United Nations A/52/294

General Assembly

Distr.: General
20 August 1997
English
Original: English and Spanish

Fifty-second session
Item 146 of the provisional agenda*

Convention on jurisdictional immunities of States and their property

Report of the Secretary-General

Contents

* A/52/150 and Corr.1.

I. Introduction

1. On 9 December 1994, the General Assembly adopted resolution 49/61, entitled "Convention on jurisdictional immunities of States and their property", paragraphs 2 and 3 of which read as follows:

> "The General Assembly,
>
> "...
>
> "2. Invites States to submit to the Secretary-General their comments on the conclusions of the chairman of the informal consultations held pursuant to its decision 48/413 of 9 December 1993, and on the reports of the Working Group established under its resolution 46/55 of 9 December 1991 and reconvened pursuant to its decision 47/414 of 25 November 1992;
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> "3. Decides to resume consideration, at its fifty-second session, of the issues of substance, in the light of the above-mentioned reports and the comments submitted by States thereon, and to determine, at its fifty-second or fifty-third session, the arrangements for the conference, including the date and place, due consideration being given to ensuring the widest possible agreement at the conference".

2. Pursuant to the above request, by a note dated 5 March 1997, the Secretary-General invited the Governments of Member States as well as of other States to submit the comments referred to in paragraph 2 of resolution 49/61.

3. The present report reproduces the replies received as at 22 August 1997. Any further replies will be reproduced in addendum to the present report.

II. Replies received from States

Argentina

[Original: Spanish]

[14 July 1997]

General observations

1. The Argentine Republic believes that the draft articles on jurisdictional immunities of States and their property, adopted by the International Law Commission at its 2235th meeting on 4 July 1991,[1] are of great value. Reflecting the usual practice of States, they represent a balanced view which reconciles the necessary immunity that should be granted to States before foreign courts with the generally recognized tendency to deny such immunity to actions that are not performed in the exercise of sovereign authority.

2. It should be noted that Act No. 24,448 on immunity from jurisdiction of foreign States before Argentine courts, insofar as its basic provisions referring to the scope of immunity are concerned, contains norms substantially similar to those contained in the draft articles.

3. Likewise, it is appropriate to stress the importance of the fact that the regime of jurisdictional immunities of States and their property may finally be regulated by international public law through a multilateral treaty concluded under United Nations auspices. The conclusion of a treaty of this type will lead to greater predictability in a State's actions before foreign courts, eliminating the discrepancies among the many legal regimes arising from the differing laws in each State.

4. Without prejudice to the above, the norms applicable to sovereign immunity of States should be complementary and should not modify the regime of privileges and immunities already established by diplomatic and consular law. In that respect, the conceptual distinction between the two legal regimes and the differing nature and purpose of each must be borne in mind. Therefore, it would be inappropriate for the regimes provided by the draft articles to overlap with the various norms of diplomatic and consular law.

Specific observations

Article 2, paragraph 1: Definition of a "State"

5. Article 2, paragraph 1 (b) (ii) says that the term "State" means "constituent units of a federal State". Subparagraph (iii), on the other hand, establishes that the same term also means "political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State".

6. With regard to those texts, the terms "constituent units of a federal State" and "political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State" do not appear to be clearly differentiated from one another in respect of their field of application. In point of fact, a "constituent unit of a federal State" (e.g., a state or province) is still a "political subdivision of the State".

7. According to the commentary of the International Law Commission on the draft articles, such units (constituent units of a federal State) "are regarded as a State for purposes of the present draft articles." Likewise, the Commission stated that "in some federal systems, constituent units are distinguishable

from the political subdivisions referred to in paragraph 1 (b) (iii) in the sense that these units are, for historical or other reasons, to be accorded the same immunities as those of the State".[2]

8. If the objective is to cover in the draft articles the acts of federated states which, being autonomous, are acting in exercise of their own sovereignty and not in exercise of that of the federal State, the concept should be expressed more clearly by adding the phrase "when acting in exercise of sovereignty which, under the law of the State of which they are a part, is accorded to them".

9. In another connection, it should be noted that, in international law, the phrase "constituent units of a State" means those units which constitute an independent State (territory, population, self-government and sovereignty) and not federated states. Along those lines, perhaps the terminology of the draft articles of the International Law Commission on State responsibility could be used (article 7, paragraph 1), and the phrase "constituent units" could be replaced by "autonomous territorial governmental entities".

10. Consequently, subparagraph (ii) could read: "the autonomous territorial governmental entities of a federal State when acting in exercise of the sovereignty which, under the law of the State of which they are a part, is accorded to them". In turn, subparagraph (iii) could read: "other political subdivisions of a State which are entitled to exercise the sovereign authority of the State".

11. Article 2, paragraph 1 (b) (v) indicates that the term "State" means "representatives of the State acting in that capacity".

12. The International Law Commission's interpretation of the text of this subparagraph should be carefully analysed. The Commission includes in this category, inter alia, heads of State or Government and diplomatic agents.[3]

13. In the case of diplomatic agents, the Commission's commentary makes reference to the theory of the importance of the function as the basis for diplomatic privileges and immunities (which are granted not for the benefit of the diplomatic agent, but of the State he represents). Likewise, it makes a distinction between immunities recognized ratione materiae and those recognized "ratione personae".[4]

14. On this point, the inclusion of diplomatic agents, consular officials or other persons who enjoy privileges and immunities under international law could represent an overlapping of the regimes of the international instruments in force in that area (Vienna Convention of 1961 on Diplomatic Relations, Vienna Convention of 1963 on Consular Relations, etc.). It should be noted that the purpose of those International Law Commission articles is to establish a regime of immunity from jurisdiction for the State as a legal person, not for the natural persons of diplomatic agents and consular officials, which has already been established by the respective codifying conventions.

15. Therefore, the scope of application of the present articles should not be extended to the point that they could modify in any way the prevailing norms of diplomatic and consular law. Accordingly, and considering that article 3 contains express safeguards regarding the existing diplomatic and consular conventions, it seems appropriate to add to the end of subparagraph (iv) the phrase "without prejudice to the provisions of article 3".

Article 3: Privileges and immunities not affected by the present articles

16. Article 3 provides as follows:

> "1. The present articles are without prejudice to the privileges and immunities enjoyed by a State under international law in relation to the exercise of the functions of:
>
> "(a) its diplomatic missions, consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences; and
>
> "(b) persons connected with them.
>
> "2. The present articles are likewise without prejudice to privileges and immunities accorded under international law to heads of State ratione personae."

17. The text of the above-mentioned provision should be interpreted in accordance with the "ordinary meaning" referred to in article 31, paragraph 1, of the 1969 Vienna Convention on the Law of Treaties. In that connection, it should be borne in mind that subparagraph (b) would read as follows: "The present articles do not affect the privileges and immunities enjoyed by a State (...) in relation to the exercise of the functions (...) of the persons connected with them (namely, diplomatic missions, consular posts, etc.)".

18. It appears from the foregoing that the above-mentioned safeguard applies only to acts performed in the exercise of official functions. Otherwise, the present articles could affect the privileges and immunities relating to acts performed by diplomatic agents outside of the exercise of their official functions. The consequence of that solution would be that the application of the present articles could nullify the privileges and immunities recognized by international law. It would therefore be advisable to amend the draft of the Commission's

text in order to provide a clear safeguard for the privileges and immunities of diplomatic law.

19. It should also be noted that the expression "connected with" does not appear to cover all those persons who are entitled to privileges and immunities (e.g., the family members of diplomatic agents or consular officials). The words "members of their staff and family members covered by the relevant statutes governing privileges and immunities" would therefore be more appropriate.

20. In view of the foregoing, the provision could be redrafted as follows:

> "1. The present articles do not affect the privileges and immunities granted under international law, conventional law or customary law to:
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> "(a) a State's diplomatic missions, consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences; and
>
> "(b) the members of their staff and family members covered by the relevant statutes governing privileges and immunities.
>
> "2. The present articles are likewise without prejudice to the privileges and immunities accorded under international law to heads of State ratione personae."

Article 14: Intellectual and industrial property

21. Paragraph (b) of article 14 provides that States shall not enjoy immunity in proceedings relating to "an alleged infringement by the State, in the territory of the State of the forum, of a right of the nature mentioned in subparagraph (a) [patents, intellectual property, etc.] which belongs to a third person and is protected in the State of the forum".

22. This rule is understood to apply only to cases in which the State commits acts that involve a clear infringement of an intellectual property right enjoyed by a person in the State of the forum (e.g., the commercial exploitation of a product which has been patented in the said State). Under no circumstances, for example, could a claim be allowed against a State for failure to provide the legal protection for a patent in its own territory. Indeed, the enactment of laws is an attribute of sovereignty and is in the nature of an act of State, which cannot be reviewed by foreign courts.

be advisable to
23. insert a new paragraph reading as follows: "In cases in which the claim is based on the failure of a State to provide adequate legal protection of a right of the nature provided for in subparagraph (a), the said State shall enjoy immunity in the courts of the State of the forum". This would become paragraph 2, and the earlier paragraph could become paragraph 1.

Article 16: Ships owned or operated by a State

24. This rule provides that a State which owns or operates a ship cannot invoke immunity from jurisdiction "if at the time the cause of action arose, the ship was used for other than government non-commercial purposes (para. 1).

25. It also provides that paragraph 1 does not apply to warships and naval auxiliaries nor does it apply to "other ships owned or operated by a State and used exclusively in government non-commercial service" (para. 2).

26. Finally, it provides that a State cannot invoke immunity from jurisdiction before a court of another State in a proceeding which relates to the carriage of cargo on board a ship owned by that State if "the ship was used for other than government non-commercial purposes" (para. 4).

27. In this connection, and without objecting to the provision itself, the Argentine Republic considers that it would be advisable to examine the expression "government non-commercial purposes" in the light of the terminology used in the United Nations Convention on the Law of the Sea.

28. That Convention uses the term in question only in its article 236, with reference to protection of the marine environment. In other parts of the Convention, reference is made simply to "non-commercial purposes" (arts. 31 and 32). Consideration might also be given to the possibility of making the terminology used in the draft articles consistent with that used in certain conventions on maritime transport, which were concluded under the auspices of the International Maritime Organization. Those conventions use the expression "government non-commercial service" (see the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969, art. XI, para. 1, and the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties of 29 November 1969, art. 1, para. 2).

Article 18: State immunity from measures of constraint

29. In general, we share the view of the International Law Commission regarding the need for a connection to be established between the property and the claim which is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed.[5] However, we also support the proposal by the Chairman of the Working Group

of the Sixth Committee to insert a paragraph reading 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."[6] In this connection, it should be noted that the text in the Spanish version is different from the original words used in the Chairman's proposal. In fact, the term "coercive measures", which appears in the Spanish version, could be confused with the type of measures provided for in Chapter VII of the Charter of the United Nations. The proposed wording ("measures of constraint") would seem to be more appropriate for an instrument of a procedural nature.

Article 21. Default judgement

30. Paragraph 3 provides that the time limit for "applying to have a default judgement set aside" shall not be less than four months and shall begin to run from the date on which the copy of the judgement is received. We believe that the text is unclear and should be redrafted. Specifically, if the purpose of the rule is to affirm that a default judgement that is rendered against a State should be set aside if the requirements stipulated in article 20 are not met, then the third paragraph should be worded as follows: "The time limit for applying to have a judgement, when rendered in default of appearance, set aside shall not be less than four months [and shall begin to run from the date on which the copy of the judgement is received or is deemed to have been received by the State in question]." The bracketed portion of the paragraph would remain the same as in the International Law Commission's version.

Other issues

Aircraft and space objects

31. On this topic, the draft articles should include general rules governing immunity of aircraft and space objects owned or operated by States. We share the view expressed by some delegations in the Working Group of the Sixth Committee that the regime which had been proposed for warships and other ships owned or operated by States for non-commercial purposes should also cover aircraft and space objects.[7]

Dispute settlement mechanism

32. The draft articles should contain a mechanism for the settlement of any disputes which may arise concerning the interpretation or application of the Convention, to which States would be required to have recourse.

33. Based on the proposal contained in the report of the Working Group on the Convention of 3 November 1992,[8] we wish to suggest the following text:

"1. Any dispute between two or more States Parties concerning the interpretation or application of the provisions of this Convention in respect of a proceeding instituted before the court of one State Party against another State Party shall be settled by the Parties through direct negotiations.

"2. If no agreement is reached within six months from the date the dispute arose, the dispute shall be submitted to the International Court of Justice, unless the Parties agree otherwise.

"3. Cases which are submitted to the Court pursuant to this article shall be dealt with and ruled upon by the chamber of summary procedure formed in pursuance of Article 29 of the Statute of the Court.

"4. Subject to the provisions of paragraphs 1 and 2, the State Party against which a proceeding has been instituted before a court of another State Party may submit the dispute to the International Court of Justice where:

"(a) A default judgement has been given against it by the court;

"(b) The court has rejected its claim to immunity from jurisdiction.

"5. Where a dispute is submitted to the International Court of Justice pursuant to the provisions of the above paragraphs, both the proceedings before the municipal court and any measures of enforcement or protection pronounced or about to be pronounced shall be suspended pending the judgement of the said Court."

Bolivia

[Original: Spanish]

[10 June 1997]

Bolivia wishes to state that the contents of the draft articles on jurisdictional immunities of States conflict with neither the provisions of the Political Constitution of the State nor those of other norms of Bolivia's internal legal order.

Notes

[1] Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10 (A/46/10), chap. II.

[2] Ibid., part I, art. 2, commentary para. (11).

[3] Ibid., para. (17).

[4] Ibid., para. (18).

[5] Ibid., part IV, art. 18, commentary, para. (10).

[6] A/C.6/48/L.4 and Corr.2, para. 78.

[7] Ibid., para. 86.

[8] A/C.6/47/L.10, annex II.