



Malaysia

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Permanent Mission to the United Nations

STATEMENT BY
MR. PEH SUAN YONG
REPRESENTATIVE OF MALAYSIA

ON

AGENDA ITEM 142: CONVENTION ON
JURISDICTIONAL IMMUNITIES OF STATES AND THEIR
PROPERTY

AT THE SIXTH COMMITTEE
DURING THE 59TH SESSION OF THE
UNITED NATIONS GENERAL ASSEMBLY

TUESDAY, 26 OCTOBER 2004

(Please check against delivery)

Mr. Chairman,

Malaysia commends Professor Gerhard Hafner, Chairman of the Ad Hoc Committee on Jurisdictional Immunities of States and their Property for his excellent stewardship, which has led to the completion of the draft Convention on Jurisdictional Immunities of States and their Property. Malaysia would also like to congratulate the other members of the Ad Hoc Committee for the successful completion of their work.

Mr. Chairman,

2. The Malaysian delegation notes that the draft Convention, which was adopted by the Ad Hoc Committee at its 8th plenary session on 5th March 2004 has taken into account the views of countries including Malaysia, which had participated in the said deliberations of the Ad Hoc Committee. Malaysia would like once again to reiterate its concern with regard to the provision of article 2(2) of the adopted draft text relating to the criteria for determining the commercial character of a contract or transaction.

3. In determining whether the contract or transaction is a "commercial transaction", the adopted article by using the word "primary" connotes that the "purpose test" is secondary to the "nature test" whereby the "purpose test" is dependent on the agreement of the parties involved or if it is the practice of the State of forum that the purpose test is relevant in determining whether the contract or transaction is a "commercial transaction". Malaysia is of the view that both the nature and purpose tests should be taken into account in determining a commercial transaction, as the "nature" criterion alone does not always permit a court to reach a conclusion. An example of this is where a State enters into a contract for the supply of cement and the cement is purchased to build army barracks. The nature of the contract seems to be a commercial transaction.

However, by looking at its purpose, the act could be regarded as an act done in a sovereign capacity, which is equipping the State's armed forces. It is also to be noted that in determining cases on State immunity, Malaysian courts have applied both the nature and purpose tests to assist them in arriving at a conclusion on the form of the contract or transaction entered into by States.

4. Malaysia would also like to thank the Ad Hoc Committee for providing clarification on the other concerns raised by Malaysia in relation to the draft text of the Convention, in particular provisions of Articles 11(2)(c), 13(b) and (c) and 17. The comprehensive explanation provided by the Ad Hoc Committee on these Articles has assisted Malaysia in better understanding these Articles and its scope of application for the purpose of facilitating any future undertaking.

Thank you.