

## **Basis for the Restrictive Approach to Jurisdictional Immunities of States and Their Properties (summary)**

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The United Nations Convention on Jurisdictional Immunities of States and Their Properties was adopted on 2 December 2004. The Convention is the fruit of attempts to clarify the international legal rules in this field. Japan signed the Convention on 11 January 2007 and is now considering new legislation to ratify it.

The UN Convention is based upon the draft prepared by the United Nations International Law Commission whose function is the codification and progressive development of international law. Although it succeeds in providing the general legal rules based upon the restrictive approach to jurisdictional immunities of States and their properties, many of the key provisions are the result of a compromise among negotiating States and such provisions are not free from some ambiguity. Therefore, there is still a lot of room for interpretation when these provisions are applied in concrete cases. As the international rules of State immunity have developed through municipal legislations and municipal cases, it is necessary to have sufficient knowledge concerning the practice of States that have abundant cases in this field in order to understand the backgrounds of the discussions undertaken in the negotiations and to come to an appropriate interpretation of the Convention.

The present article aims to examine the provisions of the UN Convention and municipal practice regarding the commercial transaction, contract of employment and personal injuries, which are the salient exceptions to the jurisdictional immunities of States in the restrictive approach. The exception of commercial transaction is the origin of the restrictive approach to the jurisdictional immunity of States and has long been the main focus of this approach. Many issues are still to be discussed because of the importance and complexity of this exception. In addition to such a core exception, the exceptions of contract of employment and personal injuries have increasingly been elucidated. It might be suggested that the number of municipal cases regarding contract of employment has in-

creased and that new arguments have been raised regarding the exception of personal injuries.

The exception of commercial transaction is provided in Article 10 of the UN Convention. It provides that a State cannot invoke immunity from the jurisdiction of another State in a proceeding arising out of its commercial transaction with a foreign natural or judicial person. Such an exception is introduced to balance the interests of two parties, i. e. a sovereign State and an individual who enters into commercial relations with the State. The question of how to distinguish commercial transactions from sovereign acts in order to fulfill the purpose has long been discussed and the definition and standard of commercial transaction are the key issues in such arguments. The definition is provided in Article 2, paragraph 1 (c) and the standard for the decision is provided in Article 2, paragraph 2. In the negotiations with regard to paragraph 2, two different tests have been contested: the nature test and the purpose test. The final expression makes it possible for the respective Contracting State to maintain the existing practice of its municipal courts. With such a sensible expression, a compromise could be reached between States, for example the United States or Germany, which have established municipal practices on the basis of the nature tests and the States such as France or China that support the purpose test.

Although the discussion concerning the “nature test” and “purpose test” was, in a way, the symbol of the difficult negotiation of the UN Convention, a detailed examination of the decisions of municipal courts in several States reveals that such a simple dichotomy does not provide a sufficiently clear test for the courts to come to a decision in complicated cases. The precedents of the courts within one State are not even coherent. While the U.S. Foreign State Immunity Act explicitly provides the nature test, there are some cases where the courts take other elements into account. In contrast, France takes the view that the purpose test has been the established approach of French courts, but there have been cases where the French court relied upon the nature test. Moreover, in the cases where the facts are very complicated, the courts are required to determine which aspects of the facts they should emphasize when they decide whether the act in question is commercial or sovereign. It can be concluded that the Court cannot always avoid difficult determinations regarding the commercial transac-

tion.

Article 11 provides that a State cannot invoke immunity from the jurisdiction of another State in a proceeding relating 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 the other State. It is explained that the exception of a contract of employment is introduced in order to balance the interests of three parties: a sovereign State that employs an individual for governmental works, the individual to be employed, and the State of *forum* in which the contract is performed and of which the domestic public policy regarding the protection to be afforded to the local labour force should be respected. In the negotiations of this provision, the most highly contested issue has been to what extent States can be allowed to invoke immunity regarding the contract of employment for diplomatic or other related governmental purposes. In some States, the contracts of employment are considered to be equivalent to the commercial contracts and States cannot be permitted to invoke immunity. However, in some other States, the court takes into account the contents or nature of the works performed under the contract in question and in the cases where they are public or governmental, the States are allowed to invoke jurisdictional immunity.

The exception of personal injuries is provided in Article 12. It provides that a State cannot invoke jurisdictional immunity in a proceeding that relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission alleged to be attributable to the State. This is an exception that is recognized to provide an individual with a remedy, to a certain extent, in the forum of the State where the act or omission is undertaken.

The original aim of such an exception was, in the cases of traffic accidents or similar situation, to provide relief or possibility of recourse to justice for individuals who suffer personal injury, death or physical damage to or loss of property caused by an act or omission which might be intentional, accidental or caused by negligence attributable to a foreign State in the courts of the State where such an act or omission was committed. However, it has recently been argued that the sphere of the application of this exception should be expanded to the cases of injuries caused by the violation of *jus cogens* in international law or by the serious

breach of human rights that were not committed within the territory of the State of *forum*. Particularly since the 1980s, such arguments have been proposed in relation to the cases of torture in which government officials are involved or compensation for injuries suffered during the World War II.

While the United States and Canada amended their acts to make the terrorist activities committed outside of its territory a new exception of jurisdictional immunity of a foreign State, other States have not amended their law or have not established precedents to accept the new arguments. In many States, a foreign State normally enjoys jurisdictional immunity in a proceeding claiming the compensation for injuries suffered as a result of the violation of *jus cogens* in the cases where the alleged act or omission was not undertaken within the territory of the State of *forum*. It has been argued that such a rejection is contrary to the human right of being allowed access to the courts.

From the examination of the three exceptions, four points might be suggested. First, although there are still lots of issues to be discussed regarding the exception of commercial transaction, other exceptions have started to play a significant role in the proceedings brought by individuals against foreign States. Second, the municipal courts should take into account various related elements when they consider other exceptions. Third, although the UN Convention was adopted, the municipal rules of jurisdictional immunities of a State still vary significantly. Finally, as far as the exception of personal injuries is concerned, the arguments regarding the *jus cogens* have shed light on a new aspect of jurisdictional immunity of States, which is the human right of the access to the court.