/48/3 and A/52/294.

38/ Brazil, France.

39/ Australia, Austria, United Kingdom, United States of America, Germany, Italy, Netherlands, Belgium and Bulgaria.

40/ The proposal read as follows: "The present subparagraphs (i) and (iii) are replaced by the following: (i) any contract or transaction of a commercial, industrial, [trading] or professional nature into which a State enters or in which it engages otherwise than in the exercise of the sovereign authority of the State, including a contract or transaction for the sale of goods or supply of services, but not including a contract of employment of persons. Alternatives for paragraph 2: 2. Notwithstanding the provisions of paragraph I (c), a contract or transaction shall not be considered commercial if the parties have so agreed when entering into the contract or transaction. 2. Notwithstanding the provisions of paragraph I (c), a court, in determining whether a contract or transaction is a 'commercial transaction', shall take into account the purpose of the contract or transaction if, at the time of its conclusion, the State which is a party to it has expressly reserved that possibility."

attachment to the “purpose” test by requiring the State to specify, in the contract or as part of the transaction, that it was reserving the possibility of having the purpose test applied. 41/ In addition to his own proposal, the Chairman introduced the proposal communicated to him by the Special Rapporteur of the Commission. 42/ None of these proposals could attain general consent. 43/

43. The Working Group established in the Sixth Committee in 1993 discussed this issue on the basis of the results of the previous year. With regard to the definition of “commercial transactions,” the Chairman reformulated his proposal, which met with a wide measure of support. 44/ As far as the criteria for determination were concerned, the Working Group could not formulate general agreement, although a lot of proposals were submitted by the representatives. 45/

44. In the informal consultations held in 1994 pursuant to General Assembly decision 48/413, the arguments with regard to the criteria continued. The Chairman suggested a possible basis for a compromise. Its basic idea was to give States the option of indicating the potential relevance of the purpose criterion under their national law and practice either by means of a general declaration in relation to the convention or a specific notification to the

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41/ Paras. 13–16, Report of the Working Group, A/C.6/47/L.10, pp. 3 and 4.

42/ Para. 18, ibid., p. 4. The proposal read as follows: “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 in the exceptional circumstances where the contract or transaction is made for the purpose of humanitarian assistance including the procurement of food supplies to relieve a famine situation or the supply of medicaments to combat a spreading epidemic, such a contract or transaction may be regarded as 'non-commercial'.”

43/ Paras. 17 and 19, ibid., pp. 4 and 11.

44/ Paras. 33–35, Report of the Working Group, A/C.6/48/L.4, pp. 6 and 7.

45/ Paras. 36-48, ibid., pp. 4-10.

other party by whatever means in relation to a particular contract or transaction, or a combination thereof in order to secure the required predictability. 46/

3. A summary of recent relevant case law

45. The practice in the municipal courts of States having a Statute or Act on immunity has, in general, determined the commercial character of an activity solely in accordance with its nature. 47/ Apart from the precedents in these States, there are precedents of determination pursuant to the nature test in Zimbabwe and in Malaysia. In Barker McCormac (Pvt) Ltd. v. Kenya, the Supreme Court of Zimbabwe explicitly supported the nature test. 48/ In Commonwealth of Australia v. Midford (Malaysia), the Supreme Court of Malaysia held that it determines the commercial character of the act in accordance with English common law and applied the nature test. 49/

46. On the other hand there are some precedents which support the purpose test. For example, in the Holy See v. Starbright Sales Enterprises Inc., the Supreme Court of Philippines took into account the intention of the purchase of land and denied the commercial character of the act in question. 50/ The

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46/ Para. 6, Informal consultations held pursuant to General Assembly decision 48/413, A/C.6/49/L.2, p. 3. The text of the basis for a compromise reads as follows: "A greater measure of certainty could be achieved by giving States the option of indicating the potential relevance of the purpose criterion under their national law and practice either by means of a general declaration in relation to the convention or a specific notification to the other party by whatever means in relation to a particular contract or transaction, or a combination thereof. This would clarify the situation not only for a private party who is so informed when entering into a contract or transaction with a State but also for a court which is called upon to apply the provisions of the convention."

47/ For example, A Limited v. B Bank and Bank of X, Court of Appeal, United Kingdom, 31 July 1996.

48/ Barker McCormac (Pvt) Ltd. v. Government of Kenya, Supreme Court, Zimbabwe, 22 July 1983, High Court, 16 January 1985, 84 ILR 18.

49/ Commonwealth of Australia v. Midford (Malaysia) Sdn Bhd and Another, Supreme Court, Malaysia, 9 February 1990, 86 ILR 640.

50/ The Holy See v. Starbright Sales Enterprises Inc., Supreme Court, Philippines, 1 December 1994, 102 ILR 163.

French courts have expressed the view that although the nature of the act should be considered primarily, the purpose of the act could be considered in certain cases as well. 51/

47. The following paragraphs draw on a number of conclusions included in a summary of cases prepared by the Secretariat of the Commission, covering the period 1991-1999. 52/

51/ For example, Société Euroéquipement v. Centre européen de la Caisse de stabilisation et de soutien des productions agricoles de la Côte d'Ivoire, Tribunal of Instance, Paris, France, 7 February 1991, commented by A. Mahiou in 118 JDI 406 (1991), and Sieur Mouracade v. Yemen, Court of Appeal, Paris, France, 20 February 1991, commented by A. Mahiou in 119 JDI 398 (1992).

52/ The following cases relevant to this issue were examined by the Secretariat: United States, Court of Appeals, Fifth Circuit, 11 February 1991, Stena Rederi AB v. Comission de Contratos del Comite Ejecutivo General del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana SC; United States, Court of Appeals, Second Circuit, 17 April 1991, Shapiro v. Republic of Bolivia and Others (ILR 98, p. 110); United States, Court of Appeals, Ninth Circuit, 19 April 1991, Schoenberg and Others v. Exportadora de Sal SA De CV (ILR 98, p. 118, Lexis 6724); United States, Court of Appeals, Seventh Circuit, 13 June 1991, Santos v. Compagnie Nationale Air France (ILR 98, p.131); United States, Court of Appeals, Fourth Circuit, 5 September 1991, Gerding and Others v. Republic of France and Others (ILR 98, p. 159); United States, Court of Appeals, Sixth Circuit, 22 October 1991, Gould Inc. v. Pechiney Ugine Kuhlmann and Trefimetaux (ILR 98, p. 137, Lexis 24913); United States, District Court, 4 October 1991, Fickling v. Commonwealth of Australia (ILR 103, p. 447); United States, Court of Appeals, Second Circuit, 28 October 1991, 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 of America v. The Public Service Alliance of Canada and Others (ILR 94, p. 264); United States, Court of Appeals, Ninth Circuit, 22 May 1992, Siderman de Blake and Others v. The Republic of Argentina and Others (ILR 103, p. 454); United States, Court of Appeals, Fifth Circuit, 4 June 1992, United States v. Moats (ILR 103, p. 480); United States, Court of Appeals, Fifth Circuit, 11 June 1992, Arriba Limited v. Petroleos Mexicanos (ILR 103, p. 490); United States, Supreme Court, 12 June 1992, Republic of Argentina and Others v. Weltover Inc. and Others (ILR 100, p. 510); United States, Court of Appeals, Fifth Circuit, 8 July 1992, Walter Fuller Aircraft Sales Inc. v. Republic of the Philippines (ILR 103, p. 503); United States, Court of Appeals, Seventh Circuit, 14 December 1992, Richard A. Week v. Cayman Islands; United States, Supreme Court, 23 March 1993, Saudi Arabia and Others v. Nelson (ILR 100, p. 545); United Kingdom, Court of Appeal, 12 November 1993, Littrell v. United States of America (ILR 100, p. 438); United States, Court of Appeals, District of Columbia Circuit, 19 July 1994, Cicippio and Others v. Islamic Republic

48. Public, sovereign and governmental acts, which only a State could perform and which are core government functions, have been found not to be commercial acts. By contrast, acts that may be, and often are, performed by private actors and which are detached from any exercise of governmental authority are likely to be found to be commercial acts. One case has articulated those propositions in the form of a test, namely, whether the relevant act giving rise to the proceedings was of a private law character or came within the sphere of governmental activities. Another case 53/ has suggested that the "private person" test for sovereign immunity should be restricted to the trading context in which it was developed.

49. Many of the cases examined 54/ took the approach that the purpose of the activity is not relevant to determining the character of a contract or transaction and that it is the nature of the activity itself which is the decisive factor. Nevertheless, some cases under different national legal orders have emphasized that it is not always possible to determine whether a State was entitled to sovereign immunity by assessing the nature of the relevant act. This is because, it is said, the nature of the act may not easily be separated from the purpose of the act. In such circumstances, it

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of Iran (ILR 107, p. 297); United States, District Court of Delaware, 3 August 1994, EAL (Delaware) Corp., Electra Aviation Inc. et al. v. European Organization for the Safety of Air Navigation and English Civil Aviation Authority (ILR 107, p. 318); 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); United States, Court of Appeals, 16 May 1995, Gates and Others v. Victor Fine Foods and Others (ILR 107, p. 371); 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); United States, Court of Appeals, Ninth Circuit, 23 April 1997, Nordmann v. Thai Airways Int'l Ltd. (Lexis 8646); and United States, Court of Appeals, District of Columbia Circuit, 28 October 1998, Atkinson v. Inter American Dev. Bank (Lexis 24915).

53/ Canada, Supreme Court, 21 May 1992, United States of America v. The Public Service Alliance of Canada and Others (ILR94, p. 264).

54/ Particularly those from United States courts in note 49 above.

has sometimes been held to be necessary to examine the motive of the act. Sometimes, even where motive and purpose are judged irrelevant to determining the commercial character of an activity, reference has been made to the context in which the activity took place. 55/

50. It is the nature of the activity which is relevant to the claim that is important, rather than the nature of other activities engaged in by the entity. Thus, it is not sufficient that the entity in issue engages in some form of commercial activity unrelated to the claim. In other words, there must be a nexus between the commercial activity and the cause of action. The cause of action has to arise out of the commercial transaction in a relevant way. The mere fact that an entity has engaged in commercial activity on other occasions does not mean that it cannot claim immunity in a given case.

51. In some States, the location of the activity is treated as important either because it is a separate requirement for jurisdiction or it is seen as relevant to the characterization of the transaction as commercial. In such case, the exception to immunity on the ground of commercial activity may not apply if there is no connection or nexus between the commercial activity and the State in whose courts the question is being considered. 56/

52. It may also be important to examine the activity in the context of all the relevant circumstances, for example, the entire course of conduct, to determine whether it is a sovereign or commercial activity. Thus the purchase of services may appear on its face to be a commercial activity but looked at in context it may be apparent that it is a non-commercial activity.

53. The activities of two governments dealing directly with each other as governments notwithstanding the fact that the subject matter relates to commercial activities of their citizens or government entities, have been held not to constitute commercial activities.

55/ See for instance Australia, Supreme Court of Victoria, 17 February 1992, Reid v. Republic of Nauru (ILR 101, p. 193).

56/ One case in a Canadian court, has posited the above requirement as a two stage enquiry, namely, an assessment of the nature of the activity, followed by an assessment of the relationship of the activity to domestic court proceedings. However, it was a case dealing with employment, which is being dealt with elswhere in the draft. See Canada, Supreme Court, 21 May 1992, United States of America v. The Public Service Alliance of Canada and Others (ILR 94, p. 264).

54. The following activities have been held to be “commercial activities”: the issuance of debt, transporting of passengers for hire, conclusion of a contract of sale, negotiation and placating a majority shareholder, the lease of premises to conduct private business, 57/ the issuance of bills of exchange by a State owned bank as guarantee for construction of public works, 58/ the guarantee under the charterparty for the charter of a ship to a governmental corporation 59/ and the hiring of services from a private company for advice in the development of rural areas of a State. 60/

55. The following activities have been held not to have been “commercial activities”: the acceptance of caveats, decisions to lift them, notification of the public, conduct of labour relations at a naval base, issuing currency, chartering of companies, regulation of companies, oversight of companies, the exercise of police powers, the imposition and collection of charges for air navigation services in national and international airspace, the power to seize property to collect a debt without prior judicial approval, implementing the general State policy of preserving law and order and keeping the peace, and keeping for disposal and actual disposal of one State’s bank notes in another State.

4. Suggestions of the Working Group

56. After discussing the issue in the light of the foregoing elements, the Working Group agreed that the following suggestions could be forwarded to the General Assembly.

57. The issue concerning which criteria to apply for determining the commercial character of a contract or transaction arises only if the

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57/ Tribunal d’Instance, Paris, 2nd district, 7 February 1991, Euroéquipement v. Centre européen de la caisse de stabilisation et de soutien des productions agricoles de la Côte d’Ivoire and Another (ILR 1992, p. 37).

58/ France, Cour de Cassation, 18 novembre 1996, Cameroons development bank v. Société des établissements Robber (ILR 1988, p. 532).

59/ Auckland High Court Admiralty, New Zealand, Reef Shipping Co. Ltd., v. the Ship Fua Kavenga (ILR 1992, p. 556).

60/ United States, Court of Appeal, District of Columbia Circuit, 17 February 1997, Practical Concepts Inc., v. Republic of Bolivia (ILR 1993, p. 420).

parties have not agreed on the application of a specific criterion, 61/ and the applicable legislation does not require otherwise.

58. The criteria contemplated in national legislation or applied by national courts offer some variety including, inter alia, the nature of the act, its purpose or motive as well as some other complementary criteria such as the location of the activity and the context of all the relevant circumstances of the act.

59. When considering this issue, the Working Group examines the following possible alternatives:

(a) The nature test as the sole criterion;

(b) The nature test as a primary criterion [second half of paragraph 2 of article 2 would be deleted];

(c) Primary emphasis on the nature test supplemented by the purpose test with a declaration of each State about its internal legal rules or policy; 62/

(d) Primary emphasis on the nature test supplemented by the purpose test;

(e) Primary emphasis on the nature test supplemented by the purpose test with some restrictions on the extent of “purpose” or with some enumeration of “purpose”. 63/ Such restrictions or enumeration should be broader than a mere reference to some humanitarian grounds.

(f) Reference in article 2 only to “commercial contracts or transactions”, without further explication.

(g) Adoption of the approach followed by the Institut de Droit International in its 1991 recommendations 64/ which are based on an enumeration of criteria and a balancing of principles, in order to define the competence of the court, in relation to jurisdictional immunity in a given case.

61/ See footnote 40 above.

62/ Alternative suggested in document A/C.6/49/L.2, para. 6 (see note 46 above).

63/ See footnote 42 above.

64/ For the text, see the appendix below.

60. As a result of this examination, and in view of the differences of the facts of each case as well as the different legal traditions, the members of the Group felt that alternative (f) above was the most acceptable. It was felt that the distinction between the so-called nature and purpose tests might be less significant in practice than the long debate about it might imply. It was noted that some of the criteria contained in the draft article of the Institut de Droit International could serve as useful guidance to national courts and tribunals in determining whether immunity should be granted in specific instances.

C. CONCEPT OF A STATE ENTERPRISE OR OTHER ENTITY IN RELATION TO COMMERCIAL TRANSACTIONS

1. Relevant provisions of the ILC draft

61. The draft recommended by the Commission to the General Assembly in 1991 contained the following provisions:

Article 10. Commercial transactions

...

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.

2. How the issue has evolved

62. The draft articles adopted on first reading by the Commission did not contain any special provision with regard to State enterprises. The Commission started its consideration of this issue when the Second Special Rapporteur proposed article 11 bis in his preliminary report. He explained that the new proposal was formulated to take into account the general comments of certain States. 65/ These States had suggested the inclusion of some provision with regard to the segregated State property, which was widely

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65/ Byelorussian SSR and USSR. Para. 122, Preliminary report on jurisdictional immunities of States and their property, A/CN.4/415, Yearbook of the ILC, 1988, vol. II, Part 1, p. 109.

recognized in the socialist countries and meant that a State enterprise, as a legal entity, possessed a segregated part of national property. 66/ In view of the primordial interest of the State in such enterprises, it was argued that the absence of immunity with respect to those enterprises could affect the immunity of the relevant State. In order to protect the latter, such a provision was thought necessary. By contrast, it was argued that because of the close linkage between the enterprise and the State, piercing of the veil of the juridical personality should be made possible so that the State could not use such enterprises in order to escape liability.

63. At the forty-first session in 1989, the Commission discussed the issue of the segregated State property on the basis of the proposal submitted by the Special Rapporteur in his preliminary report. The Special Rapporteur suggested that the purpose of this provision was not only to define the concept of segregated State property, but also to exempt foreign sovereign States from appearance before a court to invoke immunity in a proceeding concerning differences relating to a commercial contract between a State enterprise with segregated property and foreign persons. 67/ Although many of the Commission's members recognized the significance of such provision, they could not reach a general agreement with regard to the formulation.

64. At the forty-fourth session of the General Assembly, in 1989, the issue of segregated property was discussed in the Sixth Committee. Some of the representatives supported it, suggesting that the article would provide for a necessary distinction, with regard to commercial contracts, between States and

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66/ For Byelorussian Soviet Socialist Republic, Comments and observations received from Government, A/CN.4/410 and Add.1-5, Yearbook of the ILC, vol. II, Part 1, para. 3, p. 60, and for the U.S.S.R., ibid., paras. 6 and 7, p. 83.

67/ 2115th Meeting, para. 23, Summary records of the meetings of the forty-first session, Yearbook of the ILC, 1989, vol. II, Part 1, p. 138. The proposal read as follows: Article 11 bis: "If a State enterprise enters into a commercial contract on behalf of a State with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial contract fall within the jurisdiction of a court of another State, the former State cannot invoke immunity from jurisdiction in a proceeding arising out of that commercial contract unless the State enterprise, being a party to the contract on behalf of the State, with a right to possess and dispose of segregated State property, is subject to the same rules of liability relating to a commercial contract as a natural or juridical person."

their independent entities, an important concept which deserved to be studied in detail. The remark was made that if applied coherently the concept could serve to limit abusive recourse to judicial proceedings brought against the State on the subject of commercial contract concluded by its public enterprises. One representative disagreed with this provision. He observed that State entities engaged in economic and trading activities, including corporations, enterprises or other entities having the capacity of independent juridical persons, did not in fact enjoy jurisdictional immunities under domestic or international law; while engaged in commercial activities in the forum State, those entities were subject to the same rules of liability in respect of commercial contracts and other civil matters as private individuals and juridical persons. In his opinion, to allow the liability of those State-owned entities to be attributed to the State itself would be tantamount to making a State a guarantor having unlimited liability for the acts of its entities. He also pointed out that the separation of States from their independent entities in terms of jurisdictional immunity was the concern of all countries. 68/ Other representatives considered that the concept of segregated State property required further clarification and expressed doubts as to whether it was necessary to have a special provision in the draft articles on the subject. One representative pointed out that although the real problem to be settled by this provision was the liability of a State in cases where a State enterprise had entered into a commercial contract, there were some possibilities to be dealt in these draft articles. 69/

65. At the Commission's forty-second session in 1990, the Special Rapporteur submitted a new proposal 70/ for article 11 bis and the Commission discussed this issue. The main arguments fell into two groups: on the one hand, some members expressed the view that the question of State enterprises performing commercial transactions as separate and legally distinct entities from the State had a very wide application as it was highly relevant to developing

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68/ Topical Summary of the discussion held in the Sixth Committee of the General Assembly during its forty-fourth session, para. 241, A/CN.4/L.443, pp. 72-73.

69/ Ibid., para. 242, p. 73.

70/ Third report on jurisdictional immunities of States and their property, A/CN.4/431, Yearbook of the ILC, 1990, vol. II, Part 1, p. 13.

countries and even to many developed countries. On the other hand, other members took the view that this provision was of limited application as the concept of segregated property was a specific feature of socialist States and should not be included in the draft articles. 71/

66. At the forty-third session in 1991, the Drafting Committee proposed a new formulation 72/ and the Commission adopted it. The features of this new formulation are as follows: firstly, the former article 11 bis was inserted into article 10 as the third paragraph and secondly, more general terms were used; in particular, the word "segregated" was deleted. 73/

67. In the Working Group established in 1992 by General Assembly resolution 46/55, the Chairman proposed a very different formulation which suggested the deletion of paragraph 3 of article 10 and the inclusion of a new provision. 74/ His proposal aimed at expressing in the clearest possible terms the distinction, for purposes of immunity, between the State and certain enterprises or entities established by the State and having an independent legal personality. Such a distinction would be recognized not only in respect of commercial transactions entered into by the enterprise but also in relation to any other activities of the enterprise, provided that the exercise of the sovereign authority of the State was not involved. 75/

71/ Summary records of the meetings of the forty-second session, 2158th, 2159th, 2160th, 2161st, 2162nd and 2163rd meetings, Yearbook of the ILC, 1990, vol. I, pp. 78-94.

72/ Summary records of the meetings of the forty-third session, 2218th meeting, Yearbook of the ILC, vol. I, pp. 68-72.

73/ Report of the Commission to the General Assembly on the work of its forty third-session, Yearbook of the ILC, 1991, vol. II, Part 2, para. 11, pp. 35-36.

74/ The proposal referred to the elimination of article 10-3 and inclusion of the following new provision, possibly as paragraph 2 of article 5 or as a new article of Part V: "Jurisdiction shall not be exercised over a State and its property by the courts of another State in a proceeding, not related to acts performed in the exercise of sovereign authority, involving a State enterprise or other entity established by the State which: (a) has independent legal personality; (b) is capable of suing or being sued; and (c) is capable of owning, controlling, and disposing of property."

75/ Report of the Working Group, A/CN.6/47/L.10, para. 31 and 32, pp. 6-7.

68. His proposal did not address the question of under-capitalization of State enterprises, which had been raised by some delegations. For this purpose, the Chairman introduced a proposal from the Special Rapporteur of the Commission for the topic which he received after the conclusion of the debate. 76/ The purpose of this proposal was to give private companies the opportunity to "pierce the corporate veil" and to sue the State with respect to a transaction entered by its State enterprise. The Chairman supported the proposal and suggested that it seemed to be more acceptable to include a provision aimed at increasing the financial transparency of a State enterprise in order to avoid the possible objections from some delegations. 77/

69. In the Working Group established in 1993 by resolution 47/414, this issue continued to be discussed. With regard to the approach to be taken, there were two different views: one supported the approach of the draft articles of the ILC and the other sought to address the question either in Part II (General principles) or in a saving clause to appear in Part IV of the draft. The Chairman submitted a proposal in accordance with the latter approach. 78/ Paragraph 2 was intended to replace paragraph 3 of article 10 and paragraph 3 would provide for the possible liability of the State as a guarantor of the State enterprise or other entity. 79/

76/ The proposal envisages the addition of the following text either to paragraph 3 of article 10 or to the Chairman's proposal on paragraph 1 (b) (iv) of article 2: "Maintaining a proper balance sheet or financial record to which the other party to the transaction can have access in accordance with internal law of that State or the written contract."

77/ Ibid., paras. 33 and 34, p. 7.

78/ The text read as follows: "Make the present text of article 5 into a paragraph 1 and insert two new paragraphs as follows: 2. Jurisdiction shall not be exercised over a State and its property by the courts of another State in respect of a commercial transaction engaged in by a State enterprise or another entity established by the State which: (a) has independent legal personality; (b) is capable of suing and being sued in its own name; and (c) is capable of acquiring, owning or possessing and disposing of property. 3. Paragraph 2 above is without prejudice to the consideration by the courts of the liability of the State as a guarantor of the liability of the State enterprise or other entity or of cases where the enterprise or entity engaged in a transaction as an authorized agent of the State."

79/ Report of the Working Group, A/C.6/48/L.4, and paras. 49 and 50, p. 10.

70. The Working Group discussed the paragraphs of the proposal submitted by the Chairman respectively. With regard to paragraph 1, which was a reproduction of the ILC text without change, there were some suggestions about the wording. As far as paragraph 2 was concerned, although some delegations objected to it and some others reserved their views on the matter, the proposal was generally well received, subject to some observations. Various views were exchanged about the suitability and the implications of paragraph 3.

71. In the informal consultations held pursuant to General Assembly decision 48/413, the Chairman summarized the main issues and suggested a possible basis for a compromise. 80/ In their written comments, some members of the Commission supported the Chairman's basis for a compromise. 81/

3. A summary of recent relevant case law

72. The following paragraphs draw on a number of conclusions included in a summary of cases prepared by the Secretariat of the Commission, covering the period 1991-1999. 82/

80/ Informal consultations held pursuant to General Assembly decision 48/413, A/CN.6/49/L.2, paras. 7 and 8, pp. 3 and 4. The text for a basis of a compromise read as follows: "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."

81/ Replies received from States, A/53/274 and Add.1.

82/ The following cases relevant to this issue were examined by the Secretariat in its summary: United Kingdom, High Court, 9 July 1991, Re Rafidain Bank (ILR 101, p. 332); United States, Court of Appeals, Second Circuit, 28 October 1991; 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); United States, Court of Appeals, Ninth Circuit, 22 May 1992, Siderman de Blake and Others v. The Republic of Argentina and Others (ILR 103, p. 454); United States, Court of Appeals, Fifth Circuit, 4 June 1992, United States v. Moats (ILR 103, p. 480); United States, Court of Appeals, Fifth Circuit, 11 June 1992, Arriba Limited v. Petroleos Mexicanos (ILR103, p. 490); United States, Court of Appeals, Fifth Circuit, 8 July 1992, Walter Fuller Aircraft Sales Inc. v. Republic of the Philippines (ILR 103, p. 503); United States, Court of

73. It appears that to be able to consider the acts of an entity as the acts of the instrumentality of a State it is necessary that there be a legal relationship between the State and the entity concerned. If no such relationship can be shown, it will not be possible to “pierce the veil” in order to reach the assets of the instrumentality.

74. A distinction has been drawn between a State entity entitled to sovereign immunity and an entity of the State functioning as an alter ego or agent of the Government for the purpose of liability. The latter has been held to require a more substantial relationship than that required for an entity to qualify as a State entity. 83/ There is a presumption that State instrumentalities retain their separate legal status and the plaintiff bears the burden of rebutting that presumption to establish that an agency relationship existed. 84/

75. A State has been found not to be able to claim immunity where it had taken rights in property in violation of international law and the

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Appeals, Seventh Circuit, 14 December 1992, Richard A. Week v. Cayman Islands (Lexis 32985); United States, Court of Appeals, Second Circuit, 16 March 1993, Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co, Kommanditgesellschaft v. Navimpex Centralia Navala (ILR 103, p. 559); United States, Supreme Court, 23 March 1993, Saudi Arabia and Others v. Nelson (ILR 100, p. 545); United States, Court of Appeals, Second Circuit, 19 April 1993, Cargill International SA v. M/T Pavel Dybenko; Canada, Court of Appeal for Ontario, 31 January 1994, Walker et al. v. Bank of New York Inc. (ILR 104, p. 277); United States, Court of Appeals, Ninth Circuit, 16 June 1994, In re Estate of Ferdinand Marcos Human Rights Litigation Hilao and Others v. Estate of Marcos (ILR 103, p. 52; ILR104, p. 119); United States, Court of Appeals, 16 May 1995, Gates and Others v. Victor Fine Foods and others (ILR 107, p. 371); United States, Court of Appeals, Ninth Circuit, 23 April 1997, Nordmann v. Thai Airways Int’l Ltd (Lexis 8646); and United States, Court of Appeals, District of Columbia Circuit, 28 October 1998, Atkinson v. Inter American Dev. Bank (Lexis 24915).

83/ United States, Court of Appeals, Fifth Circuit, 8 July 1992, Walter Fuller Aircraft Sales Inc. v. Republic of the Philippines (ILR 103, p. 503).

84/ United States, Court of Appeals, Fifth Circuit, 11 June 1992, Arriba Limited v. Petroleos Mexicanos (ILR 103, p. 490).

property so taken was operated by an agency or instrumentality of that State engaged in commercial activities in another State. 85/

76. A bank and its employees that had participated in a bogus arms deal at the request of customs officers were found to be agents of a foreign State and therefore to be immune from suit notwithstanding the fact that the bank and its employees did not have an institutionalized relationship with that State. 86/

77. It has been held that persons acting outside their official capacities, without the authority of a foreign State, may be denied immunity on the basis of the fact that their acts are not those of an agency of the State. 87/

4. Suggestions of the Working Group

78. The Working Group discussed the issue in the light of the foregoing elements. It considered, in particular, the possible basis for a compromise contained on this issue in the report of the Chairman of the informal consultations held in the Sixth Committee in 1994. 88/

79. The Working Group concluded that the following suggestions could be forwarded to the General Assembly.

80. 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.

85/ United States, Court of Appeals, Ninth Circuit, 22 May 1992, Siderman de Blake and Others v. The Republic of Argentina and Others (ILR 103, p. 454).

86/ Canada, Court of Appeal for Ontario, 31 January 1994, Walker et al. v. Bank of New York Inc. (ILR 104, p. 277).

87/ United States, Court of Appeals, Ninth Circuit, 16 June 1994, In re Estate of Ferdinand Marcos Human Rights Litigation Hilao and Others v. Estate of Marcos (ILR 103, p. 52; ILR 104, p. 119).

88/ Document A/C.6/49/L.2, para. 8; (see note 80 above).

This clarification could be achieved either by a characterization of the acts referred to in (a) and (b) as commercial acts or by a common understanding to this effect at the time of the adoption of this article.

81. The Working Group also considered the third ground for State liability suggested in the above-mentioned basis for a compromise, namely “where the State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim”.

82. The Working Group considered that this suggestion went beyond the scope of article 10 and that it addressed a number of questions: immunity from jurisdiction, immunity from execution, and the question of the propriety of piercing the corporate veil of State entities in a special case. The Working Group also was of the view that this suggestion ignores the question whether the State entity, in so acting, acted on its own or on instructions from the State.

83. The Working Group was aware of the fact that the problem of piercing the corporate veil raises questions of a substantive nature and questions of immunity but it did not consider it appropriate to deal with them in the framework of its present mandate.

D. CONTRACTS OF EMPLOYMENT

1. Relevant provision of the ILC draft

84. The draft recommended by the Commission to the General Assembly contains the following provision:

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 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.

2. How the issue has evolved

85. Article 11 endeavors 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, 89/ in particular the need to protect the employee by offering him/her access to legal proceedings.

86. Article 11, paragraph 1 states the rule that States will not enjoy jurisdictional immunity for proceedings relating to local employment. Paragraph 2 lists the exceptions to the rule. Concern was expressed that the exceptions will undermine the rule. 90/

87. There remained divergent views on subparagraphs (a) and (c) of paragraph 2 in the informal consultations in 1994. As regards subparagraph (a), there was a 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 subparagraph (c), it was suggested that this provision could not be reconciled with the principle of non-discrimination based on nationality. The Chairman proposed that further consideration could be given to the possibility of

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89/ Commentary to article 11 (5).

90/ See document A/C.6/L.4, para. 62.

clarifying the phrase contained in subparagraph (a). He also proposed the deletion of subparagraph (c) in light of the principle of non-discrimination. 91/

88. As regards subparagraph (a) it should be pointed out that this exception was already contained in the draft articles adopted on first reading under the following wording:

> "(a) the employee has been recruited to perform services associated with the exercise of governmental authority;".

89. In 1988, Mr. Motoo Ogiso, the Special Rapporteur, stated in the preliminary report that he shared the fears expressed in written comments by Governments that subparagraph (a) as then worded could give rise to unduly wide interpretations, which could lead to confusion in the implementation of the future convention. He suggested its deletion. 92/ In 1989, he again expressed a similar view. 93/

90. The Special Rapporteur's suggestion to delete subparagraph (a) came in response to the opinion of some members of the Commission and Governments that the category of persons covered by that provision was too broad. However, the Special Rapporteur was of the view that subparagraph (a) was mainly intended to exclude administrative and technical staff of a diplomatic mission from the application of paragraph 1. Accordingly, he withdrew his proposal to delete subparagraph (a) and proposed an alternative text in 1990. The proposed text read:

> "(a) the employee is administrative or technical staff of a diplomatic or consular mission who is associated with the exercise of governmental authority;".

91/ A/C.6/49/L.2, p. 4, paras. 9 and 10. The basis for a compromise suggested by the Chairman read as follows: "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."

92/ Yearbook of the International Law Commission, 1988, vol. II, Part one, p. 110, para. 132.

93/ Yearbook of the International Law Commission, 1989, vol. II, Part two, p. 110, para. 508.

91. Some members of the Commission supported the Special Rapporteur's alternative text, whereas other members preferred either the deletion of the subparagraph or the general language of the text adopted on first reading.

92. In 1991, subparagraph (a) was adopted in its present form on second reading. The Commission on second reading considered that the expression "services associated with the exercise of governmental authority" adopted on first reading might lend itself to unduly extensive interpretation, since a contract of employment concluded by a State stood a good chance of being "associated with the exercise of governmental authority", even very indirectly. It was suggested that the exception in subparagraph (a) would only be justified if there were a close link between the work to be performed and the exercise of governmental authority. The word "associated" was therefore amended to read "closely related". In order to avoid any confusion with contracts for the performance of services which were dealt with in the definition of a "commercial transaction" and were therefore covered by article 10, the word "services" was replaced by the word "functions". 94/

93. Subparagraph (c) was also adopted in its present form on second reading in 1991. From 1988 to 1990 there was no discussion on whether this subparagraph would create a conflict with the principle of non-discrimination. 95/

94. The commentary states that this provision also favours the application of State immunity where the employee was neither a national nor a habitual resident of the State of the forum, the material time for either of these requirements being set at the conclusion of the contract of employment. This prevents potential litigants from changing either their nationality or to establish habitual or permanent residence in the State of the forum to defeat State immunity of the employer State. The protection of the State of the

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94/ Yearbook of the International Law Commission, 1991, vol. II, Part two, p. 43, para. 9.

95/ Yearbook of the International Law Commission, 1988, vol. II, Part one, p. 110, para. 130; Yearbook of the International Law Commission, 1990, vol. II, Part two, p. 34, para. 183.

forum is confined essentially to the local labour force, comprising nationals of the State of the forum and non-nationals who habitually reside in that State. 96/

3. A summary of recent relevant case law

95. The following paragraphs draw on a number of conclusions included in a summary of cases prepared by the Secretariat of the Commission covering the period 1991-1999. 97/

96. Although it has been argued that there are no universally accepted international law principles regulating the position of employees of

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96/ Yearbook of the International Law Commission, 1991, vol. II, Part two, p. 44, para. 11.

97/ The following cases relevant to this issue were examined by the Secretariat in its summary: 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); Netherlands, Supreme Court, 1991, M.K.B. van der Hulst v. USA (NYIL 1992, p. 379); Australia, Supreme Court of Victoria, 17 February 1992, Reid v. Republic of Nauru (ILR 101, p. 193); Netherlands, Sub-District Court of The Hague, 15 April 1992, M.H.C. v. The Republic of Cuba (NYIL 1996, p. 319); Canada, Supreme Court, 21 May 1992, United States of America v. The Public Service Alliance of Canada and Others (ILR 94, p. 264); United States, Court of Appeals, Fifth Circuit, 11 June 1992, Arriba Limited v. Petroleos Mexicanos (ILR 103, p. 490); Netherlands, Supreme Court, 2 March 1993, L.F.L.M. v. the Public Prosecutions Department (NYIL 1994, p. 527); 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); United Kingdom, Employment Appeal Tribunal, 17 November 1994, London Branch of the Nigerian Universities Commission v. Bastians (ILR 107, p. 613); 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, District of Columbia Circuit, 20 January 1995, Janini v. Kuwait University (ILR 107, p. 367); 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).

foreign States, relevant case law has often considered a contract of employment as merely a special type of commercial/private law contract.

97. In this regard, it is important to distinguish between those States whose law on sovereign immunities make a specific provision for contracts of employment and those States where it does not or which have no statute on the subject. In the latter cases, it is necessary to analyse the contract of employment as a commercial or private law contract, whereas in the former case, the only question is whether the contract of employment falls within the relevant provisions.

98. A key concern has been to balance the sovereignty of States with the interests of justice involved when an individual enters into a transaction with a State. One way of achieving this balance has been to stress a distinction between acts that are sovereign, public or governmental in character as against acts that are commercial or private in character. In a case refusing to recognize a State's immunity, 98/ it was considered important that the tasks performed by an employee of a foreign State's airline were the same as those of a commercial pilot and detached from any exercise of sovereign power. In another case, 99/ it was considered important in recognizing sovereign immunity that an employee's employment was performed in administrative and clerical support of sovereign functions.

99. Immunity has generally been granted in respect of the employment of persons at diplomatic or consular posts whose work involves the exercise of governmental authority.

100. The cases examined indicate a tendency for courts to find that they have the jurisdiction to hear disputes relating to employment contracts, where the employment mirrors employment in the private sector. However, there has also been recognition that some employment based on such contracts involve governmental activities by the employees and, in such circumstances, courts have been prepared to grant immunity.

98/ Australia, Supreme Court of Victoria, 17 February 1992, Reid v. Republic of Nauru (ILR 101, p. 193).

99/ New Zealand, Court of Appeal, 30 November 1994, Governor of Pitcairn and Associated Islands v. Sutton (ILR 104, p. 508).

101. Nevertheless, the Working Group noted that under article 11, (2) (b) a foreign State does enjoy immunity in cases concerning contract of employment where the subject of the proceeding is recruitment, renewal or reinstatement. But the immunity does not exclude jurisdiction for unpaid salaries or, in certain cases, damages for dismissal.

102. The Working Group noted that there was a distinction between the rights and duties of individual employees and questions of the general policy of employment, 100/ which essentially concern management issues about the public service of the forum State.

4. Suggestions of the Working Group

103. After discussing the issue in the light of the foregoing elements, the Working Group agreed that the following suggestions could be forwarded to the General Assembly.

104. As regards subparagraph (a) of paragraph 2 of article 11, the Working Group provisionally agreed that in the expression “perform functions closely related to the exercise of governmental authority”, the words “closely related to” could be deleted in order to restrict the scope of the subparagraph to “persons performing functions in the exercise of governmental authority”.

105. 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.
- Other persons enjoying diplomatic immunity, such as persons recruited to represent a State in international conferences.

100/ See, in particular, the following cases: Italian Trade Union for Embassy and Consular Staff v. United States, 1981, 65 ILR, p. 338; and United States of America v. The Public Service of Canada and Others, ILR 94, p. 264.

106. As regards subparagraph (c) of paragraph 2 of article 11, the Working Group agreed to recommend to the General Assembly that it would be advisable to delete it, as it could not be reconciled with the principle of non-discrimination based on nationality. This deletion, however, should not prejudge on the possible inadmissibility of the claim on grounds other than State immunity, such as, for instance, the lack of jurisdiction of the forum State. In this respect, the Working Group notes a possible uncertainty in paragraph 1 of article 11 as regards, for example, the meaning of the words "in part".

107. The Working Group noted that it may be desirable to reflect explicitly in article 11, the distinction referred to in paragraph 102 above.

E. MEASURES OF CONSTRAINT AGAINST STATE PROPERTY

1. Relevant provisions of the ILC draft

108. The draft recommended by the Commission to the General Assembly in 1991 contains the following provisions:

Article 18. State immunity from measures of constraint

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 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.

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:

(a) property, including any bank account, which is used or intended 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.

2. How the issue has evolved

109. The draft articles adopted in 1991 make a clear distinction between immunity from jurisdiction and immunity from measures of constraint. They proceed from the principle that no measures of constraint may be taken and thus, also provide for certain exceptions to that principle.

110. On first reading the Commission adopted three articles: article 21 (State immunity from measures of constraint), article 22 (consent to measures

of constraint) and article 23 (specific categories of property). 101/ With regard to article 21, the comments of Governments could be classified into two

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101/ Yearbook of the International Law Commission, 1986, vol. 2, para. 2, Report of the Commission at its thirty-eight session (A/38/10). The text on first reading read as follows: Article 21 State immunity from measures of constraint: A State enjoys immunity, in connection with a proceeding before a court of another State, from measures of constraints, including any measure of attachment, arrest and execution, on the use of its property or property in its possession or control [, or property in which it has a legally protected interest,] unless the property, (a) is specifically in use or intended for use by the State for commercial [non-governmental] purposes and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed; or (b) has been allocated or earmarked by the State for the satisfaction of the claim which is the object of that proceeding.

Article 22 Consent to measures of constraint: 1. A State cannot invoke immunity, in connection with a proceeding before a court of another State, from measures of constraint on the use of its property or property in its possession or control [, or property in which it has a legally protected interest,] if and to the extent that it has expressly consented to the taking of such measures in respect of that property, as indicated: (a) by international agreement; (b) in a written contract; or (c) by a declaration before the court in a specific case. 2. Consent to the exercise of jurisdiction under article 8 shall not be held to imply consent to the taking of measures of constraint under Part IV of the present articles, for which separate consent shall be necessary.

Article 23 Specific categories of property: 1. The following categories of property of a State shall not be considered as property specifically in use or intended for use by the State for commercial [non-governmental] purposes under subparagraph (a) of article 21: (a) property, including any bank account, which is in the territory of another State and is not 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 which is in the territory of another State; (d) property forming part of the cultural heritage of the State or part of its archives which is in the territory of another State and not placed or intended to be placed on sale; (e) property forming part of an exhibition of objects of scientific or historical interest which is in the territory of another State and not placed or intended to be placed on sale. 2. A category of property, or part thereof, listed in paragraph 1 shall not be subject to measures of constraint in connection with a proceeding before a court of another State, unless the State in question has allocated or earmarked that property within the meaning of subparagraph (b) of article 21, or has specifically consented to the taking of measures of constraint in respect of that category of its property, or part thereof, under article 22.

different groups: one suggested the necessity to clarify the scope of the provision and to avoid unnecessary limitation on the cases in which property might legitimately be subject to measures of constraint 102/ and the other insisted on the importance of the principle of State immunity from measures of constraint. 103/ Compared with the other two provisions, fewer States submitted comments on article 22. 104/ With regard to article 23, the comments of Governments focused on the further clarification of the meaning of each paragraph and subparagraph. 105/ On the basis of the review of the comments of Governments the Special Rapporteur suggested some amendments both in his preliminary as well as in his second but did not change the fundamental structure of the relevant articles. 106/ There still remained the criticism against the text of the first reading.

111. In his third report the Special Rapporteur proposed two alternatives for the second reading. Whereas the first one was the text as adopted on first

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102/ The comments of the following Governments could be considered as belonging to this group: United Kingdom, Federal Republic of Germany (then), Belgium, five Nordic countries, Australia, Canada, Qatar and Switzerland, paras. 211-213, Preliminary report on jurisdictional immunities of States and their property, A/CN.4/415, Yearbook of the ILC, 1988, vol. II, Part 1, p. 117.

103/ The German Democratic Republic, Byelorussian SSR and USSR commented from this viewpoint, para. 216, ibid., p. 117.

104/ Paras. 222-225, ibid., p. 118.

105/ Paras. 228-237, ibid., pp. 118-119.

106/ Para. 240, Preliminary report on jurisdictional immunities of States and their property, A/CN.4/415, Yearbook of the ILC, 1988, vol. II, Part 1, p. 119 and para. 46, Second report on jurisdictional immunities of States and their property, A/CN.4/422 and Add.1, Yearbook of the ILC, 1989, vol. II, Part 1, p. 73. For the text, see Annex III.

reading, the second suggested its reformulation. 107/ He explained that, in

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107/ Third report on jurisdictional immunities of States and their property, A/CN.4/431, Yearbook of the ILC, 1990, vol. II, Part 1, pp. 18-19. The text read as follows: First Alternative: Text as adopted in the first reading; Second alternative: Article 21 State immunity from measures of constraint: 1. No measures of constraint, including measures of attachment, arrest and execution, against the property of a foreign State may be taken in the territory of a forum State unless and to the extent that: (a) the foreign State has expressly consented to the taking of such measures in respect of that property, as indicated: (i) by arbitration agreement; (ii) by international agreement or in a written contract; (iii) by a written consent given after a dispute between the parties has arisen; or (b) the foreign State has allocated or earmarked its property for the satisfaction of the claim which is the object of that proceeding; or (c) the property is in the territory of the forum State and is specifically in use or intended for use by the State for commercial [non-governmental] purposes [and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed].

2. Consent to the exercise of jurisdiction under article 8 shall not be held to imply consent to the taking of measures of constraint under Part IV of the present articles, for which separate consent shall be necessary.

Article 22: The following categories of property of a State shall not be considered as property specifically in use or intended for use by the State for commercial purposes under paragraph 1 (c) of article 21: (a) property, including any bank account, which is in the territory of another State and 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 foreign State which is in the territory of a forum State and used for monetary purposes; (d) property forming part of the cultural heritage of the State or part of its archives which is in the territory of another State and not placed or intended to be placed on sale; (e) property forming part of an exhibition of objects of scientific or historical interest which is in the territory of another State and not placed or intended to be placed on sale.

2. A category of property, or part thereof, listed in paragraph 1 shall not be subject to measures of constraint in connection with a proceeding before a court of a forum State, unless the State in question has specifically consented to the taking of measures of constraint in respect of that category of its property, or part thereof, under paragraph 1 (a) of article 21, or allocated or earmarked that property within the meaning of paragraph 1 (b) of article 21.

Article 23: If a State property including a segregated State property is entrusted by the State to a State enterprise for commercial purposes, the State cannot invoke immunity from a measure of constraint before a court of a forum State in respect of that State property.

the light of the comments received from Governments and of the observations made in the Sixth Committee and in the Commission, carefully limited execution rather than its total prohibition would have a better chance of obtaining general approval. 108/ He also added a new provision with regard to State enterprises. 109/

112. Members of the Commission generally supported the basic approach of the second alternative, including the idea of combining articles 21 and 22. 110/ However, they expressed different views with regard to the substance of the new article 21. One of the two main issues discussed in particular was the proposed deletion of the bracketed phrase "or property in which it has a legally protected interest", which appeared in the introductory clause of article 21 and in paragraph 1 of article 22 as adopted on first reading. 111/ The other one on which the views of members were divided concerned the possible deletion of the bracketed phrase "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed" in paragraph 1 (c) of the new article 21. With regard to new article 22 proposed by the Special Rapporteur, many members supported the addition of the words "and used for monetary purposes" in paragraph 1 (c). 112/ As far as new article 23 was concerned, the majority of members were of the view that it was probably unnecessary, but that the Commission should await the final results of its work concerning the definition of the term "State" in the new article 2 and the ultimate fate of draft article 11 bis. The members considered that a State enterprise established for commercial purposes, not being a State as defined in the new article 2, was not entitled to perform acts pursuant to the governmental

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108/ Para. 5, ibid., p. 19.

109/ Para. 9, ibid., para. 9, p. 20.

110/ Report of the International Law Commission on the work of its forty-second session, para. 222, Yearbook of the ILC, 1990, vol. II, Part 2, p. 42.

111/ Para. 223, ibid.

112/ Para. 227, ibid.

authority of the State and that it fell outside the scope of the topic of jurisdictional immunities of States and the new article 23 should therefore not be included in the draft. 113/

113. At its forty-third session in 1991, the Commission completed the second reading. With regard to the execution, it adopted the articles 21 and 22 proposed by the Special Rapporteur in 1990 as new articles 18 and 19, respectively. 114/

114. In their written comments several States insisted on the need for further examining article 18. Some comments mentioned the importance of the distinction between “prejudgement or interim measures” and “measures of execution”; other comments were related to the possibility of the enforcement of a judgement in a third State; still other comments suggested the need for the provision to establish the obligation of a State to satisfy a judgement rendered against it. 115/ As far as article 19 was concerned, most comments of Governments called for the refinement and further clarification of the categories of property, particularly paragraphs 1 (a) and (c). 116/

115. In the Working Group established pursuant to resolution 46/55 of the General Assembly, the issue of execution was discussed further. With regard to article 18, the following points were raised for discussion: first, the requirement of the connection between the property and the claim or the agency or instrumentality concerned; secondly, the obligation of a State to satisfy the judgement; thirdly the necessity of the phrase “intended for use” and finally the absence of a provision with regard to an under-capitalized State agency or instrumentality. As far as article 19 was concerned, questions were raised as to the implications of some subparagraphs, particularly, the extent covered by the term “bank account” (para. 1 (a)) and the meaning of the term “monetary authority” (para. 1 (c)). Some members expressed their doubt about the need for article 19 while, in the view of others, that article was

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113/ Para. 228, ibid.

114/ Report of the ILC on the work of its forty-third session, Yearbook of the ILC, 1991, vol. II, Part 2, pp. 56-59.

115/ For the comments from Governments, A/47/326 and Add. 1-5, A/48/313, A/48/464 and A/C.6/48/3.

116/ United Kingdom, Italy.

necessary as it reinforced the protection enjoyed by certain types of State property and avoided any misunderstanding regarding the immunity of such property. 117/ The Chairman suggested that the provision with regard to the obligation of a State to satisfy the judgement against it might have provided a basis for compromise. After these discussions, the Chairman suggested new proposals in relation to article 18. 118/

116. On the basis of the proposals for article 18 submitted by the Chairman of the Working Group in 1992, the members continued their discussion in the Working Group established in 1993 pursuant to resolution and the Chairman suggested an amendment of the proposed new paragraph in the Group. Notwithstanding an extensive discussion, they could not achieve a compromise with regard to any of the proposals. 119/ As far as article 19 was concerned, the issue of its appropriateness was again raised. The members also exchanged views about the meaning of each subparagraph. 120/

117. In the informal consultations held pursuant to General Assembly decision 48/413, the issue of measures of constraint was further discussed. They could not formulate a compromise and the Chairman identified the issues as follows:

> "In general, there are different views as to whether the exercise of jurisdiction by a court in proceedings to determine the merits of a claim against a foreign State implies the power to take measures of constraint against the property of that State with a view to satisfying a valid judgement confirming the claim. If such a power is recognized, there are also different views as to which property may be subject to measures of constraint. Any attempt to reconcile the different views on these issues would need to take into account the interests of a State in minimizing the interference with its activities resulting from coercive measures taken against its property as well as the interests of a

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117/ Report of the Working Group, A/C.6/47/L.10, pp. 11-14.

118/ Paras. 21–24, ibid., pp. 4-5.

119/ Paras. 67-80, Report of the Working Group, A/C.6/48/L.4, pp. 13-15. The text of the Chairman's proposal read as follows: "No measures of constraint shall be taken against the property of a State before that State is given adequate opportunity to comply with the judgement."

120/ Paras. 81 and 82, ibid., p. 15.

private party in obtaining satisfaction of a claim against a foreign State that has been confirmed by an authoritative judicial pronouncement." 121/

118. He also suggested a possible basis for a compromise which read as follows:

"12. Given the complexity of this issue, it was not possible to achieve general agreement on the basis for a compromise in the limited time available. The informal consultations indicated that it may be necessary to consider several elements in attempting to find a generally acceptable compromise, with the following elements being identified for further consideration. First, it may be possible to lessen the need for measures of constraint by placing greater emphasis on voluntary compliance by a State with a valid judgement. This may be achieved by providing the State with complete discretion to determine the property to be used to satisfy the judgement as well as a reasonable period for making the necessary arrangements. Second, it may be useful to envisage international dispute settlement procedures to resolve questions relating to the interpretation or application of the convention which may obviate the need to satisfy a judgement owing to its invalidity. As a consequence of the first two elements, the power of a court to take measures of constraint would be limited to situations in which the State failed to provide satisfaction or to initiate dispute settlement procedures within a reasonable period. Since the State would be given complete discretion to determine the property to be used to satisfy a valid judgement and a reasonable period to do so, the court would have the power to take measures of constraint against any of the State's property located in the forum State which was not used for government non-commercial purposes once the grace period had expired."

"13. As regards prejudgement measures, the emphasis on voluntary compliance by a State with an eventual judgement, together with the possibility of measures of constraint, would also lessen the need for such precautionary measures, which could be eliminated or possibly restricted to property belonging to State agencies, instrumentalities or other entities in proceedings instituted against them rather than the

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121/ Document A/C.6/49/L.2, para. 11.

State or its organs. Thus, the requisite connection could be maintained with respect to prejudgement measures, which would only be permitted in proceedings against a State agency, instrumentality or other entity." 122/

3. A summary of recent relevant case law

119. The following paragraphs draw on a number of conclusions included in a summary of cases prepared by the Secretariat of the Commission covering the period 1991-1999. 123/

120. The cases examined appear to fall into two categories which may reflect different circumstances rather than a discernible difference in approach. The crucial issue appears to be the nature of the State property in issue and whether it is needed or destined specifically for the fulfilment of sovereign functions.

121. The first category consists of a range of cases 124/ in which requests for various orders in relation to foreign State property have been refused or overturned on the basis of a variety of legal arguments including arguments on the basis of provisions in the United Nations Charter, the United Nations-United States Headquarters Agreement and the Vienna Convention that require, for example, the premises of missions to be inviolable, and missions and representatives of United Nations Member States to be given the

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122/ Ibid., paras. 12 and 13.

123/ The following cases relevant to this issue were examined by the Secretariat in its summary: United States, Court of Appeals, Fifth Circuit, 11 February 1991, Stena Rederi AB v. Comision de Contratos del Comite 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).

124/ See cases in United States courts listed in note 123 above.

facilities and legal protection necessary for the performance of their diplomatic functions. An important factor in such cases appears to have been that the State in whose courts the matter is being considered and the State whose property is in issue have agreed on the interpretation to be given to such agreements. A further relevant and related factor may be a concern to maintain the reciprocity of recognition of diplomatic privileges and immunities of diplomats.

122. In the second category and perhaps tending in a different direction are comments made in one case 125/ to the effect that:

- the immunity of foreign States from attachment and execution in the forum State was not simply an extension of immunity from jurisdiction;
- the absolute character of immunity from execution has been increasingly rejected over the last 30 years;
- there is no longer a rule of customary international law absolutely precluding coercive measures against the property of foreign States;
- it is now broadly accepted that execution against the property of foreign States could not be excluded as a matter of principle;
- the scope of such immunity remained wider than immunity from jurisdiction, which did not apply to activities performed jure gestionis;
- in order for immunity from attachment and execution to apply, it was necessary not only that the activity or transaction at issue was performed jure gestionis but also that the property affected was not destined for the fulfilment of sovereign functions;
- the foreign policy interest of the executive in preserving good relations with other States no longer justified a rule of absolute immunity from attachment and execution where the property was not destined specifically for the fulfilment of sovereign functions;
- if the executive wished to avoid possible embarrassment it remained possible for it to intervene in the proceedings to offer to pay off a creditor seeking enforcement against the property of

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125/ Italy, Constitutional Court, 15 July 1992, Condor and Filvem v. Minister of Justice (ILR 101, p. 394).

a foreign State or to guarantee payment of a debt in return for the creditor's withdrawal of a request for attachment against such property.

123. Other cases seem to fall within this second category. For example, in a case, 126/ a court rejected a State's claim of immunity from execution and found that there was no unwritten rule of international law to the effect that seizure of a vessel belonging to a State and intended for commercial shipping is permissible in only limited circumstances. In another case 127/ a State was found not entitled to jurisdictional immunity or immunity from execution on the basis that it had acted as an ordinary private person and because it had been deprived of its prerogative as a sovereign State as a result of Security Council resolutions. That case reiterated that under international law, States were not entitled to absolute immunity from execution, that such immunity only applied to certain assets and that it was necessary to determine whether the funds subjected to attachment had been allocated in whole or part for sovereign activities. Another case from the same court contains similar comments, finding that there was power to examine assets belonging to a State to determine their nature. 128/

124. The two categories of cases referred to in the above paragraphs do not necessarily indicate a difference of approach. Courts are consistently unwilling to allow measures of constraint to be taken against the property of a State which is destined specifically for the fulfilment of sovereign functions. In addition, the first category of cases appears to be governed by provisions in international conventions and other documents which provide States with certain rights and obligations vis-à-vis other States while the second category of cases appears to be determined in the absence of any such provisions.

126/ Netherlands, Supreme Court, 28 May 1993, The Russian Federation v. Pied-Rich B.V (NYIL 1994, p. 512).

127/ Belgium, Civil Court of Brussels, 27 February 1995, Iraq v. Dumez (ILR 106, p. 284).

128/ Belgium, Civil Court of Brussels, 9 March 1995, Zaire v. D'Hoop and Another (ILR 106, p. 294).

4. Suggestions of the Working Group

125. After examining the issue in the light of all the elements above, the Working Group agreed that the following suggestions could be forwarded to the General Assembly.

126. The Working Group concluded that a distinction between prejudgement and post-judgement measures of constraint may help sort out the difficulties inherent in this issue. It was however stressed that both types of measures are subject to the conditions of article 19 [property for governmental non-commercial purposes].

127. As regards prejudgement measures of constraint, the Working Group was of the view that these should be possible [only] in the following cases:

(a) Measures on which the State has expressly consented either ad hoc or in advance;.

(b) Measures on property designated to satisfy the claim;

(c) Measures available under internationally accepted provisions [leges specialis] such as, for instance, ship arrest, under the International Convention relating to the arrest of seagoing ships, Brussels, 24 February 1956;

(d) Measures involved in property of an agency enjoying separate legal personality if it is the respondant of the claim.

128. As regards post-judgement measures, the Working Group was of the view that these should be possible [only] in the following cases:

(a) Measures on which the State has expressly consented either ad hoc or in advance;

(b) Measures on designated property to satisfy the claim;

129. Beyond this, the Working Group has explored three possible alternatives which the Assembly may decide to follow:

Alternative I

(i) Recognition of judgement by State and granting the State a 2-3 months grace period to comply with it as well as freedom to determine property for execution;

(ii) If no compliance occurs during the grace period, property of the State, [subject to article 19] could be subject to execution.

Alternative II

(i) Recognition of judgement by State and granting the State a 2-3 months grace period to comply with it as well as freedom to determine property for execution;

(ii) If no compliance occurs during the grace period, the claim is brought into the field of inter-State dispute settlement; this would imply the initiation of dispute-settlement procedures in connection with the specific issue of execution of the claim.

Alternative III

The Assembly may decide not to deal with this aspect of the draft, because of the delicate and complex aspects of the issues involved. The matter would then be left to State practice on which there are different views. The title of the topic and of the draft would be amended accordingly.

III. ANNEX

1. In resolution 53/98, the General Assembly invited the International Law Commission to present comments on outstanding substantive issues relating to the draft articles on Jurisdictional Immunities of States and their Property taking into account the recent developments of State practice and other factors related to this issue since the adoption of the draft articles.

2. It appears that resolution 53/98 seeks only to obtain the comments of the ILC on recent developments of State practice in relation to the issues considered in document A/C.6/49/L.2 (informal consultations held pursuant to General Assembly decision 48/413).

3. On the other hand there has been an additional recent development in State practice and legislation on the subject of immunities of States since the adoption of the draft articles which the ILC considers necessary to draw to the attention of the Sixth Committee. This development concerns the argument increasingly put forward that immunity should be denied in the case of death or personal injury resulting from acts of a State in violation of human rights norms having the character of jus cogens, particularly the prohibition on torture.

4. In the past decade, a number of civil claims have been brought in municipal courts, particularly in the United States and United Kingdom, against foreign Governments, arising out of acts of torture committed not in the territory of the forum State but in the territory of the defendant and other States. 129/

5. In support of these claims plaintiffs have argued that States are not entitled to plead immunity where there has been a violation of human rights norms with the character of jus cogens.

129/ See: J. Bröhmer State Immunity and Violation of Human Rights (1997); Report of International Law Association Committee on State Immunity (1994).

6. National courts, in some cases, 130/ have shown some sympathy for this argument.

7. However, in most cases, 131/ the plea of sovereign immunity has succeeded.

8. Since these decisions were handed down, two important developments have occurred which give further support to the argument that a State may not plead immunity in respect of gross human rights violations.

9. First, the United States has amended its Foreign Sovereign Immunity Act (FSIA) to include a new exception to immunity. This exception, introduced by section 221 of the Anti-Terrorism and Effective Death Penalty Act of 1996, provides that immunity will not be available in any case:

> "in which money damages are sought against a foreign State for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage-taking ...".

A Court will decline to hear a claim if the foreign State has not been designated by the Secretary of State as a State sponsor of terrorism under federal legislation or if the claimant or victim was not a national of the United States when the act occurred.

10. This provision has been applied in two cases. 132/

11. Secondly, the Pinochet case has emphasized the limits of immunity in respect of gross human rights violations by State officials. 133/

130/ See: (United Kingdom) A1-Adsani v. Government of Kuwait 100 ILR 465 at 471; (New Zealand) Controller and Auditor General v. Sir Ronald Davidson [1996] 2 NZLR 278, particularly at 290 (per Cooke P.); Dissenting Opinion of Justice Wald in (United States) Princz v. Federal Republic of Germany 26 F 3d 1166 (DC Cir. 1994) at 1176-1185.

131/ See: (United States) Siderman de Blake v. Republic of Argentina 965 F 2d 699 (9th Cir. 1992); (United States) Argentine Republic v. Amerada Hess Shipping Corporation 488 US 428 (1989); (United States) Saudi Arabia v. Nelson 100 ILR 544; (United States) Princz v. Federal Republic of Germany 26 F 3d 1166 (DC Cir. 1994); (United Kingdom) Al-Adsani v. Kuwait 107 ILR 536.

132/ See: (United States) Rein v. Libya (1999) 38 ILM 447; (United States) Cicippio v. Iran 18 F 2d 62 (1998).

133/ See: (United Kingdom) R v. Bow Street Metropolitan Stipendiary Magistrate: Ex Parte Pinochet Ugarte (No. 3) [1999] 2 WLR 827 (HL).

12. Although the judgement of the House of Lords in that case only holds that a former head of State is not entitled to immunity in respect of acts of torture committed in his own State and expressly states that it does not affect the correctness of decisions upholding the plea of sovereign immunity in respect of civil claims, as it was concerned with a criminal prosecution, there can be no doubt that this case, and the widespread publicity it received, has generated support for the view that State officials should not be entitled to plead immunity for acts of torture committed in their own territories in both civil and criminal actions.

13. The developments examined in this annex are not specifically dealt with in the draft articles on Jurisdictional Immunities of States and their Property. Nevertheless they are a recent development relating to immunity which should not be ignored.

Appendix

Article 2 of the 1991 draft of the Institut de Droit International 134/ reads as follows:

Article 2

Criteria indicating the Competence of Courts or other Relevant Organs of the Forum State in relation to Jurisdictional Immunity:

1. In determining the question of the competence of the relevant organs of the forum State, each case is to be separately characterized in the light of the relevant facts and the relevant criteria, both of competence and incompetence; no presumption is to be applied concerning the priority of either group of criteria.

2. In the absence of agreement to the contrary, the following criteria are indicative of the competence of the relevant organs of the forum State to determine the substance of the claim, notwithstanding a claim to jurisdictional immunity by a foreign State which is a party:

(a) The organs of the forum State are competent in respect of proceedings relating to a commercial transaction to which a foreign State (or its agent) is a party;

(b) The organs of the forum State are competent in respect of proceedings concerning legal disputes arising from relationships of a private law character to which a foreign State (or its agent) is a party; the class of relationships referred to includes (but is not confined to) the following legal categories: commercial contracts; contracts for the supply of services, loans and financing arrangements; guarantees or indemnities in respect of financial obligations; ownership, possession and use of property; the protection of industrial and intellectual property; the legal incidents attaching to incorporated bodies, unincorporated bodies and associations, and partnerships; actions in rem against ships and cargoes; and bills of exchange;

(c) The organs of the forum State are competent in respect of proceedings concerning contracts of employment and contracts for professional services to which a foreign State (or its agent) is a party;

134/ See paras. 55 and 60 above.

(d) The organs of the forum State are competent in respect of proceedings concerning legal disputes arising from relationships which are not classified in the forum as having a “private law character” but which nevertheless are based upon elements of good faith and reliance (legal security) within the context of the local law;

(e) The organs of the forum State are competent in respect of proceedings concerning the death of, or personal injury to, a person, or loss or damage to tangible property which are attributable to activities of a foreign State and its agents within the national jurisdiction of the forum State;

(f) The organs of the forum State are competent in respect of proceedings relating to any interest of a foreign State in movable or immovable property, being a right or interest arising by way of succession, gift or bona vacantia; or a right or interest in the administration of property forming part of the estate of a deceased person or a person of unsound mind or a bankrupt; or a right or interest in the administration of property of a company in the event of its dissolution or winding up; or a right or interest in the administration of trust property or property otherwise held on a fiduciary basis;

(g) The organs of the forum State are competent insofar as it has a supervisory jurisdiction in respect of an agreement to arbitrate between a foreign State and a natural or juridical person;

(h) The organs of the forum State are competent in respect of transactions in relation to which the reasonable interference is that the parties did not intend that the settlement of disputes would be on the basis of a diplomatic claim;

(i) The organs of the forum State are competent in respect of proceedings relating to fiscal liabilities, income tax, customs duties, stamp duty, registration fees, and similar impositions provided that such liabilities are the normal concomitant of commercial and other legal relationships in the context of the local legal system.

3. In the absence of agreement to the contrary, the following criteria are indicative of the incompetence of the organs of the forum State to determine the substance of the claim, in a case where the jurisdictional immunity of a foreign State party is in issue:

(a) The relation between the subject-matter of the dispute and the validity of the transactions of the defendant State in terms of public international law;

(b) The relation between the subject-matter of the dispute and the validity of the internal administrative and legislative acts of the defendant State in terms of public international law;

(c) The organs of the forum State should not assume competence in respect of issues the resolution of which has been allocated to another remedial context;

(d) The organs of the forum State should not assume competence to inquire into the content or implementation of the foreign defence and security policies of the defendant State;

(e) The organs of the forum State should not assume competence in respect of the validity, meaning and implementation of intergovernmental agreement or decision creating agencies, institutions or funds subject to the rules of public international law.

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