II. Report on Foreign State Immunity*

RECOMMENDATION

"Be it resolved, that the United States Government should support the efforts of the United Nations International Law Commission to develop a Convention on Foreign State Immunity based on the restrictive theory of immunity that is consistent with the Foreign Sovereign Immunities Act of 1976 and that does not preclude the further development of national remedies against foreign states consistent with general principles of international law."

REPORT

ABA Committee on Foreign Sovereign Immunity

In 1981, the Section of International Law and Practice of the American Bar Association established the Ad Hoc Committee on Revision of the Foreign Sovereign Immunities Act to develop amendments which would improve the judicial remedies available to U.S. citizens with claims against foreign states under the Foreign Sovereign Immunities Act (FSIA) of 1976.

The FSIA codifies the rules which determine when a private party can maintain a lawsuit against a foreign state and when that state is entitled to immunity. The statute is an attempt to implement the Tate Letter of 1952 which adopted the restrictive theory of sovereign immunity and transferred responsibility for assessing immunity claims from the State Department to the courts.

The Ad Hoc Committee proposed several perfecting amendments to the statute with regard to: the definition of commercial activity, arbitration agreements, admiralty claims, the act of state doctrine, prejudgment attachment and the execution of judgments. The ABA House of Delegates adopted a resolution supporting these amendments in August, 1984. Hearings have been held on these amendments in the House of Representatives, but none has yet been enacted into law.

Earlier this year the Council of the Section on International Law and Practice decided to replace the Ad Hoc Committee with a new standing Committee on Foreign Sovereign Immunity within the Division on Public International Law. While the Committee will continue to pursue amendments to the FSIA, it will also focus on the draft articles on sovereign immunity prepared by the International Law Commission.

*The Report and Recommendation were prepared by the Section's Committee on Foreign Sovereign Immunity—Mark B. Feldman, Chairman; Virginia Morris, Reporter.

International Law Commission

The International Law Commission (ILC) was created by the United Nations General Assembly in 1947 to promote the codification and progressive development of international law pursuant to Article 13 of the United Nations Charter. The following year the United Nations recognized the importance of codifying the law of state immunity in the 1948 Survey of International Law and Selection of Topics for Codification.

In 1978, the Commission began preparing draft articles on the jurisdictional immunities of states and their property to provide the basis for the first international convention to address all of the major aspects of this important area of international law. Under the guidance of the highly regarded Special Rapporteur, Dr. Sompong Sucharitkul, the Commission completed the first reading, or provisional adoption, of the draft articles during its 1986 session.

Member States have been given until January 1, 1988, to provide comments on the draft before the Commission gives its final approval during the second reading which usually progresses at a faster pace. Once the Commission has approved the articles, taking into account the views of Member States, the draft will be referred to the General Assembly. The Assembly may call for a conference to formulate a convention on the basis of the Commission's final draft or simply recognize the Commission's work in the form of a resolution or declaration if the draft is considered controversial by Member States.

Summary of the ILC Draft Convention on State Immunity

PART I. INTRODUCTION

The ILC draft addresses the immunity of a state and its property from the jurisdiction of the courts of another state (Article 1). A court is broadly defined to include any state organ which exercises judicial functions (Article 2). In accordance with the principle of non-retroactivity, the ILC draft would apply to a proceeding against a state in the court of another state only if the convention had entered into force for both states at the time the proceeding was initiated (Article 5).

For the purpose of invoking immunity, a state includes: the state and its organs of government; political subdivisions, such as states or cantons in a federal system, if they are entitled to perform acts in the exercise of the sovereign authority of the state; state agencies or instrumentalities but only to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the state; and state representatives acting in their official capacity (Article 3). While "sovereign authority" is not defined in the draft, the commentary contained in the 1986 ILC Report explains that the term "seems to be the nearest equivalent to the French

expression *'prerogatives de la puissance publique'*." The ILC provisions concerning state immunity do not affect the personal immunities accorded to a head of state or the privileges and immunities enjoyed by a state in connection with diplomatic activities or international organizations (Article 4).

PART II. GENERAL PRINCIPLES

The ILC draft recognizes a general principle of immunity "subject to the provisions of the present articles [and the relevant rules of general international law]" (Article 6). (The brackets indicate that the enclosed language is controversial.) A state is required to give effect to this immunity by "refraining from exercising jurisdiction in a proceeding before its courts against another State." A proceeding is considered to have been instituted against another state if a determination by the court of the issues presented in the case may affect the property, rights, interests or activities of that state (Article 7).

There are several situations in which a state is not entitled to immunity under the ILC articles. A state cannot invoke immunity if it has expressly consented to jurisdiction in an international agreement, a written contract, or a declaration before the court (Article 8). Similarly, a state may implicitly consent to jurisdiction by instituting or intervening in a proceeding, unless the state merely intervenes to invoke immunity or to assert a right or interest in property at issue in the proceeding (Article 9). A state which institutes or intervenes in a proceeding is also deemed to have consented to jurisdiction with regard to related counterclaims (Article 10). The failure of a state to enter an appearance to invoke immunity is not considered to constitute consent to jurisdiction (Article 9).

PART III. [LIMITATIONS ON] [EXCEPTIONS TO] STATE IMMUNITY

The ILC articles provide several distinct exceptions to immunity for claims relating to activities which are generally commercial in nature, including: commercial contracts, arbitration agreements, commercial shipping, corporations, employment contracts, and fiscal obligations. The draft also contains immunity exceptions for proceedings relating to various types of property and tort actions for personal injury or property damage.

As a practical matter, the immunity exception for *commercial contracts* is one of the most important because of the substantial degree of commercial interaction between states and private parties who may turn to the courts to enforce such a contract or provide relief for nonperformance. Under the ILC draft, a state cannot invoke immunity in a proceeding which relates to a commercial contract, unless the contract is concluded between states or the parties have otherwise expressly agreed (Article

11). The definition of a commercial contract includes three types of contracts or transactions: the sale or purchase of goods or the supply of services, financial transactions including loans and guarantees, and any other contract or transaction of an industrial, trading or professional nature (Article 2). The commercial character of a contract is determined by considering the nature of the contract; but the purpose of the contract may also be considered if it would be relevant under the law of the state which entered into the agreement and now seeks to claim immunity in the court of another state (Article 3).

Commercial contracts often provide for *arbitration* in the event of a dispute arising out of the agreement. A state cannot invoke immunity with regard to a written agreement "to submit to arbitration differences relating to a [commercial contract] [civil or commercial matter]" (Article 19). This immunity exception applies to any proceeding concerning "the validity or interpretation of the arbitration agreement, the arbitration procedure, or the setting aside of the award, unless the arbitration agreement otherwise provides" (Article 19).

The *shipping* industry is an integral part of international trade and commerce. Under the ILC articles, a state is not entitled to immunity in a proceeding which relates to a state-owned or state-operated ship engaged in commercial service, or the cargo carried on such a ship, if "at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes" (Article 18). The claims relating to the ship must arise out of its operation, for example: a collision or navigation accident; assistance, salvage and general average; or a repair or supply contract. Warships, naval auxiliaries or other ships "used or intended for use in government non-commercial service" are expressly excluded from this exception.

A state may engage in commercial activities in another state by participating in a separate legal entity, such as a *corporation, partnership or joint venture*. The ILC draft provides an exception to immunity for proceedings relating to the participation of a state in a corporation or other entity which is established under the law of the forum or has its principal place of business in that state, unless the parties have otherwise agreed in writing. Nonprofit organizations created under the law of the forum would also fall under this exception. International organizations are excluded from this provision which only applies to entities which have participants other than states or international organizations (Article 17).

Employment contracts are the subject of a separate exception under which a state is not entitled to immunity if its employee is recruited in the forum and the contract is for "services performed or to be performed, in whole or in part, in the territory of that other state" (Article 12). The exception does not apply if the employee is "recruited to perform services

associated with the exercise of governmental authority"; the proceeding relates to recruitment, renewal or reinstatement; the employee is not a national or habitual resident of the forum when the contract is concluded; the employee is a national of the employer state when the proceeding is instituted; or the parties have otherwise agreed, subject to public policy considerations of the forum.

The business or trading activities of a state may give rise to *fiscal obligations* in another state. The ILC draft provides an immunity exception for proceedings which relate to fiscal obligations, such as duties or taxes (Article 16).

A state may own or possess various types of *property* in another state. Under the ILC draft, a state cannot invoke immunity in a proceeding which relates to: immovable property located in the forum state; property acquired under the law of the forum, for example by gift or succession; or property which is the subject of estate, bankruptcy, competency or corporate dissolution proceedings (Article 14). The ILC articles contain a separate exception for intangible property interests. A state cannot invoke immunity in a proceeding which relates to the determination of a right protected under the law of the forum state, or an alleged infringement of such a right in that state, with regard to a patent, trademark, copyright, or other form of intellectual or industrial property (Article 15). The draft expressly provides that it does not "prejudge any question that may arise in regard to extraterritorial effects of measures of nationalization" with regard to any type of property (Article 20).

Tort actions for personal injury or property damage are the subject of another immunity exception. A state cannot invoke immunity for a claim relating to death, personal injury or property damage if the conduct causing the harm occurred wholly or partly in the forum state and the author of the act or omission was also in the state at the time (Article 13).

PART IV. STATE IMMUNITY IN RESPECT OF PROPERTY FROM MEASURES OF CONSTRAINT

The ILC draft recognizes two distinct aspects of state immunity: the jurisdiction of a court to decide the merits of a case; and the jurisdiction to exercise control over state property at any stage in the proceeding from prejudgment attachment to execution of a judgment. The immunity of state property from measures of constraint on its use extends to property which is owned, possessed or controlled by a state, [or in which it has a legally protected interest] (Article 21).

The immunity of state property is subject to three exceptions under the ILC articles: consent, earmarked property, and commercial property. The property of a state is not entitled to immunity if the state has expressly consented to jurisdiction over its property by international agreement,

written contract, or a declaration before the court (Article 22). It is important to note that consent to jurisdiction to decide the merits of a claim does not constitute consent to jurisdiction over state property for purposes of attachment or execution. Similarly, a state cannot invoke immunity if it has previously allocated or earmarked the property to satisfy the claim (Article 21). Commercial property is not entitled to immunity if it is "specifically in use or intended for use by the State for commercial [non-governmental] purposes" (Article 21). This exception also requires a connection between the property and the claim or the state agency or instrumentality which is before the court.

State property which falls within one of the following categories is not considered commercial property and, therefore, is not subject to measures of constraint in a foreign court, unless the state has specifically earmarked the property to satisfy the claim or otherwise expressly consented to such measures with regard to the particular property: diplomatic property, including a bank account, which is used in connection with a diplomatic or consular mission; military property used or intended for use for military purposes; property of a central bank or other monetary authority; property which is part of the cultural heritage or archives of the state; and property which forms part of a scientific or historical exhibition (Article 23).

Part V. Miscellaneous Provisions

A proceeding against a foreign state can only be instituted by service of process which is effected in one of the following ways: in accordance with a special arrangement between the parties, in accordance with a treaty between the states concerned, through diplomatic channels to the Ministry of Foreign Affairs, or by registered mail or other means if permitted by the laws of both states (Article 24).

A default judgment cannot be rendered against a foreign state, unless the claimant has complied with the service of process requirements contained in the ILC draft and not less than three months have passed since the service was effected. A copy of the judgment, and a translation if necessary, must be sent to the state by the means provided for service. The foreign state must be given at least three months from the time notice is received to have the judgment set aside (Article 25).

The ILC draft recognizes two additional elements of the principle of state immunity with regard to measures of coercion and procedural requirements. A state is immune from measures of coercion requiring it to perform or refrain from performing a specific act or incur a financial penalty. This provision addresses preliminary measures, such as an injunction, rather than the final judgment (Article 26). In terms of procedural immunities, a state cannot be required to produce documents or disclose

information with the failure to do so resulting in a fine or penalty. However, the draft allows the court to take such failure to provide information into account in determining the merits of the case. Also, a state cannot be required to provide a bond or deposit to guarantee payment of the costs involved in a proceeding. This includes situations in which a state has voluntarily initiated a proceeding as a plaintiff in a foreign court (Article 27).

The ILC articles must be applied on a non-discriminatory basis between states parties to the convention, with two exceptions based upon the principle of reciprocity or a special agreement between the states concerned (Article 28).

UNRESOLVED ISSUES AND OTHER PROVISIONS

During the second reading the Commission must resolve the controversy represented by the brackets enclosing the language contained in the following provisions:

—Article 6: A State enjoys immunity . . . subject to . . . [the relevant rules of general international law];

—Part III [Limitations On] [Exceptions To] State Immunity;

—Articles 18, 21 and 23: commercial [non-governmental] purposes;

—Article 19: arbitration differences relating to a [commercial contract] [civil or commercial matter]; and

—Articles 21 and 22: [property in which the state has a legally protected interest].

The Commission may also consider two additional parts concerning dispute settlement and final provisions.

Issues and Recommendations

1. *Nature and Effect of the ILC Draft:*

Issue: Is the draft intended to be a codification of international law or a contractual arrangement between parties to the convention? As between the parties, is the draft intended to be a comprehensive statement of all of the exceptions to immunity or would states' parties be permitted to argue that other exceptions to immunity adopted in their national law are consistent with general international law?

—Article 6 recognizes a general principle of immunity subject to "the provisions of the present articles [and the relevant rules of general international law]." As indicated by the brackets, the Commission has yet to resolve the relationship between the draft and rules of general international law.

—Because states often cite the Commission's work as a codification of international law, the text of the draft is of great importance to the United States. However, any attempt to portray the draft as a comprehensive codification of the law of state immunity is inconsistent with our national interest because it does not protect all of the exceptions developed in our law and it freezes the development of the law. The law of sovereign immunity is in a state of flux and evolution. While there is agreement with regard to certain diplomatic or military activities, there are few clear rules defining the boundaries of immunity.

Recommendation: It is essential that the bracketed language be retained. The draft should not be viewed as a comprehensive codification of the law of state immunity thereby precluding the application and development of relevant rules of general international law.

2. *Jurisdiction—Absolute versus Restrictive Immunity:*

Issue: Is the ILC draft consistent with the restrictive theory of state immunity which recognizes a limited principle of immunity for claims relating to the governmental functions of a state?

—In general, the ILC draft is consistent with the restrictive theory of immunity. The draft recognizes a general principle of immunity in Article 6 followed by exceptions contained in other articles.

—The tension between the restrictive theory and the absolute theory of state immunity is reflected in the bracketed title for the section containing the articles which indicate when a state cannot invoke immunity: "Part III [Limitations On] [Exceptions To] State Immunity." States which have adopted the restrictive theory would favor recognizing a limited principle of state immunity. In contrast, those developing countries and socialist states which purport to adhere to the absolute theory would favor an exhaustive list of exceptions expressly agreed to by the states' parties.

Recommendation: It is essential that the draft not be interpreted as recognizing an absolute immunity subject only to consent or an exhaustive list of exceptions contained in the convention. Thus, the bracketed language "[Exceptions To] State Immunity" is not acceptable. Use of the neutral phrase "Nonapplicability of State Immunity" would preserve the position of all states and permit the future development of the law of state immunity.

3. *Objective or Subjective Criterion:*

Issue: Does the draft adequately give effect to the restrictive theory which focuses on the objective character of the state activity?

—The test for determining the commercial character of a contract in Article 3(2) permits a state which is a defendant in a proceeding to avoid jurisdiction by claiming immunity based upon an alleged public purpose

if such a purpose is considered relevant under the law and practice of that state. This subjective element creates a self-judging standard which would seriously undermine the ability of a private party to sue a foreign government with regard to a commercial contract. In contrast, an objective test based on the nature of the agreement or activity provides a uniform standard for all states and protects the reasonable expectations of private parties that enter into commercial transactions with foreign states.

—As the Special Rapporteur pointed out in initially proposing an objective criterion for determining the commercial character of a contract:

> An act performed for a State is inevitably designed to accomplish a purpose which is in a domain closely associated with the State itself or the public at large. In the ultimate analysis, reference to the purpose or motive of an activity of a foreign state is therefore not helpful in distinguishing the types of activities which could be regarded as commercial from those which are non-commercial. Documents of the 32d Session, [1980] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/1980/Add.1 at para. 46 (Part 1).

—The draft uses the double criterion "commercial [non-governmental] purpose" in the exception to jurisdictional immunity for proceedings relating to a merchant ship or the carriage of cargo (Article 18). Under Article 21, state property is immune from jurisdiction if it is in use or intended for use for "commercial [non-governmental] purposes." Certain types of property, including diplomatic and military property, are not to be considered as "commercial [non-governmental] property" according to Article 23. The double criterion raises the possibility of commercial activity conducted for a governmental purpose which would be entitled to immunity. This would allow a state to enter into commercial transactions and subsequently claim immunity from jurisdiction by asserting a governmental purpose.

—Section 1603(d) of the FSIA provides that: "The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." This objective test is used to define commercial activity for purposes of the commercial activity and commercial shipping exceptions to jurisdictional immunity in Sections 1605(a)(2) and 1605(b), and the exceptions to the immunity of state property from attachment or execution in Section 1610.

Recommendation: It is essential that the draft adopt an objective test for determining the commercial character of state conduct. The reference to the subjective purpose of a state for entering into a contract must be deleted from the standard for determining the commercial character of a contract in Article 3(2). Similarly, the bracketed reference to "[non-governmental] purposes" in Articles 18, 21 and 23 must also be deleted. As pointed out by the Special Rapporteur, reference to the purpose or

motive of a state is not helpful in determining the commercial or non-commercial nature of state activity. Furthermore, the possibility of a state engaging in "commercial governmental activity" which would be entitled to immunity must be clearly rejected.

4. *Commercial Activity Exception:*

Issue: Does the commercial contract exception in the ILC draft encompass all of the types of claims which may arise in connection with the commercial activities of a state?

—Under Article 11, a state cannot invoke immunity in a proceeding which relates to a commercial contract. As discussed above, a commercial contract is broadly defined in Article 2 to include a wide variety of contracts or transactions.

—Section 1605(a)(2) of the FSIA contains a broad immunity exception for a claim based upon a commercial activity. Section 1603(d) defines commercial activity as "a regular course of commercial conduct or a particular commercial transaction or act."

—The commercial activity exception is clearly one of the most important exceptions to state immunity because of the substantial commercial interaction between states and private parties which may give rise to litigation. This type of activity does not involve the exercise of "sovereign authority" or "puissance publique," and therefore is not entitled to immunity. It is unclear whether the commercial contract exception contained in the ILC draft would cover a claim which related to the commercial activity of a state, but was not based upon a contract or transaction. Thus, it is conceivable that a state which incurred some obligation or liability as a result of its commercial activities without a contract or transaction would be entitled to immunity under the ILC draft and not the FSIA.

Recommendation: Use of the term "commercial activity," as originally proposed by the Special Rapporteur, would clarify this provision by preventing a state from invoking immunity for any claim relating to a commercial activity.

5. *Withdrawal of a Waiver:*

Issue: Is there a limitation on the ability of a state which has expressly consented to jurisdiction to revoke that consent after a claim has arisen?

—Article 8 recognizes an exception to jurisdictional immunity if a state has expressly consented to jurisdiction in an international agreement, a contract, or a declaration before the court. The provision does not limit the ability of a state to revoke its consent.

—Article 22 contains an exception to the immunity of state property based upon express consent. The commentary to this Article recognizes that

consent given in an international agreement or contract can only be withdrawn in accordance with its terms. Consent given in a declaration before a court cannot be withdrawn. (The commentary for Article 22 is contained in the 1986 Report of the ILC at pages 41–42.)

—Under Sections 1605(a)(1) and 1610(a)(1) of the FSIA, a waiver of immunity for the purpose of adjudicative or enforcement jurisdiction can only be withdrawn in accordance with its terms.

Recommendation: The commentary indicates that the express consent provisions in Articles 8 and 22 are parallel provisions. Nonetheless, it would be helpful to clarify the limited ability of a state to revoke consent to adjudicative jurisdiction under Article 8.

6. *Independent Counterclaims Which Operate as a Set-off:*

Issue: Can a state invoke immunity with regard to an independent counterclaim which would be entitled to immunity if it were brought as a separate action when the other party asserts the counterclaim as a set-off?

—Article 10 provides that a state which has instituted or intervened in a proceeding cannot invoke immunity with regard to counterclaims arising out of the same facts or legal relationship. Similarly, a state which asserts a counterclaim in a proceeding instituted against it cannot invoke immunity with regard to the principal claim.

—The commentary recognizes that a state cannot claim immunity with regard to an independent counterclaim for which a state would not be immune if it were brought as a separate action against the state. However, the Commission has not recognized the ability of a private party to assert an independent counterclaim as a set-off against the claim of the state if that counterclaim would be entitled to immunity under the draft.

—As a matter of equity, Section 1607(c) of the FSIA does not recognize the immunity of a state with regard to an independent counterclaim otherwise entitled to immunity which merely operates as a set-off. A state which invokes the jurisdiction of our courts must be prepared to litigate all of the disputes with that party. *National Bank* v. *Republic of China*, 348 U.S. 356 (1955).

Recommendation: As a matter of equity and United States law, it is essential that the draft recognize, or at least permit, an exception for an independent counterclaim to the extent that it operates as a set-off against the claim of the state.

7. *Immunity Exception for Employment Contracts:*

Issue: To what extent can the courts exercise jurisdiction over an employment contract between a foreign state and a citizen of the forum state or of a third country?

—Article 12 provides a narrow exception for employment contracts if the employee is a national or habitual resident of the forum state, the services are to be performed within the forum state, the employee is recruited in the forum, and the employee is covered by the social security laws of the forum state. The Article only applies to proceedings which relate to the terms and conditions of the employment contract and not recruitment, renewal or reinstatement. Employees "recruited to perform services associated with the exercise of governmental authority" are not covered by this Article.

—The FSIA commentary indicates that the broad commercial activity exception in Section 1605(a)(2) includes the "employment or engagement of laborers, clerical staff or public relations or marketing agents." The commentary specifically refers to "the wrongful discharge in the United States of an employee of the foreign state who has been employed in connection with a commercial activity carried on in some third country." Revised Section-by-Section Analysis of the FSIA prepared by the Department of State and sent to Congress on January 22, 1973, at pages 9 and 13.

Recommendation: It is essential that the ILC exception for employment contracts be expanded to include an action for wrongful dismissal which is clearly one of the most important types of claims that may arise under an employment contract. Other aspects of the narrow exception in Article 12 should be reviewed in light of United States law and practice.

8. *Discretionary Torts and Transboundary Harm Cases:*

Issue: Should the immunity exception for tort actions extend to discretionary torts or transboundary harm cases, such as claims arising out of transboundary pollution?

—The exception for tort actions provided in Article 13 applies only if the act causing the harm occurred wholly or partly in the forum and the author of the act or omission was in the forum at the time.

—The exception for tort claims contained in Section 1605(a)(5) of the FSIA extends to harm occurring in the United States. This provision does not require that the actor causing the harm be present in the United States. However, the FSIA commentary indicates that "the tortious act or omission must occur within the jurisdiction of the United States . . . ." Revised Section-by-Section Analysis of the FSIA prepared by the Department of State and sent to Congress on January 22, 1973, at page 16.

—The state immunity exception for tort actions in Article 13 does not exclude claims based on the performance or the failure to perform discretionary functions.

—In contrast, Section 1605(a)(5)(A) of the FSIA expressly excludes "any claim based upon the exercise or performance or the failure to exercise

or perform a discretionary function regardless of whether the discretion be abused." A state should not be subject to jurisdiction in a foreign court when the tort claim is for injury resulting from the performance or the failure to perform discretionary functions which may involve sensitive political considerations or delicate questions of judgment.

Recommendation: It is important that the exception for tort actions be modified to include transboundary harm cases in accordance with U.S. law and national interests and to exclude discretionary torts for which a state should not be required to answer in the courts of another state. However, a state should not be allowed to avoid jurisdiction in an ordinary tort action by asserting that the conduct in question, for example driving a car, involved a discretionary function.

9. *Commercial Ships and the Carriage of Cargo:*

Issue: What is the standard for determining the commercial character of a ship and does the character of the ship affect the ability of a state to invoke immunity with regard to a claim relating to cargo carried on the ship?

—Article 18 provides an immunity exception for state-owned or state-operated ships engaged in commercial [non-governmental] service if at the time the claim arose the ship was "in use or intended exclusively for use for commercial [non-governmental] purposes."

—The objectionable double criterion for determining the commercial character of a ship is discussed above. The self-judging nature of this standard is confirmed by Article 18 which authorizes a state to provide a certificate with regard to the non-commercial character of the ship.

—The reference to exclusive use would allow a state to claim immunity if a ship used in connection with commercial activity also performed a non-commercial service for the state, such as transporting supplies to the army.

—Article 18 recognizes an exception for a claim relating to the carriage of cargo if the cargo is carried on a ship which is used exclusively for commercial [non-governmental] purposes. The commercial character of an agreement relating to the carriage of cargo is not dependent upon the exclusive commercial use of the ship on which it is located, though this may be relevant for purposes of exercising jurisdiction over the property.

—Section 1605(b) of the FSIA provides a general exception for a suit in admiralty brought to enforce a maritime lien against a vessel or cargo of a foreign state if the lien is based upon the commercial activity of the foreign state.

Recommendation: It is essential that the [non-governmental] element, the exclusive use requirement, the link between the cargo and the ship, and

the provision concerning the certification by the state as to the character of a ship be deleted from this Article.

10. *Arbitration:*

Issues: What types of arbitration agreements are included in the exception to state immunity? What is the extent of jurisdiction which a court may exercise with regard to arbitration agreements under this exception?

—Article 19 provides an exception to state immunity for arbitration agreements relating to a [commercial contract] [civil or commercial matter].

—The ILC should adopt the language of the New York Convention which refers to "agreements . . . in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration." A state may, by an express declaration, limit its obligation to enforce arbitration agreements and awards to those relating to legal relationships which are commercial in nature.

—The ILC draft recognizes an exception to immunity for a proceeding which relates to the validity or interpretation of an arbitration agreement, the arbitration procedure, or the setting aside of the award. Article 19 does not recognize an exception to immunity with regard to the enforcement of an arbitral award. However, this part of the draft does not address the enforcement of judgments against state property which is expressly dealt with in Part IV.

Recommendation: It is essential that Article 19 be amended to conform with the New York Convention and to expressly provide for jurisdiction to enforce an award.

11. *Nationalization:*

Issue: Does the ILC draft implicitly reject an exception to immunity for unlawful expropriation cases?

—The ILC draft does not prejudge "any question that may arise in relation to extraterritorial effects of measures of nationalization taken by a State . . . ." (Article 20)

—Section 1605(a)(3) of the FSIA provides a separate exception for claims relating to property taken in violation of international law.

Recommendation: It is important that the ILC draft not affect United States law which allows a court to exercise jurisdiction in cases in which rights in property taken in violation of international law are in issue, if that property is present in the United States or the fruits of the unlawful taking are being exploited in the United States. The position of Congress is very clear on this issue. Article 20 should be amended to provide that the ILC articles do not prejudge "any question that may arise in regard to the validity and effect under international law of measures of nationalization."

12. *Transfer of State Property to Avoid Jurisdiction:*

Issue: Can a state avoid jurisdiction by transferring the related property from one state entity to another or by changing the character of the use of the property? Is an injured party limited to related property for the purpose of enforcing a judgment? What type of state interest in the property is required for purposes of invoking immunity?

—Article 21 provides that state property is immune from attachment or execution unless it is specifically in use or intended for use for commercial [non-governmental] purposes and is related to the claim or the state agency or instrumentality involved in the lawsuit. The unacceptable reference to "[non-governmental] purposes" is discussed above.

—The ILC draft does not provide any protection against the transfer of property or a change in the use of property to avoid jurisdiction.

—Section 1610(a)(2) of the FSIA provides some protection in this regard by referring to property which "is or was used for the commercial activity upon which the claim is based."

—The link required between the property and the claim is consistent with the FSIA. However, this provision is more restrictive than the statutes of other states, such as the United Kingdom. Practical experience has shown the provision to be too narrow, as recognized in the amendments proposed by the ABA.

—The immunity of state property is extended to property which is owned, controlled or possessed by the state or in which it has a "[legally protected interest]." The purpose of this immunity is to protect the property of a state which is used in connection with governmental activities. The immunity should not be extended to property in which the state has only a remote interest.

Recommendation: It is important that the ILC draft be amended to allow a party which has obtained a judgment to enforce it against any property of the state used in connection with a commercial activity. The draft should also be amended to provide some protection against the attempts of a foreign state to avoid jurisdiction. Finally, the bracketed language should be deleted.

13. *Implied Consent to Jurisdiction over Property:*

Issue: Can a state implicitly consent to jurisdiction over its property for purposes of attachment or execution?

—The ILC draft requires two separate or distinct expressions of consent to jurisdiction for adjudication of the merits and enforcement of the judgment. Article 22 recognizes an exception to the immunity of state property based upon express consent. Implied consent for purposes of both adjudicative and enforcement jurisdiction would be inconsistent with the two-pronged approach to consent contained in the ILC draft.

—The FSIA in Section 1610(a)(1) recognizes an exception to the immunity of state property if a state has explicitly or implicitly waived this immunity.

Recommendation: It is important that the ILC draft be amended to broaden the exception to the immunity from attachment or execution of state property used for a commercial activity, to include the situation in which there is a waiver by implication.

14. *Default Judgment:*

Issue: Is some evidence of the claim against a foreign state required for a court to grant a default judgment?

—Article 25 does not require a claimant to establish the "claim or right to relief by evidence satisfactory to the court" before obtaining a default judgment, as required in Section 1608(e) of the FSIA.

Recommendation: It is important that a court be satisfied as to the basis for a claim against a foreign state before entering a default judgment to avoid frivolous or unfounded judgments. However, the burden of the plaintiff to provide some evidence of the claim should not extend to materials within the exclusive control of the foreign state.

15. *Procedural Immunities—Security Bonds:*

Issue: Can a plaintiff state be required to provide a bond or deposit to guarantee payment of the costs associated with a proceeding?

—Under Article 27, a state cannot be required to provide a bond or deposit to guarantee the payment of costs, even if that state initiated the proceeding.

—The FSIA does not address the question of procedural immunities. Normally a foreign state which voluntarily initiates a proceeding in the United States would be presumed to consent to complying with procedural requirements of the forum which may include a deposit or bond.

Recommendation: It is important that the ILC draft distinguish between a foreign state which is a plaintiff or a defendant for the purpose of procedural immunities. A foreign state which initiates an action in a court is presumed to consent to the procedural requirements of the forum which may include providing some type of deposit or bond to guarantee the payment of costs associated with the proceeding.

Respectfully submitted,

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