

Document:-  
**A/CN.4/L.364**

**Draft articles on jurisdictional immunities of States and their property. Texts adopted by the  
Drafting Committee: articles 10, 12, 2, para. 1 (g), 3, para.2, and 15 - reproduced in  
A/CN.4/SR.1805, paras. 60, 63 and 67-69**

Topic:  
**Jurisdictional immunities of States and their property**

Extract from the Yearbook of the International Law Commission:-  
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ARTICLES 10, 12, 2, para. 1 (g), 3, para. 2, and 15

57. Mr. LACLETA MUÑOZ (Chairman of the Drafting Committee) said that, at the beginning of the present session, draft articles 10, 11 and 12 (ILC(XXXV)/Conf.Room Doc.1) on jurisdictional immunities of States and their property had been pending in the Drafting Committee. Draft articles 7, 8, 9 and 10 in part II (General principles), which constituted a reformulation of the set of draft articles proposed by the Special Rapporteur in his third report, had been referred to the Drafting Committee at the Commission's thirty-third session. Of these, the Commission had provisionally adopted, at its thirty-fourth session, only draft articles 7, 8 and 9.<sup>9</sup>

58. Draft articles 11 and 12, which belonged in part III (Exceptions to State immunity), were a new version of the draft articles proposed by the Special Rapporteur in his fourth report and referred to the Drafting Committee at the Commission's thirty-fourth session.<sup>10</sup> At the present session, the Commission had referred to the Drafting Committee articles 13, 14 and 15 proposed by the Special Rapporteur in his fifth report.

59. The Drafting Committee had approved the titles and texts of articles 10, 12 and 15. In connection with article 12, it had approved a definition of the term "commercial contract" for inclusion in article 2 (Use of terms) as paragraph 1 (g), as well as an interpretative provision for inclusion in article 3, paragraph 2. It had been considered advisable to set aside article 11 for the time being; articles 13 and 14 would be examined by the Drafting Committee at the Commission's next session. The articles adopted by the Drafting Committee were reproduced in document A/CN.4/L.364.

60. The Drafting Committee proposed the following text for article 10:

*Article 10. Counter-claims<sup>11</sup>*

1. A State cannot invoke immunity from jurisdiction in a proceeding instituted by itself before a court of another State in respect of any counter-claim against the State arising out of the same legal relationship or facts as the principal claim.

2. A State intervening to present a claim in a proceeding before a court of another State cannot invoke immunity from the jurisdiction of that court in respect of any counter-claim against the State arising out of the same legal relationship or facts as the claim presented by the State.

3. A State making a counter-claim in a proceeding instituted against it before a court of another State cannot invoke immunity from the jurisdiction of that court in respect of the principal claim.

61. Article 10 corresponded substantially to draft article 10 as proposed by the Special Rapporteur. To make the rule more easily understandable, however, the Drafting Committee had considered it advisable to set out in three separate paragraphs the three cases which appeared to be

mixed together in the two paragraphs of the original text. Accordingly, paragraph 1 dealt with the case of a counter-claim arising out of the same legal relationship or facts as the principal claim, where a State had itself instituted a proceeding before a court of another State. Paragraph 2 dealt with the case of a counter-claim against a State and arising out of the same legal relationship or facts as the claim presented by that State, where that State had intervened to present a claim in a proceeding before a court of another State. Paragraph 3 concerned a counter-claim made by a State in a proceeding instituted against it before a court of another State.

62. In order to bring the language of article 10 into line with that of the articles already provisionally adopted, the Drafting Committee had used the formula "A State . . . cannot invoke immunity from jurisdiction" in all three paragraphs. Other minor drafting changes had been introduced only to make the text clearer and more precise.

63. The Drafting Committee proposed the following text for article 12:

*Article 12. Commercial contracts<sup>12</sup>*

1. If a State enters into a commercial contract 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 State is considered to have consented to the exercise of that jurisdiction in a proceeding arising out of that commercial contract, and accordingly cannot invoke immunity from jurisdiction in that proceeding.

2. Paragraph 1 does not apply:

(a) in the case of a commercial contract concluded between States or on a government-to-government basis;

(b) if the parties to the commercial contract have otherwise expressly agreed.

64. Although the basic principle remained the same, the drafting of article 12 was appreciably different from that of draft article 12 submitted by the Special Rapporteur. The drafting changes made had been unavoidable because of the change of focus given to the article: the original text referred to "trading or commercial activity" whereas the new text referred to "commercial contracts". In the original text, moreover, the Special Rapporteur had stressed two elements which did not need any specific mention in the new text: the fact that the activity was conducted wholly or partly in the territory of another State, as a basis for jurisdiction; and the fact that the activity was conducted by the State itself or by one of its organs or agencies, whether or not organized as a separate legal entity. In the new text, a simple reference to the State had replaced the former enumeration. As to the relationship between the activity and the territory of the other State, since the new article related to commercial contracts instead of trading or commercial

<sup>9</sup> *Yearbook* . . . 1982, vol. II (Part Two), pp. 100 *et seq.*

<sup>10</sup> *Ibid.*, p. 99, para. 198.

<sup>11</sup> For the text submitted by the Special Rapporteur, *ibid.*, p. 95, footnote 218; for the Commission's consideration thereof at its thirty-fourth session, see *Yearbook* . . . 1982, vol. I, pp. 104-119, 1716th meeting, paras. 15-47, 1717th meeting and 1718th meeting, paras. 1-39.

<sup>12</sup> For the revised text submitted to the Drafting Committee by the Special Rapporteur, see *Yearbook* . . . 1982, vol. II (Part Two), p. 99, footnote 237; for the Commission's consideration of the original text (*ibid.*, footnote 221) at its thirty-fourth session, see *Yearbook* . . . 1982, vol. I, pp. 183-199, 1728th meeting, paras. 7-45, and 1729th-1730th meetings.

activity, the important point was to stress, as did paragraph 1 of the new text, that the applicable rules of private international law determined whether differences relating to commercial contracts fell within the jurisdiction of a court of the other State.

65. The article specified that one of the parties to the contract had to be a foreign natural or juridical person and stressed the importance of consent to the exercise of foreign jurisdiction in a proceeding arising out of the contract, the natural consequence being that in those circumstances the contracting State could not invoke immunity of jurisdiction in that proceeding. That was the accepted formula used throughout the draft.

66. To achieve a more systematic presentation, the exceptions stated in the two paragraphs of the original text had been repeated in the two subparagraphs of the new paragraph 2. Subparagraph (a) corresponded to paragraph 2 of the draft article submitted by the Special Rapporteur and subparagraph (b) expressed the possibility of derogation by agreement provided for in the original text by the introductory phrase of paragraph 1, "Unless otherwise agreed".

67. Having introduced the concept of a "commercial contract" into article 12, the Drafting Committee had found it necessary to adopt a definition of that term for inclusion in article 2 as paragraph 1 (g), where it would replace the definition of the expression "trading or commercial activity" in the original text of article 2 submitted by the Special Rapporteur in his second report. The proposed new definition did not call for any comment and read:

*Article 2. Use of terms<sup>13</sup>*

1. For the purposes of the present articles:

...

(g) "commercial contract" means:

- (i) any commercial contract or transaction for the sale or purchase of goods or the supply of services;
- (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee in respect of any such loan or of indemnity in respect of any such transaction;
- (iii) any other contract or transaction, whether of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

...

68. The following new interpretative provision had been introduced to replace, as paragraph 2 of article 3, the provision originally proposed by the Special Rapporteur in his second report, concerning the commercial character of a trading or commercial activity. According to the new text, in determining whether a contract was commercial, reference should be made primarily to its nature, but the purpose of the contract should also be taken into account if it was relevant to determining the non-commercial character of the contract.

*Article 3. Interpretative provisions<sup>14</sup>*

...

2. 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.

69. The Drafting Committee proposed the following text for article 15:

*Article 15. Ownership, possession and use of property<sup>15</sup>*

1. The immunity of a State cannot be invoked to prevent a court of another State which is otherwise competent from exercising its jurisdiction in a proceeding which relates to the determination of:

(a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum; or

(b) any right or interest of the State in movable or immovable property arising by way of succession, gift or *bona vacantia*; or

(c) any right or interest of the State in the administration of property forming part of the estate of a deceased person or of a person of unsound mind or of a bankrupt; or

(d) any right or interest of the State in the administration of property of a company in the event of its dissolution or winding up; or

(e) any right or interest of the State in the administration of trust property or property otherwise held on a fiduciary basis.

2. A court of another State shall not be prevented from exercising jurisdiction in any proceeding brought before it against a person other than a State, notwithstanding the fact that the proceeding relates to, or is designed to deprive the State of, property:

(a) which is in the possession or control of the State; or

(b) in which the State claims a right or interest,

if the State itself could not have invoked immunity had the proceeding been instituted against it, or if the right or interest claimed by the State is neither admitted nor supported by *prima facie* evidence.

3. The preceding paragraphs are without prejudice to the immunities of States in respect of their property from attachment and execution, or the inviolability of the premises of a diplomatic or special or other official mission or the protection of consular premises, or the jurisdictional immunity enjoyed by a diplomatic agent in respect of private immovable property held on behalf of the sending State for the purposes of the mission.

70. Article 15 corresponded substantially to draft article 15 submitted by the Special Rapporteur in his fifth report and referred to the Drafting Committee during the current session. In order to make the text clearer and more precise, and thus to facilitate understanding of the rule, the Drafting Committee had decided to rearrange the contents of the four subparagraphs of the original paragraph 1, dividing them between the new paragraphs 1 and 2. Paragraph 3 of the new text corresponded to the former paragraph 2.

71. In the introductory clause of paragraph 1, the Drafting Committee had deleted the proviso "Unless otherwise agreed". Furthermore, in the interests of the harmony of the draft as a whole, it had used the formula

<sup>13</sup> For the original text, see *Yearbook* . . . 1982, vol. II (Part Two), pp. 95–96, footnote 224. For the Commission's decision to modify the definition of "trading or commercial activity", see *Yearbook* . . . 1982, vol. I, p. 199, 1730th meeting, paras. 28–29.

<sup>14</sup> For the original text, see *Yearbook* . . . 1982, vol. II (Part Two), p. 96, footnote 225. For the Commission's decision to modify paragraph 2, see *Yearbook* . . . 1982, vol. I, p. 199, 1730th meeting, paras. 28–29.

<sup>15</sup> For the text submitted by the Special Rapporteur, see 1762nd meeting, para. 1; for the Commission's consideration thereof at the current session, see 1767th meeting, paras. 9–47, and 1768th–1770th meetings.